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Contents

Federal Register

Vol. 89, No. 69

Tuesday, April 9, 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.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

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.

5 CFR
210.....24982
212.....24982
213.....24982
302.....24982
432.....24982
451.....24982
752.....24982
1201.....24681

11 CFR

Proposed Rules:
113.....24738

14 CFR
39 (5 documents) 24682, 24684, 24686, 24689, 24691

Proposed Rules:
39 (3 documents) 24742, 24745, 24748

17 CFR
275.....24693
279.....24693

21 CFR

Proposed Rules:
1308.....24750

29 CFR
102.....24713

30 CFR
733.....24714
842.....24714

33 CFR

Proposed Rules:
101.....24751
160.....24751

38 CFR

Proposed Rules:
76.....24752

40 CFR

Proposed Rules:
131.....24758

41 CFR

Proposed Rules:
102–118.....24775

49 CFR
23.....24898
26.....24898
218.....25052

50 CFR
679.....24736

Rules and Regulations

Federal Register
Vol. 89, No. 69
Tuesday, April 9, 2024

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Appellate Jurisdiction Update

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: This final rule updates the list of sources from which the Merit Systems Protection Board (MSPB) derives appellate jurisdiction.

DATES: Effective May 9, 2024.

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

SUPPLEMENTARY INFORMATION: On February 6, 2024, the Merit Systems Protection Board (MSPB or Board) proposed an amendment to 5 CFR 1201.3, which sets forth a non-exclusive list of the types of appeals within the MSPB's jurisdiction. 89 FR 8083. In response to publication of the proposed rule, the MSPB received three comments from three commenters. The comments received by the MSPB are available for review by the public at *https://www.mspb.gov/foia/e-foiareadingroom.htm*.

Comments and Summary of Changes to the Proposed Rule

The MSPB initially proposed amending 5 CFR 1201.3 to include a new type of appeal proposed by the Office of Personnel Management (OPM) at 5 CFR 302.603. 89 FR 8083. OPM's proposed rule provided that certain Federal employees moved from the competitive service into the excepted service, or moved between schedules in the excepted service, would have a right to appeal to the MSPB any purported loss of civil service protections stemming from that move. 88 FR 63862.

OPM's Final Rule for 5 CFR 302.603, published elsewhere in this issue of the **Federal Register**, adjusted the language of the proposed regulation providing the appeal right. Generally, OPM's final rule at section 302.603 permits an appeal for: (1) an agency's assertion that a Federal employee moved from the competitive service into the excepted service, or moved between schedules in the excepted service, would lose appeal rights, competitive status, or other previously accrued protections as a result of that move; and (2) an agency's failure to provide required notice to the employee regarding whether the move would affect the employee's appeal rights, competitive status, or other accrued protections. An appeal arising under the first part of this regulation would request that the MSPB correct the assertion from the agency regarding the individual's alleged loss of appeal rights, competitive status, or other accrued protections, stemming from the move and direct the agency to afford such rights, status, and protections to the employee in subsequent actions under chapters 43 or 75 of title 5, United States Code, except to the extent that any such order would be inconsistent with an applicable statute. An appeal arising under the second part of this regulation would request that the MSPB order the employee's agency to issue the required notice regarding the asserted effect of the move. The MSPB has thus adjusted the language of its proposed rule implementing OPM's rule to accord with OPM's revisions.

Additionally, the MSPB received three comments from three commenters in response to its proposed rulemaking. Two of the commenters did not provide any substantive comment on the MSPB's proposal, but indicated general approval of the proposal. The third commenter also expressed support for the MSPB's original proposal, but further suggested that the MSPB clarify its proposal to include all of the types of appeals provided by OPM in its proposed 5 CFR 302.603. OPM's proposed rule provided not only appeals when individuals were involuntarily moved, but also appeals when individuals believed that their facially voluntary moves were coerced or otherwise involuntary. The MSPB agrees with the commenter's suggestion and has reformulated its draft rule to more clearly reflect all of the types of appeals provided in OPM's final 5 CFR 302.603.

This final rule will become effective 30 days after publication in the **Federal Register**.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

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

PART 1201—PRACTICES AND PROCEDURES

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

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

§ 1201.3 [Amended]

■ 2. Section 1201.3 is amended by adding paragraph (a)(12) to read as follows:

§ 1201.3 Appellate Jurisdiction.

(a) * * *

(12) *Actions Related to Placement or Movement into an Excepted Service Position Without Civil Service Protections.* (i) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of a competitive service employee into the excepted service, will eliminate competitive status or any other procedural and appeal rights that the employee had previously accrued. (5 CFR 302.603(b); 5 CFR 302.603(d));

(ii) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of an excepted service employee into a different schedule of the excepted service, will eliminate competitive status or any other procedural and appeal rights that the employee had previously accrued. (5 CFR 302.603(b); 5 CFR 302.603(d));

(iii) An agency's failure to provide the required notice, under 5 CFR 302.602(c)(1), of the effect of the above-described movements or placements on the employee's status or procedural and appeal rights. (5 CFR 302.603(c)).

* * * * *

Gina K. Grippando,

Clerk of the Board.

[FR Doc. 2024–07191 Filed 4–4–24; 8:45 am]

BILLING CODE 7400–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2244; Project Identifier MCAI–2023–00972–R; Amendment 39–22697; AD 2024–05–06]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Leonardo S.p.a Model AW169 helicopters. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the airworthiness limitations section (ALS) of the existing helicopter maintenance manual or instructions for continued airworthiness (ICA) for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 14, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 14, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2244; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material that is incorporated by reference in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* Internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N 321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–2244.

Other Related Service Information: For Leonardo Helicopters service information identified in this Final Rule, contact Leonardo S.p.A., Emanuele Bufano, Head of Airworthiness, Viale G. Agusta 520, 21017 C. Costa di Samarate (Va) Italy; telephone (+39) 0331–225074; fax (+39) 0331–229046; or at *customerportal.leonardocompany.com/en-US/.* You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (781) 238–7241; email: *Sungmo.D.Cho@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued a series of ADs with the most recent being EASA AD 2023–0160, dated August 16, 2023 (EASA AD 2023–0160), to correct an unsafe condition for Leonardo S.p.A. Model AW169 helicopters.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Leonardo S.p.a. Model AW169 helicopters. The NPRM published in the **Federal Register** on December 21, 2023 (88 FR 88274). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require accomplishing the actions specified in EASA AD 2023–0160, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and the EASA AD.'' The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the EASA AD in the AD docket at *regulations.gov* under Docket No. FAA–2023–2244.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0160 requires replacing components before exceeding their life limits and accomplishing maintenance tasks within thresholds and intervals specified in the applicable ALS as defined in EASA AD 2023–0160. Depending on the results of the maintenance tasks, EASA AD 2023–0160 requires accomplishing corrective action(s) or contacting Leonardo [Leonardo S.p.a.] for approved instructions and accomplishing those instructions. EASA AD 2023–0160 also requires revising the Aircraft Maintenance Programme (AMP) by incorporating the limitations, tasks, and associated thresholds and intervals described in the specified ALS as applicable to the helicopter model and configuration. Revising the AMP constitutes terminating action for the requirement to record accomplishment of the actions of replacing components before exceeding their life limits and accomplishing maintenance tasks within the thresholds and intervals specified in the applicable ALS as required by EASA AD 2023–0160 for demonstration of AD compliance on a continued basis.

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

Other Related Service Information

The FAA also reviewed AW169 Air vehicle maintenance planning information, 69–A–AMPI–00–P, Chapter 04, ALS, Issue 21, dated July 7, 2023. This service information specifies airworthiness limitations, tasks, and associated thresholds and intervals for various parts, and specifies new or more restrictive airworthiness limitations for certain components installed on the tail rotor system.

Differences Between This AD and the EASA AD

EASA AD 2023–0160 requires replacing certain components before

exceeding applicable life limits, accomplishing certain maintenance tasks within thresholds and intervals as specified in the ALS, as defined within, and depending on the results, accomplishing corrective action within the compliance time specified in that ALS. EASA AD 2023–0160 also requires revising the approved AMP to incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS within 12 months after its effective date. Whereas, this AD requires revising existing documents and programs within 30 days to incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS, and clarifies that if an incorporated limitation or threshold therein is reached before 30 days after the effective date of this final rule, you still have up to 30 days after the effective date of this final rule to accomplish the corresponding task.

Costs of Compliance

The FAA estimates that this AD affects 10 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Revising the ALS of the existing helicopter maintenance manual or ICA for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, will take 2 work-hours for an estimated cost of $170 per helicopter and $1,700 for the U.S. fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–05–06 Leonardo S.p.a.: Amendment 39–22697; Docket No. FAA–2023–2244; Project Identifier MCAI–2023–00972–R.

(a) Effective Date

This airworthiness directive (AD) is effective May 14, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Leonardo S.p.a. Model AW169 helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6400, Tail rotor system.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address fatigue cracking, damage, and corrosion in principle structural elements. The unsafe condition, if not addressed, could result in failure of a part and loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0160, dated August 16, 2023 (EASA AD 2023–0160).

(h) Exceptions to EASA AD 2023–0160

(1) Where EASA AD 2023–0160 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the requirements specified in paragraphs (1), (2), (4), and (5) of EASA AD 2023–0160.

(3) Where paragraph (3) of EASA AD 2023–0160 specifies ''Within 12 months after the effective date of this AD, revise the approved AMP,'' this AD requires replacing those words with ''Within 30 days after the effective date of this AD, revise the airworthiness limitations section of your existing helicopter maintenance manual or instructions for continued airworthiness and your existing approved maintenance or inspection program, as applicable.''

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0160 is on or before the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0160, or within 30 days after the effective date of this AD, whichever occurs later.

(5) This AD does not adopt the Remarks paragraph of EASA AD 2023–0160.

(i) Provisions for Alternative Actions, Thresholds, and Intervals, Including Life Limits

No alternative actions and associated thresholds and intervals, including life limits, are allowed for compliance with paragraph (g) of this AD unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0160.

(j) Special Flight Permit

Special flight permits are prohibited.

(k) Alternative Methods of Compliance (AMOCs)

(1) 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, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) 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.

(l) Related Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (781) 238–7241; email: *Sungmo.D.Cho@faa.gov*.

(m) 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) European Union Aviation Safety Agency (EASA) AD 2023–0160, dated August 16, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0160, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. 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, email: visit *www.archives.gov/federal-register/cfr/ibr-locations* or email: *fr.inspection@nara.gov*.

Issued on March 4, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07342 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0991; Project Identifier MCAI–2024–00051–A; Amendment 39–22724; AD 2024–07–03]

RIN 2120–AA64

Airworthiness Directives; Diamond Aircraft Industries Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Diamond Aircraft Industries Inc. Model DA 62 airplanes. This AD was prompted by a report that certain revisions of the airplane maintenance manual (AMM) specified incorrect torque values for the horizontal stabilizer attachment bolts. This AD requires reviewing the airplane maintenance records to determine the torque values for the horizontal stabilizer attachment bolts and torquing the horizontal stabilizer attachment bolts to the correct torque value if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 24, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 24, 2024.

The FAA must receive comments on this AD by May 24, 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–2024–0991; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information contact Diamond Aircraft Industries Inc., 1560 Crumlin Road, London, N5V 1S2, Canada; phone: (519) 457–4041; email: *support-canada@diamondaircraft.com;* website: *diamondaircraft.com.*
- 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. It is also available at *regulations.gov* under Docket No. FAA–2024–0991.

FOR FURTHER INFORMATION CONTACT: Isabel Saltzman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7649; email: *isabel.l.saltzman@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0991; Project Identifier MCAI–2024–00051–A'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, 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 final rule 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 final rule.

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 AD 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 AD, 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 AD. Submissions containing CBI should be sent to Isabel Saltzman, 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

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2024–02, dated January 12, 2024 (also referred to as the MCAI), to correct an unsafe condition on Diamond Aircraft Industries Inc. Model DA 62 airplanes, serial numbers 62.C001 through 62.C044 and 62.008 through 62.203. The MCAI states that the DA 62 AMM initially

specified standard torque values for the horizontal stabilizer attachment bolts but these attachment bolts were designed to require a higher torque value and the AMM was updated to include the correct torque value. During the time the DA 62 AMM specified the lower, incorrect torque value, there could have been occurrences where the removal of the horizontal stabilizer attachment bolts was required, and the lower torque value was used for the installation of the horizontal stabilizer attachment bolts.

The FAA is issuing this AD to address incorrect torque values for the horizontal stabilizer attachment bolts. The unsafe condition, if not addressed, could result in premature wearing of the horizontal stabilizer attachment bolts, loss of structural integrity of the horizontal stabilizer, subsequent separation of the horizontal stabilizer from the fuselage, and loss of control of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0991.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Diamond Aircraft Industries Work Instruction WI–MSB–62–052, Revision 0, dated September 18, 2023, attached to Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–052, Revision 0, dated September 18, 2023 (issued as one document), which specifies procedures for reviewing the aircraft technical records to determine if the horizontal stabilizer bolts were last torqued to 45 newton meters (Nm) and torquing the horizontal stabilizer attachment bolts to 45 Nm.

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 AD after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

AD Requirements

This AD requires reviewing the airplane maintenance records to determine the torque values for the horizontal stabilizer attachment bolts and torquing the horizontal stabilizer attachment bolts to 45 Nm if necessary.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because horizontal stabilizer bolts, if not torqued to the correct value, could result in premature wearing of the horizontal stabilizer attachment bolts, loss of structural integrity of the horizontal stabilizer, subsequent separation of the horizontal stabilizer from the fuselage, and loss of control of the airplane. Additionally, the corrective action must be accomplished before further flight. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 86 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Review airplane maintenance records	1 work-hour × $85 per hour = $85	$0	$85	$7,310

The FAA estimates the following costs to do any necessary on-condition action that would be required based on the results of the records review. The FAA has no way of determining the number of aircraft that might need this on-condition action:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Torque attachment bolts	1 work-hour × $85 per hour = $85	$0	$85

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–07–03 Diamond Aircraft Industries Inc.: Amendment 39–22724; Docket No. FAA–2024–0991; Project Identifier MCAI–2024–00051–A.

(a) Effective Date

This airworthiness directive (AD) is effective April 24, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Diamond Aircraft Industries Inc. Model DA 62 airplanes, serial numbers 62.C001 through 62.C044 inclusive and 62.008 through 62.203 inclusive, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 5510, Horizontal Stabilizer Structure.

(e) Unsafe Condition

This AD was prompted by a report that certain revisions of the airplane maintenance manual specified incorrect torque values for the horizontal stabilizer attachment bolts. The FAA is issuing this AD to address incorrect torque values for the horizontal stabilizer attachment bolts. The unsafe condition, if not addressed, could result in premature wearing of the horizontal stabilizer attachment bolts, loss of structural integrity of the horizontal stabilizer, subsequent separation of the horizontal stabilizer from the fuselage, and loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Within 30 days or 30 hours time-in-service after the effective date of this AD, whichever occurs later, review the airplane maintenance records to determine if the horizontal stabilizer attachment bolts were last torqued to 45 newton meter (Nm) and if the torque value is not 45 Nm, or if the value cannot be determined, before further flight, torque the bolts to 45 Nm, in accordance with steps 3 through 6 of the Instructions, Section III, in Diamond Aircraft Industries Work Instruction WI–MSB–62–052, Revision 0, dated September 18, 2023, attached to Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–052, Revision 0, dated September 18, 2023 (issued as one document).

(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, send it to the attention of the person 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 responsible Flight Standards Office.

(i) Additional Information

(1) Refer to Transport Canada AD CF–2024–02, dated January 12, 2024, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2024–0991.

(2) For more information about this AD, contact Isabel Saltzman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7649; email: *isabel.l.saltzman@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) Diamond Aircraft Industries Work Instruction WI–MSB–62–052, Revision 0, dated September 18, 2023, attached to Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–052, Revision 0, dated September 18, 2023 (issued as one document).

(ii) [Reserved]

(3) For service information contact Diamond Aircraft Industries Inc., 1560 Crumlin Road, London, N5V 1S2, Canada; phone: (519) 457–4041; email: *support-canada@diamondaircraft.com*; website: *diamondaircraft.com*.

(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 March 27, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07441 Filed 4–4–24; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2245; Project Identifier MCAI–2023–00973–R; Amendment 39–22698; AD 2024–05–07]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Leonardo S.p.a. Model AW189 helicopters. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the airworthiness limitations section (ALS) of the existing helicopter maintenance manual or instructions for continued airworthiness (ICA) for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 14, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 14, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2245; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material that is incorporated by reference in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N 321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–2245.

Other Related Service Information: For Leonardo Helicopters service information identified in this final rule, contact Leonardo S.p.A., Emanuele Bufano, Head of Airworthiness, Viale G. Agusta 520, 21017 C. Costa di Samarate (Va) Italy; telephone (+39) 0331–225074; fax (+39) 0331–229046; or at *customerportal.leonardocompany.com/en-US/.* You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (781) 238–7241; email: *Sungmo.D.Cho@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued a series of ADs with the most recent being EASA AD 2023–0161, dated August 16, 2023 (EASA AD 2023–0161), to correct an unsafe condition on Leonardo S.p.A. Model AW189 helicopters.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Leonardo S.p.a. Model AW189 helicopters. The NPRM published in the **Federal Register** on December 21, 2023 (88 FR 88276). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require accomplishing the actions specified in EASA AD 2023–0161, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and the EASA AD.'' The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the EASA AD in the AD docket at *regulations.gov* under Docket No. FAA–2023–2245.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0161 requires replacing components before exceeding their life limits and accomplishing maintenance tasks within thresholds and intervals specified in the applicable ALS as defined in EASA AD 2023–0161. Depending on the results of the maintenance tasks, EASA AD 2023–0161 requires accomplishing corrective action(s) or contacting Leonardo [Leonardo S.p.a.] for approved instructions and accomplishing those instructions. EASA AD 2023–0161 also requires revising the Aircraft Maintenance Programme (AMP) by incorporating the limitations, tasks, and associated thresholds and intervals described in the specified ALS as applicable to the helicopter model and configuration. Revising the AMP constitutes terminating action for the requirement to record accomplishment of the actions of replacing components before exceeding their life limits and accomplishing maintenance tasks within the thresholds and intervals specified in the applicable ALS as required by EASA AD 2023–0161 for demonstration of AD compliance on a continued basis.

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

Other Related Service Information

The FAA also reviewed Leonardo AW189 document 89–A–AMPI–00–P, Air Vehicle Maintenance Planning Information, Chapter 4, Airworthiness Limitations, Issue 25, dated July 5, 2023, for helicopters equipped with General Electric CT7–2E1 engines. This service information specifies procedures for airworthiness limitations, tasks, and associated thresholds and intervals for various parts; including a new or more restrictive airworthiness limitation for a certain component installed in the main rotor gearbox.

Differences Between This AD and the EASA AD

EASA AD 2023–0161 requires replacing certain components before exceeding applicable life limits, accomplishing certain maintenance tasks within thresholds and intervals as specified in the ALS, as defined within, and depending on the results, accomplishing corrective action within the compliance time specified in that ALS. EASA AD 2023–0161 also requires revising the approved AMP to incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS within 12 months after its effective date. Whereas, this AD requires revising existing documents and programs within 30 days to

incorporate the limitations, tasks, and associated thresholds and intervals described in that ALS, and clarifies that if an incorporated limitation or threshold therein is reached before 30 days after the effective date of this final rule, you still have up to 30 days after the effective date of this final rule to accomplish the corresponding task.

Additionally, EASA AD 2023–0161 requires using 89–E–AMPI–00–P Air Vehicle Maintenance Planning Information, Chapter 04, ALS Issue 09, dated July 5, 2023, for revising the ALS. This service information is applicable for helicopters equipped with SAFRAN ANETO–1K engines. This AD will not allow this service information because that engine has not been FAA type-certificated for Model AW189 helicopters.

Costs of Compliance

The FAA estimates that this AD affects 4 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Revising the ALS of the existing helicopter maintenance manual or ICA for your helicopter and the existing approved maintenance or inspection program for your helicopter, as applicable, will take 2 work-hours for an estimated cost of $170 per helicopter and $680 for the U.S. fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–05–07 Leonardo S.p.a.: Amendment 39–22698; Docket No. FAA–2023–2245; Project Identifier MCAI–2023–00973–R.

(a) Effective Date

This airworthiness directive (AD) is effective May 14, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Leonardo S.p.a. Model AW189 helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6320, Main rotor gearbox.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address fatigue cracking, damage, and corrosion in principle structural elements. The unsafe condition, if not addressed, could result in failure of a part and loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0161, dated August 16, 2023 (EASA AD 2023–0161).

(h) Exceptions to EASA AD 2023–0161

(1) Where EASA AD 2023–0161 defines ''the ALS'' as ''Leonardo AW189 document 89–A–AMPI–00–P (Air Vehicle Maintenance Planning Information), Chapter 04, Airworthiness Limitations Section (ALS) Issue 025, applicable for helicopters equipped with General Electric (GE) CT7–2E1 engines; or document 89–E–AMPI–00–P (Air Vehicle Maintenance Planning Information), Chapter 04, ALS Issue 09, applicable for helicopters equipped with SAFRAN ANETO–1K engines.;'' for this AD, replace that definition with ''Leonardo AW189 document 89–A–AMPI–00–P, Air Vehicle Maintenance Planning Information, Chapter 4, Airworthiness Limitations, Issue 25, dated July 5, 2023 (for helicopters equipped with General Electric CT7–2E1 engines).''

(2) Where EASA AD 2023–0161 refers to its effective date, this AD requires using the effective date of this AD.

(3) This AD does not adopt the requirements specified in paragraphs (1), (2), (4), and (5) of EASA AD 2023–0161.

(4) Where paragraph (3) of EASA AD 2023–0161 specifies ''Within 12 months after the effective date of this AD, revise the approved AMP,'' this AD requires replacing those words with ''Within 30 days after the effective date of this AD, revise the airworthiness limitations section of your existing helicopter maintenance manual or instructions for continued airworthiness and your existing approved maintenance or inspection program, as applicable.''

(5) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0161 is on or before the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0161, or within 30 days after the effective date of this AD, whichever occurs later.

(6) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0161.

(i) Provisions for Alternative Actions, Thresholds, and Intervals, Including Life Limits

No alternative actions and associated thresholds and intervals, including life limits, are allowed for compliance with paragraph (g) of this AD unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0161.

(j) Special Flight Permit

Special flight permits are prohibited.

(k) Alternative Methods of Compliance (AMOCs)

(1) 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, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) 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.

(l) Related Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (781) 238–7241; email: *Sungmo.D.Cho@faa.gov.*

(m) 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) European Union Aviation Safety Agency (EASA) AD 2023–0161, dated August 16, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0161, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference 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 March 4, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07343 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0026; Project Identifier MCAI–2023–00776–T; Amendment 39–22710; AD 2024–06–05]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all MHI RJ Aviation ULC Model CL–600–2E25 (Regional Jet Series 1000) airplanes. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a Transport Canada AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 14, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 14, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0026; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Transport Canada material incorporated by reference in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* website *tc.canada.ca/en/aviation.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2024–0026.

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

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all MHI RJ Aviation ULC Model CL–600–2E25 (Regional Jet Series 1000) airplanes. The NPRM published in the **Federal Register** on January 11, 2024 (89 FR 1849). The NPRM was prompted by AD CF–2023–43, dated June 21, 2023, issued by Transport Canada, which is the aviation authority for Canada (Transport Canada AD CF–2023–43) (also referred to as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed.

In the NPRM, the FAA proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in Transport Canada AD CF–2023–43. The FAA is issuing this AD to prevent potential fatigue cracking and damage in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0026.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD

to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Transport Canada AD CF–2023–43, which specifies new or more restrictive airworthiness limitations for airplane structures and a safe life limit. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 5 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–06–05 MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Amendment 39–22710; Docket No. FAA–2024–0026; Project Identifier MCAI–2023–00776–T.

(a) Effective Date

This airworthiness directive (AD) is effective May 14, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all MHI RJ Aviation ULC (Type Certificate previously held by Bombardier, Inc.) Model CL–600–2E25 (Regional Jet Series 1000) airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to prevent potential fatigue cracking and damage in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2023–43, dated June 21, 2023 (Transport Canada AD CF–2023–43).

(h) Exceptions to Transport Canada AD CF–2023–43

(1) Where Transport Canada AD CF–2023–43 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph 1. of Transport Canada AD CF–2023–43 specifies to ''incorporate the new and revised tasks identified in Table 1 below, in the appropriate chapter within Section 2 and Section 3 of the MRM CSP B–053 Part 2 manual,'' this AD requires replacing that text with ''revise the existing maintenance or inspection program, as applicable, by incorporating the new and revised tasks identified in Table 1.''

(3) The initial compliance time for doing the tasks specified in paragraph 1. of Transport Canada AD CF–2023–43 is at the applicable ''thresholds'' and ''discard times'' as specified in the service information referenced in paragraph 1. of Transport Canada AD CF–2023–43, or within 60 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt paragraph 2. of Transport Canada AD CF–2023–43.

(i) Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Corrective Actions'' section of Transport Canada AD CF–2023–43.

(j) Additional AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions

from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or MHI RJ Aviation ULC's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Additional Information

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

(l) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2023–43, dated June 21, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF–2023–43, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* website *tc.canada.ca/en/aviation.*

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

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

Issued on March 15, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07390 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0993; Project Identifier MCAI–2024–00178–E; Amendment 39–22725; AD 2024–07–04]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Rolls-Royce Deutschland Ltd & Co KG (RRD) Model RB211–524H–36 and RB211–524H–T–36 engines. This AD was prompted by reports of engine surges and a subsequent investigation which found that the surges may have been caused by material loss on the high-pressure compressor (HPC) stage 1 and stage 2 rotor path liners. This AD requires borescope inspections (BSIs) of the HPC stage 1 and stage 2 rotor path liners for material loss, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 15, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 15, 2024.

The FAA must receive comments on this AD by May 24, 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–2024–0993; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA service information, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *Ads@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2024–0993.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0993; Project Identifier MCAI–2024–00178–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, 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 final rule 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 final rule.

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 AD 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 AD, 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 AD. Submissions containing CBI should be sent to Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically

designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2024–0069–E, dated March 12, 2024 (EASA AD 2024–0069–E) (also referred to as the MCAI), to correct an unsafe condition for all RRD Model RB211–524H–36 and RB211–524H–T–36 engines. The MCAI states that multiple occurrences have been reported of engine surges during climb. A subsequent investigation determined that the HPC stage 1 and stage 2 rotor path liners had a level of liner material loss which had significantly eroded the surge margin. To address this unsafe condition, the manufacturer published service information that specifies procedures for performing BSIs of HPC stage 1 and stage 2 rotor path liners for material loss. This condition, if not addressed, could result in dual engine shutdown and reduced control of the airplane

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0993.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2024–0069–E, which specifies procedures for performing BSIs of affected HPC stage 1 and stage 2 rotor path liners.

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 referenced above. The FAA is issuing this AD after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

AD Requirements

This AD requires accomplishing the actions specified in EASA AD 2024–0069–E described previously, except for any differences identified as exceptions in the regulatory text of this AD.

Differences Between This AD and the MCAI

Where paragraph (1) of the MCAI specifies performing the initial BSI of the HPC stage 1 and stage 2 rotor path liners within 18 days after the effective date of the MCAI, this AD requires performing the initial BSI of the HPC stage 1 and stage 2 rotor path liners within 5 days after the effective date of this AD.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because material loss on the HPC stage 1 and 2 rotor path liners could cause engines to surge, which may result in dual engine shutdown and reduced control of the airplane. There have been reports of aircraft utilizing affected engines that have exceeded airworthiness requirements, therefore, the likelihood of the unsafe condition occurring is high and the inspection needs to be done on at least one engine installed on an affected airplane within 5 days. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 16 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
BSI of HPC stage 1 and stage 2 rotor path liners.	.75 work-hours × $85 per hour = $63.75	$0	$63.75	$1,020

Corrective action that may be needed as a result of the BSI could vary significantly from aircraft to aircraft. The FAA has no data to determine the costs to accomplish the corrective action or the number of aircraft that may require corrective action or repair.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2024–07–04 Rolls-Royce Deutschland Ltd & Co KG: Amendment 39–22725; Docket No. FAA–2024–0993; Project Identifier MCAI–2024–00178–E.

(a) Effective Date

This airworthiness directive (AD) is effective April 15, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model RB211–524H–36 and RB211–524H–T–36 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by reports of engine surges and a subsequent investigation which found that the surges may have been caused by material loss on the high-pressure compressor (HPC) stage 1 and stage 2 rotor path liners. The FAA is issuing this AD to prevent material loss on the HPC stage 1 and stage 2 rotor path liners. The unsafe condition, if not addressed, could result in dual engine shutdown and reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency AD 2024–0069–E, dated March 12, 2024 (EASA AD 2024–0069–E).

(h) Exceptions to EASA AD 2024–0069–E

(1) Where EASA AD 2024–0069–E refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2024–0069–E specifies compliance ''Within 18 days after the effective date of this AD,'' for this AD, replace that text with ''Within 5 days after the effective date of this AD.''

(3) Where EASA AD 2024–0069–E specifies to ''contact Rolls-Royce Deutschland Ltd & Co KG,'' for this AD, replace that text with ''contact the Manager, AIR–520 Continued Operational Safety Branch, FAA; or EASA; or the Rolls-Royce Deutschland Ltd & Co KG EASA Design Organization Approval (DOA) (if approved by the DOA, the approval must include the DOA-authorized signature)''

(4) This AD does not adopt the Remarks paragraph of EASA AD 2024–0069–E.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2024–0069–E specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD.

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.

(k) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

(l) 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) European Union Aviation Safety Agency (EASA) AD 2024–0069–E, dated March 12, 2024.

(ii) [Reserved]

(3) For EASA AD 2024–0069–E, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. 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 March 28, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07433 Filed 4–3–24; 4:15 pm]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–6578; File No. S7–13–23]

RIN 3235–AN31

Exemption for Certain Investment Advisers Operating Through the Internet

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting amendments to the rule under the Investment Advisers Act of 1940 that exempts certain investment advisers that provide advisory services through the internet (''internet investment advisers'') from the prohibition on Commission registration, as well as related amendments to Form ADV. The amendments are designed to modernize the rule's conditions to account for the evolution in technology and the investment advisory industry since the initial adoption of the rule in 2002.

DATES: *Effective date:* This rule is effective July 8, 2024.

Compliance dates: See section II.E of this release.

FOR FURTHER INFORMATION CONTACT: Blair B. Burnett, Branch Chief, Investment Company Regulation Office, Herman Brown, Senior Counsel, Sirimal R. Mukerjee, Senior Special Counsel, or Melissa Roverts Harke, Assistant Director, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551–6787 or *IArules@sec.gov*, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 275.203A–2(e) (''rule 203A–2(e)'' or ''Internet Adviser Exemption'') under the Investment Advisers Act of 1940 (''Advisers Act'' or ''Act'') [15 U.S.C. 80b–1 *et seq.*] and corresponding amendments to 17 CFR 279.1 (''Form ADV'') under the Advisers Act.[1]

Table of Contents

I. Introduction

A. Overview

We are adopting amendments to rule 203A–2(e) under the Advisers Act. The Internet Adviser Exemption provides an exemption from the prohibition on registration with the Commission that may otherwise affect certain advisers seeking to register with us. The amendments are designed to modernize the Internet Adviser Exemption's conditions to account for the evolution in technology and the investment advisory industry since the adoption of the rule over 20 years ago. Specifically, the amendments will require an internet investment adviser to provide investment advice to all of its clients exclusively through an ''operational'' interactive website at all times during which it relies on the Internet Adviser Exemption. The amendments also will eliminate the *de minimis* exception in the current rule that permits internet investment advisers to have fewer than 15 non-internet clients in the preceding 12-month period. In addition, we are adopting amendments to Form ADV to conform certain instructions and definitions to the amended Internet Adviser Exemption and to require additional representations regarding an internet investment adviser's reliance on the rule.

In July 2023, the Commission proposed amendments to the Internet Adviser Exemption with certain corresponding amendments to Form ADV.[2] The Commission received eight comments on the proposed amendments.[3] Most commenters expressed broad support for the proposal while a few commenters suggested modifications.[4] One commenter disagreed with the proposal in its entirety.[5] After consideration of the comments received and as discussed in more detail below, we are adopting the amendments to the Internet Adviser Exemption, as proposed.

B. Background

The National Securities Markets Improvement Act of 1996 (''NSMIA'') amended the Advisers Act to divide the responsibility for regulating investment advisers between the Commission and State securities authorities.[6] Congress allocated to State securities authorities the primary responsibility for regulating smaller advisory firms and allocated to the Commission the primary responsibility for regulating larger advisory firms.[7] Section 303 of NSMIA amended the Advisers Act to include section 203A [8] to effect this division of responsibility by generally prohibiting advisers from registering with the Commission unless they either have assets under management of not less than $25 million or advise a registered investment company,[9] and preempt State adviser statutes regarding registration, licensing, or qualification as to advisers registered with the Commission.[10] The ''$25 million assets

[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any section of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any section of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

[2] *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No. 6354 (July 26, 2023) [88 FR 50076 (Aug. 1, 2023)] (''Proposing Release''). *See also* Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches, Exchange Act Release No. 92766 (Aug. 27, 2021) [86 FR 49067 (Sept. 1, 2021)] (a request for information and comments issued by the Commission in 2021 on the Internet Adviser Exemption, among other areas).

[3] The comment letters on the Proposing Release are available at *https://www.sec.gov/comments/s7-13-23/s71323.htm*.

[4] *See e.g.*, Comment Letter of Better Markets, Inc. (Oct. 2, 2023) (''Better Markets Comment Letter'') (stating that the proposal was an ''important reform to implement the framework Congress envisioned for dividing responsibility for regulating investment advisers between the Commission and the States''); Comment Letter of North American Securities Administrators Association Inc. (Sept. 29, 2023) (''NASAA Comment Letter'') (stating that it was an opportune time to revise the exemption's requirements because it shared the Commission's concern that the exemption has been misused by advisers that do not meet its requirements); Comment Letter of Andres Giraldo Suarez (Sept. 28, 2023) (''Suarez Comment Letter'') (stating that the proposal would modernize the exemption and that it will help investors get the best service in the digital age). *See also infra* section II.

[5] *See* Comment Letter of Estelle Brunk (July 29, 2023). This commenter, however, did not provide a rationale for their disagreement with the proposal.

[6] National Securities Markets Improvement Act of 1996, Public Law 104–290, 110 Stat. 3416 (1996) (codified in various sections of 15 U.S.C.). *See also* Proposing Release at section I.A.

[7] *See* S. Rep. No. 293, 104th Cong., 2d Sess. 3–4 (1996) (''Senate Report''), at 4.

[8] Public Law 104–290, Sec. 303. *See also* section 203A of the Advisers Act [15 U.S.C. 80b–3a].

[9] Section 203A(a)(1) of the Advisers Act [15 U.S.C. 80b–3a(a)(1)].

[10] Section 203A(b) of the Advisers Act [15 U.S.C. 80b–3a(b)]. Advisers prohibited from registering with the Commission remain subject to the regulation of State securities authorities. Section 222 of the Advisers Act [15 U.S.C. 80b–18a]. The

under management'' test was designed by Congress to distinguish investment advisers with a national presence from those that are essentially local businesses.[11] Congress expressed that its goal in enacting the statute was more efficiently to allocate the Commission's limited resources by allowing the Commission to concentrate its regulatory responsibilities on larger advisers with national businesses, and to reduce the burden on investment advisers of the overlapping and duplicative regulation between Federal and State regulators.[12] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') amended certain provisions of the Advisers Act, including section 203A, to, among other things, reallocate primary responsibility for oversight of investment advisers by delegating generally to the States responsibility over certain ''mid-sized'' advisers—*i.e.,* subject to certain exceptions, advisers with between $25 million and $100 million of assets under management.[13]

Congress has recognized, however, that it is more efficient to regulate some advisers at the Federal level despite managing less than the minimum thresholds in assets under management and gave the Commission authority to enable advisers to register with the Commission if the prohibition would be ''unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of [section 203A].'' [14] In exercising this authority, the Commission in 2002 adopted the Internet Adviser Exemption, which relieves certain advisers that provide investment advisory services primarily through the Internet from the burdens of multiple State regulation and allows them to register with the Commission.[15]

The Internet Adviser Exemption was designed to create a narrow exemption from the prohibition on registration for certain Internet investment advisers that otherwise are not eligible for registration with the Commission, because they do not meet the statutory thresholds for registration.[16] These advisers, therefore, ''do not fall neatly into the model assumed by Congress when it added [s]ection 203A to the Act to divide regulatory authority over advisers.'' [17] An adviser could rely on the Internet Adviser Exemption (as originally adopted) if, among other obligations, it provided investment advice to all of its clients exclusively through an interactive website, except it was permitted to provide investment advice to fewer than 15 clients through other means during the preceding 12 months.[18]

The asset management industry has experienced substantial growth and change since the rule was adopted over 20 years ago. Assets under management have more than quadrupled since the adoption of the rule.[19] Similarly, since the adoption of the rule, advisers are increasingly using technology to interact with clients, including through email, websites, mobile applications, investor portals, text messages, chatbots, and other similar digital platforms.[20] The use of technology is now central to how many investment advisers provide their products and services to clients. For example, the growth of services available on digital platforms, such as those offered by online brokerage firms and robo-advisers, has multiplied the opportunities for investors to invest in and trade securities. This increased accessibility has been one of the many factors associated with the increase of retail investor participation in U.S. securities markets in recent years.[21] Concomitant with the growth in assets under management and the broader evolution and adoption of technology in the investment advisory industry, we have seen an increase in the number of advisers seeking to rely on the Internet Adviser Exemption.[22] We recognize that investment advisers are increasingly using a wide range of technologies in their businesses. The Internet Adviser Exemption, however, was intended as a narrow exemption for entities that *exclusively* provide investment advice through an interactive website.[23]

While some advisers have used the exemption as intended, others have used the exemption to register with the Commission while failing to satisfy the conditions of the exemption.[24] The

prohibition in section 203A against registration with the Commission applies to advisers whose principal office and place of business is in a United States jurisdiction that has enacted an investment adviser statute. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)], at text accompanying note 83.

[11] *See* Senate Report at 4–5 (''The states should play an important and logical role in regulating small investment advisers whose activities are likely to be concentrated in their home state.'').

[12] *See* Senate Report at 2–4 (stating ''[r]ecognizing the limited resources of both the Commission and the states, the Committee believes that eliminating overlapping regulatory responsibilities will allow the regulators to make the best use of their scarce resources to protect clients of investment advisers.'').

[13] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[14] Section 203A(c) of the Advisers Act [15 U.S.C. 80b–3a(c)]. *See also* Senate Report at 5 and 15.

[15] *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No. 2028 (Dec. 12, 2002) [67 FR 77619 (Dec. 18, 2002)], at section I (''2002 Adopting Release''). The exercise of our exemptive authority enables registration with the Commission and preempts most State law with respect to the exempted advisers that register with us. *See also* rule 203A–2.

[16] *See* Proposing Release at section I.A (discussing the Commission's rationale for providing the Internet Adviser Exemption in 2002, including, for instance, the recognition that because Internet investment advisers provide investment advice to their clients through an interactive website, the adviser's clients can come from any state, at any time, which, absent the Internet Adviser Exemption, may result in an Internet investment adviser incurring the burden of temporarily registering in multiple states and later withdrawing). *See also* 2002 Adopting Release.

[17] 2002 Adopting Release at section II (citing Section 203A(c)).

[18] *See* 17 CFR 275.203A–2(e)(1)(i) (''rule 203A–2(e)(1)(i)'').

[19] There were approximately $23.6 trillion regulatory assets under management among registered investment advisers as of Dec. 2003 and approximately $114.4 trillion assets under management as of June 2023. Based on analysis of Form ADV data.

[20] *See* Bilal Majbour, *Embracing A Digital-Human Model: The Future of Financial Advisory* (June 20, 2023), *https://www.forbes.com/sites/forbesbusinesscouncil/2023/06/20/embracing-a-digital-human-model-the-future-of-financial-advisory/?sh=6b27dd457291. See also* Andrew Osterland, *Technology is redefining that client-financial advisor relationship* (Oct. 14, 2019), *https://www.cnbc.com/2019/10/14/technology-is-redefining-that-client-financial-advisor-relationship.html* (''Easy-to-use client portals have become essential to provide investors with the ability to see their accounts, exchange secure emails with their advisor and share documents.'').

[21] *See, e.g.,* Maggie Fitzgerald, *Retail Investors Continue to Jump Into the Stock Market After GameStop Mania,* CNBC (Mar. 10, 2021), *https://www.cnbc.com/2021/03/10/retail-investor-ranks-in-the-stock-market-continue-to-surge.html* (providing year-over-year app download statistics for Robinhood, Webull, Sofi, Coinbase, TD Ameritrade, Charles Schwab, E-Trade, and Fidelity from 2018–2020, and monthly figures for Jan. and Feb. 2021); John Gittelsohn, *Schwab Boosts New Trading Accounts 31% After Fees Go to Zero,* Bloomberg (Nov. 14, 2019), *https://www.bloomberg.com/news/articles/2019-11-14/schwab-boosts-brokerage-accounts-by-31-after-fees-cut-to-zero* (noting that Charles Schwab opened 142,000 new trading accounts in October, a 31% increase over September's pace).

[22] Based on Form ADV data, the number of advisers relying exclusively on the exemption has grown from approximately 107 advisers as of Dec. 2015 to 261 advisers as of June 2023. From the initial adoption of the Internet Adviser Exemption through June 2023, approximately 937 advisers have relied on the exemption as a basis for registration with the Commission. Of these advisers, 772 initially registered exclusively in reliance on the Internet Adviser Exemption. The exemption has been used with increasing frequency recently, with 154 of the 261 advisers relying exclusively on the exemption registering after 2015.

[23] *See* Proposing Release at section I.B. *See also* 2002 Adopting Release at section II.A.

[24] *See* Proposing Release at note 26 (stating that the SEC examination staff observed that ''[n]early half of the [examined] advisers claiming reliance on the Internet Adviser Exemption were ineligible to rely on the exemption, and many were not otherwise eligible for SEC-registration''). *See also* Observations from Examinations of Advisers that Provide Electronic Investment Advice (Nov. 9, 2021), *https://www.sec.gov/files/exams-eia-risk-*

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recent increase in the number of advisers seeking to rely on the Internet Adviser Exemption coincides with an increase in registration withdrawals and cancellations of Internet investment advisers, which has affected the cumulative growth in the number of advisers relying on the Internet Adviser Exemption.[25] For example, approximately 67% of the advisers withdrawing their registration under the rule have done so since 2017, while only approximately 33% of the withdrawing advisers did so from the rule's adoption in 2002 through 2016.[26]

Our examination staff has observed numerous compliance deficiencies by advisers relying on the rule.[27] For example, the staff observed advisers relying on this exemption that did not have an interactive website. In addition, the staff observed advisers relying on this exemption that provided advisory personnel who could expand upon the investment advice provided by the adviser's interactive website or otherwise provide investment advice to clients, such as financial planning, outside of the adviser's interactive website.[28]

As discussed above, the Commission intended the Internet Adviser Exemption to be a narrow exemption for certain investment advisers that did not fall neatly within the framework established by Congress to divide regulatory authority between State regulators and the Commission.[29] The amended Internet Adviser Exemption will better align current practices in the investment adviser industry with this narrow exemption and will adapt the rule to the broader evolution in technology and the marketplace that has occurred since the rule was adopted. In addition, the amendments will enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. The amendments also will minimize opportunities for advisers to rely on the exemption to register with the Commission without meeting the rule's conditions.

II. Discussion

A. Operational Interactive Website

Largely as proposed, we are renaming the defined term ''interactive website'' as ''operational interactive website,'' and defining it as a website or mobile application through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de minimis* duration).[30] In a change from the proposal, to keep the rule evergreen as technology changes, we are also including in the definition any ''similar digital platform'' through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client.[31] The current rule defines ''interactive website'' to mean a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.[32]

Most commenters supported the proposed definition of ''operational interactive website.'' [33] Another commenter stated that the definition was ''entirely appropriate'' to protect against clients being misled by an investment adviser touting itself as Commission-registered.[34] Further, a commenter suggested that requiring investment advisers to maintain an operational website at all times ensures that ''clients can access the advice and information they need whenever they want, which is essential in the digital era.'' [35]

Two commenters did not support this element of the proposal. One asserted that the requirement that investment advisers have operational interactive websites would make it harder for smaller entities, because they tend to have fewer clients.[36] We carefully considered the potential impact this change would have on smaller advisers. However, we are requiring an adviser to have a minimum of only two internet clients to qualify for the exemption, as proposed.[37]

The other commenter stated that the Commission does not need to add the word ''operational'' to the term ''interactive website'' if the Commission eliminates the *de minimis* exception for non-internet clients and defines ''digital investment advisory service'' as proposed.[38] This commenter explained that the defined term ''interactive website'' should be sufficient, because a website cannot be interactive if it is not already operational. As discussed above, EXAMS staff has observed advisers relying on the exemption without having an operational interactive

alert.pdf (''Risk Alert''). Staff documents (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

[25] The Commission has cancelled the registration of Internet investment advisers after finding the firms are no longer in existence, not engaged in business as an investment adviser, or prohibited from registering as an investment adviser under section 203A of the Advisers Act (and related rules). The Commission also has revoked the registration of an Internet investment adviser on the basis that it was ineligible to rely on the exemption. *See* In re. Boveda Asset Management, Inc., Investment Advisers Act Release No. 6016 (May 6, 2022) (referencing *SEC* v. *Boveda Asset Management, Inc. and George Kenneth Witherspoon, Jr.,* 1:21–cv–05321–SCJ (N. D. GA) (Apr. 27, 2022)). *See also* Ajenifuja Investments, LLC; Order Cancelling Registration Pursuant to Section 203(h) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 5110 (Feb. 12, 2019) (finding that the adviser was registered as an Internet investment adviser for over three years and in that time period did not have an interactive website and did not demonstrate any other basis for registration eligibility); Strategic Options, LLC; Order Denying a Request for Hearing and Cancelling Registration Pursuant to Section 203(h) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 5689 (Feb. 24, 2021) (finding that since its registration in 2015, the registrant has not had, and does not have, any clients for which it provides investment advice through an interactive website); In re. RetireHub, Inc., Investment Advisers Act Release No. 3337 (Dec. 15, 2011) (settled) (alleging that the adviser was never an Internet investment adviser because, over the course of its registration, it did not provide investment advice exclusively through an interactive website, advised more clients than permitted through personal contact, or both).

[26] Based on analysis of Form ADV data.

[27] *See* Risk Alert.

[28] Risk Alert at 8 (also finding that some advisers' affiliates were operating as unregistered investment advisers, because the affiliates were operationally integrated with the registered advisers, and the Internet Adviser Exemption prohibited those affiliates from relying on the Internet investment adviser's registration as a basis for their own registration).

[29] *See supra* notes 16–17.

[30] *See* amended 17 CFR 275.203A–2(e)(2) (''rule 203A–2(e)(2)'').

[31] *See infra* note 46 and accompanying text.

[32] *See* rule 203A–2(e)(2). Personal information provided by the internet client generally should consist of information relevant to the client's financial situation, level of financial sophistication, investment experience, and financial goals and objectives. *See also* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] (''Fiduciary Interpretation''), at 12–14 (discussing an adviser's duty of care, which includes a duty to provide advice that is in the best interest of the client).

[33] *See, e.g.,* Better Markets Comment Letter; Suarez Comment Letter.

[34] Better Markets Comment Letter.

[35] Suarez Comment Letter.

[36] Comment Letter of Robert Martin Comment Letter (Aug. 22, 2023) (''Robert Martin Comment Letter).

[37] *See infra* section IV.D.2 (stating that a larger minimum number of clients may put advisers with a small clientele or advisers that are at the early stages of starting their advisory business at a disadvantage). *See also infra* section VI.B (stating that advisers with zero or one client are more akin to local businesses that can be effectively regulated by a State).

[38] NASAA Comment Letter.

website.[39] Therefore, it is important to include the term ''operational'' in the definition of ''operational interactive website,'' because this addition reinforces the rule's requirement that an adviser must, at all times during which the adviser relies on the Internet Adviser Exemption (*i.e.,* at the time of the adviser's registration and at all times an adviser is registered in reliance on the amended Internet Adviser Exemption), have an operational interactive website through which it provides investment advice to more than one client.

Some commenters suggested modifications to the proposed definition of ''operational interactive website.'' [40] In this regard, one commenter stated that the Commission should modify it by requiring an investment adviser to provide digital investment advisory services to at least 15 clients.[41] This commenter expressed that, in its view, 15 or more clients, rather than the proposed ''more than one,'' is a better indicator of an adviser's national presence. Although there could be various ways of demonstrating national presence, in the context of the Internet Adviser Exemption, the existence of an operational interactive website that can be accessed by persons located in multiple States better reflects that the adviser has a national presence. Requiring a larger minimum number of clients to qualify for the exemption, such as 15 clients, would be inconsistent with the general policy objective that underpins the Internet Adviser Exemption. It would burden advisers that do not fall neatly within the State and Federal regulatory framework established by Congress with the obligation of registering in several States before the adviser would be eligible for Commission registration.[42]

Another commenter urged the Commission to provide more clarity around the meaning of the phrase ''ongoing basis'' within the definition of ''operational interactive website.'' [43] An Internet investment adviser generally is providing investment advice on an ongoing basis through its website to a client if the advice is within the scope of the adviser-client relationship.[44] For example, an internet investment adviser and a client may come to an express agreement where the adviser-client relationship is of limited duration, such as for the provision of a one-time financial plan for a one-time fee. Following the termination of this adviser-client relationship by way of the expiration of the agreed duration of the agreement, the investment adviser generally would not be providing advice to the former client on an ''ongoing basis'' (absent some other arrangement or circumstance). Alternatively, an adviser providing comprehensive discretionary and continual advice to a retail client (*e.g.,* monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) generally would be providing advice to a client on an ''ongoing basis.''

Further, the Proposing Release requested comment on whether to include ''digital platform'' in the definition of operational interactive website.[45] The one commenter addressing this request for comment specifically did not take a position, expressing, on the one hand, that more generic terminology could stand up better against rapidly advancing technology and remain evergreen and, on the other hand, that a ''whole new medium of investment advice'' would be significant enough to require refreshing rules.[46] After further consideration, the Commission is adding ''similar digital platform'' to the definition of operational interactive website to recognize that different types of technologies may develop in the future but to also reinforce that qualifying technologies must be ones through which an adviser can provide digital advisory services consistent with the rule.

We understand that unforeseen technological issues outside of the control of an adviser occur at times. We also understand that websites may be temporarily inoperable due to periodic maintenance to ensure that the website performs optimally. Accordingly, as proposed, we have incorporated into the definition of ''operational interactive website'' a hardship clause that allows an internet investment adviser to satisfy the rule despite temporary technological outages of the operational interactive website of a *de minimis* duration.[47] The amended rule otherwise specifies that the requirement to provide an operational interactive website will apply at all times during which the adviser relies on the Internet Adviser Exemption (*i.e.,* at the time of the adviser's registration and at all times an adviser is registered in reliance on the amended Internet Adviser Exemption).[48] An adviser intending to rely on the Internet Adviser Exemption may, however, rely on current rule 203A–2(c) (''120-day rule'') as an initial basis for registration with the Commission. The 120-day rule allows an adviser that is not registered with the Commission but has a reasonable expectation that it will be eligible for registration within 120 days to register in anticipation of its separate eligibility.[49] With advances in technology since the initial adoption of the rule more than 20 years ago, advisers seeking to rely on the Internet Adviser Exemption may use the 120-day rule to develop, test, and launch an operational interactive website and obtain initial clients by the time the 120-day temporary registration expires. Accordingly, like the current rule, the amended rule has no grace period of its own for meeting its conditions, including providing an operational interactive website.[50]

The definition of ''operational interactive website'' is designed to specify the rule's application to advisers' use of technology, including their use of mobile applications or similar digital platforms, in connection

[39] *See supra* notes 24, 27–28 and accompanying text. *See also* notes 25–26 and accompanying text.

[40] *See, e.g.,* NASAA Comment Letter; Robert Martin Comment Letter.

[41] Better Markets Comment Letter.

[42] *See infra* section IV.D.2.

[43] Comment Letter of Maksym Puzin (July 28, 2023) (''Maksym Puzin Comment Letter'').

[44] *See* Fiduciary Interpretation at section II.A. (describing the scope of the adviser-client relationship). Internet investment advisers, like all registered investment advisers, should consider the clarity of the descriptions of the investment advisory services they offer and use reasonable care to avoid creating a false implication or sense about the scope of those services which may materially mislead clients. For example, internet investment advisers should be careful to not imply that their operational interactive website will provide a comprehensive financial plan for a client if it will not do so.

[45] *See* Proposing Release at section II.A.1.

[46] NASAA Comment Letter.

[47] internet investment advisers may seek exemptive relief from the Commission for technological outages of the operational interactive website that last longer than a *de minimis* duration. Any request for an exemptive order will be evaluated based on its particular facts and circumstances and must meet the standard under section 206A of the Advisers Act, including that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act.

[48] In the case of an existing registered investment adviser seeking to change its registration to rely on the Internet Adviser Exemption, the adviser will be required to have an operational interactive website at the time in which it begins relying on the rule.

[49] An adviser relying on the 120-day rule must file an amendment to its Form ADV at the end of the 120 days indicating it has become eligible for registration or must withdraw its registration. *See* Form ADV Part 1A, Item 2.A.(9).

[50] In order to rely on the Internet Adviser Exemption, a person must first meet the definition of investment adviser under the Advisers Act. *See* section 202(a)(11) of the Advisers Act. Also, as discussed above, an adviser relying on the Internet Adviser Exemption must meet the conditions of the rule, which includes providing investment advice to all of its clients exclusively through an operational interactive website at all times. *See supra* notes 30 and 48 and accompanying text.

with their eligibility to rely on the rule. We are adopting this aspect of the definition largely as proposed with the addition of ''similar digital platform'' to the definition.[51] Thus, the definition will expressly permit an internet investment adviser to use mobile applications or similar digital platforms to provide investment advice to clients.[52] It is appropriate to allow internet investment advisers using these platforms to interact with advisory clients to rely on the Internet Adviser Exemption, because clients increasingly access services, including investment advisory services, through these platforms,[53] which can provide interactive functionality similar to the functionality of websites.[54] By including mobile applications or similar digital platforms in the definition of ''operational interactive website,'' internet investment advisers will have broad flexibility to design the interactive website in a manner that best suits their needs and their clients' needs. In addition, the definition will allow for the evolution of advisers' use of technologies consistent with the Internet Adviser Exemption. We understand that these platforms use various methods of communication, including, but not limited to, push notifications, in-app messages, online client portal communications, and similar forms of electronic communication. The amended rule will permit an investment adviser relying on the Internet Adviser Exemption to provide digital investment advisory services through any form of mobile application technology or similar digital platform.

B. Digital Investment Advisory Service

We are adopting the definition of ''digital investment advisory service,'' as proposed. The amendments will define ''digital investment advisory service'' to mean investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website. The definition is designed to require that, as under the current rule, an adviser must provide investment advice exclusively through an interactive website.

Most commenters generally supported the defined term ''digital investment advisory service.'' [55] One commenter asserted that it was appropriate to define the exemption narrowly to apply to firms whose investment advice is technologically rendered.[56] The same commenter requested that the Commission provide clarity, within the rule text itself, that personnel of the adviser cannot expand upon technologically generated advice but can answer other questions and help clients navigate the website or application.

Advisers are increasingly using algorithms to generate investment advice in order to provide clients with cost-effective and tailored advice and the definition encompasses this use.[57] The amendments will specify that, to qualify for the exemption, the investment advice to clients must be ''generated by'' the website's software-based models, algorithms, or applications.[58] Like the current rule, this definition is designed so that an adviser's personnel do not generate, modify, or otherwise provide client-specific investment advice through the operational interactive website or otherwise.[59] Human-directed client-specific investment advice, even if delivered through electronic means, would not be eligible activity under the Internet Adviser Exemption.

The amendments will not prohibit advisory personnel from all interactions with advisory clients, however. Consistent with the current rule, advisory personnel generally can continue to assist clients with technical issues or collect feedback in connection with the use of the website (*e.g.,* accessing the website), including by assisting clients with explanations of how the algorithm generating the investment advice was developed or operates. Advisory personnel generally should be able to perform those services telephonically, through email, live electronic chats, and similar forms of electronic communication. Continuing to provide this guidance, rather than changing the rule as suggested by a commenter,[60] is appropriate in light of the breadth of services offered to investors through advisers' interactive websites and our administration of the current rule. This approach also is consistent with the Commission's approach in the 2002 Proposing Release and the 2002 Adopting Release.[61]

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[51] *See supra* note 31 and accompanying text.

[52] The term ''mobile application'' generally, refers to a software application developed primarily for use on wireless computing devices, such as smartphones and tablets. *See, e.g.,* techopedia, Mobile Application (Mobile App) (Aug. 7, 2020), *https://www.techopedia.com/definition/2953/mobile-application-mobile-app* (''techopedia'').

[53] *See* Sarah Perez, *Majority of Digital Media Consumption Now Takes Place in Mobile Apps,* TechCrunch (Aug. 21, 2014) (''[M]obile apps [. . .] eat up more of our time than desktop usage or mobile web surfing, accounting for 52% of the time spent using digital media. Combined with mobile web, mobile usage as a whole accounts for 60% of time spent, while desktop-based digital media consumption makes up the remaining 40%.''). *See generally,* Hannah Glover, *'Healthy Paranoia' Drives Innovation at Vanguard* (June 17, 2016), *https://www.ignites.com/c/1385943/158263?referrer_module=searchSubFromFF&highlight=%22mobile%20applications%22* (''Next on the horizon is mobile applications. When you travel [outside of the United States], you see how PC-centric technology does not exist anywhere else[.] In the future, [. . . [i]t's going to be all about the phone. Companies without easy-to-use, yet powerful, apps will be left behind [. . . .]'') (internal quotations omitted).

[54] *See, e.g.,* techopedia (''Mobile applications frequently serve to provide users with similar services to those accessed on PCs.''); Fundfire, *What Are Major IT Trends in Wealth Mgmt?* (Oct. 15, 2012), *https://www.fundfire.com/c/422571/47531?referrer_module=searchSubFromFF&highlight=%22mobile%20applications%22*(''Dedicated mobile applications for smartphones and tablets can enable unified digital communication between advisors and their clients—a combination of email, chat, voice and video.'').

[55] *See, e.g.,* Better Markets Comment Letter; NASAA Comment Letter.

[56] NASAA Comment Letter.

[57] *See, e.g.,* Investment Adviser Association, *2020 Evolution Revolution* (2020), at 8 (noting that by 2020, ''two of the top five advisers as measured by number of non-high net worth individual clients served [were] digital advice platforms, representing 7.5 million clients, an increase of 2.7 million clients from [the prior year].''); Akin Ajayi, *The Rise of the Robo-Advisers* (July 16, 2015) (''Robo-advisers—to use the suitably futuristic moniker adopted as a description for these services—are investment services driven by automated customer service and an investment strategy governed by computer algorithms. A clutch of start-ups, largely located in the United States but spreading to Europe and Asia, have emerged over the last few years.'').

[58] As a fiduciary, investment advisers have a duty to make full and fair disclosure of all material facts and conflicts of interest to, and to employ reasonable care to avoid misleading, clients. Given the unique aspects of internet investment advisers' business models and because client relationships may occur with limited, if any, human interaction, internet investment advisers generally should consider the most effective way to communicate to their clients the limitations, risks, and operational aspects of their advisory services. For example, internet investment advisers generally should effectively disclose to clients, among other matters, that an algorithm is used to manage individual client accounts with a description of the particular risks inherent in the use of an algorithm to manage client accounts. In addition, internet investment advisers generally should consider whether such disclosures are presented prior to client sign-up so that information necessary to make an informed investment decision is available to clients before they engage. Finally, an adviser should carefully consider whether its disclosure is sufficiently specific so that a client is able to understand the material facts or conflicts of interest and make an informed decision whether to provide consent. *See* Fiduciary Interpretation.

[59] *See* 2002 Adopting Release at section II.A.1 (stating that the exemption is for advisers that provide investment advice to all of their clients 'exclusively' through their interactive websites and that these advisers may not use their advisory personnel to elaborate or expand upon the investment advice provided by its interactive website, except as permitted by the *de minimis* exception).

[60] NASAA Comment Letter.

[61] *See* Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No.2028 (Apr. 12, 2002) [67

C. Elimination of De Minimis Non-Internet Client Exception

We are eliminating the *de minimis* exception that permits an Internet investment adviser to provide investment advice to fewer than 15 non-internet clients during the preceding 12 months, as proposed.[62] As a result, an Internet investment adviser must provide advice to all of its clients exclusively through an operational interactive website.

Most commenters broadly supported the elimination of the *de minimis* exception.[63] One commenter stated that eliminating the *de minimis* exception for non-internet clients would remove the possibility that some advisers are servicing clients directly and personally, while ignoring their obligation to provide advice through an interactive website.[64] One commenter, however, expressed concern that the elimination of the *de minimis* exception would constrain the growth potential, quality, and usefulness of internet-based services, because the rule would no longer permit human interaction to enhance the quality and reliability of fully automated, internet-based services.[65]

In considering whether to retain the *de minimis* exception, we took into account the basis for it as well as the Commission's experience administering the rule. The Internet Adviser Exemption was adopted for advisers that provide investment advice to their internet clients ''exclusively'' through their interactive website, but it was adopted at a time when providing advice in this manner was still in a fairly nascent stage.[66] Accordingly, the Commission initially adopted the *de minimis* exception so that internet investment advisers would not lose their ability to rely on the Internet Adviser Exemption as a result of providing advice to a small number of clients through means other than an interactive website. The Internet Adviser Exemption was not designed[67] to permit human interaction more broadly, however.[68] In addition, the *de minimis* exception is no longer needed in light of the widespread use of the internet, the relative ease of building and maintaining a website and applications, and other technological advances that better allow advisers to monitor to whom their advice is being provided. Accordingly, the elimination of the *de minimis* exception better reflects the allocation of regulatory responsibility between the Commission and the States. Eliminating the *de minimis* exception also will allow the Commission more effectively to identify advisers claiming reliance without meeting the requisite conditions of the rule (*i.e.,* providing investment advice to all clients exclusively through an operational interactive website). To the extent advisers have non-internet clients, these advisers may register with the States or rely on another basis for registration with the Commission, as appropriate.

D. Form ADV

We are amending Form ADV, as proposed. The amendments to Form ADV will require an investment adviser relying on the exemption as a basis for registration to represent on Schedule D of its Form ADV that, among other things, it has an operational interactive website.[69] As noted above, there has been an increase in the number of registration withdrawals and cancellations of Internet investment advisers.[70] Many of these withdrawals and cancellations were a result of the adviser not having an operational interactive website.

Most commenters broadly supported the amendments to Form ADV.[71] One commenter, however, suggested that the Commission remove the proposed representation on Form ADV generally, because Form ADV Part 1A Item 2.A(11) already asks an investment adviser to indicate whether it is relying on the exemption, and an adviser that mistakenly or falsely selects ADV Part 1A Item 2.A(11) is already susceptible to an examination deficiency finding or an enforcement action.[72] The same commenter stated that ''singling out one of the [e]xemption requirements could give the impression that it is somehow more important, which could unintentionally cause advisers to neglect the [e]xemption's other requirements.''[73] Another commenter expressed concern that Form ADV may become too lengthy as a result of the proposed amendments.[74]

The amendments to Form ADV will help ensure that registrants are aware of the new ''operational interactive website'' requirement and avoid erroneous registrations. The amendments also will require Internet investment advisers, as an initial matter and periodically thereafter, to provide an additional representation on Form ADV that more clearly notes the requirements of the exemption. In addition, the existing form has not reduced the number of advisers erroneously relying on the exemption. While we appreciate commenters' concerns regarding the existing form and adding length to the form, it is important to aid registrants with understanding and reinforcing the conditions of the Internet Adviser Exemption.[75] The amendments to Form ADV will also aid Commission staff in administering the adviser registration process.

FR 19500 (Apr. 19, 2002)] (''2002 Proposing Release''), at section II; 2002 Adopting Release at section II.A.1.

[62] *See* amended rule 203A–2(e)(1)(i).

[63] *See, e.g.,* NASAA Comment Letter; Suarez Comment Letter; Better Markets Comment Letter.

[64] *See* NASAA Comment Letter.

[65] Comment Letter of Anonymous (Oct. 2, 2023) (''Anonymous Comment Letter'').

[66] 2002 Adopting Release at section II.A.1.

[67] 2002 Adopting Release at section I. When the Commission initially adopted the fewer than 15 client *de minimis* exception, the Commission stated that it was similar to the (since repealed) ''private adviser exemption'' which, subject to certain additional conditions, exempted from the requirement to register with the Commission any adviser that during the course of the preceding 12 months, had fewer than 15 clients. That exemption was repealed by section 403 of Dodd-Frank. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) [76 FR 42949 (July 19, 2011)]. *See also* 2002 Proposing Release, at section II. In the 2002 Proposing Release, the Commission proposed permitting an adviser to rely on the exemption so long as at least 90% of the adviser's clients obtained their investment advice exclusively through the interactive website (''90% test''). In light of comments stating that the 90% test would permit more than a *de minimis* number of non-internet clients, the Commission replaced the 90% test with a provision permitting an adviser relying on the rule to have fewer than 15 non-internet clients during the course of the preceding 12 months.

[68] *See supra* section II.B (stating that advisory personnel can continue to assist clients with technical issues in connection with the use of the website, including by assisting clients with explanations of how the algorithm generating the investment advice was developed or operates). Accordingly, the elimination of the *de minimis* exception should not decrease quality and reliability of fully automated, internet-based services and, in turn, should not constrain the growth potential, quality, and usefulness of internet-based services, as suggested by a commenter.

[69] Consistent with the definition of operational interactive website, the amendments will also require an adviser that is relying on the rule to represent that it will provide investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.

[70] *See supra* notes 25–26 and accompanying text.

[71] *See, e.g.,* Better Markets Comment Letter; Suarez Comment Letter.

[72] NASAA Comment Letter.

[73] *Id.*

[74] *See* Robert Martin Comment Letter.

[75] In our experience, registrants generally seek to follow registration requirements. Therefore, we disagree that the proposed representation on Form ADV would cause advisers to neglect the rule's other requirements, as suggested by the commenter. *See* NASAA Comment Letter. In addition, the benefits of aiding registrants with understanding and reinforcing the conditions of the Internet Adviser Exemption justify any costs in this regard.

E. Compliance Dates

The compliance date for the amended rule is March 31, 2025. An adviser relying on the amended Internet Adviser Exemption must comply with the rule's conditions, including the condition to maintain the filing of a Form ADV that includes a representation that the adviser is eligible to register with the Commission under the Internet Adviser Exemption (the ''Form ADV representation''), by the rule's compliance date. The compliance date reflects the date for which most investment advisers will have filed their annual updating amendments to Form ADV (*i.e.,* 90 days after the December 31, 2024 fiscal year end).[76]

An adviser that is no longer eligible to rely on the amended Internet Adviser Exemption and does not otherwise have a basis for registration with the Commission, must register in one or more States and withdraw its registration with the Commission by filing a Form ADV–W [77] by June 29, 2025, 90 days after the rule's compliance date. After the end of this period, the Commission expects to cancel the registration of advisers no longer eligible to register with the Commission that fail to withdraw their registrations.[78]

III. Other Matters

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated the final amendments as not a ''major rule'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

IV. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 202(c) of the Advisers Act provides that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors.[79] The following analysis considers the likely significant economic effects that may result from the amended rule to rules and forms, including the benefits and costs to clients and investors and other market participants as well as the broader implications of the amended rule for efficiency, competition, and capital formation.

Where possible, the Commission quantifies the likely economic effects of its amended rules. However, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges of costs. For instance, data that separately captures the number of non-internet clients or the types of internet clients an adviser has is generally unavailable.[80] The Proposing Release requested any of such available data, but received no data or estimates from the commenters. Further, in some cases, quantification would require numerous assumptions to forecast how investment advisers and other affected parties would respond to the amended rule, and how those responses would in turn affect the broader markets in which they operate. In addition, many factors determining the economic effects of the amended rule would be investment adviser-specific. Investment advisers vary in size and sophistication, as well as in the products and services they offer. Even if it were possible to calculate a range of potential quantitative estimates, that range would be so wide as to not be informative about the magnitude of the benefits or costs associated with the amended rule. Many parts of the discussion below are, therefore, qualitative in nature. As described more fully below, the Commission is providing a qualitative assessment and, where practicable, a quantified estimate of the economic effects.

B. Baseline and Affected Parties

The final rule will amend the definitions used in the existing Internet Adviser Exemption, which allows internet investment advisers to register with the Commission. The application of this exemption, along with other applicable rules, determines which advisers the Commission regulates and which advisers may fall under State regulation. The entities potentially affected by the amended rule include all advisers that are currently relying on the Internet Adviser Exemption, or are contemplating relying on the Internet Adviser Exemption; their clients and affiliated parties; and users of Form ADV data.

1. Regulatory Baseline

NSMIA divided regulatory responsibility for advisers between the Commission and the States, where larger advisers with national presence are regulated by the Commission and smaller advisers with sufficient local presence are regulated by the States.[81] Subject to certain exemptions, only advisers that advise a registered investment company or have assets under management above $100 million are allowed to register with the Commission.[82] All other advisers may be subject to State regulation and may be required to register with one or multiple States.[83]

However, section 222(d) of the Advisers Act [15 U.S.C. 80b–18a(d)] establishes a ''national *de minimis* standard'' before a State can require an adviser to register with its securities commissioner. Under section 222(d) of the Advisers Act, States are preempted from requiring an adviser to register with its securities commissioner, if the adviser (1) does not have a place of business located within the State and (2) has had fewer than six clients who are residents of that State during the preceding 12-month period. State law varies, and States may choose to exempt from State regulation certain advisers with a place of business in that State if the adviser has a sufficiently low number of clients.[84] Depending on the

[76] Our staff is working closely with FINRA, our Investment Adviser Registration Depository (''IARD'') contractor, to re-program IARD and we understand that the system is expected to be able to accept filings of Form ADV reflecting the Form ADV representation by Sept. 30, 2024. Advisers not filing an annual updating amendment between Sept. 30, 2024, and Mar. 31, 2025, must file an other than annual amendment updating Form ADV by Mar. 31, 2025. *See also infra* notes 158–162.

[77] 17 CFR 279.2.

[78] *See* section 203(h) of the Advisers Act. As provided in the Advisers Act, an adviser would be given appropriate notice and opportunity for hearing to show why its registration should not be cancelled. Section 211(c) of the Advisers Act.

[79] 15 U.S.C. 80b–2(c).

[80] Information on number of clients, such as that described *supra* section I.B., is generally developed during adviser examinations.

[81] *See supra* section II.

[82] Section 203A(a)(2)(A) and (B) of the Advisers Act provides that an adviser is required to register with the Commission if the adviser has $25 million or more in assets under management and is not subject to examination as an adviser by the State where it maintains its principal office and place of business.

[83] *See supra* note 16 and accompanying text.

[84] *See, e.g.,* N.Y. Gen. Bus. Law sec 359–eee(a)(5) (excluding from the definition of ''investment adviser'' a person that has sold investment advisory services to fewer than 6 persons in the State, in the preceding 12 months); N.J. Stat. Ann. sec 49:3–56.9(g)(1) (exempting from registration as an investment adviser a person that does not have more than 5 clients in the State, in a 12-month period); Ill. Admin. Code tit. 14 sec 130.805(b) (exempting from registration as an investment adviser any investment adviser that had no more than 5 clients in the State, in the preceding 12 months); Ga. Comp. R. & Regs. R. 590–4–4–.13(1)(b)

location of the adviser and the number and location of its clients, an adviser not eligible for Commission registration might need to register with no State, or with up to 14 States.[85] States may also require advisers to file copies of their Commission filings with the State (notice filings) even if State registration is not required.[86]

Certain exemptions allow advisers to register with the Commission if State registration becomes unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Act.[87] The multistate exemption is one such exemption: it allows advisers that would otherwise have to register with 15 or more States to register with the Commission instead.[88] The current Internet Adviser Exemption similarly allows Commission registration for advisers that conduct their business predominantly over the internet and by the nature of their business have national presence. That is, their clients may come from multiple States, but they may not advise a registered investment company or have sufficient assets under management to be able to register with the Commission. To alleviate the burden of potentially registering with numerous States for business conducted over the internet, the Commission created in 2002 the exemption found in rule 203A–2(e).[89] Under current 17 CFR 275.203A–2(e)(1), Commission registration is allowed for an investment adviser that provides advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months. Current rule 203A–2(e) also requires the internet investment adviser to maintain records demonstrating that it meets the conditions of rule 203A–2(e)(1)(i).[90]

2. Current Use of the Internet Adviser Exemption

As of June 2023, there were 15,391 registered investment advisers with $114,430 billion regulatory assets under management. Of these, 261 (1.70%) with a combined total of $1.09 billion in regulatory assets under management (0.001%) exclusively relied on the Internet Adviser Exemption. An additional 10 advisers were dually registered with the Commission under both the Internet Adviser Exemption and another basis for registration. The total number of advisers claiming use of the Internet Adviser Exemption was 271, of which 197 were investment advisers with less than $25 million in regulatory assets under management.[91]

As of June 2023, registered internet investment advisers had on average 5,347 clients, with a minimum of 0 clients, reported by 107 advisers, and a maximum of 522,345 clients.[92] The median number of clients for all advisers using the exemption was 5, indicating that the distribution is highly skewed. As of June 2023, 107 advisers (39% of 271) reported advising 0 clients, 5 advisers (2% of 271) reported advising 1 client, and 38% of internet investment advisers (102 of 271) advised 2 to 100 clients. Only 17 advisers (6% of 271) reported advising more than 5,000 clients. Figure 1 demonstrates that 41% of internet advisers have fewer than 2 clients.

(exempting from registration an investment adviser that had fewer than 6 clients in the State, in the preceding 12 months).

[85] Advisers that would otherwise have to register with 15 or more states may register with the Commission using an existing exemption under 17 CFR 275.203A–2(d) (''multi-state exemption''). An investment adviser relying on the multi-state exemption would not be eligible for that exemption until the adviser had obtained the requisite number of clients in 15 states to trigger its registration obligations in those states. Under the rule, an investment adviser relying on this exemption must represent that it has reviewed its obligations under State and Federal law and has concluded that it is required to register as an investment adviser with the securities authorities of at least 15 states. For information on the number of State-registered investment advisers, *see, e.g.,* NASAA, NASAA 2023 Investment Adviser Section Annual Report, *https://www.nasaa.org/wp-content/uploads/2023/09/2023-IA-Section-Report-FINAL.pdf.*

[86] 15 U.S.C. 80b–3a note [Pub. L. 104–290, section 307, ''Continued State Authority'']. *See, e.g.,* Neb. Rev. St. sec. 8–1103(2)(b); N.H. Rev. Stat. sec. 421–B:4–405; 7 TX Admin. Code sec 116.1.(b)(2).

[87] 15 U.S.C. 80b–3a(c).

[88] *See* 17 CFR 275.203A–2(d). *See also* 2002 Adopting Release and *supra* note 85.

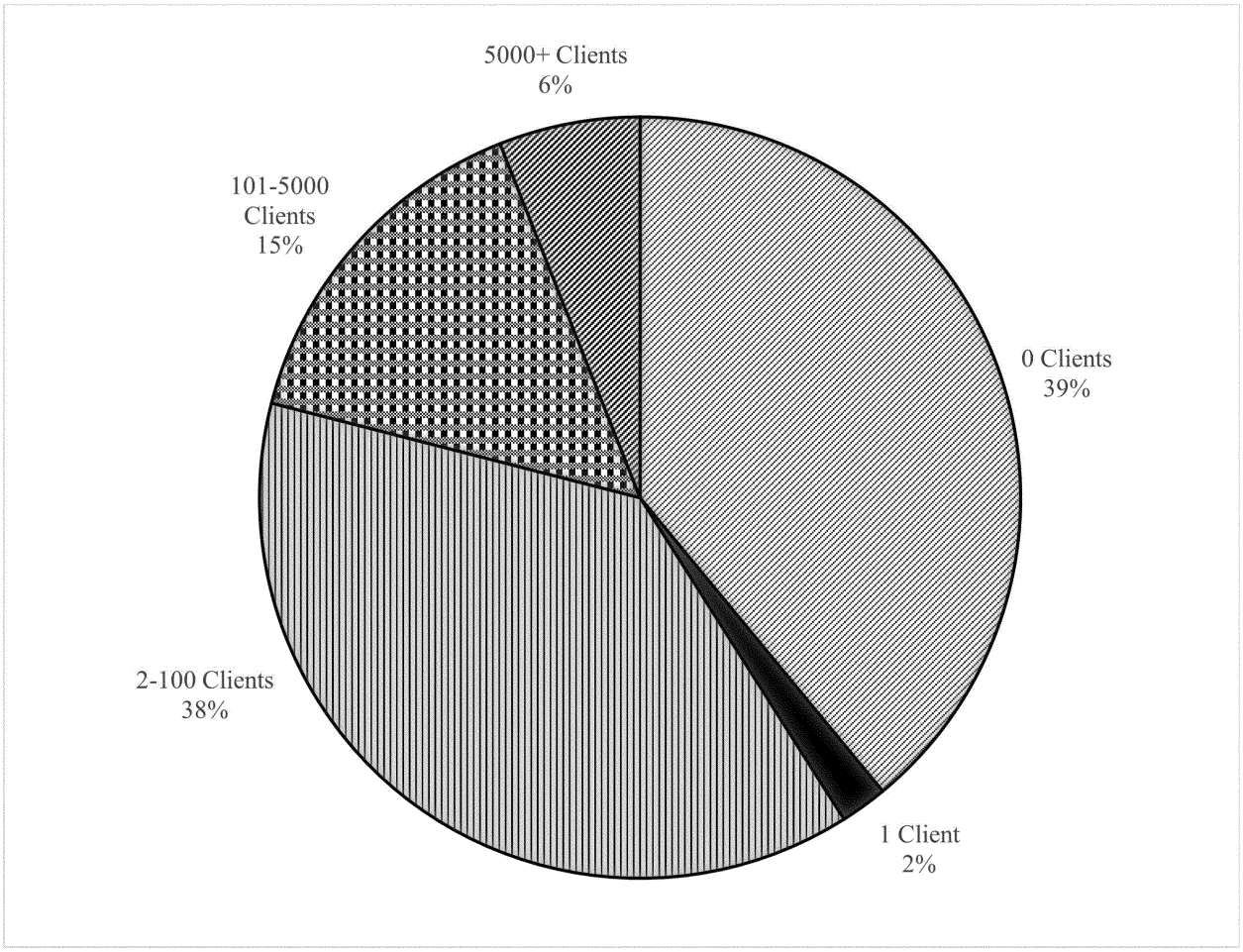
[89] *See* 2002 Adopting Release and the relevant discussion in section I.A of this release. The 2002 Adopting Release described the exemption as ''providing relief to certain investment advisers who, unlike State-registered advisers, have no local presence and whose advisory activities are not limited to one or a few states.'' At that time, the threshold for the multi-state exemption was registration in 30 states rather than 15.

[90] *See* 17 CFR 275.203A–2(e)(1)(ii) (''rule 203A–2(e)(1)(ii)''); relevant discussion *supra* section II.

[91] The data is based on the analysis of Form ADV data for the reporting period ending June 2023.

[92] The data is based on the analysis of Form ADV data for the reporting period ending June 2023.

Figure 1: Number of Clients Reported by Internet Advisers



The largest categories of clients that internet investment advisers currently have are: non-high net worth individuals, pension plans, and high net worth individuals.[93] The distribution of these client types among all internet advisers is as follows:

TABLE 1—LARGEST CATEGORIES OF CLIENTS: DISTRIBUTION ACROSS ALL INTERNET ADVISERS

Type of client	Mean clients per adviser
Non-high net worth individuals ...	4,955
Pension plans	256
High net worth individuals	1

Data source: Form ADV data for the reporting period ending June 2023.

The low median, relative to the average, is an indication of skewed distribution within the population of internet advisers. If the dataset is reduced to only those 214 advisers with 100 or fewer clients, the distribution of clients in these categories is as follows:

TABLE 2—LARGEST CATEGORIES OF CLIENTS FOR INTERNET ADVISERS WITH 100 OR FEWER CLIENTS

Type of client	Mean clients per adviser
Non-high net worth individuals ...	6.1
Pension plans	0.1
High net worth individuals	0.8

Data source: Form ADV data for the reporting period ending June 2023.

The data indicate that the majority of clients using internet advisers are non-high net worth individuals.

We do not have information on the States in which these clients are located. Advisers using the internet Adviser Exemption might also be eligible for the multistate exemption if they have clients in 15 or more States.[94] But, we

[93] The instructions of Form ADV specify that the category ''individuals'' includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members but does not include businesses organized as sole proprietorships. ''High Net Worth Individual'' is defined as an individual who is a qualified client or who is a ''qualified purchaser'' as defined in section 2(a)(51)(A) of the Investment Company Act of 1940.

[94] The multistate exemption became more widely available after the creation of the current Internet Adviser Exemption, because of the change from a minimum of 30 states to a minimum of 15. Thus, the burden of registering in numerous states has

would expect that relatively few advisers with the option to use either exemption would choose the Internet Adviser Exemption instead of the multi-state exemption, because the multi-state exemption is less restrictive: it does not limit advice provided through non-internet means, as the Internet Adviser Exemption does. This suggests that advisers using the Internet Adviser Exemption most likely do not have the option of using the multi-state exemption instead. The Proposing Release invited public comment on this topic but received no comments on the matter.

Similarly, we cannot estimate how many advisers currently using the Internet Adviser Exemption would potentially be subject to regulation by multiple States if they did not elect to use the exemption. State law varies, and regulation would depend on the location of the adviser's place of business and the location of their clients.[95] In light of the substantial number of internet investment advisers with only a few clients, however, it is likely that many of the advisers currently relying on the exemption would, if not registered using the exemption, be subject to registration in at most one State.[96] Additionally, advisers now may be able to use technology and targeted advertisement in such a way as to better control in which States they may be required to register, thereby reducing the State regulation burden.[97]

In the instances where State law does not require the adviser to register with a State, for example because the adviser has fewer than the *de minimis* number of clients in the State, registration with the Commission represents an additional compliance burden that some internet investment advisers appear to be voluntarily assuming. Moreover, where State law would require a Commission-registered adviser to make notice filings with one or more States, the combination of Commission registration and State notice filings may also represent an additional, voluntarily assumed compliance burden as compared to registering directly with those States.[98] Because some advisers choose to register with the Commission despite the potential additional compliance burden, we assume that some advisers perceive value in Commission registration as compared to State registration. We received no comments about this assumption.

Based on observations of Commission staff conducting examinations, we think some investors may believe that registration with the Commission confers a reputational advantage or appeals to potential clients. Other possibilities include the intent to obtain clients in multiple States in the future, or avoidance of individual State registration requirements such as bond and invoicing requirements. We did not receive comment letters regarding the matters discussed above.

3. Increased Reliance on the Internet Adviser Exemption

Use of the Internet Adviser Exemption has increased since its adoption, especially in recent years.[99] The number of investment advisers using the exemption as of June 2023 (that is, 271 advisers) was almost 18 times larger than it was in December 2003, one year after the exemption was put in place, when there were 15 such advisers.[100] The value of regulatory assets under management for advisers exclusively relying on the Internet Adviser Exemption as of June 2023 was $1.09 billion,[101] or 0.001% of total adviser registered assets under management. The average regulatory assets under management per adviser for internet investment advisers (about $56.09 million) was 144 times larger than it was in December 2003 when advisers using the exemption had on average about $0.39 million of registered assets under management per adviser. Further, from 2003 to 2023, 474 unique registered investment advisers that had indicated in their prior ADV filing they were utilizing the internet adviser registration basis withdrew and filed a total of 514 Forms ADV–W.[102] Note that the number of withdrawals has increased, for example, there were 69 Form ADV–W filings by internet investment advisers between 2003 and 2012 and 445 ADV–W filings between 2013 and June 2023.[103] This increase could suggest erroneous registration, as discussed later in this analysis.

Technology use in the advisory industry has also changed. One commenter wrote that since the Commission adopted the Internet Adviser Exemption in 2002, there has been an increased use of technology by internet advisers to provide investment advice including through interactive websites, mobile applications, investor portals, text messages, chatbots, and robo-advisers.[104] While the 2002 Adopting Release stated that internet investment advisers might not be fully operational within 120 days of registration,[105] today websites and associated services are more common, more website development services are available on the market, and new technologies, such as mobile applications that can generate advice, have emerged as well.[106] Currently, different options are available on the market to develop a website, from using website builder programs for an average upfront cost of about $200 and maintenance cost of about $50 per month, to hiring a website designer for an average upfront cost of about $6,000

lessened, compared to what it had been when the current exemption was developed.

[95] For example, the Uniform Securities Act would, if adopted by the relevant State, require an investment adviser to register with the State unless the adviser has no place of business in the State and no more than five clients in the State other than certain types of clients described in the Uniform Securities Act. Unif. Sec. Act of 2002 (rev. 2005), sec. 403(b). As of Feb. 2024, 21 states and territories had adopted the 2002 version of the Uniform Securities Act and 5 states had adopted an earlier version. *2002 Securities Act Enactment History, Unif. Law Comm'n*, https://www.uniformlaws.org/committees/community-home?CommunityKey=8c3c2581-0fea-4e91-8a50-27eee58da1cf, *last visited Feb. 21, 2024.*

[96] The 2002 rule contemplated internet advisers potentially having clients that ''can come from any State, at any time, without the adviser's prior knowledge'' and thus potentially necessitating registration in all states. 2002 Adopting Release at 77622. However, the significant number of currently registered internet investment advisers with one or fewer clients would not face that risk. Additionally, as noted in the Proposing Release at note 69, today's investment advisers are better able to control in which states they may be required to register.

[97] *See* Proposing Release at II.A.2.

[98] The cost of notice filing is often the same as the cost of registering with the State. *See* Investment Adviser Registration Depository, IA Firm State Registration/Notice Filing Fee Schedule (Jan. 1, 2024), *https://www.iard.com,* under the tab ''Fees & Accounting.'' We invited public comment on the cost of State registration and notice filing fees, but did not receive comment on this topic.

[99] *See supra* note 22 (number of advisers relying exclusively on the exemption grew from 107 in 2015 to 261 in 2023).

[100] The 2002 Adopting Release used a figure of 20 eligible advisers in its analysis, acknowledging that the number of eligible firms would likely grow. 2002 Adopting Release at 77623.

[101] Accounting for inflation using the Bureau of Labor Statistics' Consumer Price Index inflation calculator (*https://www.bls.gov/data/inflation_calculator.htm*), this number is 0.68 billion in Dec. 2003 dollars.

[102] The filing of 475 Forms ADV–W includes singular investment advisers that utilized the internet Adviser Exemption on a non-continuous basis (*e.g.,* investment advisers that registered, withdrew, registered again, and subsequently withdrew).

[103] Based on analysis of Form ADV data for the reporting period ending June 2023.

[104] *See* Better Markets Comment Letter.

[105] 2002 Adopting Release at 77622.

[106] *See supra* note 20 and surrounding text. *See also* Alex Padalka, *RIAs Depend on Tech for Client Communications, Growth,* Fin. Advisor IQ (Dec. 10, 2021), *https://www.financialadvisoriq.com/c/3402044/435734/rias_depend_tech_client_communications_growth?preview=1.*

and maintenance cost of about $1,000 per year.[107]

As discussed in section I.B., the Commission adopted rule 203A–2(e) to alleviate, for a narrow set of advisers with national presence, the burden of having to register in multiple States as a result of providing advice primarily through the internet. The increase in its use, especially among advisers that would not be subject to registration in more than one State, or that appear to have advised no clients in several years, suggests the exemption may currently be used in ways that were not intended by the 2002 rule.

In addition, the Commission's examination program has identified multiple instances of compliance issues relating to advisers relying on the exemption without an interactive website, or providing advisory personnel who could expand upon the investment advice provided by the adviser's interactive website or otherwise provide investment advice to clients, such as financial planning.[108] Consistent with these observations, one commenter noted that some investment advisers were attempting to rely on the Internet Adviser Exemption to register with the Commission without having a national presence.[109] The frequency of registration withdrawals has increased as well: as discussed previously in the baseline, the number of withdrawals by internet investment advisers between 2013 and 2023 (445) was over five times larger than the number of withdrawals between 2003 and 2012 (69).[110]

C. Benefits, Costs and Effects on Efficiency, Competition, and Capital Formation

1. Benefits

The amendments to the Internet Adviser Exemption are designed to modernize the exemption and address technological and other industry developments that have occurred since 2002, and to respond to observations about the use of the exemption that were not available when the exemption was first put in place.[111] Further, as discussed in more detail below, the final changes to the definitions in the rule are designed to better align regulatory authority between the Commission and the States and improve investor protection. The amended rule will:

1. Specify that the exemption is available to an investment adviser that provides investment advice to all of its clients exclusively through an operational interactive website at all times during which the investment adviser relies on the exemption found in section 275.203A–2(e).

2. Modernize the meaning of ''interactive website'' by:

- Adding the word ''operational,'' thus changing the term to ''operational interactive website;''
- Adding the term ''digital investment advisory service,'' defined to mean investment advice to clients that is generated by the website's algorithms as well as the software-based models and applications covered by the existing rule;
- Adding a reference to mobile applications or similar digital platforms;
- Requiring more than one client to which the adviser provides digital investment advisory services on an ongoing basis; and
- Adding an exception to the operational interactive website requirement for ''temporary technological outages of a *de minimis* duration.''

3. Eliminate the *de minimis* exception allowing fewer than 15 non-internet clients;

4. Require advisers to make a representation of eligibility on Schedule D of Form ADV (in addition to checking the appropriate box in Item 2.A.(11) of Form ADV).

These changes are intended to modernize the Internet Adviser Exemption, retain its intended narrow scope, and minimize opportunities for advisers to misuse the exemption to register with the Commission without meeting its conditions. Most commenters generally expressed broad support for the proposed rule amendments. For example, one commenter mentioned that the amendments would reflect a better allocation of regulatory responsibility between State regulators and the Commission by allowing the Commission to focus on regulating internet investment advisers that have a national presence. The commenter noted further that these amendments would help accomplish the original purpose of the exemption.[112]

Amending the definition of ''interactive website'' to include the new defined term ''digital investment advisory service'' captures the increasing variety of technological methods by which internet investment advisers provide advice using the internet. Also, the addition of the terms ''mobile application, or similar digital platform'' and ''algorithms'' will better align with technological advances in the industry. Advisers increasingly make use of various mobile applications to interact with the clients and use algorithms to generate investment advice.[113] The improved definition thus allows internet investment advisers that rely on mobile applications, or similar digital platforms, to generate advice to use the Internet Adviser Exemption, potentially reducing their burdens associated with multiple States' registrations and regulations. Further, internet investment adviser clients will benefit from being able to rely on mobile applications, or similar digital platforms, and algorithms, which offer a convenient means of interaction between the adviser and its clients. Additionally, including an exception for temporary technological outages of a *de minimis* duration should help accommodate occasional technological issues with the digital platform so the internet investment adviser is not required to frequently withdraw and re-register due to minor or temporary technical difficulties or planned maintenance.

To the extent advisers may be registering with the Commission in order to market themselves to potential clients, the amended rule should help avoid misleading clients. For instance, advisers without an ''operational'' website will be excluded from the pool of advisers eligible for the Internet Adviser Exemption. This will avoid clients contracting with an adviser that is relying on the Internet Adviser Exemption for registration whose website cannot be used to provide investment advice. To the extent any investors may be led to believe that an adviser relying on the Internet Adviser Exemption for registration has national presence and conducts its business via the internet, when this is not in fact the case, the amended rule could help avoid the possibility of investors using a type of adviser they did not intend to use.

The amendments remove the *de minimis* exception for non-internet clients, preventing advisers with any non-internet clients from relying on the Internet Adviser Exemption. Removing the exception better serves the narrow-intended scope of the Internet Adviser Exemption.[114] As explained in section

[107] These estimates are available from Lucy Carney, *How Much Does a Website Cost in 2024? (Full Breakdown),* WebsiteBuilderExpert (updated Sept. 20, 2023), *https://www.websitebuilderexpert.com/building-websites/how-much-should-a-website-cost/.* None of the commenters expressed an opinion or provided an estimate on the costs of developing a website.

[108] *See* Risk Alert. *See also supra* note 25 and surrounding text.

[109] *See* Better Markets Comment Letter.

[110] Based on analysis of Form ADV data for the reporting period ending June 2023.

[111] *See supra* section I.B for a relevant discussion.

[112] *See* Better Markets Comment Letter.

[113] *See supra* section II.B.

[114] *See supra* section II.C.

II.C., this amendment will assist Commission staff in identifying advisers claiming reliance on the exemption without meeting the requisite conditions. Additionally, the *de minimis* exception is no longer needed in light of the widespread use of the internet, the relative ease of building and maintaining a website and applications, and other technological advances that better allow advisers to monitor to whom their advice is being provided. Accordingly, the elimination of the *de minimis* exception better reflects the allocation of regulatory responsibility between the Commission and the States.

Additionally, the amended rule requiring advisers to represent their Internet Adviser Exemption eligibility on Schedule D of Form ADV should reduce the number of erroneous registrations and subsequent withdrawals. Instead of only checking a box on Form ADV indicating they ''are an internet adviser relying on rule 203A–2e,'' advisers will see a separate text description, on Form ADV, of the actions the adviser must have taken to become or remain eligible for the Internet Adviser Exemption.[115] The separate text description will clearly state for registrants the requirements that they must meet in order to qualify, and which they are certifying that they have met when they file Form ADV.[116] We also anticipate that by avoiding erroneous registration, ineligible registrants will avoid expending time and effort on dealing with withdrawals, and corresponding legal fees.

The amendments to Form ADV will help ensure that registrants are aware of the new ''operational interactive website'' requirement and avoid erroneous registration.[117] In addition, the amendments will require internet investment advisers, as an initial matter and periodically thereafter, to provide an additional affirmative representation on Form ADV that more clearly notes the requirements of the exemption. As discussed in section II.D, the existing form, has not reduced the incidence of advisers erroneously relying on the exemption. The amendments to Form ADV will also aid Commission staff in administering the adviser registration process.[118]

Prior to the amendments, the Internet Adviser Exemption did not require an adviser to have a minimum number of clients.[119] Requiring that digital investment advisory services be provided on an ongoing basis to more than one client will better align with the original goal of the exemption, which was to provide relief from multiple State registration requirements for advisers with a national presence via the internet.[120]

2. Costs

The amended rule may adversely affect some advisers. The adopted amendments would specifically require that the website be ''operational,'' and advisers may incur a cost of updating their website to become operational or withdrawing their Commission registration if their website is not operational. One commenter expressed concern that such a requirement may adversely affect small advisers with only a few clients.[121] Advisers relying on the Internet Adviser Exemption, large or small, however, should already have an interactive website and the Commission does not currently recognize a grace period to develop a website, beyond the separate, rule 203A–2(c) exemption for an investment adviser expecting to be eligible for Commission registration within 120 days, so the amended rule is not expected to require new website development costs for advisers of any size.[122] Therefore, this amendment would not produce significant incremental costs for small investment advisers.[123]

Advisers that choose to withdraw their Commission registration must file Form ADV–W. The current burden estimate to file Form ADV–W is 0.75 hour per respondent,[124] implying a cost of withdrawal of $319 per adviser.[125] The costs to file this form may vary between advisers and may be larger than this estimate for some. In addition, depending on their location and the scope and nature of their activities (if any), advisers that withdraw from Commission registration might need to register with one or more States. While these advisers would no longer be required to bear the costs associated with compliance with Commission rules, they would bear the cost associated with preparing State registration filings, paying State registration fees,[126] and complying with the registration requirements of the States with which they register. Also, to the extent some clients value Commission registration and select advisers based on their Commission registration status, advisers could lose clients as a result of withdrawal; however, we do not have information that would allow us to predict the size or magnitude of this effect.[127] The Commission received no comments or estimates pertaining to these costs.

Internet investment advisers that rely exclusively on the Internet Adviser Exemption and have non-internet clients, as is currently allowed, would be affected by the rule amendments because they could no longer rely on the exemption as a basis for registering with the Commission. Advisers that offer human-directed advice provided by electronic means would not be eligible for the exemption. These advisers may be required to register with one or more States if their total number of clients in any given State exceeds five and the State requires registration.[128]

One commenter expressed a concern that disallowing human generated

[115] Schedule D of Part 1A of Form ADV currently is submitted in a structured (*i.e.,* machine-readable), XML-based data language specific to that Form, so the additional information that would be required on Schedule D under the proposed rule amendments would also be structured.

[116] This amendment would also assist Commission staff in connection with its review of existing registrations and registration applications for compliance with the rule and, as applicable, for possible deregistration for inability to meet the conditions of the rule.

[117] *See supra* section II.D.

[118] *See supra* section II.D.

[119] The rule required an adviser relying on the exemption to provide investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months.

[120] *See supra* section II.

[121] *See* Robert Martin Comment Letter.

[122] *See supra* note 48 and accompanying text.

[123] *See also infra* section VI.

[124] *See, e.g.,* Submission for OMB Review; Comment request; Extension: Rule 203–2 and Form ADV–W, 88 FR 37913 (June 9, 2023) (describing the burden associated with the previously approved collection of information under OMB Control No. 3235–0313).

[125] 0.75 hour * $425 = $319. The maximum total cost of withdrawals assuming all 261 currently registered internet investment advisers relying exclusively on the Internet Adviser Exemption have to withdraw is 0.75 hour * $425 * 261 = $83,194. Assuming only 107 currently registered internet investment advisers with zero clients and 5 advisers with one client will have to withdraw, the total estimated cost is 0.75 hour * $425 *112 = $35,700. The $425 compensation rate used is the rate for a Sr. Operations Manager in the SIFMA Report on Management & Professional Earnings in the Securities Industry—2013 (Oct. 7, 2013), adjusted for inflation using the Bureau of Labor Statistics' Consumer Price Index inflation calculator, modified to account for a 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[126] State registration fees are typically the same as State notice filing fees, so to the extent the adviser is already paying notice filing fees in the states where it would need to register, the difference in filing fees should be *de minimis. See supra* note 98.

[127] *See* Proposing Release at note 65 and surrounding text (discussion of dual basis registration).

[128] *See* section 222(d) of the Advisers Act. We are unable to quantify the costs of registering with the States, beyond State registration fees, because the registration requirements and forms, and the corresponding time spent by firms, vary by each State and there is no available data to make such estimates. The average of State registration fees is $224. *See supra* note 98.

advice could adversely affect adviser-client interactions due to a loss of valuable client feedback on, for example, new services or software.[129] The Internet Adviser Exemption was adopted for advisers that provide investment advice to their internet clients ''exclusively'' through their interactive website.[130] The current *de minimis* exception was adopted when providing advice through the internet was still in a fairly nascent stage and the exception could prevent internet investment advisers from losing their ability to rely on the exemption while providing advice to a small number of clients other than using the internet.[131] As discussed in section II.C., the Internet Adviser Exemption was not designed to permit human interaction more broadly.[132] However, the rule amendment does not prohibit human interactions with clients unrelated to the provision of investment advice, such as human interactions to resolve technical issues or collect feedback related to with new services, software, computer models, or help clients navigate the website or application. The elimination of the *de minimis* exception is to respond to the widespread use of internet, relative ease of building and maintaining a website and applications and other technological advances. Thus, it will better reflect the allocation of regulatory responsibility between the Commission and the States.[133] It will also help the Commission better identify advisers claiming reliance on the exemption without meeting the requirement that investment advice is provided to all clients exclusively through an operational interactive website.

The amended rule is designed to focus on advisers that provide advice exclusively through the internet. Advisers currently relying on the Internet Adviser Exemption may need to change the way they communicate with or deliver services to their clients or rely on a different basis for Commission registration, if available. For example, internet investment advisers that have been providing advice via means other than an interactive website or with some human input might have to change their communication with clients in order to continue to rely on the exemption. In some cases, such advisers may either have to withdraw their registration or lose clients that request and/or require human-directed client-specific investment advice. Depending on the clients' needs, they may have to switch to a different adviser. As discussed in section IV.B, internet investment advisers typically advise non-high net worth individual clients. In addition to the cost associated with finding a new adviser, switching to a different adviser may represent a cost increase for such clients if the new adviser has higher fees. If in some cases the new adviser has lower fees, the clients may still face some switching costs, which could be higher than the savings from the lower fees.

The additional representation of eligibility on Schedule D of Form ADV may increase the time and effort advisers expend when filing Form ADV. One commenter, for example, expressed concern that Form ADV may become too lengthy as a result.[134] Nevertheless, such costs are expected to be minimal.[135] In addition, some of the costs associated with advisers having to register with multiple States are alleviated by the fact that the State registration burdens assessed when the exemption was originally implemented have declined since 2002, as now the advisers may be able to rely on other available exemptions or more easily meet registration thresholds in order to register with the Commission. For example, as discussed in the baseline, the multi-state exemption threshold was decreased from 30 to 15, making it easier for advisers to qualify for this exemption. Further, as discussed in the baseline, advisers relying on the Internet Adviser Exemption now tend to have more registered assets under management on average per adviser and some may be able to reach the minimum threshold on the registered assets under management sooner in order to qualify for the Commission registration. Specifically, the average regulatory assets under management per adviser for internet investment advisers (about $56.09 million) was 144 times larger than it was in December 2003 when advisers using the exemption had on average about $0.39 million of registered assets under management per adviser.

The adopted change would render ineligible for the exemption all the currently registered internet investment advisers with one or zero clients. This would reduce the current population of exemption-eligible advisers by approximately 40%, unless those advisers obtained additional clients.[136] While reducing the number of advisers relying on the exemption is not a goal of the rule, a reduction would reflect the narrow scope of the Commission's exemptive rule.[137]

3. Effects on Efficiency, Competition, and Capital Formation

We do not anticipate any significant effects on efficiency, competition, and capital formation, as the amended rule represents a minor change of the exemption parameters and is not intended to conceptually change the exemption or the original intended division of the regulatory authority over investment advisers between the Commission and the States. As discussed in the baseline, the number of advisers potentially affected by the amendments is small and does not represent a significant portion of the population of investment advisers or their clients.

The amendments may have a positive effect on competition and capital formation as they are designed to modernize the rule to recognize advances in technology and digital services employed by the investment advisory industry. Specifying that internet investment advisers may use technology, such as mobile applications, or a similar digital platform, that can better fit their clients' needs should improve client-adviser interactions, and the quality of the services provided, and could encourage client participation. Increased client participation, in turn, may also encourage new entrants in the internet adviser space. The potential increase in client participation, and any associated increase in new entrants that provide internet adviser services, could lead to more investment in the capital markets, although this effect may not be significant given the small number and market share of internet advisers.

Conversely, there could be opposing, negative effects on competition and capital formation, because certain rule amendments, such as the removal of the current *de minimis* exception, could adversely affect adviser-client interactions by preventing internet investment advisers from relying on the Internet Adviser Exemption when providing, to any client, advice beyond digital investment advisory services. In

[129] *See* Anonymous Comment Letter.

[130] *See* 2002 Adopting Release at section II.A.1. *See also supra* note 16 and accompanying text.

[131] *See supra* note 66 and accompanying text.

[132] *See supra* notes 66–67.

[133] *See supra* section I.B. (discussing the allocation of regulatory responsibility under NSMIA).

[134] *See* Robert Martin Comment Letter. *See also supra* note 74 and accompanying text for a discussion of this commenter's concern.

[135] *See supra* section IV.C.

[136] *See* previous discussion in baseline on the number of internet investment advisers with zero (107) and one (5) client out of 271 total internet investment advisers.

[137] 2002 Adopting Release at 77621; 15 U.S.C. 80b–3a(c) (allowing exemptions from the limits on Commission registration when those limits ''would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of this section'').

some cases, advisers may need to choose between retaining their Commission registration (if they rely solely on the Internet Adviser Exemption) or continuing to provide human-directed advice as is allowed under the current wording of the exemption. This may lead to advisers losing some clients who value both Commission registration and human-directed advice and thus affect competition in the investment adviser market.

D. Reasonable Alternatives

1. Allowing Non-Internet Clients

As an alternative to removing the *de minimis* provision that allowed internet investment advisers to have 15 or fewer non-internet clients, the Commission considered reducing that number, for example, by setting a defined maximum of non-internet clients, such as five. Reducing the maximum to five could strengthen the link between the Internet Adviser Exemption and the internet advisory business, while retaining an adviser's flexibility to accommodate a small number of customers who seek advice beyond mere website output allowed under the final amendment to the exemption.

However, as discussed in section II.C, if an internet investment adviser is advising non-internet clients, it should not be exempted from the registration rules that otherwise apply to all investment advisers and should more properly be regulated by a State (or States) or the Commission (using a different basis for registration), as applicable. This alternative may require advisers to keep additional records tracing instances in which clients received advice beyond the model generated output. Such cases may be hard to identify because, as discussed earlier in the Economic Analysis, it may not always be clear when some human input was involved and to what extent. This alternative may thus result in a greater number of erroneous registrations and subsequent withdrawals as compared to the current rule.

The Commission also considered variations, such as defining a maximum number of non-internet clients as a percentage of the adviser's total number of clients. Under this variation, however, the maximum number of non-internet clients could be quite large for advisers with many clients, implying sufficient local presence to register with one or more States, while remaining quite small for investors with few clients and still limiting their interactions with clients. This may not be fair, efficient or reflect the originally intended allocation of adviser regulation responsibilities between the Commission and the States: for example, advisers with a large number of non-internet clients in a given State are more likely to have a local presence in the State as opposed to a national presence.

2. Alternative Definitions of ''Interactive Website''

The Commission also considered adding a different minimum number of clients to the definition of ''operational interactive website.'' One commenter suggested 15 clients.[138] This commenter expressed that, in its view, 15 or more clients, rather than the proposed ''more than one,'' is a better indicator of an adviser's national presence.[139] Although there could be various ways of demonstrating national presence, in the context of the Internet Adviser Exemption, the existence of an operational interactive website that can be accessed by clients located in multiple States demonstrates a national presence, whereas the requirement to have a certain minimum number of clients is designed to ensure that the adviser meets the definition of investment adviser and has a basis for registration.

A larger number of clients would indeed help limit Commission registration to those advisers with a national presence. Requiring a larger minimum number of clients to qualify for the exemption would exclude advisers that are not otherwise eligible for Commission registration, but that obtain one or a few clients with the sole purpose of relying on the exemption. This would work against the originally intended division of regulatory authority between the Commission and the States. A larger minimum number of clients may, however, put advisers with a small clientele or advisers which are at the early stages of starting their advisory business at a disadvantage.

Further, the definition of ''interactive website'' could use a term other than ''operational,'' such as ''functioning'' or ''working,'' to highlight the requirement that the website can be used by the clients or prospective clients to interact with adviser or obtain advising services. These alternative terms could simplify the rule text. However, such terms may be less technical and more prone to potentially inconsistent interpretations across advisers. As discussed in the Benefits section, adding the term ''operational'' helps prevent advisers from relying on the Internet Adviser Exemption if their website cannot be used to provide investment advice.

Further, the definition of ''interactive website'' could use a more specific definition of the types of client interactions allowed, as suggested by one commenter.[140] For example, the definition of the term could specify that while expanding on model-generated advice is not allowed, other human interactions are permissible. This alternative would help avoid situations when rule text risks giving advisers the impression that they cannot communicate directly with their clients without violating the Exemption's requirements. Such a misunderstanding could lead advisers to not respond to their clients.[141] However, adding such language may result in non-internet advisers attempting to rely on the Internet Adviser Exemption by manipulating these definitions, for instance, by attempting to redefine certain human interactions as those permissible by the rule.

One commenter suggested further clarifying which clients are served on an ''ongoing basis.'' [142] We considered adding a test or definition to classify clients who receive investment advice on an ongoing basis, but concluded that the meaning of ''ongoing basis'' as proposed and as adopted is sufficiently understood under an existing, broadly applicable framework. That is, as discussed in section II.A, an internet investment adviser generally is providing investment advice on an ongoing basis through its website to a client if the advice is within the scope of the adviser-client relationship.

3. Eliminating the Internet Adviser Exemption

As another alternative, the Commission considered eliminating the Internet Adviser Exemption. With the proliferation of internet tools and their frequent use by all types of advisers, the distinction might no longer be valuable. In addition, specifically defining the bounds of the exemption may remain difficult, as evolving industry practices could quickly make rule definitions stale. New innovations and new ways of communication with the clients, which are not accounted for by the exemption definitions, could render the exemption unavailable to some internet investment advisers who adopt those new technologies. Further, as discussed in the section on costs, erroneous registrations associated with the rule

[138] Better Markets Comment Letter.

[139] *Id.*

[140] *See* NASAA Comment Letter.

[141] *See id.*

[142] *See* Maksym Puzin Comment Letter.

can create additional costs for advisers due to registration withdrawals. Eliminating the exemption would eliminate these issues.

However, eliminating the exemption would result in certain costs. Advisers that currently rely on the exemption would no longer be able to use it, and therefore would not be eligible to register with the Commission unless they meet the criteria of another exemption. Losing Commission registration would impose costs: for example, the adviser may lose some clients or may need to comply with State regulation requirements, as discussed in the Costs section. Further, losing a basis for Commission registration would require the adviser to file Form ADV–W. We estimate the burden to file Form ADV–W to withdraw from registration as 0.75 hour per respondent,[143] which can be expressed as a per-registrant cost of $319.[144] Assuming 261 currently registered internet investment advisers relying exclusively on the Internet Adviser Exemption would have to withdraw from registration, the total cost of filing Form ADV–W is estimated as $83,194.[145]

This alternative could also result in advisers losing some clients to the extent clients value Commission registration. Such clients would have to seek a different adviser and potentially face higher fees as well as switching costs as discussed above.[146] Further, losing Commission registration may result in advisers having to register in multiple (up to 14) States and be subject to the appropriate State regulations until they become eligible under a different rule or exemption, which would create a burden, especially for small advisers.[147] Nevertheless, in aggregate, such costs would likely be small as the advisers exclusively using the Internet Adviser Exemption comprise a very small portion of the relevant market (as discussed previously, 1.7% of the total number of advisers and 0.003% of the total assets under management).

V. Paperwork Reduction Act

A. Introduction

The amendments will result in new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[148] The amendments will have an impact on the current collection of information burdens of rule 203A–2(e) and Form ADV under the Act. The titles for the collections of information are: (i) ''Exemption for Certain Investment Advisers Operating Through the Internet (Rule 203A–2(e))'' (OMB control number 3235–0559); and (ii) ''Form ADV'' (OMB control number 3235–0049). The Commission is submitting the final collections of information to the OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The Commission published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted the proposed collections of information to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission did not receive any comments that addressed the estimated PRA burdens and costs in the Proposing Release.

B. Rule 203A–2(e) Recordkeeping Requirement

The amended rule will require an internet investment adviser to provide investment advice to all of its clients exclusively through an operational interactive website,[149] and will require advisers registering with the Commission under the exemption to maintain a record demonstrating that the adviser's advisory business has been conducted through an operational interactive website in accordance with the rule.[150] Although most advisers registering under the rule usually generate the necessary records in the ordinary conduct of their internet advisory business, the recordkeeping requirement of rule 203A–2(e) nonetheless may impose a small additional burden on these advisers. We estimate this recordkeeping burden to amount to an average of four (4) hours annually per adviser.[151]

We estimate the number of respondents to this information collection to be 271 advisers.[152] Accordingly, we estimate the total recordkeeping burden hours for all rule 203A–2(e) advisers to be 1,084 hours.[153] We estimate that the total monetized cost to each internet adviser to comply with the recordkeeping provision of rule 203A–2(e) will be approximately $1,700,[154] and that the total monetized cost for the 271 advisers relying on this exemption at this time will be $460,700.[155]

C. Form ADV

We are amending Form ADV Part 1A to require advisers to indicate on Schedule D that, if applying for registration with the Commission, the adviser will provide—and if amending its existing registration and continuing to rely on the Internet Adviser Exemption, that it has provided—investment advice on an ongoing basis to more than one client exclusively

[143] *See supra* note 124 and accompanying text.

[144] $425*0.75 hour per respondent. The $425 compensation rate is calculated as described in *supra* note 125.

[145] $425 * 0.75 hour per respondent * 261 advisers. The $425 compensation rate is calculated as described in *supra* note 125.

[146] As discussed previously in the costs section, we are unable to quantify these costs due to a lack of data on such clients and the new advisers they may have selected. Commenters did not provide information on this topic.

[147] *See* relevant discussion in section IV.C.2. As stated previously in the costs discussion, we are unable to quantify the costs of registering with the states, beyond State registration fees ($224 on average across states), because the registration requirements and forms, and the corresponding time spent by firms, vary by each State and there is no available data to make such estimates.

[148] 44 U.S.C. 3501 *et seq.*

[149] *See* amended rule 203A–2(e)(1)(i).

[150] *See* amended rule 203A–2(e)(1)(ii). Under the amended rule, advisers will need to maintain records of their compliance with the rule. The elimination of the *de minimis* exception does not result in an increase in the burden under the amended rule but it has been accounted for in our estimated burden for the amended rule.

[151] The adviser will need to demonstrate that all of its clients obtain investment advice from the firm exclusively through an operational interactive website. Internet investment advisers that conduct their business exclusively through interactive websites and whose employees never directly communicate with clients will likely need to spend very little time documenting their compliance with the condition. An adviser that has personnel that assist clients directly (whether through email, chatbots, telephonically, or otherwise) with administrative functions like accessing the website may need to spend more time.

[152] This estimate is based on information reported by advisers through IARD. Based on IARD data as of June 30, 2023, of the approximately 15,391 SEC-registered advisers, 271 checked Item 2.A(11) of Part 1A of Form ADV to indicate their basis for SEC registration under the Internet Adviser Exemption. This estimate may be overinclusive to the extent that advisers currently registered in reliance on the exemption, including, but not limited to, those that currently have one or fewer clients, are not able to satisfy the requirements of the amended rule. The estimate may be underinclusive to the extent that additional advisers seek to rely on the Internet Adviser Exemption, whether due to the industry's increased reliance on technology or otherwise.

[153] Four (4) hours × 271 advisers = 1,084 hours.

[154] We estimate the cost at a rate of $425 per hour. The compensation rate for the current approved information collection used is the rate for a Sr. Operations Manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 4 hours × $425 per hour = $1,700.

[155] 1,084 hours × $425 per hour = $460,700. We do not expect advisers to incur any external cost burden in connection with this information collection because advisers registering under the rule will generate the necessary records in the ordinary course of their advisory businesses.

through an operational interactive website.[156] These changes are designed to provide information to the Commission in connection with the registration and annual amendments to Form ADV filed by internet investment advisers and will assist Commission staff in connection with its review of existing registrations and registration applications for compliance with the rule and, as applicable, for possible deregistration of an adviser for an inability to meet the conditions of the rule.

Based on Form ADV data as of June 30, 2023, the Commission estimates that approximately 261 of the 271 SEC-registered internet investment advisers (approximately 96%) will complete the final rule's Form ADV representation by submitting their annual updating amendment on or prior to the rule's compliance date.[157] For these advisers, the ministerial amendments to Form ADV requiring advisers to check a box do not make any substantive modifications to any existing collection of information requirements or impose any new substantive recordkeeping or information collection requirements within the meaning of the PRA.

In addition, based on Form ADV data as of June 30, 2023, the Commission estimates that approximately 10 of the 271 SEC-registered internet investment advisers (approximately 4%) will not file an annual updating amendment between September 30, 2024,[158] and the compliance date, and will file an other than annual amendment in order to comply with the rule by the rule's compliance date.[159] We estimate that the total burden hours attributable to such internet investment advisers completion of the other than annual amendment will be 10 hours.[160] We estimate that the total monetized cost to each such adviser will be approximately $360,[161] and that the total monetized cost for the 10 advisers relying on this exemption at this time will be $3,600.[162]

D. Total Hour Burden Associated With Amendments to Rule 203A–2(e) and Form ADV

We estimate investment advisers that will be subject to the amended rule will incur a total annual hour burden resulting from the collections of information discussed above of approximately 1,094 hours, at a monetized cost of $464,300 or $1,713 per adviser.[163] The total external burden costs will be $0. The table below summarizes our PRA annual burden estimates associated with the amendments to rule 203A–2(e) and Form ADV.

Rule 203A–2(e) description of new requirements	Number of responses	Internal burden hours	External burden costs
Final Estimates for Internet Investment Advisers under Rule 203A–2(e) and Form ADV			
Annual burden for making records sufficient to demonstrate compliance with rule..	271	1,084 (4 hours per adviser)	0
Annual burden for making representations on Form ADV, Part 1A, Schedule D..	10	10 (1 hour per adviser)	0

We estimate the total burden under amended rule 203A–2(e) to amount to an average of four (4) hours annually per internet investment adviser. This estimate is identical to the estimate of the per-adviser burden under current 203A–2(e). The differences in total burden hours and internal monetized costs between current 203A–2(e) and amended 203A–2(e) will be determined primarily by the number of advisers subject to the rule.

VI. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 604 of the Regulatory Flexibility Act (''RFA'').[164] It relates to amended rule 203A–2(e) and Form ADV. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and is included in the Proposing Release.[165]

A. Need for and Objectives of the Rule and Form Amendments

1. Amendments to Rule 203A–2(e)

We are amending the Internet Adviser Exemption, which we initially adopted in 2002. The current Internet Adviser Exemption generally requires an adviser to:

- Provide investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding 12 months; and
- Maintain records for a period of not less than five years demonstrating compliance with the conditions of the rule.

The amended rule will require an Internet investment adviser to provide investment advice to all of its clients exclusively through an operational interactive website at all times during which the adviser relies on the Internet Adviser Exemption. The rule's definition of ''interactive website'' will be renamed to ''operational interactive website'' and will be expanded to include mobile applications or similar digital platforms; the definition will also be amended to define operational interactive website as a website, mobile application, or similar digital platform through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de minimis* duration).[166] In addition, the amended rule will remove the current rule's *de minimis* exception,[167] which

[156] *See supra* section II.D.

[157] *See supra* section II.E.

[158] *See supra* note 76 (stating that we expect the IARD system to be able to accept Form ADV filings reflecting the Form ADV representation by Sept. 30, 2024).

[159] *See supra* section II.E.

[160] One (1) hour × 10 advisers = 10 hours.

[161] We estimate the cost at a rate of $360 per hour. The compensation rate for the current approved information collection used is the rate for a compliance manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 1 hours × $360 per hour = $360.

[162] 10 hours × $360 per hour = $3,600.

[163] This estimate is based upon the following calculation: (1,084 hours × $425) + (10 hours × $360) = $464,300. $464,300 ÷ 271 advisers = $1,713.

[164] 5 U.S.C. 604.

[165] *See* Proposing Release at section V.

[166] *See* amended rule 203A–2(e)(2). For purposes of the rule, ''digital investment advisory service'' will be defined as investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website. *See id.*

[167] *See* amended rule 203A–2(e)(1)(i).

allows advisers relying on the rule to provide advice to fewer than 15 clients through means other than an interactive website during the preceding 12 months. The amended rule will also require advisers to comply with the requirement to maintain certain records in accordance with section 203A–2(e)(1)(ii) of the amended rule.

The amendments to the Internet Adviser Exemption are designed to reflect the evolution in technology and advisory industry since the adoption of the rule. In addition, the amendments are designed to better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. The reasons for, and objectives of, the amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections IV and V, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section V.

2. Amendments to Form ADV

The amended rule will also require an adviser to make representations on its Form ADV, Part 1A, Schedule D, indicating that it satisfies the requirements of the rule. This representation is similar to the representation that advisers relying on the multi-state exemption make on their Form ADV and will assist Commission staff in connection with its review of registration applications and deregistration of advisers that are not in compliance with the rule. The reasons for, and objectives of, the amendments are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections IV and V, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens are also discussed in section V.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be subject to the proposed amendments to rule 203A–2(e) and related amendments to Form ADV, the potential impacts discussed in the analysis of the IRFA, and whether the proposed amendments could have an effect on small entities that the Commission has not considered. Although we did not receive comments specifically addressing the IRFA, one commenter stated that the ''operational interactive website'' requirement will make it harder for ''smaller entities to conduct business solely based on the amount of clients they may have.'' [168] We carefully considered the potential impact the amended rule would have on smaller advisers. We recognize that a larger minimum number of clients may require advisers with a small clientele or advisers that are at the early stages of starting their advisory business to register with one or more States, rather than the Commission, which may subject them to different regulations.[169] The requirement that an adviser have a minimum of two clients is intended to ''reflect that advisers with zero or one client are more akin to local businesses that can be effectively regulated by a State, consistent with Congress' intent in NSMIA's amendments to the Advisers Act.'' [170] After considering comments, we are adopting the amendments, as proposed.[171]

C. Legal Basis

The Commission is amending rule 203A–2(e) and Form ADV under the authority set forth in sections 203A(c) and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3a(c) and 80b–11(a)].

D. Small Entities Subject to the Rule and Rule Amendments

Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year. Our amendments to rule 203A–2(e) will not affect most investment advisers that are small entities (''small advisers'') because they are generally registered with one or more State securities authorities and not with the Commission. Under section 203A of the Advisers Act, unless subject to an exemption such as the Internet Adviser Exemption, most small advisers are prohibited from registering with the Commission and are regulated by State regulators. Based on IARD data, we estimate that as of June 30, 2023, approximately 502 SEC-registered advisers are small entities under the RFA.

1. Small Entities Subject to Amendments to the Internet Adviser Rule

As discussed above in section IV (the Economic Analysis), the Commission estimates that based on IARD data as of June 30, 2023, approximately 271 investment advisers will be subject to the amended rule and the related amendments to Form ADV. Of the approximately 502 SEC-registered advisers that are small entities under the RFA, 197 will be subject to the amendments to rule 203A–2(e) and the corresponding amendments to Form ADV.

E. Projected Reporting, Recordkeeping and Other Compliance Requirements

1. Amendments to Rule 203A–2(e)

Amended rule 203A–2(e) will impose certain reporting, recordkeeping, and compliance requirements on investment advisers relying on the exemption for registration with the Commission, including those that are small entities. We estimate that 271 advisers [172] will be required to comply with the amended rule's requirement to maintain records in accordance with amended rule 203A–2(e)(1)(ii).[173] The requirements and rule amendments, including compliance, reporting, and recordkeeping requirements, are summarized in this FRFA (section VI.A., above). All of these requirements are also discussed in detail, above, in section II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections IV and V (the Economic Analysis and Paperwork Reduction Act Analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section V.

[168] *See* Robert Martin Comment Letter. *See also supra* section II.A

[169] *See supra* section IV.D.2.

[170] *See* Proposing Release at section II.A.1.

[171] *See supra* section II.

[172] Based on IARD data as of June 30, 2023.

[173] Amended 203A–2(e)(1)(ii) is identical to current 203A–2(e)(1)(ii) except for a conforming change to reflect the requirement that the interactive website be ''operational.''

As discussed above, approximately 502 small advisers were registered with us as of June 30, 2023, and we estimate that 197 of those small advisers registered with us will be subject to the amendments (39.2% of all registered small advisers). As discussed above in our Paperwork Reduction Act Analysis in section V above, the amendments to rule 203A–2(e) under the Advisers Act will create an annual burden of approximately 4 hours per adviser, or 788 hours in aggregate for small advisers.[174] We estimate that the total monetized cost to each small adviser to comply with the amendments to the Internet Adviser Exemption will be approximately $1,700.[175] We expect the annual monetized aggregate cost to small advisers associated with our amendments to the Internet Adviser Exemption will be $334,900.[176]

2. Amendments to Form ADV

The amendments to Form ADV will impose certain reporting and compliance requirements on investment advisers relying on the rule to register and remain registered with the Commission, including those that are small entities. An adviser relying on the rule as a basis for registration will be required to represent on Schedule D of its Form ADV that it provides investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[177] An adviser registered under the rule and continuing to rely on the rule as a basis for its registration will be required to make a representation that it has provided investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[178] The requirements and rule amendments, including recordkeeping requirements, are summarized above in this FRFA (section VI.A). All of these requirements are also discussed in detail, above, in section II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections IV and V (the Economic Analysis and Paperwork Reduction Act Analysis) and below. The professional skills required to meet these specific burdens are also discussed in section V.

Our Economic Analysis (section IV above) discusses these costs and burdens for respondents, which include small advisers. As discussed above in our Paperwork Reduction Act Analysis in section V above, the amendments to Form ADV will not increase the annual burden for advisers and will have no annual monetized cost.

F. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse effect on small entities. Accordingly, we considered the following alternatives for small entities in relation to our amendments to rule 203A–2(e) and the corresponding amendments to Form ADV: (i) differing compliance or reporting requirements that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the amended rule for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposals, or any part thereof, for such small entities.

Regarding the first and fourth alternatives, the Commission believes that establishing different compliance or reporting requirements for small advisers, or exempting small advisers from the amended rule, or any part thereof, would be inappropriate under these circumstances. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small firms, it would be inconsistent with the purposes of the Advisers Act to specify differences for small entities under the final amendments to rule 203A–2(e) and Form ADV. As discussed above, the amended rule is intended to better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and will enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a sufficiently local presence to be regulated by the States. These benefits should apply to clients of smaller firms as well as larger firms. In addition, as discussed above, our staff will use the corresponding information that advisers will report on the amended Form ADV to help determine compliance with the rule and to help prepare for examinations of investment advisers. Establishing different compliance or reporting requirements for large and small advisers relying on the Internet Adviser Exemption would negate these benefits and would be inconsistent with our mandate to provide a system of public disclosure of investment adviser information. An Internet investment adviser that is a small entity, however, by the nature of its business, will likely spend fewer resources in maintaining records and completing Form ADV and amendments than a larger adviser. Regarding the fourth alternative, specifically, the Commission has considered exempting small advisers from the amended rule. Small advisers are one of the primary beneficiaries of this exemption. Such an exemption would be inconsistent with the intended purpose of the amended rule, which, in part, is to provide regulatory relief from multiple State regulatory requirements.

Regarding the second alternative, the amended rule is clear and further clarification, consolidation, or simplification of the compliance requirements is not necessary. As discussed above, the amended rule will require an Internet investment adviser to (i) provide investment advice to all of its clients exclusively through an operational interactive website, (ii) maintain records demonstrating that it provides investment advice to its clients exclusively through an operational interactive website,[179] and (iii) represent on Schedule D of its Form ADV that it provides investment advice on an ongoing basis to more than one client exclusively through an operational interactive website.[180] These provisions will better reflect the allocation of authority between the Federal Government and States that Congress intended under NSMIA and the Dodd-Frank Act and will enhance investor protection through more efficient use of the Commission's limited oversight and examination resources by more appropriately allocating Commission resources to advisers with a national presence and allowing smaller advisers with a

[174] 197 small advisers × 4 hours.

[175] *See supra* note 154 and accompanying text.

[176] We estimate the cost at a rate of $425 per hour. The compensation rate for the current approved information collection used is the rate for a Sr. Operations Manager in the Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013 updated for 2023, and is modified to account for an 1,800-hour work-year and inflation and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. 788 hours × $425= $334,900.

[177] *See supra* section II.D.

[178] *See id.*

[179] *See* amended rules 203A–2(e)(1)(i) and (ii). As with the current rule, a person may not rely on the Internet Adviser Exemption under the amended rule if it controls, is controlled by, or is under common control with another investment adviser registered with the Commission solely in reliance on the adviser registered under the Internet Adviser Exemption. *See* 17 CFR 275.203A–2(e)(1)(iii); amended 17 CFR 275.203A–2(e)(1)(iii).

[180] *See supra* section II.D.

sufficiently local presence to be regulated by the States. Further, our amendments requiring the representation on Schedule D of Form ADV will assist the Commission's examination and enforcement capabilities, including assessing compliance with rules, and therefore, it will provide important investor protections.

Regarding the third alternative, we are using design standards because we determined that removing the *de minimis* exception and requiring Internet investment advisers to exclusively advise internet clients to be a design standard necessary to better reflect Congress's intent under NSMIA and the Dodd-Frank Act.

Statutory Authority

The Commission is amending rule 203A–2(e) and Form ADV under the authority set forth in sections 203A(c) and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3a(c) and 80b–11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Rules and Form Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.203A–2 is also issued under 15 U.S.C. 80b–3a.

* * * * *

■ 2. Amend § 275.203A–2 by revising paragraph (e) to read as follows:

§ 275.203A–2 Exemptions from prohibition on Commission registration.

* * * * *

(e) *Internet investment advisers.* (1) An investment adviser that:

(i) Provides investment advice to all of its clients exclusively through an operational interactive website at all times during which the investment adviser relies on this paragraph (e);

(ii) Maintains, in an easily accessible place, for a period of not less than five years from the filing of a Form ADV that includes a representation that the adviser is eligible to register with the Commission under this paragraph (e), a record demonstrating that it provides investment advice to its clients exclusively through an operational interactive website in accordance with the limits in paragraph (e)(1)(i) of this section; and

(iii) Does not control, is not controlled by, and is not under common control with, another investment adviser that registers with the Commission under paragraph (b) of this section solely in reliance on the adviser registered under this paragraph (e) as its registered adviser.

(2) For purposes of this paragraph (e), ''operational interactive website'' means a website, mobile application, or similar digital platform through which the investment adviser provides digital investment advisory services on an ongoing basis to more than one client (except during temporary technological outages of a *de minimis* duration). For purposes of this rule, ''digital investment advisory service'' is investment advice to clients that is generated by the operational interactive website's software-based models, algorithms, or applications based on personal information each client supplies through the operational interactive website.

(3) An investment adviser may rely on the definition of *client* in § 275.202(a)(30)–1 in determining whether it is eligible to rely on this paragraph (e).

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 3. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.,* Pub. L. 111–203, 124 Stat. 1376.

■ 4. Amend Form ADV (referenced in § 279.1) by:

■ a. In the instructions to the form, Form ADV: Instructions for Part 1A, by revising 2.i.;

■ b. In the Glossary of Terms by:

■ i. Redesignating paragraphs 13. through 42. as paragraphs 15. through 43.; and paragraphs 43. through 65. as paragraphs 45. through 67.; and

■ ii. Adding new paragraphs 13. and 44.;

■ c. In Part 1A, revising Item 2.A.(11); and

■ d. In Part 1A, Schedule D, by adding Section 2.A.(11).

Note: Form ADV is attached as Appendix A to this document. Form ADV will not appear in the Code of Federal Regulations.

By the Commission.

Dated: March 27, 2024.

J. Matthew DeLesDernier,

Deputy Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Form ADV

Form ADV (Paper Version)

* * * * *

Form ADV: Instructions for Part 1A

* * * * *

2. Item 2: SEC Registration and SEC Report by Exempt Reporting Advisers

* * * * *

i. *Item 2.A.(11): Internet Adviser.* You may check box 11 only if you are eligible for the Internet adviser exemption from the prohibition on SEC registration. See SEC rule 203A–2(e). If you check box 11, you must complete Section 2.A.(11) of Schedule D. You are eligible for this exemption if:

- You provide investment advice to all of your *clients* exclusively through an *operational interactive website* at all times during which you rely on rule 203A–2(e). Other forms of online or internet investment advice do not qualify for this exemption;
- You maintain a record demonstrating that you provide investment advice to your *clients* exclusively through an *operational interactive website* in accordance with these limits.

* * * * *

Glossary of Terms

* * * * *

13. *Digital Investment Advisory Service:* Investment advice to *clients* that is generated by the *operational interactive website's* software-based models, algorithms, or applications based on personal information each *client* supplies through the *operational interactive website.*

* * * * *

44. *Operational Interactive Website:* A website, mobile application, or similar digital platform through which the investment adviser provides *digital investment advisory services* on an ongoing basis to more than one *client* (except during temporary technological outages of a de minimis duration).

* * * * *

Part 1A

* * * * *

Item 2. * * *

A. * * *

* * * * *

(11) are an internet adviser relying on rule 203A–2(e);

If you check this box, complete Section 2.A.(11) of Schedule D.

* * * * *

Schedule D

* * * * *

Section 2.A.(11) Internet Adviser

If you are relying on rule 203A–2(e), the internet adviser exemption from the

prohibition on registration, you are required to make a representation about your eligibility for SEC registration. By checking the appropriate box, you will be deemed to have made the required representation.

If you are applying for registration as an investment adviser with the SEC or changing your existing Item 2 response regarding your eligibility for SEC registration, you must make this representation:

☐ I will provide investment advice on an ongoing basis to more than one client exclusively through an *operational interactive website.*

If you are filing an annual updating amendment to your existing registration and are continuing to rely on the internet adviser exemption for SEC registration, you must make this representation:

☐ I have provided and will continue to provide investment advice on an ongoing basis to more than one client exclusively through an *operational interactive website.*

* * * * *

[FR Doc. 2024–06865 Filed 4–8–24; 8:45 am]

BILLING CODE 8011–01–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Privacy Act of 1974; System of Records

AGENCY: National Labor Relations Board.

ACTION: Direct final rule.

SUMMARY: The National Labor Relations Board (''NLRB'' or ''Agency''), as part of publishing a notice of a modified Privacy Act system of records for the NxGen system and the rescindment of legacy systems of records, is removing exemptions for eight of those legacy systems of records from certain provisions of the Privacy Act of 1974. This rule is being published as a direct final rule as the Agency does not expect to receive any significant adverse comments. If such comments are received, this direct final rule will be withdrawn and a proposed rule for comments will be published.

DATES: This rule is effective June 10, 2024 without further action unless significant adverse comments are received by May 9, 2024. If such comments are received, the NLRB will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency regarding the rule shall mail them to the Agency's Senior Agency Official for Privacy, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570–0001, or submit them electronically to *privacy@nlrb.gov.* Comments may also be submitted electronically through *http://www.regulations.gov,* which contains a copy of this rule and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Fitz Raymond, Associate Chief Information Officer, Information Assurance, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570–0001, (202) 273–3733, *privacy@nlrb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Privacy Act permits Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records and accountings of disclosures of such records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption.

Elsewhere in this issue of the **Federal Register**, the Agency has announced a modified system of records, Next Generation Case Management System (NxGen) (NLRB–33), and rescindment of systems of records. Pursuant to subsections (k) of the Privacy Act, and for the reasons set forth below, the Board is making technical changes within 29 CFR 102.119 to remove references to exemptions for seven legacy systems that are being rescinded related to NxGen:

1. Attorney Disciplinary Case Files (Nonemployees) (NLRB–20);
2. Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB–25);
3. Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB–28);
4. Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB–30);
5. Judicial Case Management Systems-Pending Case List (JCMS–PCL) and Associated Headquarters Files (NLRB–21);
6. Solicitor's System (SOL) and Associated Headquarters Files (NLRB–23); and
7. Special Litigation Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB–27).

Additionally, the Board is making technical changes within 29 CFR 102.119 to remove references to one system that is no longer operational and which the Board will rescind as a Privacy Act system of record in a forthcoming notice: Freedom of Information Act Tracking System (FTS) and Associated Agency Files (NLRB–32).

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Agency has determined that this rule would not impose new recordkeeping, application, reporting, or other types of information collection requirements on the public.

II. Direct Final Rulemaking

This rule is being published as a direct final rule as the Agency does not expect to receive any significant adverse comments. If such comments are received, this direct final rule will be withdrawn and a proposed rule for comments will be published.

For purposes of this rule, a significant adverse comment is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment necessitates withdrawal of this direct final rule, the Agency will consider whether the comment raises an issue serious enough to warrant a substantive response had it been submitted in a standard notice-and-comment process. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how this direct final rule would be ineffective without the addition.

An agency typically uses direct final rulemaking when it anticipates the rule will be non-controversial. The Agency has determined that this rule is suitable for direct final rulemaking. The rule makes technical changes to 29 CFR 102.119 to remove references to exemptions for seven legacy systems replaced by NxGen (plus a system that will be rescinded later, NLRB–32). Related to NxGen, a notice of a modified system of records and rescindment of systems of records is also published in this issue of the **Federal Register**. Accordingly, pursuant to 5 U.S.C. 553(b), the Agency has for good cause determined that the notice and comment requirements are unnecessary.

List of Subjects in 29 CFR Part 102

Privacy, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the NLRB amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

■ 1. The authority citation for part 102 continues to read as follows:

Authority: 29 U.S.C. 151, 156. Section 102.117 also issued under 5 U.S.C. 552(a)(4)(A), and § 102.119 also issued under 5 U.S.C. 552a(j) and (k). Sections 102.143 through 102.155 also issued under 5 U.S.C. 504(c)(1).

■ 2. Amend § 102.119 by:

■ a. Removing and reserving paragraphs (k) and (l);

■ b. Revising paragraph (m); and

■ c. Revising the second sentences of paragraphs (n)(4) and (6).

The revisions read as follows:

§ 102.119 Privacy Act Regulations: Notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

* * * * *

(m) Pursuant to 5 U.S.C. 552a(k)(2), investigatory material compiled for law enforcement purposes that is contained in the Next Generation Case Management System (NxGen) (NLRB–33), are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(n) * * *

(4) * * * Because certain information from this system of records is exempt from subsection (d) of the Act concerning access to records, and consequently, from subsection (f) of the Act concerning Agency rules governing access, these requirements are inapplicable to that information.

* * * * *

(6) * * * Because certain information from this system is exempt from subsection (d) of the Act, the requirements of subsection (f) of the Act are inapplicable to that information.

* * * * *

Dated: April 2, 2024, Washington, DC.

By direction of the Board.

Roxanne L. Rothschild,

Executive Secretary, National Labor Relations Board.

[FR Doc. 2024–07323 Filed 4–8–24; 8:45 am]

BILLING CODE 7545–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 733 and 842

[Docket ID: OSM–2022–0009; S1D1SSS08011000SX064A000245S180110; S2D2S SS08011000SX064A0024XS501520]

RIN 1029–AC81

Ten-Day Notices and Corrective Action for State Regulatory Program Issues

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior is amending its regulations related to the Office of Surface Mining Reclamation and Enforcement's (OSMRE's) notifications to a State regulatory authority of a possible violation of any requirement of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The final rule also amends the Federal regulations regarding corrective actions for State regulatory program issues. Together, the updates to these two areas of the Federal regulations amend the overall ''ten-day notice'' (TDN) process and OSMRE's oversight process.

DATES: This rule is effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: William R. Winters, (865) 545–4103, ext. 170, *bwinters@osmre.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

In addition to the explanations in this preamble, OSMRE directs the reader to the preamble for the proposed rule, 88 FR 24944 (April 25, 2023), because the Department is adopting the regulatory provisions as proposed with one exception.

A. Primary Provisions of SMCRA Supporting the Final Rule

Under SMCRA, each State that wishes to regulate surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders can submit a proposed State regulatory program to the Secretary of the Interior. 30 U.S.C. 1253(a). The Secretary, acting through OSMRE, reviews and approves or disapproves the proposed program. 30 U.S.C. 1211(c)(1), 1253(b). When the Secretary approves a State program, the State assumes exclusive jurisdiction or ''primacy,'' except as provided in sections 521 and 523 and title IV of SMCRA. 30 U.S.C. 1253(a), 1271, 1273, and 1231–1244. Under the exception at 30 U.S.C. 1271(a)(1), in a primacy State that has an approved State regulatory program, OSMRE retains oversight of the State program and some Federal enforcement authority. In this regard, SMCRA sometimes refers to a State regulatory authority as having ''primary'' responsibility. *See, e.g.,* 30 U.S.C. 1201(f) and 1291(26) (defining ''State regulatory authority'' to mean ''the department or agency in each State which has primary responsibility at the State level for administering [SMCRA]'').

As explained in the preamble to the proposed rule, two provisions of SMCRA primarily govern OSMRE's

oversight and enforcement of State regulatory programs: sections 521(a) and (b), 30 U.S.C. 1271(a) and (b). Section 521(a)(1) requires OSMRE to notify a State regulatory authority (SRA) when OSMRE has ''reason to believe'' that any person is in violation of any requirement of SMCRA, the approved regulatory program, an approved permit, or a required permit condition. That OSMRE notification of a possible violation is known as a ten-day notice (TDN) because the SRA must respond to OSMRE within ten days by either taking ''appropriate action'' to cause the possible violation to be corrected or showing ''good cause'' for not taking action. In general, if the SRA fails to respond within ten days or the response is arbitrary, capricious, or an abuse of discretion, OSMRE must immediately order a Federal inspection of the surface coal mining operation where the alleged violation is occurring and take appropriate enforcement action.

Section 521(b) of SMCRA describes the Secretary's oversight and enforcement obligations when an SRA fails to effectively implement any part of its approved State program. The relevant existing regulations implementing section 521(b) of SMCRA are found at 30 CFR part 733 and are administered by OSMRE. The 2020 TDN Rule revised provisions in 30 CFR parts 733 and 842 to address State regulatory program issues before they rose to the level that would require OSMRE to take over administration of all or part of an approved State program under section 521(b). *See* 85 FR 75150 (Nov. 24, 2020). This final rule retains the basic structure of the 2020 TDN Rule but amends 30 CFR 733.5 and 733.12 to comply more fully with SMCRA's statutory requirements.

B. Key Regulatory Provisions of the Final Rule and Their Purposes

i. Information Used for ''Reason To Believe'' Determinations

In the 2020 TDN Rule, OSMRE modified the regulations at 30 CFR 842.11(b)(1)(i) so that when OSMRE received a citizen complaint, OSMRE could consider ''any information readily available [ ], from any source, including any information a citizen complainant or the relevant State regulatory authority submits'' when determining whether OSMRE had reason to believe a violation existed. Existing §§ 842.11(b)(2) (TDN process) and 842.12(a) (requests for Federal inspections) contain similar ''information readily available'' and ''readily available information'' language. Providing for consideration of information from the SRA was an attempt to allow OSMRE to consider the latest, most accurate information when determining if it had reason to believe a violation existed.

Since publishing the 2020 TDN Rule, OSMRE has observed instances in which requesting and considering information from an SRA resulted in delay because the process extended the time periods for OSMRE to receive the information from the SRA. OSMRE generally interpreted the 2020 TDN Rule to require the consideration of all readily available information, including information that could be obtained from an SRA, when determining whether OSMRE has reason to believe a violation exists. In some instances, it took up to 30 days for the SRA to send OSMRE information that OSMRE could consider in determining if it had reason to believe a violation existed. This extended period is not consistent with the text or spirit of the statutory language. SMCRA's ''reason to believe'' standard does not require that OSMRE determine whether a violation actually exists; rather it only requires that OSMRE determine that a possible violation could exist.

To that end, this final rule limits the sources of information that OSMRE will need to consider in determining whether it has reason to believe a possible violation exists. In this final rule, after careful review of the statutory language, OSMRE's experience implementing the 2020 TDN Rule, and the public comments received on the proposed rule, OSMRE has removed the direction to consider ''readily available information'' and has, instead, in the final rule, as in the proposed rule, limited the scope of information it will consider before determining whether it has reason to believe ''information received from a citizen complainant, information available in OSMRE files at the time that OSMRE is notified of the possible violation (other than information resulting from a previous Federal inspection), and publicly available electronic information.'' § 842.11(b)(1)(i). OSMRE also made similar changes to final §§ 842.11(b)(2) and 842.12(a). With these sources of information, OSMRE believes it meets the text, intent, and spirit of SMCRA's ''reason to believe'' standard while also allowing OSMRE to consider enough information in a timely manner to firmly establish whether OSMRE has reason to believe a violation exists. Notably, this is not simply a reversion to the pre-2020 TDN regulations; this final rule also provides for OSMRE's consideration of ''publicly available electronic information,'' which often fills in any gaps in a citizen complaint, but with information that can be obtained in a more timely manner than waiting for a response from an SRA. Importantly, SMCRA's legislative history indicates that Congress ''anticipated that 'reasonable belief' could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.'' H. Rept. No. 95–218, at 129 (April 22, 1977). This illustrates that in § 521(a)(1) of SMCRA, Congress intended that OSMRE could form ''reason to believe'' well short of proving an actual violation before issuing a TDN to an SRA. Thus, the simpler test for the ''reason to believe'' standard in this final rule is fully consistent with SMCRA and supported by its legislative history. In its response to a TDN, an SRA can include information that attempts to definitively disprove the existence of a violation; this approach is consistent with SMCRA for the stage at which OSMRE is determining whether a State has taken appropriate action or demonstrated good cause for not doing so in response to a TDN.

ii. Types of Possible Violations

This final rule revises the 2020 TDN Rule with respect to what is considered a ''violation'' for TDN purposes. As in the proposed rule, the final rule treats all violations the same, regardless of their genesis (*i.e.,* whether they result from an operator's or permittee's failure to conduct surface coal mining operations consistently with the approved State program, or whether they result from an SRA's issuance of a permit that allows mining that would be inconsistent with the approved State program). As such, under 30 CFR 842.11, OSMRE will issue a TDN for any possible violation after forming reason to believe a violation exists.

OSMRE considered language in existing 30 CFR 733.12(d) that allowed OSMRE to issue a TDN for a previously identified State regulatory program issue that results in or may imminently result in a violation of the approved State program. In this final rule, however, as in the proposed rule, OSMRE modifies § 733.12(d) such that OSMRE will not wait for evidence of an imminent or actual on the-ground violation before issuing a TDN. It makes little sense to wait for mining to occur under a defective permit or a violation to occur on-the-ground before issuing a TDN for an inconsistency with the approved permit, approved State program, or SMCRA. It will no longer be the case that a possible violation could bypass 30 CFR part 842 and proceed

initially as a State regulatory program issue under 30 CFR part 733. Instead, under this final rule, all possible violations, excluding imminent harm situations, will initially be considered under part 842.

In the preamble to the proposed rule, OSMRE used the example of issuing a TDN for failure to submit a required certification or monitoring report. This type of violation is not ''on-the-ground,'' but OSMRE may nonetheless issue a TDN in such instances. As first described in the preamble to the proposed rule and now reflected in the final rule, OSMRE will issue TDNs for all violations, including those committed by a permittee or those that result from an SRA issuing a defective permit (*i.e.,* a permit that is not in compliance with the approved State program or that would allow a permittee to mine in a manner that is not authorized by the State program). As stated in the preamble to the proposed rule, the term ''permit defect'' is not in the statute or regulations, and it has never been officially defined. OSMRE has used the phrase in internal guidance documents through the years and considers a permit defect to be a deficiency in a permit-related action taken by an SRA, such as when an SRA has issued a permit with a provision that is contrary to the approved State program or that, as explained above, would allow mining that is not authorized by the State program. After careful review and consideration of the public comments received on the proposed rule, OSMRE concludes that this change to apply the TDN process to all violations, including permit defects, more closely adheres to SMCRA's language in 30 U.S.C. 1271(a)(1) by treating all violations the same and preventing the perception that there are two classes of violations: one that is subject to the TDN process and one that is not. Instead, all possible violations, except those that create an imminent harm, will start under 30 CFR part 842 whenever OSMRE has reason to believe that a violation exists. Under this final rule, upon forming reason to believe that a violation exists, OSMRE will generally issue a TDN for all possible violations, including permit defects.

iii. State Regulatory Authorities as ''Any Person'' for TDN Purposes

The issue of who can be in violation of SMCRA or a State program for TDN purposes is related to the issue of permit defects. As OSMRE noted in the preamble to the proposed rule (88 FR at 24949): ''In the preamble to the 2020 TDN Rule, [OSMRE] explained that, under 30 U.S.C. 1271(a)(1), 'any person' who can be in violation of SMCRA or a State regulatory program 'does not include a State regulatory authority, unless it is acting as a permit holder. 85 FR 75176; *see also id.* at 75179.' '' After OSMRE's review of SMCRA, Congressional intent, and implementation experience through the years on this issue, OSMRE concludes that OSMRE must issue a TDN when it has reason to believe that any person, including an SRA, violates the approved State program, approved permit, or SMCRA. OSMRE will accept a State's response to the TDN unless OSMRE concludes that the action or response is arbitrary, capricious, or an abuse of discretion. 30 CFR 842.11(b)(1)(ii)(B)(*2*).

iv. Definitions

As in the proposed rule, the final rule adopts, for the first time, regulatory definitions of ''ten-day notice'' and ''citizen complaint.'' OSMRE decided to define ''ten-day notice'' because these notices are fundamental to the overall ten-day notice process that is addressed in this final rule. OSMRE has frequently used the term ''ten-day notice'' in its implementing regulations and directives but has never defined the term until now. The concept derives from SMCRA section 521(a)(1), which provides that, after OSMRE notifies an SRA of a possible violation, the State must take ''appropriate action'' or show ''good cause'' for not doing so ''within ten days.'' This final rule creates a new section, 30 CFR 842.5, which defines ''ten-day notice'' as ''a communication mechanism that OSMRE uses, in non-imminent harm situations, to notify a State regulatory authority under §§ 842.11(b)(l)(ii)(B)(*1*) and 843.12(a)(2) when an OSMRE authorized representative has reason to believe that any permittee and/or operator is in violation . . . .'' Importantly, as the definition notes, a ten-day notice is a ''communication mechanism'' between OSMRE and an SRA about a possible violation. Issuance of a TDN, therefore, provides the State with the first opportunity to review and address the possible violation, as necessary, under its approved State program.

SMCRA section 521(a)(1) provides citizens with the right to participate in the SMCRA enforcement process. This right often takes the form of a citizen filing a complaint to OSMRE or the SRA concerning a possible violation. These communications are often questions, formal and informal complaints, or general inquiries about particular surface coal mining and reclamation operations. At times, it has been difficult to ascertain the exact nature of these communications. Consistent with the proposed rule, the final rule defines ''citizen complaint'' at 30 CFR 842.5 to provide clarity and indicate that the purpose of a citizen complaint, in the TDN context, is for citizens to inform OSMRE of a possible violation. The definition of ''citizen complaint'' in this final rule is ''any information received from any person notifying the Office of Surface Mining Reclamation and Enforcement (OSMRE) of a possible violation of the Act, this chapter, the applicable State regulatory program, or any condition of a permit or an exploration approval.'' The definition also provides that the information ''must be provided in writing (or orally, followed up in writing).'' Defining the phrase ''citizen complaint'' provides clarity for the meaning of the phrase and related processes.

v. Time Frames

In this final rule, OSMRE adopts the time frames that it proposed to ensure quicker resolution of outstanding issues. SMCRA section 521(a)(1) requires the SRA to respond within ten days to an OSMRE notification of a possible violation, indicating either that it has taken appropriate action to cause a possible violation to be corrected or that it has good cause for not acting. 30 U.S.C. 1271(a)(1); 30 CFR 842.11(b)(1)(ii)(B). Responding within ten days does not require the possible violation to be fully resolved but does require the SRA to indicate its intended actions to resolve a possible violation. As described in the proposed rule and below, the final rule incorporates several additional time frames in both the TDN process and development of a 30 CFR part 733 corrective action plan to reduce the time between the identification of a violation or State regulatory program issue and final resolution of the identified issue.

a. State Regulatory Program Issues

The 2020 TDN Rule contained no definitive time frames to address a State regulatory program issue, except that, if OSMRE believed the issue would take longer than 180 days to resolve, an action plan would be developed. 30 CFR 733.12(b). There were no interim action items or timelines, no maximum amount of time for an action plan to be completed, and no defined time frames for development of an action plan. Existing § 733.12(b) provided only that OSMRE ''may employ any number of compliance strategies to ensure that the State regulatory authority corrects a State regulatory program issue in a timely and effective manner.'' *Id.* Under this framework, a State regulatory program issue could potentially exist for

a long period of time between identification of the issue and final resolution.

This final rule amends existing 30 CFR 842.11 and 733.12 to address the possibility of delays in resolving State regulatory program issues. To accomplish this objective, under amended 30 CFR 842.11(b)(1)(ii)(B)(*3*), corrective actions developed under 30 CFR part 733 can no longer constitute appropriate action in response to a TDN. However, under this final rule, addressing a possible violation, along with substantially similar possible violations, under a part 733 action plan can constitute ''good cause'' for not acting.

This final rule also removes the 180-day language from 30 CFR 733.12(b) that would trigger development of an action plan. In the final rule, for each State regulatory program issue, § 733.12(b) indicates that OSMRE, ''in consultation with the State regulatory authority, will develop and approve an action plan within 60 days of identification of a State regulatory program issue.'' The fact that development of an action plan is intended to be a cooperative process between OSMRE and the SRA is also inherent in final § 733.12(b)(4). However, as that section indicates, ''[i]f the State regulatory authority does not cooperate with OSMRE in developing the action plan, OSMRE will develop the action plan . . . and require the State regulatory authority to comply with [it].''

The 2020 TDN Rule, at existing § 733.12(b), did not require interim measures between identification of the State regulatory program issue and implementation of a corrective action plan. The existing regulations simply implied that measures would be developed, noting that OSMRE ''may employ any number of compliance strategies to ensure that the State regulatory authority corrects a State regulatory program issue in a timely and effective manner.'' *Id.* OSMRE concluded that this language could allow a violation to exist for extended periods of time before or during the time in which an action plan was developed and the issue resolved. In final § 733.12(b), OSMRE adds a provision, which it included in the proposed rule, to allow interim remedial measures to be developed. The final provision provides: ''Within 10 business days of OSMRE's determination that a State regulatory program issue exists, OSMRE and the State regulatory authority may identify interim remedial measures that may abate the existing condition or issue.''

Section 733.12(b)(1) of the final rule allocates 365 days (one calendar year) for the SRA to complete all identified actions in an action plan. The one year starts on the date on which OSMRE sends the action plan to the SRA. As stated in the preamble to the proposed rule, OSMRE recognizes that final resolution of an issue could exceed one year. 88 FR at 24950. This is particularly true for actions involving multiple parties and/or agencies, State legislative actions, or any requirements imposed by court decisions. OSMRE reiterates that care must be exercised in development of the action plan to ensure that the identified corrective actions can be accomplished within one calendar year. The associated completion criteria must have actions and milestones that are achievable within one calendar year. The goal is to keep violations from going unabated, minimize on-the-ground impacts, and prevent off-site impacts. For example, if a State regulatory program issue requires a State program amendment, it is often not possible for a program amendment to be approved within one calendar year. A more reasonable action plan objective may be to submit to OSMRE a program amendment within one year.

b. Good Cause for Not Taking Action

The existing regulations at 30 CFR 842.11(b)(1)(ii)(B)(*4*)(*ii*) indicated that ''good cause'' for an SRA not taking ''appropriate action'' in response to a TDN includes the State's initiation of ''an investigation into a possible violation'' and its resulting determination that it ''requires a reasonable, specified additional amount of time to determine whether a violation exists.'' This language had the potential to allow violations to remain unabated for an open-ended amount of time. As in the proposed rule, the final rule modifies this provision by specifying the time within which the SRA must complete its investigation. The final rule provides that ''[t]he State regulatory authority may request up to 30 additional days to complete its investigation of the issue'' and that, ''in complex situations, the State regulatory authority may request up to an additional 60 days to complete the investigation.'' The final rule caps the maximum amount of time at 90 additional days from when the SRA has satisfied the criteria for good cause for not taking action. Under OSMRE's normal practice, when an SRA requests additional time under this provision, the length of any OSMRE approved additional time will be measured from when OSMRE notifies the SRA that OSMRE has approved an extension. The final rule also requires a reasoned justification for an extended time frame to identify whether a violation exists as indicated in a TDN. As stated in the final rule provision, ''[i]n all circumstances, an extension request must be supported by an explanation of the need for, and the measures being undertaken that justify, an extension, along with any relevant documentation.'' OSMRE retains discretion to approve the requested time extension or establish the length of time, up to 90 additional days, that the SRA has to complete its investigation. These changes are intended to facilitate expedited resolutions of identified issues.

vi. Contacting the SRA Before OSMRE

The 2020 TDN Rule, at 30 CFR 842.12(a) of the existing regulations, required citizens, when requesting a Federal inspection, to provide a statement, including, among other things, the fact that the person has notified the SRA of the existence of the possible violation. OSMRE carefully reviewed the statutory language and Congressional record preceding SMCRA's enactment and determined that no requirement exists for citizens to contact the SRA before contacting OSMRE about a possible violation. This concept first appeared in the preamble to the Permanent Regulatory Program regulations (44 FR 15299 (August 27, 1979)) and was discussed in the comments section of that preamble. There OSMRE concluded that it ''has no authority under [SMCRA] to require a citizen to ask for a State inspection before asking for a Federal inspection.'' *Id.* A few years later, in the preamble to a final rule entitled, ''Permanent Regulatory Program Modifications; Inspections and Enforcement; Civil Penalty Assessments'' (47 FR 35620 (Aug. 16, 1982)), OSMRE took the position that citizens must ''notify the State regulatory authority in writing prior to, or simultaneously with, his or her request to OSM[RE]'' (*id.* at 35628), even though OSMRE had previously acknowledged that this is not a statutory requirement (44 FR 15299). Even under that rule, however, ''the person [was] not required to wait for any action to be taken by the State regulatory authority before requesting a Federal inspection.'' 47 FR at 35628. The State notification requirement was incorporated into section 842.12(a) of the 1982 rule as a measure to allow the SRA the first chance to address an issue identified by a citizen. However, OSMRE is aware of instances where citizens were hesitant to contact the SRA. Based on the foregoing, in this final rule, as in the

proposed rule, OSMRE removed the language in existing section 842.12(a) requiring a citizen to first contact an SRA before they contact OSMRE to report the same possible violation.

vii. Citizen Justification for Possible Violation

As in the proposed rule, OSMRE is removing the existing requirement in section 842.12(a) that a citizen must state the basis for their allegation of a possible violation. After careful consideration of the statute, OSMRE's implementation experience, the regulatory language, and the public comments on the proposed rule, this final rule removes the requirement that a citizen must state the ''basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation.'' Citizens are not necessarily well-versed on the text of SMCRA or its implementing regulations; therefore, they should not need to state their allegation in statutory or regulatory language. Conversely, OSMRE and the SRAs are experts in interpreting and implementing SMCRA and are, therefore, best suited to determine if a violation is or is not occurring under the applicable statutory and regulatory provisions. As OSMRE stated in the preamble to the proposed rule, OSMRE continues to believe that if a citizen first contacts the SRA, most possible violations will be resolved without the need for OSMRE to issue a TDN. Therefore, although a citizen is not required to contact the SRA about a possible violation before contacting OSMRE, OSMRE continues to strongly encourage citizens to do so because the SRA should be more acquainted with conditions on the ground for permits that it has issued and is typically in the best position to quickly determine and, if necessary, act on the merits of a citizen complaint.

viii. Citizen Complaints as Requests for Federal Inspections

To better align §§ 842.11(b)(1)(i) and 842.12(a), which both allow citizens to provide information to OSMRE concerning possible violations, the final rule makes both sections consistent with respect to a Federal inspection resulting from information received from a citizen complainant. This revision will reduce a real or perceived barrier to our public participation procedures because, even if a citizen complaint does not specifically request a Federal inspection, the TDN process could ultimately result in a Federal inspection if an SRA does not respond to the TDN or OSMRE determines that the SRA's response is arbitrary, capricious, or an abuse of discretion. As in the proposed rule, the final rule includes language in both §§ 842.11(b)(2) and 842.12(a) stating that all citizen complaints will be considered as requests for a Federal inspection. As stated in the proposed rule, the final rule provides that, if a Federal inspection occurs because of any information received from a citizen complainant, the citizen will be afforded the opportunity to accompany the Federal inspector on the inspection.

ix. Action Plans as Appropriate Action

As in the proposed rule, this final rule modifies the existing regulations by removing 30 CFR part 733 corrective actions associated with a State regulatory program issue as a possible ''appropriate action'' in response to a TDN. 30 CFR 842.11(b)(1)(ii)(B)(*3*). This rule excludes identification of a State regulatory program issue as a possible appropriate action in response to a TDN because, as stated in the preamble to the proposed rule, action plans do not themselves remedy violations. After careful review, while OSMRE will no longer consider an action plan to address a State regulatory program issue to be ''appropriate action'' in response to a TDN, OSMRE concluded that identifying and addressing a 30 CFR part 733 State regulatory program issue can, in certain circumstances, constitute good cause for not taking action within ten days in response to a TDN under 30 CFR 842.11(b)(1)(ii)(B)(*4*). Addressing a part 733 State regulatory program issue and associated action plan demonstrates that the SRA will take actions to abate a violation, even though an action plan likely will not be developed and completed within the ten days allotted for responding to a TDN. The SRA must adhere to the timelines provided for in final 30 CFR 733.12(b) related to action plans.

x. Similar Possible Violations

This final rule also amends § 842.11(b)(1)(ii)(B)(*1*) to reduce the burden on SRAs and OSMRE. This is accomplished by allowing OSMRE to issue a single TDN for substantively similar possible violations. The final rule reads: ''Where appropriate, OSMRE may issue a single ten-day notice for substantively similar possible violations found on two or more permits, including two or more substantively similar possible violations identified in one or more citizen complaints.'' As discussed in more detail in section II of this preamble, OSMRE is removing the words ''involving a single permittee'' after ''two or more permits,'' which represents a change from the proposed rule language.

Additionally, as mentioned above, this final rule amends § 842.11(b)(1)(ii)(B)(*4*)(*iii*) so that good cause in response to a TDN includes situations in which ''OSMRE has identified substantively similar possible violations on separate permits and considers the possible violations as a single State regulatory program issue . . . .'' As stated in the preamble to the proposed rule, the phrase ''substantively similar possible violations'' is meant to indicate issues or possible violations that have a common basis or theme; that are similar, or even identical, in nature; and that are subject to the same statutory or regulatory provisions. 88 FR at 24951. Issuing separate and distinct TDNs for substantively similar possible violations would be redundant and not an efficient use of OSMRE or State resources when the underlying issue can be more efficiently addressed through a single TDN or State regulatory program issue and associated corrective action plan for a group of similar possible violations. This is discussed further in section II of this preamble. OSMRE believes that the presence of similar or identical violations on several approved permits may indicate a systemic issue with implementation of an SRA's program and that combining substantively similar violations into a single State regulatory program issue and addressing the similar violations through implementation of an action plan is an efficient means of addressing the underlying issue. Treating these possible violations as an overarching State regulatory program issue will allow an SRA and OSMRE to focus on the larger context and make sure that the underlying issue is efficiently resolved and properly addressed going forward.

As mentioned above, final section 842.11(b)(1)(ii)(B)(*4*)(*iii*) also provides that ''good cause'' includes when ''OSMRE has identified substantively similar possible violations on separate permits and considers the possible violations as a single State regulatory program issue addressed through § 733.12.'' It is appropriate to consider a State regulatory program issue and associated action plan as ''good cause'' because proper completion of the action plan will resolve the underlying issue. After reconsidering the 2020 TDN Rule, the existing regulations, and comments on the proposed rule, OSMRE determined that an action plan is not ''appropriate action'' because creation of the action plan itself does not resolve or correct the underlying issue. Instead, as

its name suggests, it is only a ''plan'' to correct the underlying issue.

The changes in this final rule enhance efficiency and effectiveness of the TDN process, while honoring State primacy, and they more closely adhere to the language, spirit, and intent of SMCRA's statutory requirements. OSMRE will continue to honor State primacy and perform its statutorily mandated oversight to ensure adequate SMCRA implementation in the primacy States. In addition, OSMRE will continue to work with citizens to ensure that their voices are heard and that their legitimate concerns are properly addressed as SMCRA intended. In summary, this final rule eases burdens on citizens filing complaints, makes the TDN process more effective and efficient, and provides more structure to the identification of State regulatory program issues and associated action plan processes. As such, the final rule reduces burdens on both OSMRE and SRAs and increases the overall effectiveness of the SMCRA programs.

II. Summary of Changes From the Proposed Rule

As mentioned in section I.B.x of this preamble, in this final rule, OSMRE made only one change from the proposed regulatory provisions. OSMRE removed the phrase ''involving a single permittee'' after ''two or more permits'' from the proposed revisions at 30 CFR 842.11(b)(1)(ii)(B)(*1*). All other provisions that OSMRE included in the proposed rule are reflected in this final rule. The final rule language enables OSMRE to incorporate substantively similar violations into a single TDN without writing a separate TDN for each permittee. This will allow OSMRE to group the possible violations together, which will alert the SRA that the identified permits have possible violations involving a substantively similar issue and relieve OSMRE of having to write numerous TDNs for each identified permittee. Without this approach, an SRA could receive multiple TDNs for substantively similar issues, which would take undue time and effort for the SRA to evaluate before identifying the commonality.

III. General Public Comments and Responses

OSMRE published the proposed rule on April 25, 2023 (88 FR 24944), soliciting public comments for 60 days. During the comment period, OSMRE received over 5,000 sets of comments from members of the public, State governments, trade associations, environmental advocacy groups, and private companies. Each public comment was considered in the development of the final rule. Many comments were supportive of the proposed rule, with some expressing support for reverting the regulations to the pre-2020 rule, which provided for looking only at the allegations of the citizen complaint before issuing a TDN. OSMRE also received comments that were critical of the proposed rule. Some of these comments expressed concern about revising these regulatory provisions so soon after the 2020 TDN Rule became effective and alleged that the proposed rule would infringe on State primacy.

Comments received that are similar in nature have been categorized by subject and, in some instances, have been combined with related comments.

A. Rule Basis and Justification

Comment: Some commenters asserted that the proposed rule conflicts with various provisions of SMCRA, especially as it pertains to the roles and responsibilities of SRAs and OSMRE in primacy states, such as 30 U.S.C. 1201(f), 1253, and 1271. These comments suggested that the proposed rule should be withdrawn.

Response: As discussed more fully in the preamble of the proposed rule at 88 FR at 24947–24948 and throughout this preamble, this rule is fully consistent with the text, legislative history, and purposes of SMCRA. OSMRE reviewed SMCRA and its legislative history and found no discrepancy between the statute and the revisions to the regulations that OSMRE is finalizing in this rule. As the commenters stated, over the years, several court opinions and the Department have discussed SMCRA's cooperative federalism structure. In this rule, OSMRE is committed to ensuring that SRA's maintain their ''exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, *except as provided in [30 U.S.C. 1271 and 1273].*'' 30 U.S.C. 1253(a) (emphasis added). The TDN process, which is the focus of this rule, is set forth in 30 U.S.C. 1271(a) and is part of OSMRE's oversight and enforcement role. Because SMCRA specifically exempts the TDN process from a State's exclusive jurisdiction, this rule is not inconsistent with SMCRA or any binding legal precedent on this topic.

Comment: One commenter asserted that the proposed rule fails to acknowledge the 1988 TDN rule and the decades of regulatory policy established by that rule, such as the limited Federal role in primacy States and the handling of disagreements between OSMRE and SRAs.

Response: One of the policies established by the 1988 TDN Rule (53 FR 26728) was a uniform standard by which OSMRE would evaluate State responses to a TDN. The 1988 preamble states that ''OSMRE will accept a state regulatory authority's response to such a notice, called a ten-day notice, as constituting appropriate action to cause a possible violation to be corrected or showing good cause for failure to act unless OSMRE makes a written determination that the state's response was arbitrary, capricious, or an abuse of discretion under the state program.'' 53 FR at 26728. The 1988 rule clearly delineated the roles of the State and OSMRE with respect to SMCRA implementation once a State acquires primacy. In the same preamble, OSMRE also stated: ''In primacy states, a mine operator's compliance is measured against the approved state program, rather than directly against the Act. As the court explained in *In re: Permanent Surface Mining Regulation Litigation* (*In re: PSMRL*), 'it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply.' 653 F.2d at 519.'' With respect to OSMRE's role once a State has an approved State program, OSMRE has stated that '' 'the state regulatory agency plays the major role, with its greater manpower and familiarity with local conditions. It exercises front-line supervision, and the Secretary will not intervene unless its discretion is abused.' '' 53 FR at 26729 (quoting *In re: PSMRL,* 653 F.2d at 523).

This final rule is consistent with the legal authorities that OSMRE cited in support of the 1988 rule. Nothing in this final rule changes OSMRE's long-standing position not to intervene in a State's SMCRA implementation unless a State is not properly implementing its SMCRA program as approved. Likewise, OSMRE will continue not to intervene in a State's enforcement actions unless the State acts inconsistently with an approved State program. Nothing in this final rule is inconsistent with these long-standing principles.

Comment: Some commenters stated that the rule lacks any concrete justification or the legal or factual explanation for changing the 2020 TDN Rule.

Response: OSMRE disagrees. In the preambles to both the proposed and final rules, OSMRE has demonstrated sufficient legal and factual reasons for the revisions. This demonstration includes a closer adherence to SMCRA's statutory requirements, which OSMRE discussed in detail in the preamble to the proposed rule. Additionally,

OSMRE observed instances while implementing the 2020 TDN Rule, as discussed in section I.B of this preamble, where the TDN process was delayed as OSMRE sought and considered information from SRAs before issuing a TDN or otherwise disposing of the citizen complaint.

Comment: Some commenters asserted that OSMRE did not have sufficient experience (at most one year) implementing the 2020 TDN Rule to support the rule changes. The commenters requested examples, data, and facts to justify the rule, including specifically how the 2020 TDN Rule compromised public protections, created delays for OSMRE's consideration of some possible violations, caused communication breakdown between OSMRE and SRAs, and created burdens by having the complainant notify the SRA simultaneously with or before notifying OSMRE of any potential violations. These commenters also asked for identification of any material delays discussed in post-2020 OSMRE reports, including State Oversight Reports, OSMRE Annual Reports, and budget justifications.

Response: OSMRE has an independent duty to enforce SMCRA in order to ''assure appropriate procedures are provided for public participation in . . . the programs established by the Secretary or any State under this Act . . . .'' 30 U.S.C. 1202(i), 1211(c)(2). Since the 2020 TDN Rule's promulgation, citizen groups have raised legal and practical issues about it with OSMRE, specifically about actual and perceived barriers to filing citizen complaints, the length of time it takes for OSMRE to issue TDNs, and the overall time it takes for possible violations to be addressed under the 2020 TDN Rule. Regardless of the time that the 2020 TDN Rule has been in effect, OSMRE has an obligation to seriously consider whether it caused delays or other unintended effects and was the best interpretation of SMCRA.

Notably, the commenters do not identify any specific data that is needed to understand the justification for the rule but instead suggest, for example, that OSMRE should have sought data from the States to support this rule. OSMRE did not request any specific data from SRAs because OSMRE already had all of the information it needed to review the amount of time it took under the 2020 TDN Rule to issue a TDN or otherwise address a citizen complaint. OSMRE has been monitoring implementation of the 2020 TDN Rule from the outset and has observed that there is often a lag time of a month or more between the time OSMRE receives a citizen complaint and when a TDN is issued or the citizen complaint is otherwise resolved. Moreover, one commenter noted that it was aware of an instance where it took OSMRE almost 60 days to issue a TDN after receiving a citizen complaint. OSMRE notes there have been additional instances when there have been several month lags between the time OSMRE receives a citizen complaint and the time it notifies the citizen complainant that it does not have reason to believe a violation exists. OSMRE believes the 2020 TDN Rule would have continued to lead to enforcement delays. The documented instances of delay demonstrate how the 2020 TDN Rule is contrary to the immediate process set forth in 30 U.S.C. 1271(a). To address this issue, this final rule eliminates the 2020 TDN Rule's potential for an open-ended, information gathering process—including obtaining information from an SRA—before OSMRE determines whether it has reason to believe a violation exists.

Comment: One commenter asserted the proposed rule was generated by OSMRE Headquarters staff without meaningful consultation with OSMRE's regional or field office staff.

Response: This comment is not accurate. OSMRE field staff, along with Headquarters staff, participated in the rule development team since its inception. OSMRE developed this rule with proper input from qualified staff.

B. Burden Reduction and Duplication of Work

Comment: One commenter agreed with OSMRE that citizens are burdened by the existing TDN process and supported reverting to the pre-2020 rule process.

Response: OSMRE appreciates this comment. This final rule will reduce burdens on citizens to file citizen complaints and otherwise bring concerns to OSMRE's attention. To arrive at this final rule, OSMRE reviewed the statutory and regulatory language as well as implementation of the citizen complaint and TDN processes through the years and incorporated changes that ease the burden on citizens to notify OSMRE of a possible violation.

Comment: Some commenters asserted that the proposed changes to the 2020 TDN Rule would create additional burdens, promote duplication of resources, increase costs, and decrease productivity for SRAs and subvert their jurisdiction.

Response: OSMRE does not agree with these commenters' assertions. While this final rule reduces burdens on citizen complainants and the time it takes to resolve possible violations, it will not simultaneously increase SRA workloads in an appreciable manner and will not lead to duplication of inspections and enforcement efforts between OSMRE and SRAs. As has been the case for many years, after OSMRE issues a TDN to an SRA, the SRA has the first opportunity to address or explain the underlying issue. OSMRE will not second guess an SRA's response to a TDN unless it is arbitrary, capricious, or an abuse of discretion. As this rule is consistent with 30 U.S.C. 1271(a), there is nothing in this rule that infringes upon or subverts an SRA's jurisdiction, obligations, or implementation of its approved State program.

In addition, as specified in § 842.11(b)(1)(i) of the final rule, before issuing a TDN, OSMRE will review only ''information received from a citizen complainant, information available in OSMRE files at the time that OSMRE is notified of the possible violation . . . , and publicly available electronic information'' and not information from a State when it decides if it has reason to believe a violation exists. As a result, under the final rule, a State need not expend the time and effort to provide OSMRE with a response at the reason-to-believe stage and then again if OSMRE ultimately sends a TDN to a State. This rule ensures that States need only respond to OSMRE about a citizen complaint once—in response to a TDN, if OSMRE determines that it has reason to believe a violation exists. Therefore, OSMRE believes this final rule will not increase the burdens on SRAs and may eliminate duplicative responses from the SRAs.

Comment: One commenter noted that, according to OSMRE, one of the ''[t]he primary goals of this rulemaking [is] to reduce burdens for citizens to engage in the TDN process.'' However, according to this commenter, there is no statutory directive for citizens to participate in the TDN process.

Response: OSMRE disagrees with the tenor of this comment. Section 521 of SMCRA serves as the statutory underpinning for the TDN process. It provides that OSMRE can receive information, in writing, from ''any person'' about a possible SMCRA violation. 30 U.S.C. 1271(a)(1). However, that provision does not exist in a vacuum; 30 U.S.C. 1267(h)(1) provides that ''any person who is or may be adversely affected by a surface mining operation'' may contact OSMRE about ''any violation of this Act which he has reason to believe exists at the

surface mining site.'' These two provisions operate together so that the receipt of information from a citizen under 30 U.S.C. 1267(h)(1) is one way that the TDN process may be initiated.

As the House of Representatives explained in a report preceding SMCRA's enactment, citizens play an important role in the enforcement of SMCRA and approved State programs. The House report states:

> The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. * * * Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the act.

H. Rept. No. 95–218, at 88–89 (April 22, 1977); *see also* S. Rept. No. 95–128, at 59 (May 10, 1977). This idea is codified in the purposes of SMCRA at section 102(i) and various statutory sections including section 521(a)(1) of SMCRA, which provides that the TDN process can be initiated upon ''receipt of information from any person.'' 30 U.S.C. 1271(a)(1). One of the primary ways that citizens provide such information to OSMRE is through formal and informal citizen complaints about possible violations. This final rule assures that citizens can easily file citizen complaints with OSMRE about possible violations and play their important role in the implementation and enforcement of SMCRA and approved State programs.

C. Consultation With States Before and During This Rulemaking

Comment: Some commenters asserted that OSMRE did not engage with SRAs in the development of the rule as should be expected with cooperative federalism; accordingly, the commenters urged OSMRE to abandon the rulemaking.

Response: OSMRE disagrees. In drafting this rule, OSMRE followed all legal requirements by seeking feedback from SRAs and other stakeholders through the notice and comment process described in the Administrative Procedure Act.

D. State Primacy

Comment: One commenter stated that the proposed rule attempts to ''federalize'' issues with State permits because, according to the commenter, any disagreement between OSMRE and an SRA over a State permitting decision could be subject to a Federal TDN and potentially other Federal enforcement actions instead of resting solely with the SRA, and OSMRE taking oversight action, if necessary, under 30 CFR 733.13 to substitute Federal enforcement of State programs or withdraw approval of the State program. In addition, this commenter opines that this interpretation transgresses the careful and deliberate statutory allocation of regulatory jurisdiction, violates the specific statutory procedures and deadlines for appealing State permits, and violates the exclusive avenue for administrative and judicial review of all State regulatory program decisions. As support for its position, the commenter cites court decisions, a 2005 letter decision by the Department's Assistant Secretary for Land and Minerals Management (ASLM) (which was attached to the comments), a Departmental 2007 rule preamble, and an OSMRE Director's 2010 memorandum decision.

Response: OSMRE disagrees with this comment. OSMRE has reviewed the documents cited by the commenter and has determined that nothing in this final rule conflicts with SMCRA or relevant case law. While the Department has articulated different positions related to the issuance of TDNs for permitting issues, OSMRE concludes that the positions it takes in this final rule best comport with SMCRA section 521(a)(1).

The 2005 ASLM letter decision rejected an environmental group's request for OSMRE to conduct a Federal inspection of a mine that an SRA had recently permitted. The letter described the request as asking ''OSM to review the permit decision of [the SRA] with which you disagree'' and concluded that ''[a] request for inspection under section 517(h)(1) [of SMCRA] is not an alternative avenue for seeking review of the regulatory authority's decision to issue a permit.'' The letter also explained that the request did not provide ''any basis to conclude that a violation exists at the mine site.'' In addition, the letter referenced the SRA's ''exclusive jurisdiction'' under SMCRA and cited several judicial decisions in support of that proposition: *Bragg* v. *West Virginia Coal Ass'n,* 248 F.3d 275, 293–94 (4th Cir. 2001), *Pa. Fed'n of Sportsmen's Clubs, Inc.* v. *Hess,* 297 F.3d 310, 318 (3rd Cir. 2002), *Haydo* v. *Amerikohl Mining Inc.,* 830 F.2d 494, 497 (3rd Cir. 1987), and *In re: PSMRL,* 653 F.2d at 519. This commenter also cited these and other cases in support of its position.

A close examination of the cases cited in the 2005 ASLM letter decision reveals that they do not address whether OSMRE has oversight and enforcement authority over State permitting decisions under section 521(a) of SMCRA and OSMRE's implementing regulations. In fact, *Bragg* and *Pa. Fed'n of Sportsmen's Clubs* expressly recognize that, despite the asserted exclusivity of a primacy State's jurisdiction, OSMRE retains oversight authority in primacy States. *See Bragg,* 248 F.3d at 289, 294 (primacy State's ''exclusive jurisdiction'' subject to Federal oversight and enforcement under section 521 of SMCRA); *Pa. Fed'n of Sportsmen's Clubs,* 297 F.3d at 317, 325, 328 (OSMRE's ''oversight jurisdiction'' under 30 CFR 843.12(a)(2) includes inspection of specific mines and issuance of notices of violation to State permittees pursuant to the TDN process). Therefore, the position taken in the 2005 letter decision goes beyond the holdings of the cited cases.

Moreover, the 2010 OSMRE Director's guidance (with which the Office of the ASLM officially concurred) analyzed and rejected the rationale set forth in the 2005 ASLM letter. The 2010 Director's guidance ''reaffirm[ed] OSM's historic position on this issue'' and ''clarifie[d] that OSM's TDN and pertinent Federal enforcement regulations at 30 CFR parts 842 and 843 apply to *all* types of violations, including violations of performance standards or permit conditions and violations of permitting requirements.''

The 2007 rule preamble, 72 FR 68000, 68024–26, also does not support the commenter's assertions. That preamble relied in part on the 2005 ASLM letter decision and the judicial decisions cited therein to support the withdrawal of a specific regulatory provision related to ''State-issued permits that may have been improvidently issued based on certain ownership or control relationships,'' which had been previously codified at 30 CFR 843.21. *See* 72 FR at 68024. Before it was removed, that section provided for ''direct Federal inspection and enforcement . . . if, after an initial notice, a State failed to take appropriate action or show good cause for not taking action with respect to an improvidently issued State permit.'' *Id.* When OSMRE withdrew that specific regulatory provision, however, it did not amend the general TDN regulatory provision that this final rule has revised (§ 842.11). Indeed, that preamble did not even mention § 842.11. In any event, the 2007 rule preamble language does not expressly pertain to how OSMRE interpreted § 842.11, and, as mentioned, OSMRE concludes that its positions in this final rule best comport with SMCRA and the relevant implementing regulations. Moreover, as discussed above, in 2010, the OSMRE Director, with the concurrence of the Office of the

ASLM, rejected the rationale in the 2005 ASLM letter decision.

The 2007 rule preamble cited *Nat'l Mining Ass'n* v. *U.S. Dep't of the Interior,* 177 F.3d 1 (D.C. Cir. 1999) (*NMA* v. *DOI II*), in support of rescinding former § 843.21. 72 FR at 68025–26. The better reading of that opinion, however, is the Department's contemporaneous interpretation in the 2000 preamble, *see, e.g.,* 65 FR 79582, 79652. In 2000, the Department explained, among other things, that, in the *NMA* v. *DOI II* decision, ''the court upheld our ability to take remedial action relative to improvidently issued State permits, but found that our previous regulations 'impinge on the ''primacy'' afforded states under SMCRA insofar as they authorize OSM to take remedial actions against operators holding valid state mining permits without complying with the procedural requirements set out in section 521(a)(1) of SMCRA, 30 U.S.C. 1271(a).' '' 65 FR at 79652 (citing *NMA* v. *DOI II,* 177 F.3d at 9). In 2000, the Department revised the regulation to conform with the court's decision. The 2007 rule preamble later set forth an alternative interpretation of the relevant *NMA* v. *DOI II* holding, which the Department no longer supports. *See, e.g.,* 2010 OSMRE Director's memorandum decision.

In addition, under section 503(a) of SMCRA, 30 U.S.C. 1253(a), upon OSMRE's approval of a State program, a State ''assume[s] exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, *except as provided in sections 1271 [SMCRA section 521] and 1273 of this title and subchapter IV of this chapter . . . .*'' (Emphasis added.) This final rule implements section 521 of SMCRA and thus is an exception to a State's otherwise-exclusive jurisdiction. SMCRA also refers to a State's ''primary responsibility.'' *See, e.g.,* 30 U.S.C. 1291(26) (defining ''State regulatory authority'' to mean ''the department or agency in each State which has primary responsibility at the State level for administering [SMCRA].''). However, this language is describing which State department or agency will administer SMCRA at the State level and does not remove OSMRE oversight in any way. The final rule is consistent with the State regulatory authority's responsibility to administer SMCRA, which affords the SRA the first opportunity to address the underlying issue identified in a TDN. And OSMRE is prepared to accept a State's response to a TDN unless it is arbitrary, capricious, or an abuse of discretion, which is an appropriately high level of deference.

OSMRE disagrees with the commenter's other assertions about how this rule impinges on State primacy. This final rule does not allow OSMRE to intervene in a State's permitting action while the permit application is under review, nor does it contain any language that circumvents the process for appealing a State's permitting actions. A TDN is appropriate to address situations where a permittee is not mining in accordance with the approved permit or the approved State permit allows the permittee to mine in a manner that is inconsistent with the approved State program.

In sum, this final rule is consistent with SMCRA and binding legal precedent.

E. ''Any Person'' Who Can Be in Violation of SMCRA

Comment: Some commenters asserted that in section 521(a)(1) of SMCRA, ''any person'' who can be in violation of SMCRA or the applicable State program means a permittee, not the SRA.

Response: As explained in section I.B of this preamble, OSMRE concludes that ''any person'' in violation under section 521(a)(1) of SMCRA includes an act or omission by an SRA that is inconsistent with its State program. The relevant SMCRA language refers to ''any person [ ] in violation of any requirement of this Act or any permit condition required by this Act . . . .'' As noted above, the preamble to the 2020 TDN Rule stated that ''any person'' who can be in violation of SMCRA or a State regulatory program ''does not include a State regulatory authority, unless it is acting as a permit holder.'' 85 FR at 75176; *see also id.* at 75179. However, after careful consideration and review, OSMRE concludes that an SRA is not exempt from the meaning of the phrase ''any person'' in this context. For over four decades, the Federal regulations at 30 CFR 700.5 have defined ''any person'' to include ''any agency, unit, or instrumentality of Federal, State or local government . . . .'' This definition would clearly include an SRA, which is an agency or unit of a State government. OSMRE did not change this general definition in the 2020 TDN Rule even though it excluded an SRA from ''any person'' in the TDN context. OSMRE now concludes that the term ''any person'' in 30 U.S.C. 1271(a)(1) should match this long-standing definition. As a result, a TDN could be issued for a possible violation if the SRA issues a permit that is not in compliance with an approved State program or that authorizes a permittee to mine in a manner that is inconsistent with that program. If an SRA issues such a permit, that would be a violation of a ''requirement of this Act'' or the applicable State program. Thus, under this final rule, if an SRA issues a permit that would allow a permittee to mine in a manner that is inconsistent with the approved permit or the approved State program, or that fails to include one or more required provisions of the approved State program, that will be considered as a possible violation for TDN purposes.

F. Permit Defects

Comment: Some commenters supported the proposed rule, stating that it properly recognized that SMCRA intended ''permit defects'' to be among the types of violations that OSMRE must address under the TDN process as an avenue for citizens to raise concerns with permit-related actions that may impact their lives.

Response: OSMRE appreciates these commenters' support for the proposed change requiring a TDN be sent to an SRA for a possible violation in the form of a permit defect. As outlined in the preamble to the proposed rule and discussed in sections 1.B and III.F of this preamble, OSMRE agrees with these commenters and concludes that a close reading of SMCRA indicates that permit defects, just like all other possible violations, are subject to a TDN. Thus, under this final rule, OSMRE, upon forming reason to believe a violation exists, will consider permit defects under 30 CFR part 842.

Comment: A few commenters asserted that OSMRE should ensure that the regulations make clear that a violation is ''earth bound.'' As support, the commenters noted that, when discussing a Federal inspection, SMCRA section 521(a)(1) refers to alleged violations occurring at a surface coal mining operation and that the last sentence of that provision allows citizen complainants to accompany an inspector on a Federal inspection.

Response: We disagree with the conclusions the commenters reach from the statutory provision cited. In order to determine if a surface coal mining operation is meeting the approved program or any permit condition as required by both the existing and final rule at § 842.11(b)(1)(i), it is sometimes necessary for OSMRE to not just observe a mine site, but also to review and examine the SRA's permitting material. As a result of this review, a violation may be identified in those materials regardless of whether that violation can also be observed at the mine site. Indeed, the existing Federal regulations

require SRAs to make records related to surface coal mining operations available to OSMRE. 30 CFR 840.14(a). Because OSMRE sometimes needs to review the permitting files, OSMRE has historically viewed these files and related materials as items that should be considered during a Federal inspection. OSMRE adheres to that long-standing approach in this final rule.

G. Procedural Determinations

Comment: A few commenters asserted that the 2023 proposed TDN rule would produce ''significant new, unjustified'' exchanges of paper between OSMRE and the SRA, resulting in increased burden.

Response: OSMRE's analysis under the Paperwork Reduction Act indicates that there will be no new OSMRE requests for information as a result of the changes in this final rule. Consequently, the final rule will not increase the regulatory burden. Under this final rule, OMSRE will only consider information contained in a citizen complaint, information already in OSMRE's files at the time of a citizen complaint, and publicly available electronic information to inform whether OSMRE has reason to believe a violation may be present.

OSMRE strives to reduce redundancy particularly when a simple search for publicly available electronic records can often adequately inform the ''reason to believe'' analysis and determination. As such, there is no additional transactional cost or burden created between the SRA and OSMRE when available data from the three identified sources provides sufficient information collection to reach a sound decision on whether OSMRE has reason to believe. Based on OSMRE's experience, it does not believe more TDNs will result from implementing this final rule when viewed in the context of OSMRE's history related to writing TDNs. Additionally, OSMRE estimates that the number of TDNs and associated burden hours will stay the same as what is currently authorized by OMB 1029–0118. Moreover, the SRAs already have a legal responsibility to address underlying possible violations in accordance with their approved State programs. A TDN is OSMRE's mechanism to notify an SRA of a possible violation in accordance with OSMRE's statutorily mandated oversight responsibilities. Even if an increase in TDNs does result in an SRA needing to generate more responses to OSMRE, addressing substantively similar possible violations as a single State regulatory program issue and not requesting information from the SRA at the time OSMRE is determining whether it has reason to believe a violation exists will introduce efficiencies in the process and limit paperwork burdens in those situations.

Comment: Some commenters asserted that the rule ''totally redefines the relationship between itself and the States by essentially eliminating State primacy under SMCRA'' such that OSMRE must prepare a federalism summary impact statement.

Response: OSMRE disagrees. As explained in the responses above, this rule neither makes OSMRE a co-regulator in primacy states nor otherwise deviates from SMCRA's statutorily defined cooperative federalism. SRAs will still retain exclusive jurisdiction subject to OSMRE's oversight and enforcement authority set forth in 30 U.S.C. 1271 and 1273. The final rule focuses on OSMRE's process for handling citizen complaints, issuing TDNs, and OSMRE's oversight responsibilities, all of which are provided for in 30 U.S.C. 1271(a)(1)—an exception to the exclusive jurisdiction of the SRAs. If an SRA receives a TDN from OSMRE, the SRA will continue to have the first opportunity to address possible violations in accordance with their approved State program, which remains codified in its State laws and regulations. While revising the existing regulations governing the TDN process will have a direct effect on the States' and the Federal Government's relationship with the States, this effect will not be significant, as it will neither impose substantial unreimbursed compliance costs on States nor preempt State law. OSMRE also does not believe more Federal inspections and Federal enforcement actions in primacy States will result from this rule. As discussed in the response to the preceding comment, this rule will not significantly increase burdens on SRAs to address and resolve underlying issues. As such, a federalism summary impact statement is not required.

Comment: A few commenters stated that the TDN rule would increase regulatory burdens on SRAs so OSMRE needs to prepare a regulatory flexibility analysis under the Regulatory Flexibility Act.

Response: OSMRE disagrees with these comments because, as discussed in prior responses to comments, the new rule provisions are considered enhancements in aiding more efficient and effective enforcement rather than adding new significant regulatory burden on SRAs.

H. Minor Text Changes and Conforming Edits

Comment: A few commenters stated that changes in the regulatory text that are editorial or introduce plain language changes in the rule text may be interpreted by courts as substantive changes. These commenters suggested that OSMRE should not make any editorial changes so that a court cannot reinterpret the intended meaning.

Response: OSMRE disagrees with the commenters. OSMRE has made certain changes in language pursuant to the Plain Writing Act of 2010 to improve the readability of the rule that do not affect its substance. Any challenges to these minor, non-substantive wording changes would likely withstand legal scrutiny, particularly when OSMRE has noted that it did not intend substantive changes in meaning.

IV. Section-by-Section Summaries of and Responses to Public Comments

This section presents a summary of the final rule revisions, section-by-section, accompanied with summaries of comments and OSMRE's responses to the comments. This section starts with the revisions to 30 CFR part 842, followed by the revisions to 30 CFR part 733, to mirror the sequence of the TDN process (*i.e.,* issuance of a TDN under part 842, followed by possible grouping of substantively similar possible violations into a State regulatory program issue under part 733).

A. 30 CFR 842.5

Summary of final rule provisions at 30 CFR 842.5: The final rule creates a new definitions section at 30 CFR 842.5 that includes definitions for the terms ''citizen complaint'' and ''ten-day notice.'' The definition of ''citizen complaint'' includes the word ''possible'' to modify ''violation,'' indicating that not all complaints need to contain an affirmative allegation of a violation but can still identify a possible violation. The definition of ''ten-day notice'' provides a uniform understanding of the term, emphasizing that a TDN is a communication mechanism that OSMRE uses to inform an SRA of a possible violation of its State regulatory program when OSMRE has reason to believe such a violation exists.

Comment: Some commenters supported the proposed definition of ''ten-day notice'' and the recognition that the TDN is a communications mechanism and not a judgment or determination on the performance of the permittee, operator, or SRA.

Response: OSMRE appreciates the support and again reiterates that a TDN

is not an enforcement action in and of itself and the issuance of a TDN is not a negative reflection on the permittee, operator, or the SRA. It is simply the mechanism that OSMRE uses to inform an SRA about a possible violation so that the SRA can investigate that allegation and take action to abate the violation if the SRA determines a violation exists.

Comment: Some commenters stated that ''citizen complaint'' and ''ten-day notice'' already have sufficient meaning and do not need to be defined.

Response: OSMRE disagrees with these comments. While implementing the SMCRA program, OSMRE has heard various proposed interpretations for both terms from citizens, SRAs, and among its own staff. For example, during TDN implementation, OSMRE has observed a range of references to citizen complaints that characterize the complaints as anything ranging from *any* information received to information that must be ''perfected'' before it would be considered a citizen complaint. These disparate definitions mean that different people may treat information received from citizens differently. For example, one person may consider the information received and start the TDN process whereas another person may review similar information, deem it unperfected, and delay action or forgo issuing a TDN. OSMRE is introducing regulatory certainty by establishing uniform definitions of these common terms.

Comment: One commenter asserted that the proposed changes to the TDN process convert the TDN from a communication tool to an enforcement tool.

Response: OSMRE does not agree with this comment. There are no enforcement provisions associated with a TDN itself, and there is no enforcement downstream of a TDN unless a State does not respond to the TDN or the response is arbitrary, capricious, or an abuse of discretion. That standard is deferential, and, in this regard, this final rule is no different than prior iterations of the rules. As such, a TDN is accurately described as a communication mechanism between OSMRE and an SRA about a possible violation.

Comment: One commenter suggested that OSMRE specify that the definition of ''citizen complaint'' includes ''any information received from any person by the OSMRE of a *condition or practice that might be* a possible violation of the Act . . .'' (emphasis added to identify the commenter's suggested additions to the rule text).

Response: As OSMRE understands the comment, adding this language to the definition of ''citizen complaint'' would not improve the definition of the term or add any clarity because the suggested phrase is encompassed by the definition of the term in this final rule. If a questionable condition or practice is occurring, the key question is whether it constitutes a possible violation of a State program. If OSMRE has reason to believe a possible violation exists, OSMRE will issue a TDN to the relevant SRA for the condition or practice. The proposed language is therefore unnecessary and could imply that other possible violations of a State program are not encompassed by the definition.

Comment: One commenter suggested changing the term ''ten-day notice'' to ''Ten-Day Notification to Respond'' because the proposed rule will create two types of TDNs, one that results from a possible SRA violation and a second that results from a citizen complaint.

Response: OSMRE disagrees that this rule creates two types of TDNs, and it sees no benefit in revising the term or in using two terms to describe a single process. OSMRE determines whether it has reason to believe a violation exists from any source of information concerning a possible violation, including information from a citizen or from an oversight inspection. If it makes such a determination, OSMRE will send the SRA a TDN, regardless of whether that possible violation stems from an action of the permittee or from an SRA issuing a permit that is inconsistent with the approved State program or that would allow a permittee to mine in a manner that is inconsistent with the State program.

B. 30 CFR 842.11(b)(1)(i)

Summary of final rule revisions to 30 CFR 842.11(b)(1)(i): As in the proposed rule, the final rule limits the sources of information that OSMRE reviews when determining whether OSMRE has reason to believe a violation exist. The final rule amends the text of § 842.11(b)(1)(i), in pertinent part, to state that the authorized representative determines whether there is ''reason to believe'' that there is a violation based on ''information received from a citizen complainant, information available in OSMRE files at the time that OSMRE is notified of the possible violation (other than information resulting from a previous Federal inspection), and publicly available electronic information.''

Comment: Some commenters asserted that the proposed rule impermissibly raises the bar on Federal action, impermissibly delays notification to the SRAs through the TDN process, and is inconsistent with SMCRA because OSMRE would delay issuance of a TDN until after a records search of all electronic databases, any complaint information, and other information not in the agency's possession when the complaint is received.

Response: OSMRE disagrees with these comments. SMCRA affords OSMRE discretion to establish whether OSMRE has reason to believe a violation exists based on ''any information available.'' 30 U.S.C. 1271(a)(1). OSMRE review of these three sources of information that are available to it at the time the citizen complaint is received neither ''raises the bar'' with respect to information collection nor delays notification to a State of a possible violation because OSMRE must still form the predicate belief in a possible violation. In this rule, OSMRE merely explains the processes it will use to form that belief. Thus, OSMRE will review the citizen complaint and information that OSMRE already has in its files or from publicly available electronic information. In addition, OSMRE, in its expertise, has sufficient knowledge to identify pertinent publicly available electronic information that may be relevant to the citizen complaint and that will help it to determine whether it has reason to believe a violation exists. OSMRE does not envision exhaustive, time-consuming reviews of any of these sources of information.

This final rule eliminates the potential that the 2020 TDN Rule could allow for an open-ended, information gathering process before OSMRE determines whether it has reason to believe a violation exists; however, the final rule retains the 2020 TDN Rule's removal of the ''if true'' standard. Therefore, this final rule will allow OSMRE to proceed more quickly and efficiently than under the 2020 TDN Rule when making a reason to believe determination. At the same time, this final rule will allow OSMRE to exercise its expertise in reviewing citizen complaints to determine whether there is reason to believe a possible violation of SMCRA, the regulations, the State program, or permit condition exists before deciding whether to send the SRA a TDN.

Comment: Some commenters supported OSMRE's limiting of the information it can review when establishing reason to believe to that information found in the complaint, publicly available electronic information, and information OSMRE already possesses.

Response: OSMRE appreciates these comments. Limiting the information to these three sources will result in an expeditious ''reason to believe'' determination while at the same time making the process more efficient.

Comment: Some commenters agreed that the complainant may not understand SMCRA's technical details, but an agency official, trained in interpreting regulations, can determine if a possible violation exists and notify the SRA.

Response: OSMRE agrees with these comments. OSMRE has developed considerable expertise since the enactment of SMCRA in 1977 as it implements SMCRA in Federal program States and on Indian lands across the country and provides oversight of the 24 State programs. As stated above, this final rule allows OSMRE to use this expertise to initially evaluate a citizen complaint along with limited sources of other information, determine if a possible violation exists, and, if so, let the SRA know using a TDN.

Comment: One commenter supported the changes that limit the information OSMRE can consider when evaluating a citizen complaint and restore the requirement that complaints contain ''information'' rather than ''documentation.''

Response: OSMRE appreciates the commenter's support. SMCRA affords citizens with the opportunity to report possible violations to either the SRA or OSMRE. Likewise, it contains a low threshold with respect to OSMRE establishing reason to believe a violation exists and stops short of requiring documentation from a citizen complainant before OSMRE decides whether to send a TDN to the SRA. Thus, in final sections 842.11(b)(1)(i) and 842.11(b)(2), OSMRE will not require a citizen to provide documentation; instead, OSMRE will consider any information that a citizen complainant provides.

Comment: Some commenters asserted that excluding SRA input will result in redundant, duplicative enforcement processes.

Response: OSMRE disagrees. OSMRE's goal is not to exclude SRA input but rather to remove a process that is duplicative of the TDN process itself, which will expedite OSMRE's initial evaluation of the prospective violation. In addition, under SMCRA, the TDN is the communication mechanism that OSMRE sends to the SRA whenever OSMRE has reason to believe a violation exists. As explained above, OSMRE will only take enforcement action if the SRA fails to respond to the TDN or the response is arbitrary, capricious, or an abuse of discretion. Thus, there will not be redundant enforcement processes.

Comment: One commenter stated that State-supplied information should be considered when establishing reason to believe a violation exists.

Response: OSMRE disagrees with the commenter. OSMRE concludes that seeking and considering information from an SRA before making a reason to believe determination is not the best interpretation of section 521(a)(1) of SMCRA and creates a duplicative process within the TDN process. However, publicly available electronic information may include publicly viewable SRA permitting databases, water monitoring and reporting databases, GIS applications, and other easily viewable information.

Comment: A few commenters suggested that OSMRE should develop an internal OSMRE policy on information collection in lieu of this rulemaking.

Response: OSMRE recognizes that it may have been able to use internal policy guidance, such as a directive, to clarify to its own staff what types of information OSMRE could consider when evaluating a citizen complaint to determine if it has reason to believe a violation exists. However, given the indirect impacts on SRAs and the public as well as SMCRA's focus on ''assur[ing] appropriate procedures are provided for public participation[,]'' 30 U.S.C. 1202(i), we concluded that regulations, rather than internal and non-binding policy documents, were the appropriate mechanism because they are more transparent, easily accessible, and create more regulatory certainty than an internal guidance document. OSMRE will continue to employ internal policy documents and directives, as necessary, to ensure that OSMRE staff are properly and consistently implementing the final rule. Therefore, OSMRE intends to revise the relevant policy and guidance documents after this final rule becomes effective to ensure there are no conflicts between the final rule and preexisting guidance.

Comment: Some commenters asserted that delays in the TDN process will result from OSMRE reviewing all information contained in OSMRE files, publicly available electronic information, and information contained in a citizen complaint.

Response: OSMRE recognizes that there may be some small delay as OSMRE reviews information in the citizen complaint, information in OSMRE's files, and publicly available electronic information; however, this delay should be minor compared to the delays that have sometimes occurred under the 2020 TDN Rule as OSMRE sought additional information from an SRA and thoughtfully considered the information that had been received. By allowing OSMRE to consider only these three sources of information available to it at the time it receives the citizen complaint, OSMRE should be able to more expeditiously establish whether reason to believe a possible violation exists, and, if so, send the SRA a TDN so that the SRA can conduct an investigation and respond to OSMRE within ten days. Therefore, while it may be marginally faster for OSMRE to act simply as a pass through for citizen complaints, this process is streamlined in comparison to the existing rule.

Comment: Some commenters assert that the scope of information considered in the proposed rule is inconsistent with SMCRA, which, according to these commenters, requires OSMRE to consider ''all information available.''

Response: OSMRE disagrees with the commenters' assertion that OSMRE must consider ''all information available.'' SMCRA section 521(a)(1) provides that OSMRE should consider ''any information available'' to determine if it has reason to believe a violation exists, not *all* information that tends to disprove the existence of a possible violation. Even in the 2020 TDN Rule, OSMRE recognized that it should not consider ''all information available'' and sought to put sideboards on data collection by basing a reason to believe determination on ''any information readily available.'' 30 CFR 842.11(b)(1)(i) (*see also* § 842.11(b)(2) (referencing ''any information readily available'')). Moreover, the preamble to the 2020 TDN Rule clearly explained that, to ensure the process would proceed quickly and not become ''open-ended,'' OSMRE would only consider ''any information that is accessible without unreasonable delay'' to be ''readily available information.'' 85 FR at 75163.

However, because the 2020 TDN Rule did not limit sources of information it considered to be ''readily available'' as this final rule does, in some instances there have been extensive investigations and data collection *before* issuance of a TDN or before OSMRE determined whether reason to believe existed. This result is contrary to section 521(a)(1), which focuses on correcting possible violations expeditiously.

To reduce any delay, the final rule provides that OSMRE should use its best professional judgment, including any information it has on hand when it receives the citizen complaint, to determine whether it has reason to believe a violation exists. This approach

strikes a balance between collecting all available information, which could include information obtained from any source after the citizen complaint is received, along with the attendant delays in seeking and considering such information, and considering only information in a citizen complaint, which was the case prior to the 2020 TDN Rule. The more limited information that OSMRE will consider under this final rule fully comports with the statutory directive to consider ''any information available'' to determine whether OSMRE has reason to believe a violation exists, as well as the structure of section 521(a)(1), which seeks to resolve possible violations quickly.

Comment: One commenter asked if OSMRE could provide an example of the information that will no longer be used for a reason to believe determination if the objective of the change is to expedite the TDN process.

Response: Under the final rule, OSMRE will only consider information contained in its files at the time it is notified of a possible violation, information contained in a citizen complaint, and publicly available electronic information. All other sources of information will not be considered when OSMRE determines whether it has reason to believe a violation exists. Information excluded could include information provided by an SRA or permittee after OSMRE received the citizen complaint that is not publicly available. These limitations will help to prevent an open-ended investigation of the possible violation before OSMRE determines whether to issue a TDN.

Comment: One commenter noted that the proposed rule suggested that OSMRE will consider verbal allegations when making ''reason to believe'' determinations and recommends removing the option for an oral complaint to prevent inconsistencies between verbal and written complaints.

Response: Accepting a verbal citizen complaint and request for a Federal inspection, followed by submission of the complaint in writing, has been a feature of the regulations for many years. *See* 30 CFR 842.12(a). In order to ensure public participation in the enforcement of SMCRA, especially from those who may not be well-versed in SMCRA or its regulations, as well as comply with the requirements of section 517(h)(1), OSMRE will continue to allow a verbal citizen complaint as long as the oral complaint is followed up in writing.

C. 30 CFR 842.11(b)(1)(ii)

Summary of final rule revisions to 30 CFR 842.11(b)(1)(ii): At 30 CFR 842.11(b)(1)(ii)(B)(*1*), the final rule adds a new sentence at the end of the existing provision. In the final rule, the sentence reads: ''Where appropriate, OSMRE may issue a single ten-day notice for substantively similar possible violations found on two or more permits, including two or more substantively similar possible violations identified in one or more citizen complaints.'' In the proposed rule, OSMRE proposed to include the phrase ''involving a single permittee'' after ''two or more permits.'' The rationale for this change to the proposed rule is discussed in section II of this preamble.

At 30 CFR 842.11(b)(1)(ii)(B)(*3*), this final rule also eliminates the language from the existing regulations that allowed for the possibility that corrective action plans for State regulatory program issues under 30 CFR part 733 could be a form of ''appropriate action'' in response to a TDN. Instead, in appropriate circumstances, under the final rule at new § 842.11(b)(1)(ii)(B)(*4*)(*iii*), State regulatory program issues addressed under final § 773.12, and associated action plans, will be included under the ''good cause'' exception for not acting in response to a TDN, aligning the regulations more closely with statutory requirements. Finally, the good cause provision of the final rule at § 842.11(b)(1)(ii)(B)(*4*)(*ii*) outlines specific time limits for SRAs to request extensions to determine whether a violation exists, with a maximum cap of 90 additional days, emphasizing expeditious resolution.

Comment: Some commenters noted that SMCRA section 521(a)(1) authorizes the issuance of a TDN only when there is reason to believe that a violation—not the plural ''violations''—exists.

Response: To the extent that these commenters are suggesting that OSMRE must issue a separate TDN for each individual possible violation, OSMRE disagrees with the commenters. SMCRA section 521(a)(1) does not limit the number of possible violations that can be included in a TDN. Nor does SMCRA limit the number of substantively similar possible violations that OSMRE can group together as a single State regulatory program issue.

Comment: Some commenters asserted that an action plan should not count as either appropriate action or good cause for not taking such action. The commenters also asserted that an action plan does not replace immediate enforcement action if violations become manifest.

Response: As noted above, we agree with the commenters that development of an action plan does not constitute appropriate action that in and of itself corrects a violation in a manner consistent with SMCRA. As such, OSMRE has concluded that it is not correct to consider development of an action plan as appropriate action in response to a TDN.

We disagree with the commenters, however, that development of an action plan could not be good cause for not taking appropriate action. As noted in this final rule, OSMRE added § 842.11(b)(1)(B)(*4*)(*iii*) to specify that State regulatory program issues addressed through a § 733.12 action plan could constitute good cause. An action plan would ensure the violation is corrected, even if the correction does not occur until after the plan is executed. Allowing a State to invoke good cause for addressing a possible violation through an action plan does not, however, mean that the underlying violation will not be corrected. Instead, it means that the correction of the violation may occur later as the systematic issues are addressed, which could be as late as the implementation of the action plan, but may be sooner. For example, under this final rule at § 733.12(d), even if a possible violation is being addressed as a State regulatory program issue, an SRA can take direct enforcement action under its State regulatory program and OSMRE can take additional appropriate oversight enforcement action. Alternatively, if OSMRE has adequate proof of an imminent harm, OSMRE would immediately conduct a Federal inspection even if OSMRE is also developing a part 733 action plan.

Comment: Some commenters recommended that OSMRE should allow a request for additional time to be considered an appropriate action.

Response: A request for additional time to review a specific situation is not considered an ''appropriate action to cause the said violation to be corrected'' as required by 30 U.S.C. 1271(a)(1), but more appropriately falls under the good cause provision for not acting to correct the violation within ten days. Requesting more time to evaluate a situation can be an appropriate response to a TDN, but it should not be confused with an appropriate action to correct the violation.

Comment: One commenter requested that OSMRE retain the language in the 2020 TDN Rule that allows for a State issuance of a notice of violation (NOV) with appropriate remedial measures and deadlines to be regarded as appropriate action.

Response: The 2020 TDN Rule allowed OSMRE to consider an SRA's response indicating that it had written

an NOV to the permittee for the possible violation contained in a TDN to be an appropriate action in response to a TDN. This final rule does not change that concept.

Comment: Some commenters asserted that use of action plans for violations erases the distinction between SMCRA section 521(a) ''on-the-ground'' violations and section 521(b) State regulatory program issues. The commenters stated that OSMRE must use its Federal substitution regulations when a State regulatory program issue is evident rather than developing an action plan or using the TDN process.

Response: OSMRE disagrees with this assertion. As explained in sections I.B and III.E of this preamble, SMCRA section 521(a) contains the conceptual framework for addressing a violation of ''any person''—either a permittee's violation or a violation stemming from an SRA's improper implementation of its approved program. Addressing on-the-ground violations and State regulatory program issues through the § 842.11 process is consistent with SMCRA and OSMRE's approach in this rule.

Moreover, as we explained in the preamble to the 2020 TDN Rule, the addition of corrective action plans under § 773.12(a)(2) did not ''significantly alter OSMRE's implementation of the SMCRA program'' because OSMRE has used a similar process through guidance documents for years. 85 FR at 75153. The final rule retains the use of the action plan process ''to more easily address, with the cooperation of the State regulatory authority, situations where an alleged violation can be traced to a systemic problem within an existing State regulatory program.'' *Id.* at 75172. OSMRE maintains, as it did in the 2020 TDN Rule, that corrective action plans are ''consistent with SMCRA's cooperative federalism approach, and OSMRE expects to use revised 30 CFR 733.12 more frequently than it has traditionally used its authority to substitute Federal enforcement or withdraw State program approval because it will allow OSMRE to work with a State regulatory authority to cooperatively correct a State regulatory program issue.'' *Id.*

If, at any time, OSMRE is addressing a potential violation that is a State regulatory program issue and later concludes that the SRA is not effectively implementing, administering, enforcing, or maintaining any part of its approved State regulatory program, OSMRE may then also initiate procedures at § 733.13 to substitute Federal enforcement or withdraw approval of the State regulatory program. A State regulatory program issue by itself does not, at least initially, rise to the level of calling for substituting Federal enforcement or withdrawing the State program, especially if the state is working with OSMRE to implement an action plan. Identification of a State regulatory program issue, instead, is intended to provide an efficient process for an SRA to work with OSMRE to ensure it is effectively implementing its program before the State regulatory program issue ''warrant[s] the rare remedies of substitution of Federal enforcement or withdrawal of an approved State program.'' *Id.* at 75175.

Comment: Commenters stated that informal review afforded to an SRA under 30 CFR 842.11(b)(1)(iii) should not interfere with OSMRE's obligation to initiate a Federal inspection and enforcement action, as there is no legal authorization in the text or legislative history of SMCRA for OSMRE to wait for informal review to be complete before conducting a Federal inspection if OSMRE concluded, after receiving an SRA's TDN response, that the State failed to take appropriate action or did not have good cause for doing so.

Response: Existing 30 CFR 842.11(b)(1)(iii)(A) indicates that when OSMRE notifies an SRA that its response to a TDN does not constitute appropriate action or good cause, the State is entitled to seek informal review by OSMRE's Deputy Director. Also, in general, § 842.11(b)(1)(iii)(B) provides that no Federal inspection can be conducted, or corresponding enforcement action taken, until the informal review is completed. OSMRE did not propose to amend its informal review process and declines to make any changes now based on these comments. Because of the importance of these procedures, any such changes should be subject to full notice and comment, especially from the SRAs, who would be most affected by any changes.

Comment: One commenter asserted that actions plans should not be considered ''good cause'' for failing to take appropriate action because an action plan itself is a type of action. Thus, this commenter opined that when an SRA enters into an action plan, it should be considered ''appropriate action.'' Because OSMRE only evaluates whether a State has shown ''good cause'' when the SRA fails to act on a TDN, actions it takes under an action plan should not be part of OSMRE's ''good cause'' determination.

Response: As explained above, OSMRE disagrees. Section 521(a)(1) provides that OSMRE should conduct a Federal inspection if the SRA ''fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure.'' 30 U.S.C. 1271(a)(1). While we agree with the commenter's overarching point that an action plan will cause the violation to be corrected, that correction did not happen during the ten days in which the SRA responded to OSMRE's TDN. Therefore, it is more consistent with SMCRA to consider action plans as ''good cause'' in response to a TDN.

Comment: One commenter requested clarification on whether, because of OSMRE not allowing action plans to be appropriate action in response to a TDN, a TDN will be considered an open, unresolved enforcement action until the action plan is completed.

Response: A TDN would remain open while an action plan is being used to resolve an underlying violation. Upon successful completion of the action plan, the SRA will be deemed to have taken appropriate action because the underlying violation will have been abated, and the TDN will be resolved. As noted above, the TDN is a communication mechanism and is not itself an enforcement action.

Comment: Some commenters supported the shortened time limits for how much additional time States may request to respond to a TDN. The commenters noted that this will be 30 days in most cases and 60 days in complex cases.

Response: Under this final rule, an SRA must continue to respond to a TDN within ten days. The time frames to which the commenters are referring apply to the good cause provisions under final 30 CFR 842.11(b)(1)(ii)(B)(*4*)(*ii*) after a TDN is issued. Under that provision, good cause includes when ''[t]he State regulatory authority has initiated an investigation into a possible violation and has determined that it requires an additional amount of time to determine whether a violation exists.'' This additional amount of time may be days or weeks, which is obviously necessary sometimes to develop material to determine whether a violation does exist. As the commenter notes, under this final rule, the ''State regulatory authority may request up to 30 additional days to complete its investigation of the issue; in complex situations, the State regulatory authority may request up to an additional 60 days to complete its investigation.'' Further, ''[t]he sum total of additional time for any one possible violation must not exceed 90 days.'' Under the 2020 TDN Rule, the SRA's investigation could

have been for a ''reasonable, specified amount of time.'' As that provision did not provide concrete time frames to ensure expeditious correction of violations, OSMRE concluded that it was appropriate to include the 30-day and 60-day time frames.

Comment: One commenter requested clarification that the revised action plan process will not be used as a justification for SRA failure to take appropriate action or to show good cause for such failure and requested that OSMRE take immediate inspection and enforcement action to correct on-the-ground violations resulting from programmatic failures.

Response: An action plan will not be used as a ''justification for failure,'' meaning an SRA cannot have an action plan ongoing indefinitely while the underlying violation remains uncorrected. All action plans will have defined timelines, stated objectives, and criteria defining success. This final rule sets concrete timelines on creation and completion of action plans (*see* § 773.12(b)), which will ensure timely resolution of underlying violations. An SRA cannot claim action plan completion without addressing the underlying violation. Moreover, even when OSMRE and a State are pursuing an action plan, final § 733.12(d) allows an SRA to take direct enforcement actions and OSMRE to take appropriate oversight enforcement actions, as necessary. Further, under § 842.11(b)(1)(i), in imminent harm situations OSMRE will proceed directly to a Federal inspection, which ensures that these situations will be handled promptly.

Comment: One commenter stated that existing 30 CFR 842.11(b)(1)(iii)(B) should be rewritten to provide that a request for informal review by an SRA of OSMRE's determination that the SRA has failed to take appropriate action or to show good cause for such failure should not delay or prevent either a Federal inspection or issuance of an enforcement order for the violation.

Response: OSMRE did not propose to modify existing 30 CFR 842.11(b)(1)(iii)(A) regarding informal review afforded to SRAs. As such, that provision, along with § 842.11(b)(1)(iii)(B), is now beyond the scope of this rulemaking. OSMRE declines to make the requested change.

D. 30 CFR 842.11(b)(2)

Summary of final rule revisions to 30 CFR 842.11(b)(2): As in the proposed rule, the final rule adds two new sentences to § 842.11(b)(2) specifying that: ''All citizen complaints will be considered as requests for a Federal inspection under § 842.12. If the information supplied by the complainant results in a Federal inspection, the complainant will be offered the opportunity to accompany OSMRE on the Federal inspection.'' These changes remove the requirement that a citizen specifically request a Federal inspection, which should eliminate any confusion regarding the processes associated with citizen complaints versus requests for Federal inspections. Additionally, and as previously discussed, this final rule also amends § 842.11(b)(2) by revising the information that OSMRE will consider when determining if OSMRE has reason to believe a violation exists. Finally, the final rule removes the existing language providing that OSMRE will have reason to believe a violation exists if facts known to OSMRE ''constitute simple and effective documentation of the alleged violation . . . .'' Instead, the final rule provides that OSMRE will have reason to believe that a violation exists if the facts ''support the existence of a possible violation . . . .''

Comment: Some commenters supported the revisions that restore SMCRA's intent to treat all citizen complaints as requests for Federal inspection. These commenters also supported eliminating the requirement that a citizen first notify the SRA and then explain to OSMRE why the State's response was insufficient.

Response: OSMRE agrees. Treating all citizens complaints as requests for Federal inspections is consistent with SMCRA. OSMRE has revised the implementing regulatory language at §§ 842.11(b)(2) and 842.12(a) to reflect that. In addition, as explained in section I.B of this preamble, allowing citizens to contact OSMRE directly about a possible violation without an express requirement to contact the SRA is consistent with SMCRA and alleviates any tension or stress associated with a citizen contacting the SRA in situations where the citizen is not comfortable with doing so. As also discussed in section I.B of this preamble, OSMRE has explained why it eliminated the requirement at existing § 842.12(a) for a citizen to state the basis for their assertion that the SRA has not acted.

Comment: As explained in the discussion above, one commenter agreed that all citizen complaints should serve as requests for Federal inspections, even if inspections are not specifically requested.

Response: OSMRE appreciates this comment, and as explained elsewhere, has decided to finalize the corresponding regulatory provisions as proposed at §§ 842.11(b)(2) and 842.12(a). If a citizen complaint, whether or not it specifically requests a Federal inspection, gives OSMRE reason to believe there is imminent harm or a violation of SMCRA or the applicable State program that will be addressed through the TDN process, OSMRE could ultimately conduct a Federal inspection. Thus, OSMRE concludes that there is not a sufficient reason to keep the concepts separate in this final rule.

Comment: Some commenters asserted that all citizen complaints should not be considered as requests for a Federal inspection. These commenters were concerned that doing so could lead to a significant increase in the number of Federal inspections, which could drain State resources as SRAs often participate jointly with OSMRE in Federal inspections. These commenters would prefer that OSMRE maintain its discretion in deciding whether a citizen complainant is ''truly requesting an inspection.'' These commenters also noted that the last sentence of § 842.12(a) as revised states that ''*[i]f* the information supplied by the complainant results in a Federal inspection, the complainant will be offered the opportunity to accompany OSMRE on the Federal inspection.'' These commenters indicated that the discretionary nature of ''if'' in that sentence appeared to contradict OSMRE's statements in the preamble to the proposed rule that all citizen complaints will be treated as requests for a Federal inspection.

Response: OSMRE disagrees and has concluded that it is appropriate to consider all citizen complaints as requests for a Federal inspection, even if the citizen does not specifically ask for a Federal inspection. If a citizen brings a possible violation to OSMRE's attention, it is logical to assume that the citizen would also want OSMRE to conduct any corresponding and necessary Federal inspection.

Contrary to the commenters' assertions, OSMRE does not believe that treating all citizen complaints as a request for a Federal inspection will significantly increase the overall number of Federal inspections performed. While OSMRE will treat all citizen complaints as a request for Federal inspection, OSMRE will still evaluate that citizen complaint under 30 CFR 842.11(b)(1) to determine if it has reason to believe a violation exists and, if so, issue a TDN to the State. In a primacy State, a Federal inspection will only be conducted if OSMRE determines that the State's response to a TDN was arbitrary, capricious, or an abuse of discretion. Because SRAs typically provide adequate responses to

TDNs, we expect the number of Federal inspections to remain about the same as under the existing rule.

Furthermore, pursuant to this final rule, the Department requires a citizen complaint or request for Federal inspection to follow the process in § 842.11(b); as a result, OSMRE retains two points of discretion: when determining whether it has reason to believe a violation exists before issuing a TDN, and determining whether an SRA's TDN response is arbitrary, capricious, or an abuse of discretion. If OSMRE either decides that it does not have reason to believe a violation exists or that the State was not arbitrary and capricious in its response, OSMRE will not conduct a Federal inspection; therefore, the regulation correctly includes ''if'' in the last sentence.

Comment: One commenter noted that the proposed rule at § 842.12 states that citizen complaints under § 842.11(b) will be considered requests for a Federal inspection. The commenter noted further that, if the complaint results in a Federal inspection, the complainant will be offered the opportunity to accompany OSMRE on the inspection. The commenter asserted that the rule should be revised to clarify details about the communication mechanism to the citizen, the time frame for OSMRE's decision, OSMRE's notification to the SRA, and opportunity to accompany OSMRE on the inspection.

Response: The final rule does not change the communication mechanism between OSMRE and citizens related to participation on a Federal inspection, the time frames for OSMRE's decision to conduct a Federal inspection, or affording the SRA an opportunity to accompany OSMRE. Under the TDN process, if OSMRE determines that the State did not take appropriate action or show good cause for not doing so in response to a TDN, OSMRE will notify the SRA according to existing 30 CFR 842.11(b)(1)(iii)(A). In accordance with OSMRE's longstanding practice, the authorized representative may inform the SRA of a resulting Federal inspection. Likewise, if a Federal inspection occurs as a result of information provided by a citizen, OSMRE will notify and give the citizen the opportunity to accompany OSMRE on the inspection consistent with existing 30 CFR 842.12(c). If an imminent harm situation exists, there is no requirement for OSMRE to notify the State of a Federal inspection. If OSMRE determines a need exists in the future for more specificity in procedures for citizen involvement or SRA notification, OSMRE will propose such changes.

Comment: One commenter requested clarification of what constitutes an SRA response that is arbitrary, capricious, or an abuse of discretion and at what levels of OSMRE these decisions are made.

Response: Regarding the ''arbitrary, capricious, or an abuse of discretion'' portion of the comment, the Department adopted that standard of review in 1988. 53 FR at 26732. At that time, the Department opted not to adopt the same deference standards that Federal courts accord to the Secretary in developing regulations. *Id.* at 26733. Instead, the Department decided that such language was unnecessary and ''[c]oncerns about future application of those words will best be decided when specific fact situations have arisen and can be evaluated.'' *Id.* The Department did state that ''OSMRE [will] defer to a state's interpretation of its own regulations, as long as that deference occurs within the framework of careful oversight, as provided by the statute. OSMRE will recognize a State's interpretation of its own program as long as it is not inconsistent with the terms of the program approval or any prior state interpretation recognized by the Secretary and as long as the state interpretation is not arbitrary, capricious, or an abuse of discretion.'' *Id.* at 26732.

Regarding the levels at which OSMRE makes decisions such as when ''reason to believe'' exists or whether a TDN response is arbitrary, capricious, or an abuse of discretion: these decisions are made in accordance with OSMRE's internal management structure, but, generally, an OSMRE authorized representative, with the concurrence of the Field Office Director, makes the decision whether an SRA's response to a TDN does or does not meet the standards for appropriate action or good cause.

Comment: One commenter requested clarification as to whether the proposed rule is intended to limit Federal inspections to requests arising from citizen complaints.

Response: This final rule does not limit Federal oversight inspections to those that occur because of citizen complaints. In general, under existing § 842.11(a)(1), OSMRE conducts oversight inspections of surface coal mining and reclamation operations ''as necessary . . . [t]o monitor and evaluate the administration of approved State programs.''

Comment: Similarly, one commenter sought clarification as to whether a citizen-requested Federal inspection would be counted toward the overall number of Federal oversight inspections agreed upon in the agencies' performance agreements.

Response: Under OSMRE's Directive REG–8 (Oversight of State and Tribal Regulatory Programs, *https://www.osmre.gov/sites/default/files/pdfs/directive997.pdf*), when OSMRE conducts a Federal inspection because of a citizen complaint, that inspection will count toward OSMRE's target number of oversight inspections for the relevant State or Tribe for the applicable evaluation year. OSMRE will retain this approach under this final rule. However, if necessary, OSMRE can exceed the target number of oversight inspections in an evaluation year. As mentioned in response to the prior comment, under § 842.11(a)(1), OSMRE will conduct any Federal inspections that are necessary, regardless of the overall amount.

E. 30 CFR 842.12(a)

Summary of final rule revisions to 30 CFR 842.12(a): As in the proposed rule, the final rule changes § 842.12(a) so that any person may request a Federal inspection under § 842.11(b) by providing to an authorized representative a signed, written statement (or an oral report followed by a signed, written statement) setting forth information that, along with any other information the complainant chooses to provide, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists. Under the final rule, OSMRE will also consider ''any other information the complainant chooses to provide.'' In addition, OSMRE removed the phrase ''readily available'' and added that a reason to believe determination will be based upon information from a citizen complainant, information available in OSMRE files, and publicly available electronic information. Finally, OSMRE added new sentences to clarify that all citizen complaints under § 842.11(b) will be considered as requests for a Federal inspection, and that, if the information a citizen provides leads to a Federal inspection, the citizen will be afforded the opportunity to accompany OSMRE on the inspection.

Comment: One commenter opined that the term ''violation'' is used throughout SMCRA in the context of a permittee or operator.

Response: Although the meaning of this comment is unclear, as explained elsewhere, to the extent the commenter is suggesting that OSMRE should not send a TDN to an SRA for a permit defect, OSMRE disagrees with the comment. As explained above, OSMRE will issue a TDN whenever it has reason

to believe that ''any person'' is in violation of SMCRA or the applicable State program, including not only permittees and operators, but also SRAs.

Comment: One commenter asserted that imposition of an opportunity for the SRA to seek informal review and OSMRE's completion of that review as a prerequisite to conducting a Federal inspection or issuing a Federal notice of violation following issuance of a TDN and a determination by OSMRE that the State did not take appropriate action (or show good cause for such failure) is nowhere provided for in SMCRA. The commenter also asserted that the provision has the effect of allowing extant violations to continue unabated, possibly ripening into avoidable imminent harm situations.

Response: For the reasons explained above, OSMRE declines to make any changes to the final rule based on this comment. Until OSMRE renders a decision on an SRA's request for informal review, OSMRE will be vigilant in monitoring the underlying situation and make every effort to ensure that an underlying violation does not reach the point of imminent harm.

Comment: Some commenters agreed with OSMRE that a citizen should not have to first notify the State when a citizen is requesting a Federal inspection.

Response: As mentioned previously in section I.B of this preamble and in response to other comments, when requesting a Federal inspection, this final rule removes the requirement at § 842.12(a) for a citizen to notify an SRA of a possible violation.

Comment: Some commenters supported continuation of the requirement for a complainant to contact the SRA before OSMRE.

Response: OSMRE explains above why it is removing the requirement for a citizen to notify the SRA when requesting a Federal inspection. The public will still be able to report possible violations directly to the SRA, and OSMRE encourages citizens to do so. The change in this final rule simply removes the requirement that a citizen notify the SRA prior to or simultaneously with OSMRE. As a general matter, OSMRE agrees with the commenters' reasoning that it is typically better for the SRA, which has primary jurisdiction, to address a citizen complaint because the SRA can address them promptly, ''without the delay the ten day notice procedure necessarily involves.'' However, without the regulatory change, if a citizen opted not to contact the SRA first for whatever reason, then under the 2020 TDN Rule, OSMRE could have refused to consider information received from any person—*i.e.,* the citizen—to determine whether it had reason to believe a violation of SMCRA exists. After review, OSMRE determined that such an outcome would be contrary to SMCRA section 521(a)(1), which requires OSMRE to consider ''any information available'' from ''any person'' about the existence of a possible violation and does not require that that person notify the SRA first. Therefore, excluding the requirement for a citizen complainant to contact the SRA first hews more closely to the statutory requirements for public participation under 30 U.S.C. 1271(a)(1).

Comment: One commenter recommended that a citizen's failure to provide information for the basis of the person's assertion should not result in rejecting a citizen complaint.

Response: Under this final rule, as explained in section I.B of this preamble and as stated in the preamble to the proposed rule, a citizen need not state the basis for the assertion that the SRA has not acted with respect to a possible violation.

Comment: Some commenters asserted that OSMRE should not remove the requirement in the 2020 TDN Rule that a citizen provide a basis for their belief that the SRA failed to act. These commenters recognized that there was no mandate that this provision be included, but they stated that such information would be, at a minimum, useful for OSMRE to decide whether a possible violation exists. These commenters also contend that providing a simple explanation would not add a significant burden to the citizen complainant. Further, one commenter noted they are not aware of OSMRE not acting on a citizen complaint, even if the citizen did not provide such information.

Response: As the commenter recognizes, there is no language in SMCRA that requires OSMRE to mandate that a citizen provide a reason why they think the SRA failed to act. Therefore, as with removing the requirement that the SRA be notified first, discussed above, removing this requirement will remove barriers to public participation and make the final rule adhere more closely to the requirements of SMCRA section 521(a)(1). OSMRE does, however, recognize that it will consider all information provided by ''any person'' about the existence of a possible violation in determining whether it has reason to believe a violation exists. Thus, OSMRE encourages, but does not require, citizens to provide it with all pertinent information about the possible violation, which could include information about the SRA's prior response, if any.

F. 30 CFR 733.5

Summary of final rule revisions to 30 CFR 733.5: The changes to 30 CFR 733.5 involve amending the definitions of ''action plan'' and ''State regulatory program issue.'' As explained in the preamble to the proposed rule (88 FR at 24957), the revisions to the ''action plan'' definition in this final rule are non-substantive clarifying changes that enhance its readability. OSMRE changed ''a detailed schedule'' to ''a detailed plan,'' but this change is not substantive because the revised definition also provides that an action plan ''includes a schedule . . . .'' Both the existing and new definitions require an action plan to lead to the resolution of a State regulatory program issue.

OSMRE also revised the definition of ''State regulatory program issue.'' The revisions are chiefly for clarity but also include substantive changes to the definition. Consistent with the discussions of permit defects in the preamble to this final rule, OSMRE changed ''could result in'' to ''may result from'' to indicate that a State regulatory program issue may result from a State regulatory authority's actions. In tandem with this change, the last sentence of the revised definition provides that ''State regulatory program issues will be considered as possible violations and will initially proceed, and may be resolved, under part 842 of this chapter.'' This language makes clear that an SRA's actions could constitute a possible violation for which OSMRE would issue a TDN. *See* discussions of permit defects above and at 88 FR at 24951–24952 and 24957.

Comment: See section III.E. (''Any Person'' Who Can Be in Violation of SMCRA) for comment summary and response.

G. 30 CFR 733.12(a)

Summary of final rule revisions to 30 CFR 733.12(a): Without changing the meaning, the final rule removes ''in order'' before ''to ensure'' as it is unnecessary. In addition, the final rule changes ''escalate into'' to ''become'' to be more concise. In existing § 733.12(a)(1), the final rule adds ''including a citizen complainant'' at the end of the sentence to emphasize that a citizen complainant can be the source of information that leads OSMRE to identify a State regulatory program issue. In existing § 733.12(a)(2), the final rule adds ''initiate procedures to'' before ''substitute Federal enforcement'' and adds ''in accordance with § 733.13'' at the end of the sentence to replace ''as

provided in this part.'' The changes to the last sentence indicate that there is an established process for substituting Federal enforcement or withdrawing approval of a State regulatory program.

Comment: See Section III.H (Minor Text Changes and Conforming Edits) for comment summary and response.

H. 30 CFR 733.12(b)

Summary of final rule revisions to 30 CFR 733.12(b): The final rule modifies existing § 733.12(b) to require OSMRE to develop and approve an action plan for a State regulatory program issue, along with a specific time frame for completing the identified actions. The final rule revises the first sentence of § 733.12(b) to read: ''For each State regulatory program issue, the Director or their designee, in consultation with the State regulatory authority, will develop and approve an action plan within 60 days of identification of a State regulatory program issue.'' Additionally, the final rule adds a new second sentence that would allow OSMRE and the relevant SRA to ''identify [within 10 business days] interim remedial measures that may abate the existing condition or issue.'' The final rule removes the existing language that allows OSMRE to ''employ any number of compliance strategies'' and replaces it with the requirement for OSMRE to develop and approve an action plan for all State regulatory program issues. In addition, the final rule removes the existing second sentence, which includes the requirement for OSMRE to develop and institute an action plan only if OSMRE does not expect the SRA to resolve the State regulatory program issue within 180 days after identification or that it is likely to result in a violation of the approved State program. Instead, the final rule includes a 60-day period for development and approval of an action plan for all State regulatory program issues. These changes also emphasize that State regulatory program issues will start as possible violations under 30 CFR part 842, which is consistent with the revised definition of State regulatory program issue at § 733.5. Finally, the revised provision includes the 10-day interim remedial measure language.

Comment: Some commenters supported the added language to § 733.12(b) that requires OSMRE to develop action plans in consultation with SRAs.

Response: OSMRE appreciates the support for this aspect of the rule. OSMRE recognizes that it is vitally important for an SRA to have input into an action plan that is developed to resolve a violation because the States primarily implement SMCRA on non-Federal, non-Indian lands within their borders, subject to OSMRE's oversight.

Comment: Some commenters asserted that action plan time frames are too short, especially if the SRA needs to develop regulations or seek legislative changes from the State legislature, which may have short legislative sessions, or if there is litigation that affects the resolution of the State regulatory program issue.

Response: OSMRE disagrees. OSMRE thoroughly considered these comments and concludes that the time frames in final § 733.12(b) are sufficient and appropriate for what the action plan requires. As explained in section I.B of this preamble, OSMRE, in general, does not expect that final resolution of an issue could exceed one year. *See also* 88 FR at 24950. Instead, when developing an action plan, OSMRE and the SRA must give careful consideration to objectives that can be completed within the specified time frame, such as proposing a State program amendment (rather than having a State program amendment approved).

Further, regarding the 10 days for interim measures, identification of these measures is not mandatory. The final regulatory language uses the phrase ''*may* identify interim measures that may abate the existing condition or issue.'' (Emphasis added.) If 10 days is not sufficient or feasible, OSMRE and the SRA will not need to develop interim measures. The provision serves the purpose of highlighting and emphasizing the utility of identifying interim measures that may abate a violation as soon as possible. Even if these measures are not identified within 10 days, nothing prevents an SRA from later identifying such measures at any time to ameliorate or resolve an underlying violation or issue.

OSMRE also concludes that 60 days is adequate for development of an action plan, with the understanding that development and approval of an action plan does not mean that any of the requirements of the action plan need to be completed within 60 days.

Comment: One commenter noted that there is no provision for an SRA appeal of an OSMRE-developed action plan.

Response: Under this final rule, OSMRE contemplates that development of an action plan will be a joint effort between OSMRE and an SRA. However, under final § 773.12(b)(4), if the SRA does not cooperate in developing the action plan, OSMRE will develop, and require the State to comply with, the action plan. The Federal regulations provide that any written decision of the Director or their designee may be appealed to the Interior Board of Land Appeals if the decision specifically grants such an appeal. 43 CFR 4.1281. Thus, it will be up to the OSMRE Director or designated official to make a case-by-case determination if the action plan warrants IBLA appeal rights.

Comment: One commenter noted there are no OSMRE time frames required during its action plan development, and violations could remain unabated while OSMRE develops or considers an action plan.

Response: SMCRA does not have concrete time frames for OSMRE to determine whether it has reason to believe a violation exists. In like manner, this final rule does not create time frames for OSMRE to determine that there is a State regulatory program issue. However, the non-mandatory 10-day period for OSMRE and the SRA to develop interim measures in this final rule demonstrates OSMRE's commitment to addressing on-the-ground issues quickly even while the action plan is being developed. OSMRE will, of course, continue to monitor the underlying situation and make every effort to ensure that an underlying violation does not become an imminent harm if it is being addressed through an action plan.

I. 30 CFR 733.12(b)(1) Through (4)

Summary of final rule revisions to 30 CFR 733.12 (b)(1) through (4): In the first sentence of existing 30 CFR 733.12(b)(1), the final rule repeats the word ''identify'' before ''an effective mechanism for timely correction'' for clarity. This is a non-substantive change. The final rule also modifies § 733.12(b)(1) by adding a new second sentence that would require the SRA to ''complete all identified actions contained within an action plan within 365 days from when OSMRE sends the action plan to the relevant State regulatory authority.'' The 365-day requirement is discussed in section I.B of this preamble and in response to other comments in this section. OSMRE also finalized § 733.12(b)(2) as proposed by adding ''upon approval of the action plan'' to the end of the existing section. This change clarifies that an approved action plan will identify any remedial measures that an SRA must take immediately after the action plan is approved. Additional non-substantive changes to 30 CFR 733.12(b)(3) that were presented in the proposed rule are included in this final rule.

Finally, OSMRE introduced in the proposed rule a new § 733.12(b)(4) to enable OSMRE to develop and approve an action plan unilaterally if the SRA does not cooperate in a manner

sufficient to develop such a plan. OSMRE would develop the action plan in accordance with the requirements of § 733.12(b)(1) through (3) and require the State to comply with the action plan. This will ensure timely resolution of violations. Further discussion of the changes to existing 30 CFR 733.12(b) can be found in the preamble to the proposed rule, 88 FR at 24958.

Comment: One commenter asserted that the proposed rule seeks to treat State regulatory program issues as potential violations and resolved under part 842 of this chapter, which aligns with SMCRA and should be finalized.

Response: As discussed, requiring OSMRE to issue TDNs for 30 CFR part 733 State regulatory program issues (*i.e.,* permit defects) more closely aligns with the text of SMCRA and congressional intent regarding TDNs. Consistent with the revised definition of State regulatory program issue at final § 733.5, OSMRE notes that State regulatory program issues will initially be considered as possible violations and will initially proceed, and may be resolved, under 30 CFR part 842. However, OSMRE also notes that while it will consider all possible violations initially under part 842, there may be instances when it makes more sense to handle certain possible violations solely through the part 733 action plan process rather than through the TDN process. Even in these instances, the new action plan time frames and requirements in § 733.12(b) will ensure that these situations do not take any longer than the TDN process, which will lead to timely resolution of underlying issues.

Comment: One commenter noted that the proposed rule acknowledged the need to address programmatic issues with SMCRA implementation by the State regulator through part 733, while also ensuring timely and direct enforcement of permit-related violations.

Response: OSMRE agrees with the commenter that the State regulatory authority is responsible for addressing violations and State regulatory program issues. As acknowledged by the commenter, SMCRA provides mechanisms to address violations and State regulatory program issues. SMCRA section 521(a), as implemented at 30 CFR 842.11, is intended to address all possible violations of SMCRA or a State regulatory program. SMCRA 521(b), as implemented at 30 CFR 733.12, is intended to address issues that arise from a State's implementation of its approved SMCRA program. In this final rule, all possible violations will initially be considered under 30 CFR part 842. Violations that indicate problems with SMCRA implementation may be addressed under the TDN process if the issue is limited in scope and can be successfully resolved within the confines of the TDN process. However, OSMRE believes most systemic issues will be addressed through a State regulatory authority program issue and addressed with a corrective action plan under 30 CFR 733.12.

Comment: One commenter stated that it is not clear how the revisions prevent duplication and confusion when OSMRE receives a citizen complaint related to a State regulatory program issue.

Response: When OSMRE receives a citizen complaint, OSMRE will review the information contained in the complaint, information in its files at the time the complaint is received, and publicly available electronic information to determine if OSMRE has reason to believe a violation exists. If OSMRE has reason to believe a violation exists, it will communicate this possible violation to the SRA via a TDN. There is no redundancy in this process. If the State is already aware of the issue, it can respond to the TDN that there is no violation of the State program, the State has taken appropriate action to abate the issue, the State is in the process of developing an abatement plan, or the State needs additional time to fully consider if the issue is a violation. And, short of an imminent harm scenario, OSMRE would only conduct a Federal inspection and take any corresponding enforcement action if the State does not respond in ten days or its response to the TDN is arbitrary, capricious, or an abuse of discretion.

Comment: Some commenters asserted that the State regulatory program issue process identified in the TDN rule will result in Federal assumption and/or control when a State regulatory program issue is identified.

Response: OSMRE disagrees with these commenters. The only way Federal assumption or control of a State program can occur is through the procedures at existing 30 CFR 733.13, which are not a subject of this final rule. Federal assumption of SMCRA jurisdiction cannot occur through the State regulatory program issue process outlined in this final rule at § 733.12. Issuing a TDN in the first instance for a State regulatory program issue and allowing a part 733 action plan to constitute ''good cause'' in response to the TDN is consistent with SMCRA and State primacy.

Comment: One commenter stated that the regulatory text demonstrating deference to States should be reflective of SMCRA regarding Federal inspections.

Response: As OSMRE understands the comment, the commenter claims that OSMRE should not intervene in SRA inspections. If OSMRE has reason to believe a violation exists, OSMRE will send a TDN to the SRA about the possible violation. OSMRE will conduct a Federal inspection only as directed in SMCRA and the implementing regulations at 30 CFR 842.11 if the SRA does not respond in ten days or its response to the TDN is arbitrary, capricious, or an abuse of its discretion. As previously noted, the arbitrary or capricious standard affords a high level of deference to an SRA, and it is fully consistent with SMCRA.

J. 30 CFR 733.12(c)

Summary of final rule revisions to 30 CFR 733.12(c): The final rule includes non-substantive and grammatical changes to existing § 733.12(c) for clarity. These revisions do not change the meaning of the provision.

Comment: See section III.H. (Minor Text Changes and Conforming Edits) for a general comment summary and response.

K. 30 CFR 733.12(d)

Summary of final rule revisions to 30 CFR 733.12(d): As in the proposed rule, in the final rule at § 733.12(d), OSMRE inserted the word ''additional'' before the phrase ''appropriate oversight enforcement action'' to indicate that any oversight enforcement action that OSMRE takes is in addition to an initial TDN or identification of a State regulatory program issue. The final rule ends the sentence there and deletes the last clause of the existing language. The revised provision reads: ''Nothing in this section prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program or OSMRE from taking additional appropriate oversight enforcement action.'' OSMRE deleted the remainder of the sentence because, as explained in section I.B of this preamble, under this final rule, it will no longer be the case that a possible violation could proceed initially as a State regulatory program issue that could subsequently transform into a possible violation that warrants the issuance of a TDN. Instead, under this final rule, OSMRE will consider all possible violations initially under 30 CFR part 842, which may result in the issuance of a TDN.

Comment: None.

V. Severability of Provisions in This Final Rule

The changes to the TDN and Federal inspection provisions at 30 CFR part 842 are intended to be severable from the 30 CFR part 733 provisions for State regulatory program issues and associated action plans. Thus, if any of the provisions of this final rule are stayed or invalidated by a reviewing court, the other provisions could operate independently and would be applicable to the relevant provisions of the existing regulations. For example, if a court were to invalidate any portion of the changes to part 842, the provisions at part 733 could still operate independently. Conversely, if a court were to invalidate any of the provisions at part 733, the provisions at part 842 could still operate independently. Likewise, changes to specific sections within these parts are intended to be severable from the changes to other sections.

VI. Procedural Matters and Required Determinations

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

This rule does not result in a taking of private property or otherwise have regulatory takings implications under Executive Order 12630. The rule primarily concerns Federal oversight of approved State programs and enforcement when permittees and operators are not complying with the law. Therefore, the rule will not result in private property being taken for public use without just compensation. A takings implication assessment is therefore not required.

Executive Order 12866—Regulatory Planning and Review, Executive Order 13563—Improving Regulation and Regulatory Review, and Executive Order 14094—Modernizing Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant under Executive Order 12866, as amended.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that agencies must base regulations on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. OSMRE has developed this final rule in a manner consistent with these requirements.

Executive Order 12988—Civil Justice Reform

This rule complies with the requirements of Executive Order 12988. Among other things, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity; and be written to minimize litigation;

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Executive Order 13132—Federalism

Under the criteria in section 1 of Executive Order 13132, this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. While revising the existing regulations governing the TDN process would have a direct effect on the States and the Federal Government's relationship with the States, this effect would not be significant, as it would neither impose substantial unreimbursed compliance costs on States nor preempt State law. Furthermore, this final rule does not have a significant effect on the distribution of power and responsibilities among the various levels of government. The final rule would not significantly increase burdens on SRAs to address and resolve underlying issues. As such, a federalism summary impact statement is not required.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. OSMRE has evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and determined that it does not have substantial direct effects on Federally recognized Tribes and that consultation under the Department's Tribal consultation policy is not required. Currently, no Tribes have achieved primacy. Thus, this rule will not impact the regulation of surface coal mining operations on Tribal lands. However, OSMRE coordinated with Tribes to inform them of the rulemaking. OSMRE coordinated with the Navajo Nation, Crow Tribe of Montana, Hopi Tribe of Arizona, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Cherokee Nation and did not receive comments or concerns. None of the Tribes requested consultation.

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

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

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

This final rule is not subject to Executive Order 13045 because it does not meet the criteria of Executive Order 12866 section 3(f)(1), as amended, and this action does not concern environmental health or safety risks disproportionately affecting children.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), 15 U.S.C. 3701 *et seq.,* directs Federal agencies to use voluntary consensus standards in their regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. OMB Circular A–119 at page 14. This final rule is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA and is not applicable to this final rule.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* is not required because the rule is covered by a categorical exclusion. Specifically, OSMRE has determined that the final rule is administrative or procedural in nature in accordance with the Department of the Interior's NEPA

regulations at 43 CFR 46.210(i). OSMRE has also determined that the final rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Paperwork Reduction Act

This rule does not impose any new information collection burden under the Paperwork Reduction Act. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 1029–0118. This rule does not impose an information collection burden because OSMRE is not making any changes to the information collection requirements. OSMRE estimates that the number of burden hours associated with TDN processing will stay the same as what is currently authorized by OMB control number 1029–0118.

Regulatory Flexibility Act

OSMRE certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). OSMRE evaluated the impact of the regulatory changes and determined the rule changes would not induce, cause, or create any unnecessary burdens on the public, SRAs, or small businesses; would not discourage innovation or entrepreneurial enterprises; and would be consistent with SMCRA, from which the regulations draw their implementing authority.

Congressional Review Act

The Congressional Review Act (5 U.S.C. 804(2)) requires certain procedures for ''any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

a. an annual effect on the economy of $100 million or more;

b. a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions;

c. significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

OIRA has determined that this rule does not meet those criteria.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector, of $100 million or more in any given year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects

30 CFR Part 733

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 842

Law enforcement, Surface mining, Underground mining.

Delegation of Signing Authority

The action taken herein is pursuant to an existing delegation of authority.

Steven H. Feldgus,

Principal Deputy Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, the Department of the Interior, acting through OSMRE, amends 30 CFR parts 733 and 842 as follows:

PART 733—EARLY IDENTIFICATION OF CORRECTIVE ACTION, MAINTENANCE OF STATE PROGRAMS, PROCEDURES FOR SUBSTITUTING FEDERAL ENFORCEMENT OF STATE PROGRAMS, AND WITHDRAWING APPROVAL OF STATE PROGRAMS

■ 1. The authority citation for part 733 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Revise § 733.5 to read as follows:

§ 733.5 Definitions.

As used in this part, the following terms have the specified meanings:

Action plan means a detailed plan that the Office of Surface Mining Reclamation and Enforcement (OSMRE) prepares to resolve a State regulatory program issue identified during OSMRE's oversight of a State regulatory program and that includes a schedule that contains specific requirements that a State regulatory authority must achieve in a timely manner.

State regulatory program issue means an issue OSMRE identifies during oversight of a State or Tribal regulatory program that may result from a State regulatory authority's implementation, administration, enforcement, or maintenance of all or any portion of its State regulatory program that is not consistent with the basis for OSMRE's approval of the State program. This may include, but is not limited to, instances when a State regulatory authority has not adopted and implemented program amendments that are required under § 732.17 and subchapter T of this chapter, and issues related to the requirement in section 510(b) of the Act that a State regulatory authority must not approve a permit or revision to a permit, unless the State regulatory authority finds that the application is accurate and complete and that the application is in compliance with all requirements of the Act and the State regulatory program. State regulatory program issues will be considered as possible violations and will initially proceed, and may be resolved, under part 842 of this chapter.

■ 3. Revise § 733.12 to read as follows:

§ 733.12 Early identification and corrective action to address State regulatory program issues.

(a) When the Director identifies a State regulatory program issue, he or she should take action to make sure the identified State regulatory program issue is corrected as soon as possible to ensure that it does not become an issue that would give the Director reason to believe that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program.

(1) The Director may become aware of State regulatory program issues through oversight of State regulatory programs or as a result of information received from any source, including a citizen complainant.

(2) If the Director concludes that the State regulatory authority is not effectively implementing, administering, enforcing, or maintaining all or a portion of its State regulatory program, the Director may initiate procedures to substitute Federal enforcement of a State regulatory program or withdraw approval of a State regulatory program, in accordance with § 733.13.

(b) For each State regulatory program issue, the Director or their designee, in consultation with the State regulatory authority, will develop and approve an action plan within 60 days of identification of a State regulatory program issue. Within 10 business days of OSMRE's determination that a State regulatory program issue exists, OSMRE and the State regulatory authority may identify interim remedial measures that may abate the existing condition or issue. The requirements of an action plan are as follows:

(1) An action plan will be written with specificity to identify the State

regulatory program issue and identify an effective mechanism for timely correction. The State regulatory authority must complete all identified actions contained within an action plan within 365 days from when OSMRE sends the action plan to the relevant State regulatory authority.

(2) An action plan will identify any necessary technical assistance or other assistance that the Director or his or her designee can provide and remedial measures that a State regulatory authority must take immediately upon approval of the action plan.

(3) An OSMRE approved action plan must also include:

(i) An action plan identification number;

(ii) A concise title and description of the State regulatory program issue;

(iii) Specific criteria for establishing when complete resolution of the violation will be achieved;

(iv) Specific and orderly sequence of actions the State regulatory authority must take to remedy the problem;

(v) A detailed schedule for completion of each action in the sequence; and

(vi) A clear explanation that if, upon completion of the action plan, the State regulatory program issue is not corrected, the provisions of § 733.13 may be initiated.

(4) Once all items in paragraphs (b)(1) through (3) of this section are satisfactorily addressed, OSMRE will approve the action plan. If the State regulatory authority does not cooperate with OSMRE in developing the action plan, OSMRE will develop the action plan within the guidelines listed in paragraphs (b)(1) through (3) of this section and require the State regulatory authority to comply with the action plan.

(c) All identified State regulatory program issues, and any associated action plans, must be tracked and reported in the applicable State regulatory authority's Annual Evaluation Report. Each State regulatory authority Annual Evaluation Report will be accessible through OSMRE's website and at the relevant OSMRE office. Within each report, benchmarks identifying progress related to resolution of the State regulatory program issue must be documented.

(d) Nothing in this section prevents a State regulatory authority from taking direct enforcement action in accordance with its State regulatory program or OSMRE from taking additional appropriate oversight enforcement action.

PART 842—FEDERAL INSPECTIONS AND MONITORING

■ 4. The authority citation for part 842 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 5. Add § 842.5 to read as follows:

§ 842.5 Definitions.

As used in this part, the following terms have the specified meanings:

Citizen complaint means any information received from any person notifying the Office of Surface Mining Reclamation and Enforcement (OSMRE) of a possible violation of the Act, this chapter, the applicable State regulatory program, or any condition of a permit or an exploration approval. This information must be provided in writing (or orally, followed up in writing).

Ten-day notice means a communication mechanism that OSMRE uses, in non-imminent harm situations, to notify a State regulatory authority under § 842.11(b)(l)(ii)(B)(*1*) and § 843.12(a)(2) of this chapter when an OSMRE authorized representative has reason to believe that any permittee and/or operator is in violation of the Act, this chapter, the applicable State regulatory program, or any condition of a permit or an exploration approval or when, on the basis of a Federal inspection, OSMRE determines that a person is in violation of the Act, this chapter, the applicable State regulatory program, or any condition of a permit or an exploration approval and OSMRE has not issued a previous ten-day notice for the same violation.

■ 6. Amend § 842.11 by:

■ a. Revising paragraphs (b)(1)(i), (b)(1)(ii)(B)*(1)* and *(3),* and (b)(1)(ii)(B)(*4*)(*ii*);

■ b. Redesignating paragraphs (b)(1)(ii)(B)(*4*)(*iii*) through (*v*) as paragraphs (b)(1)(ii)(B)(*4*)(*iv*) through (*vi*), respectively;

■ c. Adding a new paragraph (b)(1)(ii)(B)(*4*)(*iii*); and

■ d. Revising paragraph (b)(2).

The revisions and addition read as follows:

§ 842.11 Federal inspections and monitoring.

* * * * *

(b)(1) * * *

(i) When the authorized representative has reason to believe on the basis of information received from a citizen complainant, information available in OSMRE files at the time that OSMRE is notified of the possible violation (other than information resulting from a previous Federal inspection), and publicly available electronic information, that there exists a violation of the Act, this chapter, the applicable State regulatory program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources; and

(ii) * * *

(B)(*1*) The authorized representative has notified the State regulatory authority of the possible violation and more than ten days have passed since notification, and the State regulatory authority has not taken appropriate action to cause the violation to be corrected or to show good cause for not doing so, or the State regulatory authority has not provided the authorized representative with a response. After receiving a response from the State regulatory authority, but before a Federal inspection, the authorized representative will determine in writing whether the standards for appropriate action or good cause have been satisfied. A State regulatory authority's failure to respond within ten days does not prevent the authorized representative from making a determination, and will constitute a waiver of the State regulatory authority's right to request review under paragraph (b)(1)(iii) of this section. Where appropriate, OSMRE may issue a single ten-day notice for substantively similar possible violations found on two or more permits, including two or more substantively similar possible violations identified in one or more citizen complaints.

* * * * *

(*3*) Appropriate action includes enforcement or other action authorized under the approved State regulatory program to cause the violation to be corrected.

(*4*) * * *

(*ii*) The State regulatory authority has initiated an investigation into a possible violation and has determined that it requires an additional amount of time to determine whether a violation exists. The State regulatory authority may request up to 30 additional days to complete its investigation of the issue; in complex situations, the State regulatory authority may request up to an additional 60 days to complete the investigation. In all circumstances, an extension request must be supported by an explanation of the need for, and the measures being undertaken that justify, an extension, along with any relevant

documentation. The authorized representative has discretion to approve the requested time extension or establish the length of time that the State regulatory authority has to complete its investigation. The sum total of additional time for any one possible violation must not exceed 90 days. At the conclusion of the specified additional time, the authorized representative will re-evaluate the State regulatory authority's response, including any additional information provided;

(*iii*) OSMRE has identified substantively similar possible violations on separate permits and considers the possible violations as a single State regulatory program issue addressed through § 733.12 of this chapter. Previously identified possible violations that were the subject of ten-day notices or subsequent, substantively similar violations may be included in the same State regulatory program issue;

* * * * *

(b)(2) An authorized representative will have reason to believe that a violation, condition, or practice referred to in paragraph (b)(1)(i) of this section exists if the facts that a complainant alleges, or facts that are otherwise known to the authorized representative, support the existence of a possible violation, condition, or practice. In making this determination, the authorized representative will consider information from a citizen complainant, information available in OSMRE files at the time that OSMRE is notified of the possible violation, and publicly available electronic information. All citizen complaints will be considered as requests for a Federal inspection under § 842.12. If the information supplied by the complainant results in a Federal inspection, the complainant will be offered the opportunity to accompany OSMRE on the Federal inspection.

* * * * *

■ 7. Amend § 842.12 by revising paragraph (a) to read as follows:

§ 842.12 Requests for Federal inspections.

(a) Any person may request a Federal inspection under § 842.11(b) by providing to an authorized representative a signed, written statement (or an oral report followed by a signed, written statement) setting forth information that, along with any other information the complainant chooses to provide, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists. In making this determination, the authorized representative will consider information from a citizen complainant, information available in OSMRE files at the time that OSMRE receives the request for a Federal inspection, and publicly available electronic information. The statement must also set forth a phone number, address, and, if available, an email address where the person can be contacted. All citizen complaints under § 842.11(b) will be considered as requests for a Federal inspection. If the information supplied by the complainant results in a Federal inspection, the complainant will be offered the opportunity to accompany OSMRE on the Federal inspection.

* * * * *

[FR Doc. 2024–07248 Filed 4–8–24; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 240304–0068; RTID 0648–XD854]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters (m)) length overall using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the A season apportionment of the 2024 total allowable catch (TAC) of Pacific cod to be harvested.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), April 4, 2024, through 2400 hours, (A.l.t.), December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Krista Milani, 907–581–2062.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season apportionment of the 2024 Pacific cod TAC specified for vessels using jig gear in the BSAI is 1,169 metric tons (mt) as established by the final 2024 and 2025 harvest specifications for groundfish in the BSAI (89 FR 17287, March 11, 2024).

The 2024 Pacific cod TAC allocated to catcher vessels less than 60 feet (18.3 m) length overall (LOA) using hook-and-line or pot gear in the BSAI is 2,767 mt as established by final 2024 and 2025 harvest specifications for groundfish in the BSAI (89 FR 17287, March 11, 2024).

The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that jig vessels will not be able to harvest 1,100 mt of the A season apportionment of the 2024 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*1*). Therefore, in accordance with § 679.20(a)(7)(iv)(C), NMFS apportions 1,100 mt of Pacific cod from the A season jig gear apportionment to the annual amount specified for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

The harvest specifications for 2024 Pacific cod included in final 2024 and 2025 harvest specifications for groundfish in the BSAI (89 FR 17287, March 11, 2024) are revised as follows: 69 mt to the A season apportionment and 848 mt to the annual amount for vessels using jig gear, and 3,867 mt to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. NMFS was unable to publish a notification providing time for public comment because the most recent, relevant data only became available as of April 3, 2024.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: April 3, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–07483 Filed 4–4–24; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 69
Tuesday, April 9, 2024

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

FEDERAL ELECTION COMMISSION

11 CFR Part 113

[Notice 2024–09]

Use of Campaign Funds for Candidate and Officeholder Security

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission proposes to amend its regulations regarding the use of campaign funds to pay for security measures for federal candidates and officeholders. The proposed rule would codify several Commission advisory opinions that authorized the use of campaign funds to pay for certain security measures and address additional issues raised in those advisory opinions. The Commission seeks comment on the proposed rule and has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before June 10, 2024. The Commission may hold a public hearing on this Notice. Commenters wishing to testify at a hearing must so indicate in their comments. If a hearing is to be held, the Commission will publish a notice in the **Federal Register** announcing the date and time of the hearing.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's website at *http://sers.fec.gov/fosers,* reference REG 2024–01. Alternatively, comments may be submitted in paper form addressed to the Federal Election Commission, Attn.: Mr. Robert M. Knop, Assistant General Counsel for Policy, 1050 First Street NE, Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Robert M. Knop, Assistant General Counsel for Policy, Luis M. Lipchak, Attorney, Anthony T. Buckley, Attorney, or Joseph P. Wenzinger, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission proposes to amend its regulations to clarify that federal candidates and officeholders may use campaign funds to pay for security measures so long as the security measures address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. The proposed rule would be consistent with Commission advisory opinions that authorized such spending and would address additional issues raised in those advisory opinions. The Commission invites public comments on this proposed rule.

I. Background

A. Act and Commission Regulations

The Federal Election Campaign Act (the ''Act'') [1] identifies six categories of permissible uses of contributions accepted by a federal candidate, two of which are ''ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office,'' and ''any other lawful purpose not prohibited by 52 U.S.C. 30114(b).'' [2] Under 52 U.S.C. 30114(b), contributions accepted by a candidate may not be converted to ''personal use'' by any person.

The Act and Commission regulations define ''personal use'' as the use of campaign funds ''to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office.'' [3] The Act and Commission regulations provide a non-exhaustive list of expenses that, when paid using campaign funds, constitute *per se* conversion of those funds to personal use.[4] The Commission determines on a case-by-case basis whether the use of campaign funds to pay expenses other than those listed would be a prohibited conversion of the funds to personal use.[5]

The Commission has long recognized that if a candidate ''can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.'' [6]

B. Security Measures

Neither the Act nor Commission regulations identify the use of campaign funds to pay for the costs of security measures for federal candidates or officeholders as *per se* personal use. In several advisory opinions, however, the Commission has permitted the use of campaign funds to pay for various security measures for federal candidates or officeholders.

The Commission has issued several advisory opinions authorizing the use of campaign funds for certain home security upgrades to protect against threats to the physical safety of federal officeholders and their families.[7] The facts presented in those advisory opinions indicated that the threats were motivated by the requestors' public roles as federal officeholders, candidates, or both. The Commission

[1] 52 U.S.C. 30101–45.

[2] 52 U.S.C. 30114(a); *see also* 11 CFR 113.2(a)–(e).

[3] 52 U.S.C. 30114(b)(2); *see also* 11 CFR 113.1(g) (defining ''personal use'').

[4] *See* 52 U.S.C. 30114(b)(2); 11 CFR 113.1(g)(1)(i).

[5] *See* 11 CFR 113.1(g)(1)(ii) (providing non-exhaustive list of expenses to be determined for personal use on a case-by-case basis).

[6] Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995).

[7] *See* Advisory Opinion 2022–02 (Steube) at 5 (approving use of campaign funds for the cost of a locking steel security gate at the federal officeholder's residence); Advisory Opinion 2020–06 (Escobar) at 2 (authorizing the use of campaign funds for security lighting and wiring at a federal officeholder's residence); Advisory Opinion 2011–17 (Giffords) at 3 (approving use of campaign funds for installing improved exterior lighting, improved locks, and a duress alarm button); Advisory Opinion 2011–05 (Terry) at 4 (approving use of campaign funds for installation of an exterior closed circuit television monitor); Advisory Opinion 2009–08 (Gallegly) at 4 (approving use of campaign funds for non-structural upgrades to home security system).

determined in each instance that the expenses for the proposed security upgrades would not have existed irrespective of the requestors' duties as federal officeholders or candidates.[8] Therefore, the Commission concluded that the use of campaign funds to pay for the security upgrades was permissible under the Act and Commission regulations.[9]

The Commission also has previously considered the implications of the heightened threat environment faced by Members of Congress collectively, necessitating increased residential security measures even if an individual Member has not received direct threats. For example, in Advisory Opinion 2017–07 (Sergeant at Arms), the Commission considered information from the House Sergeant at Arms about the threats faced by Members of Congress due to their status as federal officeholders, and the recommendations of the Capitol Police that Members of Congress install or upgrade residential security systems to protect themselves and their families in response to those threats. In light of that information, the Commission concluded that certain costs of installing or upgrading home security systems in and around a Member's residence would constitute ordinary and necessary expenses incurred in connection with Members' duties as federal officeholders and that, therefore, Members of Congress may use campaign funds to pay reasonable costs associated with such home security systems.[10]

In two advisory opinions, the Commission has also considered whether campaign funds may be used to pay for window security film as an authorized security enhancement in response to a heightened threat environment faced by federal officeholders.[11] In Advisory Opinion 2022–05 (Crapo), the Commission considered whether campaign funds could be used to pay for a series of residential security enhancements recommended by the U.S. Capitol Police, including the installation of security film ''on all accessible windows to prevent surreptitious observation into the residence.'' [12] Similarly, in Advisory Opinion 2023–04 (Guy for Congress), the Commission considered whether campaign funds could be used to pay for the costs to purchase and install a security window film to protect a Member of Congress's home. The Commission determined in both instances that window security film, as a removeable security measure designed to mitigate potential threats stemming from the Members' duties as federal officeholders, falls within the category of ''non-structural security devices'' for which campaign funds could be used, citing Advisory Opinion 2017–07 (Sergeant at Arms).[13]

The Commission also has permitted the use of campaign funds to pay for security measures beyond home security upgrades.[14] In Advisory Opinion 2021–03 (NRSC *et al.*), the Commission authorized the use of campaign funds to pay for ''bona fide, legitimate, professional personal security personnel'' as ordinary and necessary expenses incurred in connection with an officeholder's duties.[15] The Commission concluded that such expenses were permissible due to the threats arising from members' status as federal officeholders, including the heightened threat environment faced by Members of Congress collectively.[16]

Last, in two advisory opinions the Commission authorized the use of campaign funds to pay for reasonable cybersecurity expenses as ordinary and necessary expenses incurred in connection with duties as a federal officeholder.[17] In those opinions, the Commission also determined that the incidental benefit to others of cybersecurity measures, like the incidental benefit to others of home security measures to protect against physical harm, do not change the conclusion that such expenses are ordinary and necessary expenses incurred in connection with a federal officeholder's duties.[18]

II. Proposed Rule

Consistent with the advisory opinions described above authorizing the use of campaign funds to pay for security measures to protect federal candidates and federal officeholders, the Commission proposes to amend the regulatory definition of personal use to clarify that campaign funds may be spent on certain security measures. A general overview of the proposed rule is followed by specific details of each proposal. The Commission seeks comments on the proposed rule and emphasizes that it has not made any final decisions on whether or how to amend its regulations.

A. Overview

The Commission's current regulations at 11 CFR 113.1(g)(1) through (9) address the personal use of campaign funds. The Commission proposes to add a new paragraph (g)(10) to address the use of campaign funds for security measures.

Proposed 11 CFR 113.1(g)(10) would provide that the use of campaign funds to pay for the reasonable costs of security measures for a federal candidate or federal officeholder is not personal use. The new regulation would only permit the use of campaign funds to pay for security measures that address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. The proposed regulation would require that disbursements for security measures be for the usual and normal charge for such goods and services. Categories of permissible security measures and examples of such measures would be listed in the following subparagraphs.

Although the advisory opinions discussed above explicitly addressed only federal officeholders or individuals who were both federal candidates and federal officeholders, the proposed rule would apply to all candidates, including those who are not officeholders. This is consistent with the statutory and

[8] Additionally, in Advisory Opinion 2020–06 (Escobar), the Commission specified that the requested wiring and lighting costs ''constitute an integral part of an ordinary and necessary expense that may be paid with campaign funds.'' Advisory Opinion 2020–06 (Escobar) at 4. Likewise, in Advisory Opinion 2022–02 (Steube), the Commission stated that the requested locking steel gate at the entrance to the property was a ''necessary component'' of a residential security system and the costs of which ''constitute an integral part of an ordinary and necessary expense that may be paid with campaign funds.'' Advisory Opinion 2022–02 (Steube) at 5.

[9] *See* Advisory Opinion 2022–02 (Steube) at 5; Advisory Opinion 2020–06 (Escobar) at 2; Advisory Opinion 2011–17 (Giffords) at 3; Advisory Opinion 2011–05 (Terry) at 4; Advisory Opinion 2009–08 (Gallegly) at 4.

[10] Advisory Opinion 2017–07 (Sergeant at Arms) at 3.

[11] *See* Advisory Opinion 2022–05 (Crapo) at 3 (approving use of campaign funds for the cost of window security film at the federal officeholder's residence); Advisory Opinion 2023–04 (Guy for Congress) at 4 (authorizing the use of campaign funds for window security film at a federal officeholder's residence).

[12] Advisory Opinion 2022–05 (Crapo) at 3.

[13] Advisory Opinion 2022–05 (Crapo) at 5; Advisory Opinion 2023–04 (Guy for Congress) at 4.

[14] *See* Advisory Opinion 2021–03 (NRSC *et al.*) at 2 (concluding that Members of Congress may use campaign funds to pay for bona fide, legitimate, professional personal security personnel to protect themselves and their immediate families due to threats arising from their status as officeholders).

[15] *Id.*

[16] *See id.* at 3.

[17] *See* Advisory Opinion 2018–15 (Wyden) at 4 (permitting use of campaign funds for cybersecurity expenses including hardware, software, consulting services, and emergency assistance); Advisory Opinion 2022–17 (Warren) at 5 (approving use of campaign funds for the incremental costs of professionally managed cybersecurity services for ongoing network monitoring, patch management, backup management, and remote incident remediation).

[18] *See* Advisory Opinion 2022–17 (Warren) at 5.

regulatory framework on the personal use of campaign funds, which generally treats candidates and officeholders the same. Should the rule, if adopted, nonetheless distinguish between a federal officeholder and a candidate who is not a federal officeholder as it pertains to the permissible use of campaign funds to pay for security measures, for example on the grounds that candidates may not necessarily face the same heightened threat environment as sitting Members of Congress?

Proposed 11 CFR 113.1(g)(10)(i) would identify non-structural security devices as a category of security measures for which reasonable expenses would not be personal use and provides a non-exhaustive list of examples of non-structural security devices.

Proposed 11 CFR 113.1(g)(10)(ii) would identify structural security devices as a category of security measures for which reasonable expenses would not be personal use and include a non-exhaustive list of examples of structural security devices. This regulation would only permit structural security measures that are intended solely to provide security and not to improve the property or increase its value.

Proposed 11 CFR 113.1(g)(10)(iii) would identify professional security personnel and services as a category of security measures for which reasonable expenses would not be personal use.

Last, proposed 11 CFR 113.1(g)(10)(iv) would identify cybersecurity software, devices, and services as a category of security measures for which reasonable expenses would not be personal use.

B. Proposed 11 CFR 113.1(g)(10)—Candidate and Federal Officeholder Security

Consistent with the advisory opinions described above, the proposed rule would permit the use of campaign funds to pay for the reasonable costs of security measures so long as the security measures address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. The proposed regulation would require that disbursements for security measures be for the usual and normal charge for such goods or services. The usual and normal charge would be defined as, in the case of goods, the price of those goods in the market in which they are ordinarily purchased, and, in the case of services, the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. The proposed rule would provide a non-exhaustive list of permissible security measures based on the security measures that the Commission has previously approved via advisory opinions. Are ''reasonable costs'' an appropriate standard for determining the amount in campaign funds that may be used to pay for the security measures, or does a reasonableness test invite uncertainty? Should the regulation apply a reasonableness standard to the amount of expenses overall or to the types of security measures for which campaign funds are used? How would the Commission evaluate the reasonableness of overall costs or of costs for specific security measures? What kind of guidelines could the Commission use to evaluate the reasonability of a given expense or of aggregate expenses for security measures? Should the Commission consider different limitations on the security measures or ''ordinary and necessary costs of security measures''? [19] Apart from the reasonability of the amount in campaign funds used to pay for security measures, the Commission is proposing to require that disbursements be for the usual and normal charge for such goods or services. The proposed definition of ''usual and normal charge'' is derived from the Commission's regulation at 11 CFR 100.52(d), describing in-kind contributions. This definition is also consistent with the requirement in 11 CFR 113.1(g)(1)(H), which prohibits a candidate from paying a salary to a family member unless the salary is in exchange for *bona fide* services and the salary payment is for the fair market value of the services. This is intended to prevent candidates or officeholders from converting campaign funds to personal use by paying friends or family members above-market rates for security-related goods and services and to ensure that candidates and officeholders do not receive a potentially impermissible in-kind contribution from vendors.[20] Should the Commission consider any other limitations to ensure that candidates and officeholders don't enrich friends and family members?

The requirement that threats be ''ongoing'' is meant to be flexible and permissive, but to still set some concrete limits on uses, such as after threats subside or the person is no longer an officeholder or candidate. Is ''ongoing'' appropriate limiting language to qualify under the rule? Should the Commission use different limiting language on the nature of the threats in addition to or instead of ''ongoing'' (*e.g.,* ''direct,'' ''specific'' or ''persistent'')? If a security measure is taken in response to a specific threat, as opposed to the ''heightened threat environment'' discussed below, should the Commission require that such threat or threats be reported to law enforcement before a committee may use campaign funds to pay for security measures related to that threat?

Several advisory opinions have approved the use of campaign funds for security measures due to ongoing—but not necessarily specific—threats to the requestors due to their status as federal officeholders and considering the ''heightened threat environment'' in recent years.[21] Should the rule explicitly require that candidates or officeholders face a ''heightened threat environment''? If so, should the rule explain how the Commission will evaluate whether there is a ''heightened threat environment''? How would the Commission evaluate whether a ''heightened threat environment'' no longer exists?

The Commission has followed Advisory Opinion 2017–07 (Sergeant at Arms) in concluding there is a ''heightened threat environment'' in more recent advisory opinions, but should the rule allow other bases for establishing threats or dangers, such as a law enforcement opinion or some other standard? Should a law enforcement or a professional security firm's recommendation be required before a candidate or officeholder may purchase security measures with campaign funds, or should such recommendation at least establish a presumption that the security measures do ''address'' an ongoing danger or threat? The Commission does not intend for the proposed rule to encompass privacy measures that do not provide a security function, *e.g.* privacy hedges or one-way mirror glass. Does the use of the term ''security measures'' in the proposed rule address that distinction or is additional clarification needed in the rule?

In addition to candidates and officeholders, should the rule also permit campaign funds to be used to pay for security measures specifically for staff members of a candidate or officeholder, for example, to pay for security measures to protect a staff member's house? Further, should the rule also permit campaign funds to be used to pay for security measures for the candidate or officeholder's family,

[19] *See, e.g.,* 11 CFR 100.52(d)(2), 11 CFR 100.111(e)(2).

[20] *See* Advisory Opinion 2022–17 (Warren) fn. 22.

[21] *See* Advisory Opinion 2021–03 (NRSC *et al.*); Advisory Opinion 2017–07 (Sergeant at Arms).

including family members that do not reside with the candidate or officeholder? To ensure that security measures are primarily for the protection and benefit of a federal candidate or federal officeholder and no other persons, should the rule further stipulate that any benefits accruing to other household members or visitors from the security measures must be ''incidental'' to the protection of the candidate or officeholder? [22] Should certain security measures be explicitly permitted for the family members of candidates or officeholders? [23]

Finally, should the Commission require any recordkeeping requirements beyond those that apply to all disbursements by an authorized committee? [24]

C. Proposed 11 CFR 113.1(g)(10)(i)—Non-Structural Security Devices

Under existing regulations, the Commission has authorized the use of campaign funds for non-structural security devices in several prior advisory opinions under the rationale that expenses for such security measures would not exist irrespective of the duties of a federal officeholder or candidate.[25]

Proposed 11 CFR 113.1(g)(10)(i) would identify non-structural security devices as a category of security measures for which reasonable expenses would not be personal use and provides a non-exhaustive list of examples of non-structural security devices that includes security hardware, locks, alarm systems, motion detectors, and security camera systems.

Are there additional examples of ''non-structural security devices'' that should be explicitly listed in this category? For example, should the rule explicitly allow payments for ''training and equipment for personal defense?'' Should the use of these devices be further limited in any way, for example limiting the use of transportable security devices only to residences or offices?

D. Proposed 11 CFR 113.1(g)(10)(ii)—Structural Security Devices

The Commission has previously concluded that the use of campaign funds for certain structural security devices, such as wiring, lighting, gates, doors, and fencing, would not be personal use so long as they are not intended to improve the property or increase its value. The Commission reasoned that such expenses were ordinary and necessary expenses related to the duties of a federal candidate or federal officeholder.[26] Proposed 11 CFR 113.1(g)(10)(ii) would identify structural security devices as a category of security measures for which reasonable expenses may be paid for using campaign funds by federal officeholders and candidates. Proposed 11 CFR 113.1(g)(10)(ii) would also include a non-exhaustive list of examples of structural security devices. The proposed rule would only permit structural security measures that are intended solely to provide security and not to improve the property or increase its value.

Should the use of structural security devices be limited to particular properties, such as a candidate or officeholder's residence, which are the only properties for which the Commission has specifically approved structural security devices? [27] Is the limitation on the use of structural security devices—namely that the devices may not be intended to improve the property or increase its value—sufficient or should the Commission use a different limiting language? [28] Should the proposed rule provide that an incidental improvement to the property or the increase in its value as a result of an installation of a structural security device nonetheless would be an acceptable use of campaign funds? [29]

E. Proposed 11 CFR 113.1(g)(10)(iii)—Professional Security Personnel and Services

The Commission has previously authorized the use of campaign funds for personal security expenses for Members of Congress and their families as ordinary and necessary expenses arising from their status as officeholders when they are not under the protection of federal agents.[30] Proposed 11 CFR 113.1(g)(10)(iii) would establish professional security personnel and services as a category of security expenses for which campaign funds may be used.

Under the proposed rule, campaign funds could be used to pay for personal security expenses of federal candidates and officeholders so long as the security measures address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. Should this proposed rule be further limited such that payment for professional security personnel or similar services is permitted only when candidates or officeholders are not already receiving protection from law enforcement? [31] Should the proposed rule explicitly permit the use of campaign funds for professional security personnel or similar services for the immediate family members of federal candidates or federal officeholders? [32] Should the proposed rule require that professional security personnel be *bona fide,* legitimate, professional personal security or have additional qualifications or licenses?

F. Proposed 11 CFR 113.1(g)(10)(iv)—Cybersecurity Software, Devices, and Services

Lastly, in two prior instances, the Commission has authorized the use of campaign funds for cybersecurity measures including software, devices, and services as ordinary and necessary expenses related to a federal officeholder's duties.[33] Proposed 11

[22] *See* Advisory Opinion 2022–17 (Warren) at 5 (concluding that candidate and officeholder may use campaign funds for cybersecurity measures to protect her home network, notwithstanding that family members and visitors may also connect their personal devices to candidate's home network, so long as any benefit to others are incidental).

[23] *See* Advisory Opinion 2021–03 (NRSC *et al.)* at 2.

[24] *See* 11 CFR 102.9.

[25] *See* Advisory Opinion 2011–17 (Giffords) at 3 (approving use of campaign funds for security expenses that would not exist irrespective of duties as a federal officeholder or candidate); Advisory Opinion 2011–05 (Terry) at 4 (same); and Advisory Opinion 2009–08 (Gallegly) at 4 (same). *See also* 2017–07 (Sergeant at Arms) at 2 (concluding that Members of Congress may use campaign funds for security expenses as ordinary and necessary expenses); Advisory Opinion 2018–15 (Wyden) at 3 (concluding that campaign funds can be used to pay for cybersecurity expenses as they are ordinary and necessary expenses in connection with duties of a federal office holder).

[26] *See* Advisory Opinion 2020–06 (Escobar) at 3 (authorizing the use of campaign funds for security lighting and wiring at member's residence); Advisory Opinion 2022–02 (Steube) at 5 (permitting the use of campaign funds for the installation of a security gate at member's residence).

[27] *See* Advisory Opinion 2020–06 (Escobar) at 3 (authorizing the use of campaign funds for security lighting and wiring at member's residence); Advisory Opinion 2022–02 (Steube) at 5 (permitting the use of campaign funds for the installation of a security gate at member's residence); Advisory Opinion 2022–05 (Crapo) at 5 (concluding that campaign funds can be used for various security upgrades at member's residences).

[28] *See* Advisory Opinion 2022–02 (Steube) at 4–5 (''[T]he purchase and installation of the gate is intended to provide an effective security system and is not intended for the purpose of improving your home.''); Advisory Opinion 2020–06 (Escobar) at 3 (approving use of campaign funds for installation of security lighting and wiring ''meant solely for supporting the effectiveness of the security system and not as an 'improvement' to your home.'').

[29] *Id.*

[30] *See* Advisory Opinion 2021–03 (NRSC *et al.*) at 3 (concluding that Members of Congress may use campaign funds to pay for security personnel to protect themselves and their immediate families due to threats arising from their status as officeholders ''when federal agents are not protecting the Members or the Members' families.'').

[31] *Id.*

[32] *Id.*

[33] *See* Advisory Opinion 2022–17 (Warren) at 5 (concluding that federal officeholder could use

Continued

CFR 113.1(g)(10)(iv) would establish cybersecurity software, devices, and services as a category of security measures that may be paid for using campaign funds for federal officeholders and candidates. Should this proposed rule be further limited to only those that provide ''incidental'' benefits to persons other than the candidate or officeholder, such as family members or campaign staff, who might also benefit from enhanced cybersecurity'' when using the software, devices, or services provided to the candidate or officeholder? [34] And, if so, should the Commission define the scope of permissible ''incidental'' benefits?

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposed rule would provide flexibility to principal campaign committees that choose to use campaign funds to pay for security measures for federal candidates or officeholders. Any proposed rule that could be construed as placing an obligation on a principal campaign committee would apply only to campaigns that choose to pay for security measures for federal candidates or officeholders. This proposed rule would not impose any new recordkeeping, reporting, or financial obligations on principal campaign committees that do not choose to pay for security measures for federal candidates or officeholders, and any such new obligations that may be imposed on principal campaign committees that do choose to pay for such security measures would be minimal. Thus, to the extent that any entities affected by these proposed rules might fall within the definition of ''small businesses'' or ''small organizations,'' the economic impact of complying with this rule would not be significant.

List of Subjects in 11 CFR Part 113

Campaign funds.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend 11 CFR part 113 as follows:

PART 113—PERMITTED AND PROHIBITED USES OF CAMPAIGN ACCOUNTS

■ 1. The authority citation for part 113 continues to read as follows:

Authority: 52 U.S.C. 30102(h), 30111(a)(8), 30114, and 30116.

■ 2. In § 113.1, add paragraph (g)(10) to read as follows: § 113.1 Definitions (52 U.S.C. 30114).

* * * * *

(g) * * *

(10) *Candidate and federal officeholder security.* The use of campaign funds to pay for the reasonable costs of security measures for a federal candidate or federal officeholder is not personal use, so long as the security measures address ongoing dangers or threats that would not exist irrespective of the individual's status or duties as a federal candidate or federal officeholder. Disbursements for security measures must be for the usual and normal charge for such goods or services. *Usual and normal charge* means, in the case of goods, the price of those goods in the market in which they are ordinarily purchased, and, in the case of services, the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. Examples of such security measures include, but are not limited to:

(i) Non-structural security devices, such as security hardware, locks, alarm systems, motion detectors, and security camera systems;

(ii) Structural security devices, such as wiring, lighting, gates, doors, and fencing, so long as such measures are intended solely to provide security and not to improve the property or increase its value;

(iii) Professional security personnel and services;

(iv) Cybersecurity software, devices, and services.

Dated: March 27, 2024.

On behalf of the Commission.

Sean J. Cooksey,

Chairman, Federal Election Commission.

[FR Doc. 2024–06863 Filed 4–8–24; 8:45 am]

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campaign funds for cybersecurity improvements to her home network without violating the prohibition against personal use ''so long as the benefits accruing to household members and visitors required by the protection of the home network are incidental.''); Advisory Opinion 2018–15 (Wyden) at 4 (concluding that the use of campaign funds to pay for certain cybersecurity measures for United States Senators would constitute ordinary and necessary expenses incurred in connection with their duties as federal officeholders.)

[34] *See* Advisory Opinion 2022–17 (Warren) at 5.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0996; Project Identifier AD–2023–00365–Q]

RIN 2120–AA64

Airworthiness Directives; Various Airplanes and Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2021–07–13, which applies to certain Pacific Scientific Company rotary buckle assemblies (buckles). AD 2021–07–13 requires inspecting each buckle including its buckle handle vane, and depending on the results, removing the buckle from service and installing an airworthy buckle. AD 2021–07–13 also prohibits installing affected buckles. Since the FAA issued AD 2021–07–13, the manufacturer published an updated service bulletin, which revises the applicability based on date of manufacture of the affected buckles. This proposed AD would retain certain requirements of AD 2021–07–13. This proposed AD would also reduce the applicability to plastic buckles manufactured on or before May 31, 2007, or any buckle assembly whose date of manufacture cannot be determined. Additionally, this proposed AD would require performing corrective actions by complying with certain portions of the updated service bulletin. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 24, 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* by searching

for and locating Docket No. FAA–2024–0996; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Parker Meggitt Services, 1785 Voyager Ave., Simi Valley, CA 93063; phone: (877) 666–0712; email: *TechSupport@meggitt.com.*
- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Other Related Service Information: For other service information identified in this NPRM, contact Parker Meggitt Services, at the Parker Meggitt Services contact information under *Material Incorporated by Reference* above. You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Hal Jensen, Aviation Safety Engineer, FAA; 3960 Paramount Boulevard, Lakewood, CA 90712; phone (303) 342–1080; email *hal.jensen@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–2024–0996; Project Identifier AD–2023–00365–Q'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Hal Jensen, Aviation Safety Engineer, FAA; 3960 Paramount Boulevard, Lakewood, CA 90712; phone (303) 342–1080; email *hal.jensen@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2021–07–13, Amendment 39–21490 (86 FR 17703, April 6, 2021) (AD 2021–07–13), for Pacific Scientific Company buckles part numbers 1111430 and 1111475, all dash numbers, installed on but not limited to Bombardier Inc., Learjet Inc., Mitsubishi Heavy Industries, Ltd., Textron Aviation, Inc. (type certificate (TC) previously held by Cessna Aircraft Company), and Viking Air Limited (TC previously held by de Havilland, Inc.) model airplanes and Airbus Helicopters (TC previously held by Eurocopter France) model helicopters. AD 2021–07–13 was prompted by European Union Aviation Safety Agency (EASA) AD 2007–0256, dated September 19, 2007 (EASA AD 2007–0256), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for certain Pacific Scientific Company Seat Restraint System Plastic Rotary Buckle Handles. According to EASA, Pacific Scientific Company reported several instances of cracked handles on certain buckles with a date of manufacture from November 2004 through May 2007. EASA later cancelled EASA AD 2007–0256 and adopted FAA AD 2021–07–13.

Accordingly, AD 2021–07–13 requires inspecting each buckle including its buckle handle vane, and depending on the results, removing the buckle from service and installing an airworthy buckle. AD 2021–07–13 also prohibits installing the affected buckles on any airplane or helicopter. The FAA issued AD 2021–07–13 to prevent a strap from not releasing as intended when the buckle is rotated.

Actions Since AD 2021–07–13 Was Issued

Since the FAA issued AD 2021–07–13, the manufacturer determined that the cracking on the buckle handle was caused by a material process issue and stated that the issue was resolved in 2007. Accordingly, the manufacturer published revised service information to revise the applicability by date of manufacture and clarify procedures.

Consequently, this proposed AD would revise the applicability to plastic buckles with a date of manufacture on or before May 31, 2007, or buckles whose date of manufacture cannot be determined, except not those buckles repaired with the installation of an airworthy buckle handle after May 31, 2007, and marked with a BLUE logo on the center button. This proposed AD would also clarify that the unsafe condition could result in occupants not being able to release the buckle in certain emergency landing conditions. Furthermore, this proposed AD would also require using the revised service information to accomplish its requirements. Lastly, the FAA has determined that adding a special flight permit limitation in this proposed AD is necessary.

Additionally, this NPRM would update the contact information to obtain service information, and move and update the contents of Note 1 in AD 2021–07–13 to the preamble of this NPRM.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other airplanes and helicopters with a restraint system with a certain buckle installed as part of their type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Parker Meggitt Service Bulletin SB 25–1111432, Revision 002, dated September 12, 2023 (SB 25–1111432 Rev 002), which specifies instructions for inspecting certain buckles for a crack, and measuring each buckle handle vane for correct thickness. SB 25–1111432 Rev 002 also specifies instructions for corrective actions, including but not limited to, removing and returning the buckle assembly or restraint assembly to Parker Meggitt for overhaul or replacement; and removing the buckle assembly or restraint assembly and replacing them with spare, new, or

repaired assemblies. An applicable buckle may be included as a component of a different part-numbered restraint system assembly. Table 1 of SB 25–1111432 Rev 002 identifies restraint system P/Ns that may be affected.

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**.

Other Related Service Information

The FAA also reviewed Meggitt Service Information Letter SIL Restraint–25–002–2023, dated January 24, 2023, which contains additional information specifying how to locate the date of manufacture on each buckle.

Proposed AD Requirements in This NPRM

This proposed AD would retain certain requirements of AD 2021–07–13. This proposed AD would also reduce the applicability paragraph to apply to plastic buckle assemblies with a certain date of manufacture, or with a date of manufacture not known. This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under ''Differences Between this Proposed AD and the Service Information.''

Differences Between This Proposed AD and the Service Information

Where the service information specifies sending affected parts to the manufacturer, this proposed AD would not. The service information does not specify a compliance time to inspect for a crack or measure for thickness, whereas this proposed AD would require inspecting the buckle handle for a crack within 6 months and measuring the buckle handle vane thickness within 12 months.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect up to 1,435 restraint systems installed on aircraft of U.S. registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

Inspecting each buckle handle for a crack and measuring thickness would take a nominal amount of time.

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

Replacing each buckle would take about 0.5 work-hour and parts would cost about $636 for an estimated cost of $679 per buckle replacement.

Replacing each restraint system would take about 0.5 work-hour and parts would cost about $1,031 for an estimated cost of $1,074 per restraint system replacement.

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 that the 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:

■ a. Removing Airworthiness Directive 2021–07–13, Amendment 39–21490 (86 FR 17703, April 6, 2021); and

■ b. Adding the following new airworthiness directive:

Various Airplanes and Helicopters: Docket No. FAA–2024–0996; Project Identifier AD–2023–00365–Q.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) action by May 24, 2024.

(b) Affected ADs

This AD replaces AD 2021–07–13, Amendment 39–21490 (86 FR 17703, April 6, 2021) (AD 2021–07–13).

(c) Applicability

(1) This AD applies to all airplanes and helicopters, certificated in any category, with a restraint system with a Pacific Scientific Company plastic rotary buckle assembly (buckle) part number (P/N) 1111430 or P/N 1111475 (all dash numbers) installed having a date of manufacture on or before May 31, 2007, or an unknown date of manufacture, except not those buckles repaired with the installation of an airworthy buckle handle after May 31, 2007, and marked with a BLUE logo on the center button.

Note 1 to paragraph (c)(1): Information about the location of the date of manufacture can be found in Meggitt Service Information Letter SIL Restraint–25–002–2023, dated January 24, 2023.

(2) The buckles identified in paragraph (c)(1) of this AD may be installed on, but not limited to, The Boeing Company, Bombardier Inc., Learjet Inc., Mitsubishi Heavy Industries, Ltd., Textron Aviation, Inc. (type certificate (TC) previously held by Cessna Aircraft Company), and Viking Air Limited (TC previously held by de Havilland, Inc.) model airplanes and Airbus Helicopters (TC previously held by Eurocopter France) model helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code: 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports of cracked buckle handles and updated manufacturer service information. The FAA is issuing this AD to inspect for cracks and thickness of the buckle handle. The unsafe condition, if not addressed, could prevent a strap from releasing when the buckle is rotated, which could result in occupants not being able to release the buckle in certain emergency landing conditions.

(f) Compliance

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

(g) Required Actions

(1) Within 6 months after the effective date of this AD, inspect the buckle handle for a crack. If there is any crack, before further flight, remove the buckle from service and replace it with an airworthy buckle, or remove the restraint system from service and replace it with an airworthy restraint system.

(2) Within 12 months after the effective date of this AD, measure the thickness of the buckle handle vane as depicted in Figures 3 and 4 of Parker Meggitt Service Bulletin SB 25–1111432, Revision 002, dated September 12, 2023 (SB 25–1111432 Rev 002). If the buckle handle vane thickness is 0.125 inch or greater, before further flight, remove the buckle from service and replace it with an airworthy buckle, or remove the restraint system from service and replace it with an airworthy restraint system.

Note 2 to paragraph (g)(2): SB 25–1111432 Rev 002 refers to a buckle as both a buckle and buckle assembly, interchangeably.

(3) As of the effective date of this AD, do not install any buckle P/N 1111430 or P/N 1111475 (all dash numbers), with a buckle handle vane thickness of 0.125 inch or greater, or any restraint system with a buckle P/N 1111430 or 1111475 (all dash numbers), with a buckle handle vane thickness of 0.125 inch or greater installed, with the buckle having a date of manufacture on or before May 31, 2007, or if the date of manufacture cannot be determined, on any airplane or helicopter, unless the buckle has been repaired with the installation of an airworthy buckle handle after May 31, 2007, and is marked with a BLUE logo on the center button.

(h) Credit for Previous Actions

If you measured the thickness of the buckle handle vane as required by paragraph (g)(2) of this AD before the effective date of this AD using Pacific Scientific Service Bulletin SB 25–1111432, dated May 22, 2007, or using Meggitt Service Bulletin SB 25–1111432, Revision 001, dated May 20, 2021, you have met that requirement.

(i) Special Flight Permits

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 provided that there are no passengers onboard.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, West Certification 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 certification office, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to *9-ANM-LAACO-AMOC@faa.gov.*

(2) 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.

(3) AMOCs approved for AD 2021–07–13 are approved as AMOCs for the corresponding requirements of this AD.

(k) Related Information

(1) For more information about this AD, contact Hal Jensen, Aviation Safety Engineer, FAA; 3960 Paramount Boulevard, Lakewood, CA 90712; phone (303) 342–1080; email *hal.jensen@faa.gov.*

(2) Meggitt and Pacific Scientific service information, that are not incorporated by reference can be found in the contact information identified in paragraph (l)(4) of this AD.

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) Parker Meggitt Service Bulletin SB 25–1111432, Revision 002, dated September 12, 2023.

(ii) [Reserved]

(4) For service information identified in this AD, contact Parker Meggitt Services, 1785 Voyager Ave., Simi Valley, CA 93063; phone: (877) 666–0712; email: *TechSupport@meggitt.com.*

(5) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(6) 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 April 2, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07394 Filed 4–8–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0995; Project Identifier MCAI–2023–01075–T]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain MHI RJ Aviation ULC Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposed AD was prompted by a determination that the overhead bin attachment could fail under certain conditions. This proposed AD would require replacing existing overhead bin hook assemblies and support tubes with a different type, as specified in a Transport Canada AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 24, 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–2024–0995; 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 material that is proposed for IBR in this AD, contact Transport

Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.* It is also available at *regulations.gov* under Docket No. FAA–2024–0995.

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0995; Project Identifier MCAI–2023–01075–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–71, dated October 16, 2023 (Transport Canada AD CF–2023–71) (also referred to after this as the MCAI), to correct an unsafe condition on certain MHI RJ Aviation ULC Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The MCAI states that during a review of the certification test of the overhead bin configuration (also referred to as overhead storage compartment), it was discovered that the aft serrated hook attachment could fail when the overhead bin is subjected to the 9G forward emergency landing condition certification requirements. A design review revealed that a tolerance buildup could lead to a lack of engagement between the serrated hooks and the supporting serrated tube. This condition leads to a lack of forward load reaction capability, which is essential during an emergency landing, and could result in displacement of the overhead bins. As a result, the overhead bins could fall on the occupants and/or prevent access to emergency exits.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0995.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2023–71 specifies procedures for the replacement of the existing serrated hook assemblies and serrated support tubes with hook assemblies using a shear pin and non-serrated support tubes on the overhead bins.

This material 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

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in Transport Canada AD CF–2023–71 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate Transport Canada AD CF–2023–71 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2023–71 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by Transport Canada AD CF–2023–71 for compliance will be available at *regulations.gov* under Docket No. FAA–2024–0995 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 230 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
21 * work-hours × $85 per hour = $1,785	$1,764	$3,549	$816,270

* This figure does not include the time (up to 24 hours) for curing the sealant applied around the new hook assembly.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Docket No. FAA–2024–0995; Project Identifier MCAI–2023–01075–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 24, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, as identified in Transport Canada AD CF–2023–71, dated October 16, 2023 (Transport Canada AD CF–2023–71).

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by a determination that the overhead bin attachment could fail under certain conditions. The FAA is issuing this AD to address a lack of forward load reaction capability during a high forward G emergency landing condition that could result in displacement of the overhead bins. The unsafe condition, if not addressed, could result in the overhead bins falling on the occupants and/or preventing access to emergency exits.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2023–71.

(h) Exception to Transport Canada AD CF–2023–71

(1) Where Transport Canada AD CF–2023–71 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Transport Canada AD CF–2023–71 refers to hours air time, this AD requires using flight hours.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

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

(k) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2023–71, dated October 16, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF–2023–71, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email

TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca. You may find this Transport Canada AD on the Transport Canada website at *tc.canada.ca/en/aviation.*

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

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

Issued on April 2, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07374 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0998; Project Identifier MCAI–2023–01212–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation 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 Dassault Aviation Model FALCON 7X airplanes. This proposed AD was prompted by a determination that non-conforming washers may have been installed in production on engine 1 and 3 forward yokes. This proposed AD would require a one-time inspection for non-conforming washers and, depending on findings, related investigative and corrective actions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by May 24, 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–2024–0998; 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 material that is proposed for IBR in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@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–2024–0998; Project Identifier MCAI–2023–01212–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0208, dated November 22, 2023 (EASA AD 2023–0208) (also referred to after this as the MCAI). The MCAI states that a quality review revealed that non-conforming washers may have been installed in production on engine 1 and 3 forward yokes. This condition, if not addressed, could lead to cracks in the bolts and the engine forward yokes, possibly resulting in loss of a lateral engine.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0998.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0208 specifies procedures for a one-time inspection for non-conforming (non-compliant) double countersink washers on the engine 1 and 3 forward yokes, installing the engine 1 and 3 forward yokes with new attachments, and, depending on findings, related investigative and corrective actions. Related investigative and corrective actions include a special

detailed fatigue inspection for cracking of the engine forward yokes and replacement if any cracking is found.

This material 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

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2023–0208 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0208 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0208 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0208 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0208. Service information required by EASA AD 2023–0208 for compliance will be available at *regulations.gov* under Docket No. FAA–2024–0998 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 8 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
8 work-hours × $85 per hour = $680	$16,280	$16,960	$135,680

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
8 work-hours × $85 per hour = $680	$33,170	$33,850

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Dassault Aviation: Docket No. FAA–2024–0998; Project Identifier MCAI–2023–01212–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by May 24, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2023–0208, dated November 22, 2023 (EASA AD 2023–0208).

(d) Subject

Air Transport Association (ATA) of America Code 71, Powerplant.

(e) Unsafe Condition

This AD was prompted by a determination that non-conforming washers may have been installed in production on engine 1 and 3 forward yokes. The FAA is issuing this AD to address a condition that could lead to cracks in the bolts and the engine forward yokes. The unsafe condition, if not addressed, could result in loss of a lateral engine.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0208.

(h) Exceptions to EASA AD 2023–0208

(1) Where paragraph (2) of EASA AD 2023–0208 specifies to ''accomplish the corrective actions,'' replace that text with ''accomplish a special detailed fatigue inspection to detect cracking of the engine forward yoke, and replace before further flight if any cracking is found.''

(2) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0208.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email: *tom.rodriguez@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0208, dated November 22, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0208, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

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

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

Issued on April 2, 2024.

Victor Wicklund,

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

[FR Doc. 2024–07373 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA1156]

Announcement of Hearing: Schedules of Controlled Substances: Placement of 2,5-dimethoxy-4-iodoamphetamine (DOI) and 2,5-dimethoxy-4-chloroamphetamine (DOC) in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notification of hearing on proposed rulemaking.

SUMMARY: This is notification that the Drug Enforcement Administration will hold a hearing with respect to the proposed placement of two phenethylamine hallucinogens, as identified in the proposed rule, in schedule I of the Controlled Substances Act.

DATES: The hearing will commence on June 10, 2024, at 9 a.m. ET at the DEA Hearing Facility, 700 Army Navy Drive, Arlington, VA 22202. The hearing may be moved to a different place and may be continued from day to day or recessed to a later date without notice other than announcement thereof by the Administrative Law Judge at the hearing. 21 CFR 1316.53.

FOR FURTHER INFORMATION CONTACT: Hearing Clerk, Debralynn Rosario, Office of the Administrative Law Judges, 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–7035.

SUPPLEMENTARY INFORMATION:

Background

On December 13, 2023, the Drug Enforcement Administration published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (88 FR 86278) to place two phenethylamine hallucinogen substances in schedule I of the Controlled Substances Act (CSA) (21 U.S.C. 801, *et seq.*). Specifically, in this NPRM, DEA proposed to schedule the following two controlled substances in schedule I of the CSA, including their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- 2,5-dimethoxy-4-iodoamphetamine (DOI), and
- 2,5-dimethoxy-4-chloroamphetamine (DOC).

Pursuant to that notice provided in the NPRM, three (3) requests for hearing

were filed with DEA. Upon review of the requests for hearings, I have authorized a hearing, and direct the Chief Administrative Law Judge to assign the matter to an Administrative Law Judge who will complete all prehearing procedures, conduct a due process hearing in accordance with the Administrative Procedure Act (5 U.S.C. 551–559), the CSA (21 U.S.C. 811, *et seq.*), and the DEA regulations, and issue a recommended decision for the Agency's review and action.

Hearing Notification

Pursuant to 21 U.S.C. 811(a), 21 CFR 1308.44, and 21 CFR 1316.47, DEA is convening a hearing on the NPRM. Accordingly, the hearing will commence on June 10, 2024, at 9 a.m. ET at the DEA Hearing Facility, 700 Army Navy Drive, Arlington, VA 22202. The hearing may be moved to a different place and may be continued from day to day or recessed to a later date without notice other than announcement thereof by the Administrative Law Judge at the hearing. 21 CFR 1316.53.

Signing Authority

This document of the Drug Enforcement Administration was signed on March 28, 2024, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2024–07473 Filed 4–8–24; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 101 and 160

[Docket No. USCG–2022–0802]

RIN 1625–AC77

Cybersecurity in the Marine Transportation System

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; extension of the comment period.

SUMMARY: On February 22, 2024, the Coast Guard published a proposed rule in the **Federal Register** proposing to update maritime security regulations by adding regulations specifically focused on establishing minimum cybersecurity requirements for U.S.-flagged vessels, facilities on the Outer Continental Shelf, and U.S. facilities subject to regulations under the Maritime Transportation Security Act of 2002. The Coast Guard is extending the comment period for the proposed rulemaking for an additional 30 days through May 22, 2024, in response to requests for additional time. We invite comments on our proposed rulemaking.

DATES: The comment period for the proposed rulemaking published on February 22, 2024, at 89 FR 13404 is extended. Comments and related material must be received by the Coast Guard on or before May 22, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0802 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document, email *MTSCyberRule*@uscg.mil or call Commander Brandon Link, Office of Port and Facility Compliance, 202–372–1107, or Commander Frank Strom, Office of Design and Engineering Standards, 202–372–1375.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

The Coast Guard views public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this notice for alternate instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. All comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions in response to this document, see the Department of Homeland Security's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

Background and Discussion

On February 22, 2024, the Coast Guard published a notice of proposed rulemaking, ''Cybersecurity in the Marine Transportation System'' (89 FR 13404). In the proposed rule, we propose to update the maritime security regulations by adding regulations specifically focused on establishing minimum cybersecurity requirements for U.S.-flagged vessels, facilities on the Outer Continental Shelf, and U.S. facilities subject to regulations under the Maritime Transportation Security Act of 2002. This proposed rule would help to address current and emerging cybersecurity threats in the marine transportation system. The proposed rule provided for a 60-day comment period, set to close on April 22, 2024.

The Coast Guard has received multiple requests to extend the comment period. The requesters cited the potentially significant impact of this rulemaking on the operations of affected owners and operators, and the need for additional time to adequately comment as reasons for the requested extension. In response to these requests, we have decided to extend the public comment period by 30 days. The comment period is now open through May 22, 2024.

This notice is issued under the authority of 46 U.S.C. 70124.

Dated: April 4, 2024.

W.R. Arguin,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.

[FR Doc. 2024–07512 Filed 4–8–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 76

RIN 2900–AR84

Monthly Assistance Allowance for Veterans in United States Olympic or Paralympic Events

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Department of Veterans Affairs (VA) regulations that govern the monthly assistance allowance for eligible veterans in the United States (U.S.) Olympic or Paralympic Events. We are amending these regulations to conform with the governing statute and to codify current VA policy, which would make the process for applying for the monthly assistance allowance more transparent. We would also make edits to outdated terminology.

DATES: Comments must be received on or before June 10, 2024.

ADDRESSES: Comments may be submitted through *www.Regulations.gov.* Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on *www.regulations.gov* as soon as possible after they have been received. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. VA encourages individuals not to submit duplicative comments; however, we will post comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking. In accordance with the Providing Accountability Through Transparency Act of 2023, a 100 word Plain-Language Summary of this proposed rule is available at *Regulations.gov,* under RIN 2900–AR84.

FOR FURTHER INFORMATION CONTACT: Rachel McArdle, Deputy Executive Director, VHA Rehabilitation Prosthetics Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (727) 219–6296. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: Section 322 of 38 United States Code (U.S.C.) establishes a monthly assistance allowance for veterans with disabilities who are invited by the United States Olympic Committee (USOC) to compete for a slot on, or selected for, the Paralympic Team for any month in which the veteran is training or competing in any event sanctioned by the USOC or who are residing at a USOC training center. We note that, although section 322 uses the term United States Olympic Committee, the actual name of the organization is the United States Olympic and Paralympic Committee (USOPC), which will be used throughout this rule. Section 322 of 38 U.S.C. also establishes a monthly assistance allowance for veterans with a VA service-connected disability rated as 30 percent or greater by VA who are selected by the USOPC for the United States Olympic Team for any month in which the veteran is competing in any event sanctioned by the National Governing Bodies of the United States Olympic Sports.

On March 16, 2011, VA published a final rule in the **Federal Register** that codified 38 U.S.C. 322 into regulation as new 38 Code of Federal Regulations (CFR) part 76. See 76 FR 14283. This proposed rule would amend current 38 CFR part 76 by replacing certain sections and by including an incorporation by reference section, defining new terms, establishing in regulation certain criteria that are currently established in VA policy, and generally reorganizing content for ease of readability and understanding.

We note that current VA policy is located at VA's website at Monthly Training Allowance—Veterans Health Administration (*va.gov*). Current policy is also stated on U.S. Department of Veterans Affairs (VA) Veteran Monthly Assistance Allowance for Disabled Veterans Training in Paralympic and Olympic Sports Program (VA Monthly Training Allowance) program guide. We believe that the VA policy criteria that we would seek to regulate in this rulemaking are reasonable interpretations of VA's authority under 38 U.S.C. 322 and are well known to veterans that participate in this monthly allowance program.

Revising the Center Heading Title for Part 76

Part 76 of 38 CFR is currently titled Monthly Assistance Allowance for Veterans in Connection with the United States Paralympics. However, the monthly assistance allowance is not paid solely to veterans who are training for or competing in the Paralympics, it may also be paid to veterans who compete in the Olympics. As stated in 38 U.S.C. 322(d)(1)(B), the special monthly allowance may be paid to a veteran with a VA service-connected disability rated as 30 percent or greater by the Department of Veterans Affairs who is selected by the USOPC for the United States Olympic Team for any month in which the veteran is competing in any event sanctioned by the National Governing Bodies of the United States Olympic Sports. For this reason, we propose to amend the center heading title for 38 CFR part 76 to state Monthly Assistance Allowance for Veterans in Connection with a United States Olympic or Paralympic Event.

The current authority for 38 CFR part 76 is 38 U.S.C. 501, 322(d), and as stated in specific sections. However, paragraph (d) of 38 U.S.C. 322 is not the only paragraph in section 322 that is applicable to the monthly assistance allowance. Paragraph (c) of section 322 is applicable as the Secretary has the discretion to determine whether a program is a qualifying program for purposes of the monthly allowance. Section 322(e) is also applicable as U.S. commonwealths and territories have their own National Olympic and Paralympic teams, but veterans who reside in such commonwealths and territories are eligible to receive the monthly assistance allowance. We therefore propose to amend the authority section for 38 CFR part 76 to state 38 U.S.C. 501, 322, and as stated in specific sections.

76.1 Incorporation by Reference

Proposed § 76.1 would address the incorporation by reference in 38 CFR part 76 of the International Paralympic Committee (IPC) Athlete Classification Code, which contains certain required classifications, standards, and criteria related to para-athlete sports competition. The IPC Athlete Classification Code defines who is eligible to compete in Para-sport and consequently who has the opportunity to reach the goal of becoming a Paralympic Athlete. The IPC Athlete Classification Code also groups athletes into sport classes, which ensure that the impact of impairment is minimized. In addition, the IPC Athlete Classification Code aims to ensure that sporting excellence determines which athlete or team is ultimately victorious. International competitions require that competitors comply with the IPC Athlete Classification Code. As such, VA relies on the IPC Athlete Classification Code because most

competitors who receive a monthly assistance allowance compete internationally. We would use a separate section for incorporation by reference in this proposed rule because the IPC Athlete Classification Code would apply to all of part 76, as stated in the relevant sections.

VA currently incorporates by reference the IPC Classification Code and International Standards November 2007 edition as part of the definition of the term disability in § 76.1, However, the IPC Code and Standards were updated in November 2015 and are now titled the IPC Athlete Classification Code. In compliance with 5 U.S.C. 552(a) and 1 CFR part 51, we propose to incorporate by reference the most current edition of the IPC Athlete Classification Code, the November 2015 edition. The introductory text of proposed § 76.1 would state the approval language for IBR material in part 76 and paragraph § 76.1(a) would identify this IBR material, its publisher, and how to view or obtain it.

76.5 Purpose

Proposed § 76.5 would establish the purpose for 38 CFR part 76, to state that this part implements the VA program for monthly assistance allowance available to eligible veterans with disabilities who are training or competing in sanctioned Olympic or Paralympic events as provided under 38 U.S.C. 322. This language would be in alignment with 38 U.S.C. 322 and would provide context for the remainder of the proposed sections as outlined in this rule.

76.10 Definitions

Proposed § 76.10 would provide the definitions section for 38 CFR part 76. Current § 76.1 only defines two terms, disability, and Paralympic training center. We would amend the definition of disability from current § 76.1 as this definition includes the incorporation by reference information that would now be addressed in proposed § 76.1. We would amend the definition of disability and Paralympic training center, and add new definitions, as further explained below.

We would define the term dependent to mean a spouse, child, or parent who meets the definition of these terms as defined in 38 U.S.C. 101. Consistent with 38 U.S.C. 322(d)(2), the rate at which VA pays the monthly allowance must be equal to the monthly amount of subsistence allowance that would be payable to a veteran under chapter 31 of title 38 U.S.C. if the veteran were eligible for and entitled to rehabilitation under chapter 31. The monthly amount of subsistence allowance under chapter 31 of title 38 U.S.C. (and as regulated in 38 CFR part 21) is affected by whether an eligible veteran has any dependents and therefore whether the veteran has dependents would also affect the monthly assistance allowance under this section. See current § 76.4 and proposed § 76.25. We, therefore, would add a definition of dependent to part 76. Using VA's statutory definitions of these terms under section 101 would provide for consistency with the administration of monthly assistance allowance under 38 U.S.C. chapter 31 as required by section 322(d)(2).

Current § 76.1 defines the term disability to include the incorporation by reference information that would now be addressed in proposed § 76.1. We would amend the definition of disability from current § 76.1 by eliminating the incorporation by reference information and would now state that disability means a condition that meets the criteria prescribed by the International Paralympic Committee (IPC) Classification Code and International Standards, as incorporated by reference in § 76.1, and qualifies the veteran for participation in a sport sanctioned by the USOPC.

We would define the term eligible veteran to mean a veteran who meets the requirements of § 76.15. For a veteran to receive the monthly assistance allowance, they must meet the eligibility criteria stated in proposed § 76.15.

We would define the term national governing body to mean an organization recognized by the USOPC or equivalent committee in the U.S. that looks after all aspects of an individual sport and is responsible for the training, competition, and development for their sports within their designated jurisdiction. Although the term National Governing Bodies of the United States Olympic Sports is used in section 322(d)(1)(B), we would not use this term and, instead, use the term USOPC, because United States Olympic Sports is not the name of an official entity; it is the United States Olympic and Paralympic Committee (USOPC). A national governing body would include the USOPC itself or organizations recognized by the USOPC in the 50 States and the District of Columbia. Veterans who live in U.S. Commonwealths and Territories are also eligible for this allowance, however, their national governing body may not be recognized by the USOPC because the International Paralympic Committee recognizes each U.S. Commonwealth and Territory as independent entities of the international community. Instead, we would provide that the national governing body be recognized by the USOPC or equivalent committee in the U.S to include governing bodies in the Commonwealths and Territories.

We would define the term National Team to mean the highest level of elite athlete(s) within a respective event. Section 322(d)(1)(A) provides that, for Paralympic sports, VA may pay the monthly allowance for a veteran with a disability who is invited by the United States Olympic Committee to compete for a slot on, or selected for, the Paralympic Team for any month in which the veteran is training or competing in any event sanctioned by the United States Olympic Committee or who is residing at a United States Olympic Committee training center. Although not stated in the statute, VA understands the Paralympic Team to mean the National Paralympic Team. Section 322(d)(1)(B) provides that VA may pay the monthly allowance for a veteran with a VA service-connected disability rated as 30 percent or greater who has been selected to participate in the United States Olympic Team.

We would define the term Olympic and Paralympic Training Center (OPTC) to mean locations where the national governing body established facilities for training Olympic and Paralympic athletes. Section 322(d)(1)(A) provides that the monthly allowance may be paid to a veteran who is residing at a United States Olympic Committee training center. Although the statue uses the term Unites States Olympic Committee training center, we would instead define the term OPTC to be in alignment with the current name used by the USOPC. Current § 76.1 defines the term Paralympic Training Center to refer to the following locations: The United States Olympic Training Center at Chula Vista, California; the United States Olympic Training Center at Colorado Springs, Colorado; the United States Olympic Training Center at Lake Placid, New York; the Lakeshore Foundation in Birmingham, Alabama; and the University of Central Oklahoma in Edmond, Oklahoma. However, these sites are subject to change, which would require VA to continuously amend its regulations. As such, we propose to define the term OPTC to generally refer to the locations where the national governing body established facilities for training Olympic and Paralympic athletes to provide for that flexibility.

We would define the term Olympic event to mean an event contested in the Summer Olympic Games or Winter Olympic Games. Section 322(d)(1)(B) states that VA may pay a monthly assistance allowance to veterans who

are selected for the U.S. Olympic team for any month in which the veteran is competing in any event sanctioned by the National Governing Bodies of the United States Olympic Sports. Olympic events are only contested in the Summer and Winter Olympic Games.

We would define the term Paralympic event to mean an event that is contested in the Summer Paralympic Games or Winter Paralympic Games, as well as events run by IPC-recognized international federations that meet the criteria of active international competition consistent with IPC standards for a Paralympic event. Section 322(d)(1)(A) provides that VA may provide a monthly assistance allowance to a veteran with a disability invited by the USOPC to compete for a slot on, or selected for, the Paralympic Team for any month in which the veteran is training or competing in any event sanctioned by the USOPC or who is residing at an OPTC. Contrary to Olympic events, Paralympic events may be contested in venues other than the Summer or Winter Paralympic Games.

We would define the term service-connected to be consistent with the statutory definition to mean, with respect to disability, that such disability was incurred or aggravated in line of duty in the active military, naval, air, or space service. VA defines the term service-connected in 38 U.S.C. 101 and would similarly define it here for consistency. However, we would not include statutory reference to death resulting from a disability that was incurred or aggravated, in line of duty in the active military, naval, air, or space service because the monthly allowance is only paid to veterans and not a surviving spouse, child, or parent of a veteran. A monthly allowance may be provided to a veteran with a service-connected disability rated 30 percent or greater who is selected by the United States Olympic Committee for the United States Olympic Team for any month in which the veteran is competing in any event sanctioned by the National Governing Bodies of the United States Olympic Sports. See 38 U.S.C. 322(d)(1)(B).

We would define the term U.S. to mean the United States and each of the 50 States, the District of Columbia, American Samoa, Guam, Puerto Rico, Northern Mariana Islands, and the United States Virgin Islands. Although this definition is largely consistent with the statutory definition of State in 38 U.S.C. 101, we believe it is important to specifically list out all commonwealths and territories that are listed in section 322(e). This definition would be used in the context of this monthly allowance program to qualify the locations in which national teams, national governing bodies, or residential criteria may be considered for purposes of eligibility in proposed § 76.15.

We would define the term veteran to have the meaning as given to this term in 38 U.S.C. 101 (2). We would add this definition to be clear who VA considers a veteran eligible for the monthly assistance allowance.

76.15 Eligibility

Current § 76.2 establishes the eligibility criteria for the monthly allowance by stating that VA will pay an allowance to a veteran with a disability who is: Invited by the United States Paralympics (USP) to compete for a slot on, or selected for, the USP Team for any month or part of any month in which the veteran is training or competing in any event sponsored by the USP or the IPC; or Residing at a USP training center in connection with any Paralympic training or competition for the period certified under § 76.3. However, these are not the only criteria for payment of the monthly allowance. Proposed § 76.15 would establish the eligibility criteria for eligible veterans who apply to receive a monthly assistance allowance. These criteria would be in alignment with 38 U.S.C. 322(d) and would also incorporate current VA policy.

We would state in proposed paragraph (a) that to be eligible for a monthly assistance allowance under this part, a veteran must have a training and competition plan and meet the requirements applicable to their event, as established and certified by the national governing body to verify that the veteran meets the criteria for eligibility in their respective sport. The training plan would establish the veteran's training goals and plans for upcoming competition in sanctioned events.

Proposed paragraph (b) would provide the eligibility criteria for veterans who compete in Paralympic and Olympic events. Proposed paragraph (b)(1) would establish the eligibility criteria for veterans who would compete in a Paralympic event. We would state in proposed (b)(1) that for a Paralympic event, a veteran must: (i) have a disability which meets the criteria prescribed by the IPC Athlete Classification Code (incorporated by reference under § 76.1). As previously stated in this rulemaking, international competitions require that competitors comply with the IPC Athlete Classification Code. As such, VA relies on the IPC Athlete Classification Code because most competitors who receive a monthly assistance allowance compete internationally.

We would state in proposed (b)(1)(ii) that a veteran must be invited by a national governing body to compete for a slot on, or selected for, the National Team in a Paralympic sport and (A) Is training or competing in an event sanctioned by a national governing body; or (B) Is residing at a U.S. Olympic and Paralympic Committee Training Center. We would state in Proposed (b)(1)(iii) that a veteran must meet the minimum performance standards or higher in the veteran's respective Paralympic event at a competition or other designated event sanctioned by a national governing body. The requirements in (b)(1)(ii) are in alignment with section 322(d)(1)(A). The requirements in (b)(1)(iii) are consistent with VA policy to ensure only eligible veterans receive the monthly allowance because there are many sanctioned Paralympic events in which veterans participate that can draw a wide range of first-time participants who do not have sufficient athletic skills to meet minimum performance standards for an event.

Current part 76 does not establish eligibility criteria for veterans who participate in Olympic events. However, 38 U.S.C. 322(d)(1)(B) allows for a monthly allowance to be payable to a veteran with a service-connected disability rated as 30 percent or greater who is selected by the USOPC for the United States Olympic Team for any month in which the veteran is competing in any event sanctioned by the National Governing Bodies of the United States Olympic Sports. Consistent with section 322(d)(1)(B), proposed paragraph (b)(2) would establish the eligibility criteria for a veteran who participates in an Olympic event. We would state in proposed (b)(2) that for an Olympic event a veteran must: (i) have a service-connected disability rated at 30 percent or more by VA; (ii) be selected by a national governing body in the U.S. to compete as a member of a National Team in an Olympic event; and (iii) is competing in an event sanctioned by a national governing body.

Proposed paragraph (c) would establish the relationship between VA and the entities that are recognized as national governing bodies. As such we would state in proposed paragraph (c) that VA must have an active partnership with a national governing body in an Olympic or Paralympic event in order to have an active monthly assistance allowance for a respective Olympic or Paralympic event. An active partnership allows VA to have an effective

relationship with the national governing body to ensure effective, valid actions exist through all aspects of the allowance program and are formalized through joint-use allowance support software. Partnership relationships ensure that the national governing bodies involved and central to this part are identified and recognized by some system or standard. Partnerships are also an essential component of the monthly assistance allowance because VA relies on the criteria established by various national governing bodies to determine whether veterans are eligible to receive the monthly allowance. Partnerships would also assist the eligible veteran in obtaining certification, as discussed below regarding section 76.20, from a recognized national governing body.

76.20 Application, Certification

Proposed § 76.20 would establish the application procedures for the monthly assistance allowance. This section would clarify current § 76.3 and make it consistent with current VA policy. We note that there is no specific time period for submitting an application. However, VA would only issue payment of the monthly assistance allowance prospectively within a given fiscal year. Funds for the payment of the monthly assistance allowance are appropriated on a fiscal year basis.

We would state that to receive a monthly assistance allowance under this part, an eligible veteran must submit the items stated in this section. Proposed paragraph (a) would require that the eligible veteran submit a complete application.

Proposed paragraph (b) would establish the requirement for the veteran to provide certification by a national governing body. Proposed paragraph (b) would state that the veteran must submit a complete certification, subject to paragraph (b)(3) of this section, signed by an authorized representative from the national governing body, that specifies whether payment is due for training, competition, or residence; the level of performance accomplished; and the dates of the training, competition, or residence for the period for which payment is requested.

In proposed paragraph (b)(1)(i) we would provide, for Paralympic events, the national governing body must additionally certify that the veteran meets the applicable classification criteria prescribed by the IPC Athlete Classification Code (as incorporated by reference in § 76.1).

Proposed paragraph (b)(1)(ii) would state that a national governing body for a Paralympic event will work cooperatively with VA in the establishment of Paralympic event performance standards. For emerging athletes not on a National Team in a Paralympic event, performance standards may consist of initial entry standards and increasing performance standards over time for progress as a training Paralympic athlete. This is in alignment with current VA policy.

Proposed paragraph (b)(1)(iii) would state that the national governing body will act as lead in classification and certification of an eligible veteran's performance, but VA will make final determination on performance standards in a Paralympic event and the frequency of the certification. This is in alignment with current VA policy.

Proposed paragraph (b)(2) would provide criteria related to Olympic events and would state that for Olympic events, the national governing body must certify the veteran's status as a National Team member.

Proposed paragraph (b)(3) would add that waivers for the certification requirement may be allowed at VA's discretion in exceptional circumstances. Exceptional circumstances include, but are not limited to, National emergencies, such as a pandemic that causes cessation of activities, such as the COVID–19 National Emergency, or a disruption of a sports activity due to circumstances beyond the veteran's control that would necessitate ongoing veteran training for elite competition and would reasonably warrant a waiver. This paragraph would be consistent with current VA policy.

Proposed paragraph (c) would provide for the frequency of submission of the training plan and certification. Proposed paragraph (c)(1) would state that eligible veterans must submit their established training and competition plans in monthly reports in order to continue receiving the monthly assistance allowance. This paragraph would be consistent with current VA policy.

Proposed paragraph (c)(2) would provide that an eligible veteran must resubmit a certification at least every twelve months to continue to receive a monthly assistance allowance after the initial twelve month period. The update of a certification of achieving standards establishes a new 12-month period.

76.25 Monthly Assistance Allowance Amount

Proposed § 76.25 would provide for the amount payable for the monthly assistance allowance. Section 322(d)(2) of 38 U.S.C. provides that the amount of the monthly assistance payable to a veteran shall be equal to the monthly amount of subsistence allowance that would be payable to the veteran under chapter 31 of this title if the veteran were eligible for and entitled to rehabilitation under such chapter.

Consistent with section 322(d)(2), we would state in proposed paragraph (a) that VA may pay a monthly assistance allowance at the rate payable to a veteran, including those with dependents, who is in a full-time institutional program under title 38 United States Code (Chapter 31). This language would clarify current § 76.4(a) and (c).

Proposed paragraph (b) would provide for the monthly assistance allowance amount for eligible veterans who train or compete in an event sanctioned by a national governing body for each day of training or competition. We would state that when a veteran meets allowance standards for less than a full month, the payment is prorated for the portion of the month certified and may be made at 1/30 of the monthly rate to eligible veterans who train or compete in an event sanctioned by a national governing body for each day of training or competition.

Proposed paragraph (c) would provide for the monthly assistance allowance amount for eligible veterans who reside at a U.S. Olympic and Paralympic Committee Training Center. We would state that payment may be made at 1/30 of the monthly rate to eligible veterans who reside at a U.S. Olympic and Paralympic Committee Training Center for each day of residence. This language is consistent with the language in current § 76.4(b).

Proposed paragraph (d) would state that in providing the monthly assistance allowance, VA will issue payments on a monthly basis. This language is consistent with the language in current § 76.4(b).

We would state in proposed paragraph (e) that VA would periodically assess funding for the allowance during the fiscal year. We would add that if a periodic assessment reveals that funding is insufficient to pay all eligible veterans for the duration of the appropriation period, VA would first pay in full eligible veterans with service-connected disabilities. Under 38 U.S.C. 322(d)(1), the payment of the monthly assistance allowance is subject to the availability of appropriations. In addition, 38 U.S.C. 322(d)(3) states that in providing assistance under this subsection, the Secretary shall give priority to veterans with service-connected disabilities. Therefore, VA would continuously assess the funding for the monthly assistance allowance and ensure priority is given to those veterans with service-connected

disabilities. This is consistent with 38 U.S.C. 322(d)(3) and current VA policy.

76.30 Reclassification and Change in Event

Historically, classification of an individual in a particular event was based on the individual's disability as established by a medical evaluation, placing little emphasis on the individual's skill level on an event. In the 1980s and 1990s many athletes and classifiers recognized this shortcoming and drove the development of functional Classification Systems, which focus more fully on performance. As an eligible veteran progresses on a particular event, their classification within that event may change. As a result, these eligible veterans must be reassessed every year and potentially reclassified during that same year if their skill level progresses within their chosen event. Current VA policy allows for eligible veterans to be reclassified in their current event or change events altogether. We believe that these reclassifications and changes in event should also be addressed in regulation as they affect the eligibility of a veteran to receive the monthly allowance.

Proposed § 76.30 would provide requirements for after a veteran is reclassified or changes events. Proposed paragraph (a) would establish the requirements for continued monthly allowance after an eligible veteran is reclassified. We note that the reclassification primarily occurs when an individual participates in an event, which is usually during the competitive season. We would state in proposed paragraph (a)(1) that if an eligible veteran is reclassified by a national governing body the following must occur: (i) the eligible veteran must achieve the performance standard or higher, as stated in § 76.20(b)(1), in the eligible veteran's new classification for the event; (ii) the performance standard must be achieved no later than six months after the date of reclassification. We would also state in proposed paragraph (a)(2) that the eligible veteran would continue to receive an allowance under this part as long as all other applicable standards and requirements under this part continue to be met.

Proposed paragraph (b) would provide the requirements for continued monthly allowance after an eligible veteran changes event. We would state that if an eligible veteran changes the event for which they have been approved for an allowance under this part, they must meet all applicable standards and requirements stated in § 76.20 for the new event to receive an allowance under this part.

Approval of Incorporations by Reference

The Office of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, approved VA's incorporation by reference of previous editions of the IPC's Classification Code and International Standards, November 2007 edition. We propose to update this incorporation by reference to the current IPC's Athlete Classification Code, November 2015 edition. The IPC Athlete Classification Code applies to all members of the Paralympic Movement and to all athletes competing in a Para-sport at International competitions under the jurisdiction of the International Sport Federation. The Code also applies to the International Recognized Federations. The Code details policies and procedures common across all sports and sets principles to be applied by all Para-sports. The Code is intended to be specific enough to achieve harmonization on Classification where standardization is required and general enough in other areas to permit flexibility regarding the implementation of its principles. It consists of International Standards that provide technical and operational standards for specific aspects of Classification to be carried out by all signatories in a manner which athletes and other Paralympic stakeholders understand and have confidence in, namely: International Standard for Eligible Impairments—*https://www.paralympic.org/sites/default/files/document/161007092455456_Sec+ii+chapter+1_3_2_subchapter+1_International+Standard+for+Eligible+Impairments.pdf;* International Standard for Athlete Evaluation—*https://www.paralympic.org/sites/default/files/document/161007092547338_Sec+ii+chapter+1_3_2_subchapter+2_International+Standard+for+Athlete+Evaluation.pdf;* International Standard for Protests and Appeals—*https://www.paralympic.org/sites/default/files/document/161007092547338_Sec+ii+chapter+1_3_2_subchapter+2_International+Standard+for+Athlete+Evaluation.pdf;* International Standard for Classifier Personnel and Training—*https://www.paralympic.org/sites/default/files/document/161007092741545_Sec+ii+chapter+1_3_2_subchapter+4_International+Standard+for+Classifier+Personnel+and+Training.pdf;* International Standard for Classification Data Protection—*https://www.paralympic.org/sites/default/files/document/161007092840570_Sec+ii+chapter+1_3_2_subchapter+5_International+Standard+for+Classification+Data+Protection.pdf.* This rule would incorporate the IPC Athlete Classification Code, November 2015 edition, in its entirety.

The incorporation by reference document is reasonably available from the Department of Veterans Affairs, Office of National Veterans Sports Programs and Special Events by email at *stipends4vets@va.gov* and also available from the publisher at: *170704160235698_2015_12_17+Classification+Code_FINAL2_0.pdf* (*paralympic.org*). We will request approval of this incorporation by reference from the Office of the Federal Register during the Final rule stage.

Executive Orders 12866, 13563, and 14094

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

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). This rulemaking does not change VA's policy regarding small businesses, does not have an economic impact to individual businesses, and does not increase or decrease costs to small business entities. This rule would only affect eligible veterans with disabilities who are training and competing in programs or

events sanctioned by the U.S. Olympic and Paralympic Committee, an equivalent national governing body, or National Paralympic Committees in the United States as defined in this rule, and is considered a benefit for these veterans. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

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

Paperwork Reduction Act (PRA)

Although this proposed rule contains collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collection of information. The collection of information for proposed 38 CFR 76.20 is currently approved by the Office of Management and Budget (OMB) and has been assigned OMB control 2900–0760.

Assistance Listing

The Assistance Listing number and title for the program affected by this document is 64.037, VA U.S. Paralympics Monthly Assistance Allowance Program. Certification, Disabled, Eligibility, Incorporation by reference, Individuals with disabilities, Monthly assistance allowance, Overpayment, Oversight, Physically challenged athletes, Service-connected disabilities, Sport event, Travel and transportation expenses, U.S. Paralympics training center, Veterans.

List of Subjects in 38 CFR Part 76

Certification, Disabled, Eligibility, Incorporation by reference, Individuals with disabilities, Monthly assistance allowance, Overpayment, Oversight, Physically challenged athletes, Service-connected disabilities, Sport event, Travel and transportation expenses, U.S. Olympic and Paralympic Training Center, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on March 28, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

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

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to revise 38 CFR part 76 as set forth below:

PART 76—MONTHLY ASSISTANCE ALLOWANCE FOR VETERANS IN CONNECTION WITH A UNITED STATES OLYMPIC OR PARALYMPIC EVENT

Sec.

Authority: 38 U.S.C. 501, 322, and as stated in specific sections.

§ 76.1 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Department of Veterans Affairs and at the National Archives and Records Administration (NARA). Contact the Department of Veterans Affairs at: Office of National Veterans Sports Programs and Special Events at 810 Vermont Ave. NW, Washington DC 20420; or by email at *stipends4vets@va.gov.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the following source:

(a) International Paralympic Committee, Adenauerallee 212–214, 53113 Bonn, Germany; *https://www.paralympic.org/sites/default/files/document/170704160235698_2015_12_17%2BClassification%2BCode_FINAL2_0.pdf.*

(1) International Paralympic Committee (IPC) Athlete Classification Code, November 2015 edition; IBR approved for §§ 76.10, 76.15(b)(1)(i), and 76.20(b)(1)(i).

(2) [Reserved]

(b) [Reserved]

§ 76.5 Purpose.

The purpose of this part is to implement the Department of Veterans Affairs' (VA) program for monthly assistance allowance available to eligible veterans with disabilities who are training or competing in sanctioned Olympic or Paralympic events as provided under 38 U.S.C. 322.

§ 76.10 Definitions.

The following definitions apply to 38 CFR part 76.

Dependent means a spouse, child, or parent who meets the definition of these terms as defined in 38 U.S.C. 101.

Disability means a condition that meets the criteria prescribed by the International Paralympic Committee (IPC) Athlete Classification Code (incorporated by reference, see § 76.1) and qualifies the veteran for participation in a sport sanctioned by the USOPC.

Eligible veteran means a veteran who meets the requirements of § 76.15.

National governing body means:

(1) An organization recognized by the USOPC or equivalent committee in the U.S. and

(2) Looks after all aspects of an individual sport and is responsible for the training, competition, and development for their sports within their designated jurisdiction.

National Team is the highest level of elite athlete(s) within a respective event.

Olympic and Paralympic Training Center (OPTC) means the locations where the national governing body established facilities for training Olympic and Paralympic athletes.

Olympic event means an event contested in the Summer Olympic Games or Winter Olympic Games.

Paralympic event means an event that is contested in the Summer Paralympic Games or the Winter Paralympic Games, as well as events run by IPC-recognized international federations that meet the criteria of active international competition consistent with IPC standards for a Paralympic event.

Service-connected means, with respect to disability, that such disability was incurred or aggravated in line of duty in the active military, naval, air, or space service.

U.S. means the United States and each of the 50 States, the District of Columbia, American Samoa, Guam, Puerto Rico, Northern Mariana Islands, and the United States Virgin Islands.

Veteran has the meaning as given to this term in 38 U.S.C. 101 (2).

§ 76.15 Eligibility.

(a) *General.* To be eligible for a monthly assistance allowance under this part, a veteran must have a training and competition plan and meet the requirements applicable to their event, as established and certified by the national governing body to verify that the veteran meets the criteria for eligibility in their respective sport.

(b) *Paralympic and Olympic events.* (1) *Paralympic event.* For a Paralympic event, a veteran must:

(i) Have a disability which meets the criteria prescribed by the IPC Athlete Classification Code (incorporated by reference under § 76.1);

(ii) Be invited by a national governing body to compete for a slot on, or selected for, the National Team in a Paralympic sport and:

(A) Is training or competing in an event sanctioned by a national governing body; or

(B) Is residing at a U.S. Olympic and Paralympic Committee Training Center; and

(iii) Meet the minimum performance standards or higher in the veteran's respective Paralympic event at a competition or other designated event sanctioned by a national governing body.

(2) *Olympic event.* For an Olympic event, a veteran must:

(i) Have a service-connected disability rated at 30 percent or more by VA;

(ii) Be selected by a national governing body in the U.S. to compete as a member of a National Team in an Olympic event; and

(iii) Is competing in an event sanctioned by a national governing body.

(c) VA must have an active partnership with a national governing body in an Olympic or Paralympic event in order to have an active monthly assistance allowance for a respective Olympic or Paralympic event.

§ 76.20 Application, certification.

To receive a monthly assistance allowance under this part, an eligible veteran must submit the following:

(a) A complete application; and

(b) A complete certification, subject to paragraph (b)(3) of this section, signed by an authorized representative from the national governing body, that specifies whether payment is due for training, competition, or residence; the level of performance accomplished; and the dates of the training, competition, or residence for the period for which payment is requested.

(1) *Paralympic events.* (i) For Paralympic events, the national governing body must additionally certify that the veteran meets the applicable classification criteria prescribed by the IPC Athlete Classification Code (as incorporated by reference in § 76.1);

(ii) A national governing body for a Paralympic event will work cooperatively with VA in the establishment of Paralympic event performance standards. For emerging athletes not on a National Team in a Paralympic event, performance standards may consist of initial entry standards and increasing performance standards over time for progress as a training Paralympic athlete.

(iii) The national governing body will act as lead in classification and certification of an eligible veteran's performance, but VA will make final determination on performance standards in a Paralympic event and the frequency of the certification.

(2) *Olympic* events. For Olympic events, the national governing body must certify the veteran's status as a National Team member.

(3) *Waivers.* Waivers for the certification requirement may be allowed at VA's discretion in exceptional circumstances.

(c) *Frequency of submission of the training and competition plan and certification.* (1) *Training and competition plans.* Eligible veterans must submit their established training and competition plans in monthly reports in order to continue receiving the monthly assistance allowance.

(2) *Certification.* An eligible veteran must resubmit a certification at least every twelve months to continue to receive a monthly assistance allowance after the initial twelve month period.

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0760).

§ 76.25 Monthly assistance allowance amount.

(a) VA may pay a monthly assistance allowance at the rate payable to a veteran, including those with dependents, who is in a full-time institutional program under title 38 United States Code (Chapter 31).

(b) When a veteran meets allowance standards for less than a full month, the payment is prorated for the portion of the month certified and may be made at 1/30 of the monthly rate to eligible veterans who train or compete in an event sanctioned by a national governing body for each day of training or competition.

(c) Payment may be made at 1/30 of the monthly rate to eligible veterans who reside at a U.S. Olympic and Paralympic Committee Training Center for each day of residence.

(d) In providing the monthly assistance allowance, VA will issue payments on a monthly basis.

(e) VA will periodically assess funding for the allowance during the fiscal year. If a periodic assessment reveals that funding is insufficient to pay all eligible veterans for the duration of the appropriation period, VA will first pay in full eligible veterans with service-connected disabilities.

§ 76.30 Reclassification and change in event.

(a) *Reclassification.* (1) If an eligible veteran is reclassified by a national governing body the following must occur:

(i) The eligible veteran must achieve the performance standard or higher, as stated in § 76.20(b)(1), in the eligible veteran's new classification for the event;

(ii) The performance standard must be achieved no later than six months after the date of reclassification.

(2) The eligible veteran will continue to receive an allowance under this part as long as all other applicable standards and requirements under this part continue to be met.

(b) *Change in event.* If an eligible veteran changes the event for which they have been approved for an allowance under this part, they must meet all applicable standards and requirements stated in § 76.20 for the new event to receive an allowance under this part.

[FR Doc. 2024–06984 Filed 4–8–24; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2023–0325; FRL 11009–03–OW]

RIN 2040–AG35

Mercury Criterion To Protect Aquatic Life in Idaho

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of public hearing.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to promulgate a Federal Clean Water Act (CWA) chronic aquatic life ambient water quality criterion for waters under the state of Idaho's jurisdiction to protect aquatic life from the effects of

exposure to harmful concentrations or levels of total mercury (*i.e.,* including methylmercury and inorganic mercury). In 2008, the EPA disapproved the state's revision of its mercury aquatic life criteria. The state has not adopted and submitted revised mercury aquatic life criteria to the EPA to address the EPA's 2008 disapproval. Therefore, the EPA is proposing a Federal mercury criterion to protect aquatic life uses in Idaho.

DATES: Comments must be received on or before June 10, 2024. *Public Hearing:* The EPA will hold two public hearings during the public comment period. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearings.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2023–0325, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document. The EPA is offering two public hearings on this proposed rulemaking. Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

FOR FURTHER INFORMATION CONTACT: Kelly Gravuer, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2946; email address: *Gravuer.Kelly@epa.gov.*

SUPPLEMENTARY INFORMATION:

This proposed rulemaking preamble is organized as follows:

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2023–0325, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to the EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

B. Participation in Public Hearings

The EPA is offering two online public hearings so that interested parties may provide oral comments on this proposed rulemaking. For more details on the online public hearings and to register to attend the hearings, please visit *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

II. General Information

A. Does this action apply to me?

Entities that discharge mercury to waters under Idaho's jurisdiction [1] that are subject to relevant aquatic life designated uses—such as industrial facilities and municipalities that manage stormwater, separate sanitary, or combined sewer systems—could be indirectly affected by this rulemaking because Federal water quality standards (WQS) promulgated by the EPA would be the applicable WQS for Clean Water Act (CWA) purposes. Specifically, these WQS would be the applicable standards that must be used in CWA regulatory programs, such as permitting under the National Pollutant Discharge Elimination System (NPDES) (CWA section 402) [2] and identifying impaired waters under CWA section 303(d). Categories and entities that could be affected include the following:

[1] Throughout this preamble, the phrase ''waters under Idaho's jurisdiction'' refers to waters of the United States under Idaho's jurisdiction, since the Clean Water Act applies to waters of the United States.

[2] Before any water quality-based effluent limit would be included in an NPDES permit, the permitting authority (here, the Idaho Department of Environmental Quality [IDEQ]), must first determine whether a discharge ''will cause or has the reasonable potential to cause, or contribute to an excursion above any WQS.'' 40 CFR 122.44 (d)(1)(i) and (ii).

Category	Examples of potentially affected entities
Industry	Industrial point sources discharging mercury to waters under Idaho's jurisdiction.
Municipalities, including those with stormwater or combined sewer system outfalls.	Publicly owned treatment works or similar facilities responsible for managing stormwater, separate sanitary, or combined sewer systems that discharge mercury to waters under Idaho's jurisdiction.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that could be indirectly affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

III. Background

A. Statutory and Regulatory Authority

CWA section 101(a)(2) establishes a national goal of ''water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water'' (hereafter, collectively referred to as ''101(a)(2) uses''), wherever attainable. The EPA's regulation at 40 CFR 131.10(g) and (h) implements this statutory provision by requiring that WQS protect 101(a)(2) uses unless those uses are shown to be unattainable.

Under the CWA, states have the primary responsibility for establishing, reviewing, and revising WQS applicable to their waters (CWA section 303(c)). WQS define the desired condition of a water body, in part, by designating the use or uses to be made of the water and by setting the numeric or narrative water quality criteria to protect those uses (40 CFR 131.2, 131.10, and 131.11). There are two primary categories of water quality criteria: human health criteria and aquatic life criteria. Human health criteria protect designated uses such as public water supply, recreation, and fish and shellfish consumption. Aquatic life criteria protect designated uses such as survival, growth, and reproduction of fish, invertebrates, and other aquatic species. Regardless of their category, water quality criteria ''must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use'' (40 CFR 131.11(a)(1)).

Section 304(a) of the CWA directs the EPA to periodically develop and publish recommended water quality criteria ''accurately reflecting the latest scientific knowledge'' on the effects of pollutants on human health and welfare, including effects on aquatic life, as well as information on those pollutants, including their concentration and dispersal and how pollutants affect receiving waters (CWA section 304(a)(1)). Those recommendations are available to states for use in developing their own water quality criteria (CWA section 304(a)(3)). When states establish criteria, the EPA's regulation at 40 CFR 131.11(b)(1) specifies that they should establish numeric criteria based on: (1) the EPA's CWA section 304(a) recommended criteria, (2) modified 304(a) recommended criteria that reflect site-specific conditions, or (3) other scientifically defensible methods.

CWA section 303(c)(2)(B), added to the CWA in the 1987 amendments to the Act,[3] requires states to adopt numeric criteria, where available, for all toxic pollutants listed pursuant to CWA section 307(a)(1) (*i.e.,* priority toxic pollutants [4]) for which the EPA has published CWA section 304(a) recommended criteria, the discharge or presence of which could reasonably be expected to interfere with the states' designated uses.

States are required to hold a public hearing to review applicable WQS at least once every three years and, if appropriate, revise or adopt new standards (CWA section 303(c)(1); 40 CFR 131.20(a)). Any new or revised WQS must be submitted to the EPA for review and approval or disapproval (CWA section 303(c)(2)(A) and (c)(3)). If the EPA disapproves a new or revised WQS because it is inconsistent with the requirements of the CWA, the EPA must notify the state within 90 days and ''specify the changes to meet such requirements'' (CWA section 303(c)(3)). If the state does not adopt changes to comply with the Act within 90 days of notification, the EPA must promptly propose a new or revised WQS for the waters involved (CWA section 303(c)(3) and (4)).

B. Sources of Mercury and Effects on Aquatic Life

Mercury is a naturally occurring metal that can be enriched in some mineral deposits (*e.g.,* cinnabar) and is often present as an impurity in coal. In Idaho, there are several areas with geologically enriched mercury deposits.

Human activities can result in the release and transport of mercury to the aquatic environment primarily through the deposition of mercury that was released to the atmosphere, discharges to water, and leaching from mercury-bearing strata exposed due to mining or other activities. Historically, mercury was both mined directly and used in hardrock and placer gold mining in Idaho, resulting in a legacy of elevated mercury levels in several parts of the state. Industrial processes (*e.g.,* chemical manufacture and metals processing) are the predominant sources of current mercury emissions to air in Idaho and nationally. Globally, natural sources of mercury are less significant than anthropogenic sources and include the weathering of mercury-containing rocks, volcanoes, and geothermal activity.[5] In Idaho, hot springs throughout the state are a natural mercury source.[6] Because atmospheric releases of mercury, whether natural or human-caused, can ultimately be deposited in waterways far from their point of emission, some of the mercury in Idaho's environment originated outside the state.

In water, mercury can occur in a dissolved form or bound to particles. The main forms of dissolved mercury in the aquatic environment are inorganic mercury and methylmercury. Aquatic organisms can take up both forms of mercury through dietary exposure and through direct water column exposure. Aquatic organisms tend to take up mercury more rapidly than they eliminate it, causing mercury (especially methylmercury) to bioaccumulate. Methylmercury can also biomagnify (*i.e.,* increase in concentration at successively higher trophic levels) within aquatic food webs, whereas inorganic mercury does not. Because of methylmercury's potential for

[3] Water Quality Act Amendments of 1987, Public Law 100–4, 101 Stat. 7.

[4] See 40 CFR part 423, Appendix A—126 Priority Pollutants.

[5] UN Environment, 2019. Global Mercury Assessment 2018. UN Environment Programme, Chemicals and Health Branch. Geneva, Switzerland. *https://www.unep.org/resources/publication/global-mercury-assessment-2018.*

[6] U.S. Geological Survey. 1985. Geochemistry and hydrology of thermal springs in the Idaho Batholith and adjacent areas, Central Idaho. Water Resources Investigations Report 85–4172. H.W. Young, Boise, Idaho.

biomagnification, dietary exposure is of greater concern than direct water column exposure for mercury toxicity.

Mercury is a potent neurotoxin that causes neurological damage, which can result in behavioral changes and ultimately in reduced growth and reproduction in aquatic organisms. Dietary exposure to methylmercury has been shown to impair reproduction in fish. Aquatic invertebrates are typically more tolerant to both inorganic and methylmercury exposures than vertebrates, with larval stages tending to be the most sensitive. However, there are exceptions to this general pattern. For example, the red swamp crayfish [7] was found to be the fourth most sensitive (out of 19 mostly vertebrate) species for which data were available to derive this mercury criterion (see section IV.B. in this preamble below).

In general, mercury cycling in the aquatic environment is affected by pH, temperature, oxidation-reduction (redox) potential, and the availability of nutrients, humic acids, and complexing agents. The conversion of inorganic mercury to the more toxic methylmercury occurs in anoxic environments, such as wetlands. Higher mercury methylation rates tend to occur in areas with higher anerobic microbial activity and when inorganic mercury is in a form that is bioavailable to the microbial community.[8] Mercury has a high affinity for sorbing to sediments as well as dissolved and particulate matter suspended in the water column. This sorption to sediments can allow sediments to serve as a source of mercury to the water column long after mercury-releasing activities have ceased.

C. History of Mercury Aquatic Life Criteria in Idaho

On June 25, 1996, the EPA approved Idaho's numeric aquatic life mercury criteria (0.012 µg/L chronic and 2.1 µg/L acute) under CWA section 303(c). In 2003, the Idaho Department of Environmental Quality (''IDEQ'') began a negotiated rulemaking in response to a petition from the Idaho Mining Association to update Idaho's mercury criteria. As a result of that negotiated rulemaking, Idaho adopted and, on August 8, 2005, submitted revised standards to the EPA for review under CWA section 303(c). IDEQ's revised standards removed the acute and chronic numeric aquatic life criteria for mercury and added a footnote ''g'' to the state's toxic criteria table. Footnote ''g'' stated that Idaho's existing narrative criteria for toxics would apply instead of the numeric criteria and that the existing human health criterion for methylmercury would be protective of aquatic life in most situations.

On December 12, 2008, the EPA disapproved Idaho's removal of numeric acute and chronic aquatic life criteria for mercury and their replacement with footnote ''g,'' stating that these revisions were inconsistent with CWA section 303(c) and 40 CFR 131.11.[9] The EPA noted that ''the supporting documentation that Idaho had submitted [did] not provide specific information which would demonstrate that the designated aquatic life uses in Idaho are assured protection from discharges of mercury that would adversely affect water quality and/or the attainment of the aquatic life uses.'' The EPA further stated that Idaho's Implementation Guidance for the Mercury Water Quality Criteria [10] (which primarily pertains to Idaho's human health criteria for mercury) did not ''contain definitive information on how the State would translate the fish tissue criterion developed to protect human health to a value which could be used to protect aquatic life.''

To remedy this disapproval, the EPA specified ''several options Idaho could consider in establishing mercury criteria that are based on scientifically defensible methods and protect Idaho's designated aquatic life uses.'' These options included (1) evaluating the protectiveness of the EPA's existing recommended 304(a) numeric acute aquatic life criterion for mercury (1.4 µg/L); (2) evaluating the protectiveness of Idaho's previous numeric chronic aquatic life criterion for mercury (0.012 µg/L); (3) evaluating development of Idaho-specific numeric acute and chronic aquatic life criteria for mercury; and (4) evaluating the use of a combination of protective numeric water column values and numeric wildlife criteria appropriate for Idaho species. The EPA also pointed out that it was not recommending Idaho use the EPA's existing 304(a) numeric chronic aquatic life criterion for mercury (0.77 µg/L) as one of the options. The EPA explained that information arising after the derivation of that 304(a) criterion had indicated that it may not adequately protect certain fish species that are present in Idaho.

The EPA concluded that ''[u]ntil Idaho develops and adopts and EPA approves revisions to [the] numeric acute and chronic aquatic life criteria for mercury, the numeric aquatic life mercury criteria applicable to the designated aquatic life uses in Idaho that are effective for Clean Water Act [p]urposes are the previously adopted acute (2.1 µg/L) and chronic (0.012 µg/L) mercury criteria which EPA approved'' in 1996. No revisions to Idaho's aquatic life mercury criteria have been made since the EPA's December 2008 disapproval. Idaho's WQS acknowledge the EPA's 2008 disapproval and state that the mercury aquatic life criteria that were published in the 2004 Idaho Administrative Code (prior to adoption of the disapproved standards) still apply and are effective for CWA purposes.[11] Those criteria are currently being implemented for CWA purposes including NPDES permitting in the state.

On June 14, 2013, Northwest Environmental Advocates filed suit in the Federal district court for the District of Idaho against the National Marine Fisheries Service and the Fish and Wildlife Service (the Services).[12] The complaint alleged that the Services unreasonably delayed or unlawfully withheld completion of Endangered Species Act (ESA) consultation with the EPA regarding new and revised WQS that Idaho submitted in 1996 and/or 1997. On September 24, 2013, Northwest Environmental Advocates were joined by the Idaho Conservation League (collectively, the plaintiffs) in filing an amended complaint adding various CWA and ESA claims against the EPA regarding dozens of Idaho WQS submissions dating back to 1994.

By 2020, all claims against the EPA except one had either been dismissed on statute of limitations grounds or included in a stipulated dismissal agreed upon by the parties. The remaining claim alleged that the EPA failed to act under section 303(c)(4) of the CWA to promulgate aquatic life

[7] Although the red swamp crayfish (*Procambarus clarkii*) is not native to Idaho, it serves as a surrogate for similar native invertebrate species for which toxicity data were not available.

[8] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

[9] Letter from Michael F. Gearheard, Director, EPA Region 10 Office of Water and Watersheds to Barry Burnell, Water Quality Program Administrator, Idaho Department of Environmental Quality, Re: EPA's Disapproval of Idaho's Removal of Mercury Acute and Chronic Freshwater Aquatic Life Criteria, Docket No. 58–0102–0302 (December 12, 2008).

[10] Idaho Department of Environmental Quality. 2005. *Implementation Guidance for the Idaho Mercury Water Quality Criteria.* Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/4836.*

[11] IDAPA 58—Department of Environmental Quality, Surface and Wastewater Division, 58.01.02—Water Quality Standards. *https://adminrules.idaho.gov/rules/current/58/580102.pdf.*

[12] *Nw. Env't Advocs.* v. *United States Env't Prot. Agency,* No. 1:13–cv–263 (D. Idaho filed June 14, 2013).

mercury criteria for Idaho following the EPA's December 12, 2008 disapproval of the state's revisions to its mercury criteria. On July 19, 2021, the Court issued a decision on that claim in favor of the plaintiffs, concluding that, as a result of its disapproval, the EPA was subject to a mandatory duty to promulgate new criteria for the state.[13] The Court directed the parties to file briefs regarding an appropriate remedy. The parties negotiated a settlement and entered into a Stipulated Order on Remedy on October 4, 2022.[14] The Order states that the EPA will sign for publication in the **Federal Register** proposed aquatic life mercury criteria for the state of Idaho within 18 months of its entry with the Court (*i.e.,* by April 4, 2024).

With regard to the form of the proposed criteria, the Stipulated Order on Remedy states that ''[i]n recognition of the comparative ease of translating water column concentrations and values into permit effluent limitations and wasteload allocations, EPA commits to developing proposed Mercury Criteria that include water column concentrations, or default water column values that can be modified on a case-by-case basis, if EPA determines there are sufficient data available to support this form of criteria.''

D. General Recommended Approach for Deriving Aquatic Life Criteria

The EPA developed the mercury criterion for Idaho in this proposed rulemaking consistent with the EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (referred to as the ''Aquatic Life Guidelines'').[15] The EPA's Aquatic Life Guidelines describe a method to estimate the highest concentration (magnitude) of a substance in water—averaged over a given time period (duration) and that should not be exceeded more than the allowable number of times during a specified time period (frequency)—that will not present a significant risk to the aquatic organisms in the water. The Aquatic Life Guidelines recommend using toxicity test data from a minimum of eight taxa of aquatic organisms to derive criteria. These taxa are intended to be representative of a wide spectrum of aquatic life, and act as surrogates for untested species. Therefore, the specific test organisms do not need to be present in the water(s) where the criteria will apply.

Aquatic life criteria are typically represented as concentrations of a pollutant in the water column with two magnitudes: one associated with a shorter-term (acute) duration and another associated with a longer-term (chronic) duration. However, depending on the mode of toxicity, for some pollutants, an acute-only or chronic-only water column criterion is appropriate.[16] For example, for pollutants where toxicity to aquatic life is primarily driven by diet (*i.e.,* the consumption of contaminated prey) rather than by direct exposure to dissolved contaminants in the water column, longer-term water column measurements that capture the degree of likely pollutant uptake via dietary exposure—such as measurements with a 30-day average (chronic) duration—are often the most appropriate water column-based measure of their toxicity to aquatic life. Furthermore, for some pollutants, measurements of pollutant concentrations within the tissues of aquatic organisms provide a more direct measure of toxicity (to both the organisms themselves, and to humans consuming those organisms) than water column measurements. For bioaccumulative pollutants such as mercury, where exposure is primarily through diet, both of these rationales apply, with tissue measurements and longer-term water column measurements providing more appropriate measures of toxicity than the 1-hour and 4-day water column measurements that capture the toxic effects of many other pollutant types.

Because tissue measurements provide a more direct measure of toxicity for bioaccumulative pollutants such as mercury, the EPA has considered it appropriate to establish tissue criteria for these pollutants. However, criteria expressed as organism tissue concentrations can prove challenging to implement in CWA programs such as NPDES permitting and Total Maximum Daily Loads (TMDLs) because these programs typically demonstrate that water quality standards are met by using a water column concentration to calculate a load-based effluent limit or daily load, respectively. In recent years, the EPA has developed tissue-based national criteria recommendations for certain bioaccumulative pollutants and then assessed the degree to which available knowledge and data support translating those tissue criteria to water column criteria at the site, state, or national level.

For exceedance frequency, most water column aquatic life criteria developed by the EPA include a recommended exceedance frequency of no more than once in three years. The EPA based this maximum exceedance frequency recommendation of once every three years on the time aquatic ecosystems require to recover from the exceedances. For water column criteria, an exceedance occurs when the average concentration over the duration of the averaging period is above the criterion. Because fish tissue concentrations of bioaccumulative pollutants reflect longer-term uptake and elimination dynamics and tend to change slowly over time, their frequency and duration components tend to be different than those of water column criteria. Specifically, for fish tissue criteria, the EPA recommends for bioaccumulative pollutants [17] [18] that the criteria be expressed with an ''instantaneous measurement'' duration and be considered exceeded if a fish tissue sample measurement from a single sampling event (defined as a composited tissue sample from each fish species or a central tendency estimate of individual tissue samples from each fish species, collected from a given site or waterbody in a discrete sampling period) exceeds the criterion value.[19]

IV. Proposed Mercury Aquatic Life Criterion for Idaho

A. Scope of the EPA's Proposed Rule

The final criterion resulting from this proposed rulemaking would establish

[13] *Nw. Env't Advocs.* v. *United States Env't Prot. Agency,* 549 F. Supp. 3d 1218 (D. Idaho 2021).

[14] Stipulated Order on Remedy, *Nw. Env't Advocs.* v. *United States Env't Prot. Agency,* No. 1:13–cv–263 (D. Idaho October 4, 2022).

[15] USEPA. 1985. *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses.* U.S. Environmental Protection Agency, Office of Research and Development, Duluth, MN, Narragansett, RI, Corvallis, OR. PB85–227049. *https://www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf.*

[16] *https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table#table.*

[17] USEPA. 2021. *2021 Revision to Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2016.* EPA 822–R–21–006. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2021-08/selenium-freshwater2016-2021-revision.pdf.*

[18] USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctanoic Acid (PFOA).* EPA–842–D–22–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfoa-report-2022.pdf;* USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctane Sulfonate (PFOS).* EPA–842–D–22–002. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfos-report-2022.pdf.*

[19] As previously stated, since fish tissue concentrations of bioaccumulative pollutants tend to change slowly over time, any exceedance indicates that waterbody conditions may not be protective of aquatic life.

levels of mercury appropriate for the protection and maintenance of a viable aquatic life community in waters under Idaho's jurisdiction that are designated for aquatic life uses. The criterion would apply to all of Idaho's aquatic life use designations and would replace the current CWA-effective acute and chronic mercury criteria.

B. Proposed Mercury Criterion

Since mercury is significantly more toxic through chronic dietary exposure than through water-based exposure, the EPA developed a proposed chronic criterion that is based on dietary exposures. The EPA did not develop a separate acute or chronic criterion from the results of toxicity tests with only water-based exposure. Because the most harmful effects of mercury on aquatic organisms are due to its bioaccumulative properties and because the resulting chronic effects are observed at lower mercury concentrations than acute effects, this chronic criterion based on dietary exposure is expected to additionally protect aquatic communities from any potential acute effects of mercury. For reasons described below, the EPA concluded that this chronic mercury criterion should integrate consideration of both relative organismal sensitivity (*i.e.,* inherent toxicity) and relative exposure potential (*i.e.,* bioaccumulation) across the aquatic species for which data are available. A summary of the EPA's approach is described below; for more details, please see the Technical Support Document included in the docket for this rulemaking.[20]

1. Inherent Toxicity Data

To account for inherent toxicity, the EPA evaluated toxicity studies in which the authors fed food spiked with methylmercury and/or inorganic mercury to aquatic organisms for an appropriate chronic duration (based on the taxon and the endpoint of interest, ranging up to 249 days in this data set[21]). The EPA then assessed each study that measured the organisms' resulting tissue mercury levels and associated toxicity effects. The tissue mercury levels in these studies were measured as methylmercury or total mercury. Although the toxicity reported in most of these studies was primarily due to methylmercury, the toxicity observed in at least some aquatic taxa was likely due to the combined effects of inorganic and methylmercury.

Idaho's aquatic life uses call for water quality appropriate for the protection and maintenance of a viable aquatic life community, including active self-propagating populations of salmonid fishes where appropriate habitat is available and the salmonid spawning use is designated. To protect these aquatic life designated uses, the EPA seeks to protect aquatic life and health of the aquatic community by minimizing adverse effects on the assessment endpoints of survival, growth, and reproduction in the taxa present in the aquatic community. Measures of effect (such as increased mortality, reduction in organism weight, or the number of eggs laid per female fish) reported in each study were used to quantify changes in the assessment endpoints of survival, growth, and reproduction. As with recent national recommended bioaccumulative pollutant criteria, the EPA selected the EC_{10}—the concentration that results in a 10% difference in a measure of effect (*e.g.,* a 10% decrease in number of eggs laid per female) in the test population—as the numeric metric for the measures of effect, wherever possible. The EC_{10} estimates a low level of effect that is different from controls but is not expected to cause severe effects at the population level for a bioaccumulative contaminant. For studies with experimental designs that did not provide sufficient test concentrations to calculate an $EC_{10,}$ the EPA generally used an estimate of the No Observed Effect Concentration (NOEC) as a surrogate for the $EC_{10.}$[22]

The EPA collected chronic dietary toxicity test data of sufficient quality across the eight diverse taxonomic groups (including vertebrates and invertebrates) recommended in the Aquatic Life Guidelines. Quantitative data were available for 19 species within 18 genera. For each toxicity study, the EPA recorded the type of tissue in which the mercury concentration had been measured (muscle or whole-body) and then used conversion factors derived from the literature to create two equivalent data sets: one in terms of muscle tissue concentrations and the other in terms of whole-body tissue concentrations. This approach allowed the EPA to develop two tissue criterion elements (one for muscle tissue and one for whole-body tissue).

2. Bioaccumulation Data

The EPA estimated bioaccumulation using the bioaccumulation factor (BAF) approach; a BAF is the ratio of the concentration of a chemical in the tissue of an aquatic organism to the concentration of the chemical dissolved in ambient water at the site of sampling. Because mercury bioaccumulation, and thus BAFs, can be affected by multiple site-specific factors (see section III.B. in this preamble above), it is desirable to base BAFs on field-collected data from the location(s) to which the criterion will be applied. Consequently, the EPA assembled a data set of paired (*i.e.,* collected in the same waterbody within one year) aquatic organism tissue and water samples from Idaho. The data set contained data from 30 fish species and one crayfish species. Although no paired tissue and water data from Idaho were found for amphibians, the EPA conducted a literature search and identified paired tissue and water data for the wood frog (resident in Northern Idaho) that had been collected in Maine and Vermont; these data were added to the data set to ensure consideration and protection of Idaho amphibians.

From this data set, the EPA calculated species-level BAFs by first taking the median for a species at a site in a particular year, then the median across years within a site, then the median across sites for a species to get one median BAF per species.

3. Development of Fish Tissue Criterion Elements: Magnitude

Having assembled data on both toxicity and bioaccumulation for a suite of aquatic species relevant to protection and maintenance of a viable aquatic life community in Idaho, the EPA proceeded to develop the muscle and whole-body tissue criterion elements. The EPA noted that there were large ranges of toxicological sensitivity and bioaccumulation potential across taxa. Two specific issues were apparent

[20] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

[21] The chronic studies used in the derivation of the mercury criterion followed taxa-specific exposure duration requirements from various test guidelines (*i.e.,* EPA's 1985 Aquatic Life Criteria Guidelines: *https://www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf* and EPA OCSPP's 2016 Ecological Effects Test Guidelines: *https://www.epa.gov/test-guidelines-pesticides-and-toxic-substances/series-850-ecological-effects-test-guidelines*) when available. Thus, most studies consisted of partial life-cycle tests of sufficient length to ascertain whether dietary exposure to mercury had a deleterious effect on the endpoint of interest. For studies involving amphibian taxa, only dietary exposure studies using fully aquatic life stages (larvae, tadpoles, and metamorphs) of these species were considered.

[22] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

related to differing bioaccumulation rates among species for mercury.

First, the two amphibians in the toxicity data set were the two most sensitive species based on dietary exposure (inherent toxicity), but also have by far the lowest mercury bioaccumulation potential. Fish, on the other hand, are comparatively more tolerant to inherent (direct) toxicity, but generally more vulnerable to mercury pollution due to their higher mercury bioaccumulation potential. Therefore, establishing a criterion based solely on inherent toxicity data, *i.e.,* without considering bioaccumulation differences, would be inappropriate. The EPA also aimed to develop a criterion that was practical and implementable, recognizing that Idaho typically samples fish (rather than amphibians) for CWA implementation purposes. Therefore, in consideration of the bioaccumulation data, the EPA is proposing a chronic criterion for mercury based on fish and aquatic invertebrate inherent toxicity data, which also protects amphibians.

Second, mercury bioaccumulation potential among fish species varies widely (up to 20-fold differences) due primarily to their diets: as trophic level increases so does mercury bioaccumulation. In order to protect higher trophic level fish, such as salmonids, which are commercially, recreationally, and ecologically important in Idaho, the EPA made adjustments to account for known bioaccumulation differences among fish species. Doing so ensures that higher trophic level fish species are protected when evaluating sampling data from lower trophic level species (*e.g.,* bluegill, suckers, pumpkinseed) for implementation purposes.

To address these two issues, the EPA used a modified approach based on the ''good science'' clause in the Aquatic Life Guidelines [23] to integrate inherent toxicity and bioaccumulation. Briefly, to address the first issue (the most sensitive organisms having by far the lowest bioaccumulation potential), the EPA calculated both tissue criterion elements using the fish and aquatic invertebrate data (*i.e.,* excluding amphibians) and then analyzed whether the resulting criterion elements would be protective of all aquatic species in the data set in light of their inherent toxicity and bioaccumulation differences (see further details below).

To address the second issue, the EPA evaluated the differences in bioaccumulation between fish species in the data set and developed adjustment factors that can be used when sampling fish for implementation. If a high trophic level adult fish (*e.g.,* trophic level 4) is sampled and found to have mercury tissue concentrations at (or below) the criterion level, it would be reasonable to assume that all aquatic species in that water body are protected (*i.e.,* because lower trophic level species are expected to have lower levels of mercury bioaccumulation). However, if a lower trophic level fish is sampled and found to be below the criterion level, it does not necessarily mean that higher trophic level fish are protected. To resolve this issue, the EPA developed a method to estimate the tissue mercury levels of higher trophic level adult fish resident in that water body to determine whether all aquatic species in that water body are protected.

To make these estimates, the EPA developed Bioaccumulation Trophic Adjustment Factors (BTAFs). The BTAF is an adjustment factor applied to the tissue sample data from a lower trophic level fish and is based on the relative relationship of bioaccumulation rates of the highest trophic level fish species as compared to lower trophic level fish species. The EPA first assigned all the fish in the bioaccumulation data set to one of three trophic categories: low (trophic level 2 or TL2), medium (trophic level 3 or TL3), or high (trophic level 4 or TL4).[24] The EPA then developed two BTAFs by calculating the ratio between the trophic level BAFs: one to be used if a TL2 species is sampled (representative TL4 BAF/representative TL2 BAF) and another to be used if a TL3 species is sampled (representative TL4 BAF/representative TL3 BAF). To calculate representative BAFs, the EPA used the median of BAFs for species at that trophic level from the species-level BAF data set for TL3 (TL3 BAF = 108,418 L/kg, n = 21) and TL4 (TL4 BAF = 378,150 L/kg, n = 6) fish. For the representative TL2 BAF, due to the paucity of TL2 fish species in the data set (n = 3), the EPA used the 20th centile of the full distribution of the species-level median BAFs (TL2 BAF = 67,203 L/kg, n = 30). The EPA's use of the 20th centile ensures appropriate protection for aquatic species in Idaho (*i.e.,* providing water quality appropriate for the protection and maintenance of a viable aquatic life community as specified by Idaho's aquatic life uses) and is consistent with previous EPA approaches for bioaccumulative chemicals.[25] [26]

Therefore, the EPA is proposing that if a TL2 fish is sampled, its muscle tissue mercury concentration (converted from whole-body tissue concentration where appropriate, as discussed below) must be multiplied by 5.6 (378,150 L kg^{-1}/67,203 L kg^{-1}) to estimate the muscle tissue mercury concentration of a TL4 fish in the same water body, and that estimate must be compared to the muscle tissue criterion element (225 ng total mercury (THg)/g wet weight (ww)) to determine whether the criterion is met. Similarly, if a TL3 fish is sampled, its muscle tissue mercury concentration must be multiplied by 3.5 (378,150 L kg^{-1}/108,418 L kg^{-1}) and the resulting value compared to the muscle tissue criterion element. If an adult TL4 fish species is sampled, its muscle tissue mercury concentration must be compared directly to the muscle tissue criterion element. Because the BAFs in this data set were calculated using muscle tissue concentrations, it is most appropriate to use the BTAFs to adjust muscle (rather than whole-body) tissue concentration measurements. If whole-body tissue samples are taken from TL2 or TL3 fish, the EPA is proposing that those measurements must be converted

[23] The Aquatic Life Guidelines note that a modified approach may be needed in some situations, directing users to: ''On the basis of all available pertinent laboratory and field information, determine if the criterion is consistent with sound scientific evidence. If it is not, another criterion, either higher or lower, should be derived using appropriate modifications of these Guidelines.'' (pg. 30).

[24] Fish species were binned into three trophic magnitude categories largely corresponding to trophic levels designated in Essig 2010 (Arsenic, mercury, and selenium in fish tissue and water from Idaho's major rivers: A statewide assessment. Idaho Department of Environmental Quality, Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/3472*) based on Zaroban et al. 1999 (Classification of species attributes for Pacific Northwest freshwater fishes. Northwest Sci. 73(2): 81–93). In some instances, additional information regarding trophic ecology and other attributes of Pacific Northwest fish species resident in Idaho were also incorporated into the trophic level categorization determination (Brown, C.J.D. 1971. Fishes of Montana. Bozeman, MT: Big Sky Books/Montana State University. 207 p.; Zaroban et al. 1999. Classification of species attributes for Pacific Northwest freshwater fishes. Northwest Sci. 73(2): 81–93; Froese, R. and D. Pauly. Editors. 2022. FishBase. World Wide Web electronic publication. *www.fishbase.org*).

[25] USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctanoic Acid (PFOA).* EPA–842–D–22–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfoa-report-2022.pdf;* USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctane Sulfonate (PFOS).* EPA–842–D–22–002. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfos-report-2022.pdf.*

[26] USEPA. 2021. *2021 Revision to Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2016.* EPA 822–R–21–006. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2021-08/selenium-freshwater2016-2021-revision.pdf.*

to a muscle tissue equivalent (by dividing by 0.72, a conversion factor derived from the literature [27]) before multiplying by the appropriate BTAF and comparing the result to the muscle tissue criterion element.

Trophic level assignments for fish species found in Idaho are included in the Technical Support Document [28] and should be used where available. Additional sources for trophic level assignment cited in the Technical Support Document should be consulted to assign trophic levels for other species. In some cases, consultation with state fisheries experts may be necessary. At this time, the EPA has developed BTAFs for fish based on Idaho species with available BAF data. The EPA requests comment on whether there is interest in sampling species other than fish to determine compliance with the criterion, and if so, whether any data exist to develop appropriate BTAFs for those other species.

Having confirmed that the most bioaccumulative species (*i.e.,* those at the highest trophic level) would be protected by the tissue criterion with BTAF adjustments applied as appropriate, the EPA analyzed whether a tissue criterion derived based solely on fish and aquatic invertebrates (excluding the two amphibian species) would be protective of all aquatic species in the data set. Comparing the amphibian BAF (8,222 L/kg) to the median TL4 fish BAF (378,150 L/kg), the EPA found that amphibians would be expected to bioaccumulate approximately 46 times less mercury than the median TL4 fish when exposed to the same mercury levels. Therefore, if a TL4 fish is sampled and found to have a mercury level equivalent to the muscle tissue criterion value (225 ng THg/g ww), amphibians in that same water body would be expected to have muscle tissue concentrations of approximately 4.9 ng THg/g ww, well below the EC_{10} of the most sensitive amphibian species (33.7 ng THg/g ww). Similar reasoning would apply if TL2 or TL3 fish species were sampled and adjusted with the BTAFs to an estimated TL4 muscle tissue concentration at or below 225 ng THg/g ww; in all cases, estimated amphibian muscle tissue concentrations in that water body would be below the most sensitive amphibian's EC_{10}. Therefore, the EPA concluded that the tissue criterion elements protect the full suite of aquatic species (including amphibians) without being unnecessarily stringent.

The EPA's proposed tissue criterion elements are expressed as total mercury (THg) (*i.e.,* including methylmercury and inorganic mercury). As noted above, both forms of mercury can bioaccumulate and have toxic effects, although only methylmercury biomagnifies. Furthermore, the analysis of total mercury incorporates the measurement of methylmercury, but costs less and uses less complex analytical methods than the measurement of methylmercury alone. Additionally, measurement of total mercury in fish tissue has served as the basis for quantifying mercury concentrations in fish tissue monitoring programs implemented by the EPA and many states, including Idaho.

4. Development of the Water Column Criterion Element: Magnitude

To develop the water column criterion element, the EPA first needed to assign a BAF to each species in the toxicity data set to facilitate the translation from tissue to water, since not all species in the toxicity data set were also present in the bioaccumulation data set. To determine appropriate BAFs for the fish species without species-specific BAFs, the EPA calculated TL-specific BAFs by taking the 80th centile of the median species-level BAFs for all fish within that TL. The EPA's use of the 80th centile here is consistent with the process for deriving water column criteria for other bioaccumulative pollutants.[29] [30] The EPA then assigned the most representative BAF (*i.e.,* species- or genus-level where available, otherwise trophic-level) to each fish species in the toxicity data set.[31] Nearly all BAFs were derived from field-collected Idaho tissue and water data, representing a diverse range of site-specific relationships between mercury in tissue and water across the state of Idaho (see TSD section 3.5 for more details). The EPA then translated the tissue-based toxicity value for each species in the toxicity data set to a water column-based toxicity value by dividing the species' tissue-based toxicity value by its assigned BAF.

The EPA ranked the translated water column-based toxicity values by sensitivity and calculated the water column criterion element per the Aquatic Life Guidelines calculation method to arrive at a final water column value of 2.1 ng/L (see Table 1 to proposed 40 CFR 131.XX(b)). No exclusions or adjustments to this criterion element were needed to account for bioaccumulation differences because in this case both mercury toxicity and bioaccumulation in aquatic species were directly incorporated into the water column criterion element derivation. The EPA is proposing to express the water column criterion element as total mercury in whole water (not dissolved or filtered)—*i.e.,* including methylmercury and inorganic mercury measured from an unfiltered water sample. The EPA chose this unit rather than dissolved mercury for the following reasons. First, the water column data used to derive the BAFs were from unfiltered water samples. Second, NPDES regulations (40 CFR 122.45(c)) require that permit effluent limits be expressed as total recoverable metal (with limited exceptions), so most point source discharge monitoring data for mercury (in Idaho and elsewhere) is from unfiltered samples. Third, because the primary route of mercury toxicity is through dietary exposure, particulate mercury may contribute to toxicity (in contrast to some other metals for which the primary route of toxicity is absorption from water, and for which measurements of the dissolved fraction may therefore be more appropriate).

For most of the paired aquatic organism tissue and water samples that were available for the calculation of Idaho BAFs, the unfiltered water samples were collected during the July to October period. In Idaho flowing waters, discharge rates and turbidity tend to be highest in the spring due to snowmelt, whereas they tend to be lower during the July to October time period (*i.e.,* under baseflow conditions). In an analysis of time series data from several Idaho rivers, the EPA found that there are higher total mercury concentrations during high flow periods (see Technical Support Document

[27] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

[28] Ibid.

[29] USEPA. 2021. *2021 Revision to Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2016.* EPA 822–R–21–006. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2021-08/selenium-freshwater2016-2021-revision.pdf.*

[30] USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctanoic Acid (PFOA).* EPA–842–D–22–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfoa-report-2022.pdf;* USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctane Sulfonate (PFOS).* EPA–842–D–22–002. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfos-report-2022.pdf.*

[31] For invertebrates, the EPA assigned the crayfish BAF to the other invertebrates in the data set (daphnid, mayfly, and clam). For amphibians, the EPA assigned the wood frog BAF.

section 3.1.2 for more details [32]). The EPA calculated BAFs using unfiltered water samples collected primarily during baseflow conditions, and then used those BAFs to calculate the water column criterion element. Therefore, water samples collected during baseflow conditions would be most representative of the data used to derive this criterion element.

5. Frequency and Duration of Water Column and Fish Tissue Criterion Elements

The EPA also determined appropriate frequencies and durations for the tissue and water column criterion elements. For the tissue criterion elements, because fish tissue mercury concentrations change slowly (*e.g.,* changing on the order of 2–3% per year), fish tissue collected from a site can be assumed to integrate and represent the mercury bioaccumulation dynamics at that site over several years. Therefore, the EPA is proposing an ''instantaneous measurement'' duration for the fish tissue criterion elements (Table 1 to proposed 40 CFR 131.XX(b)) because fish tissue measurements already reflect longer-term bioaccumulation dynamics. For similar reasons and considering that fish tissue mercury concentrations are relatively slow to respond to a decrease in mercury inputs, the EPA is proposing a frequency of ''not to exceed'' for the fish tissue criterion elements (Table 1 to proposed 40 CFR 131.XX(b)).

For the water column criterion element, the EPA considered observed durations of mercury methylation processes affecting trophic transfer and of mercury bioaccumulation and elimination processes in aquatic organisms and, consistent with the duration components of other bioaccumulative contaminants,[33] [34] set the duration at 30 days (Table 1 to proposed 40 CFR 131.XX(b)). For the frequency aspect, the EPA considered the number of times mercury concentrations in water could exceed the criterion over time without negatively affecting the aquatic community and determined that a once-in-three years exceedance frequency is appropriate (Table 1 to proposed 40 CFR 131.XX(b)), based on the ability of an aquatic ecosystem to recover from stress caused by a toxic pollutant such as mercury.[35] [36]

6. Structure of Criterion

The EPA requests comment on two alternatives for the relationship of the fish tissue and water column elements. The first alternative, preferred by the EPA, is for the fish tissue criterion elements to supersede the water column criterion element in a hierarchical structure (Table 1 to proposed 40 CFR 131.XX(b)). Because the tissue criterion elements were estimated directly from toxicity studies, whereas the water column criterion element required the use of BAFs to translate those tissue values, the water column element is a step removed from the toxicity values. These translations introduced some uncertainty into the water column values since species-specific BAFs from Idaho were not available for every species. In other words, the EPA has greater confidence in the tissue criterion elements, and therefore greater confidence in implementation decisions made using these criterion elements. If the EPA were to finalize this hierarchical structure, a water body would be attaining its aquatic life designated use if a tissue criterion element was met, even if its water column criterion element was exceeded.

The second alternative is for the fish tissue and water column criterion elements to be independently applicable. Because major sources of mercury to aquatic systems in Idaho are legacy mining contamination and atmospheric deposition, water column measurements of mercury from a waterbody are expected to be relatively stable over time. In contrast, pollutants with new and increasing direct sources tend to have more variable measurements over time, depending on the anthropogenic source of the pollutant. This expected relative stability of water column concentrations over time suggests that, while the EPA has relatively greater confidence in the fish tissue elements, as noted above, it would also be reasonable to conclude that a water body that is not meeting the water column element may be worthy of further evaluation, even if the fish tissue elements are being met. If the EPA were to finalize an independently applicable criterion structure, a water body would not be attaining its aquatic life designated use if either a tissue criterion element or the water column criterion element was exceeded. The EPA requests comment on the most appropriate relationship (hierarchical or independently applicable) of the fish tissue and water column elements.

Within the fish tissue elements, the EPA is proposing that sample data from TL4 fish supersede sample data from TL3 or TL2 fish. Where possible, TL4 fish should be sampled to determine whether a fish tissue criterion element is met, because these data provide a direct assessment of whether highly bioaccumulative species in the water body are experiencing tissue mercury levels associated with adverse effects. This direct assessment is more certain than an assessment based on an estimated TL4 fish tissue concentration generated by applying the appropriate BTAF to TL3 or TL2 fish tissue sample data, so if tissue sample data from fish at multiple trophic levels are available, the TL4 fish sample data would supersede.

The EPA requests comment on two alternatives for the relationship between TL3 fish sample data and TL2 fish sample data. The first alternative, preferred by the EPA, is for sample data from TL3 fish to supersede sample data from TL2 fish (with both still being superseded by sample data from TL4 fish), for two reasons. First, the trophic ecology of TL4 fish is closer to that of TL3 fish than TL2 fish. Second, more data were available to establish the relationship between TL3 and TL4 fish than between TL2 and TL4 fish.[37] The second alternative is for sample data from TL3 fish and sample data from TL2 fish to be independently applicable (with both still being superseded by sample data from TL4 fish). A rationale

[32] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

[33] USEPA. 2021. *2021 Revision to Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2016.* EPA 822–R–21–006. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2021-08/selenium-freshwater2016-2021-revision.pdf.*

[34] USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctanoic Acid (PFOA).* EPA–842–D–22–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfoa-report-2022.pdf;* USEPA. 2022. *Draft Aquatic Life Ambient Water Quality Criteria for Perfluorooctane Sulfonate (PFOS).* EPA–842–D–22–002. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2022-04/pfos-report-2022.pdf.*

[35] USEPA. 1985. *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses.* U.S. Environmental Protection Agency, Office of Research and Development, Duluth, MN, Narragansett, RI, Corvallis, OR. PB85–227049. *https://www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf.*

[36] USEPA. 2023. *Proceedings from the EPA Frequency and Duration Experts Workshop September 11–12, 2019.* U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2023-02/proceedings-frequency-duration-workshop.pdf.*

[37] USEPA. 2023. Technical Support Document: Aquatic Life Water Quality Criterion for Mercury in Idaho. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/wqs-tech/mercury-criterion-protect-aquatic-life-idaho.*

for this structure would be that TL3 and TL2 sample data are equally uncertain, relative to TL4 sample data, because BTAFs must be applied to both. The EPA requests comment on the most appropriate relationship (hierarchical or independently applicable) of the TL3 fish sample data and TL2 fish sample data.

In addition to the criterion structure alternatives described above, the EPA invites public comment on all aspects of the process used to derive the proposed mercury criterion, including but not limited to the compilation of toxicity and bioaccumulation data, the derivation of the proposed tissue criterion element magnitudes and the water column criterion element magnitude from these data, the derivation and proposed application of the BTAFs, and the proposed frequency and duration of the criterion elements.

C. Implementation

The EPA understands that states have certain flexibility with how they implement WQS. The EPA is recommending possible approaches below to facilitate consistent implementation of the mercury aquatic life criterion resulting from this proposed rulemaking for the state's consideration and for public comment. The EPA recommends that Idaho develop implementation guidance, potentially building on its existing implementation guidance for the methylmercury fish tissue human health criterion,[38] adding information to clarify how implementation should proceed given the presence of a water column element and fish tissue elements as presented in this proposed mercury aquatic life criterion.

1. Identification of Impaired Waters and TMDL Development

Section 303(d) of the CWA and the EPA's supporting regulations in 40 CFR 130.7 require states to develop biennial lists of waters impaired (*i.e.,* not meeting one or more applicable water quality standards) or threatened by a pollutant and needing a TMDL (*i.e.,* the Section 303(d) list). States are required to establish a prioritized schedule for waters on the lists and develop TMDLs for the identified waters based on the severity of the pollution and the sensitivity of their uses, among other factors (40 CFR 130.7(b)(4)). A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards, and an allocation of that load among the various point and/or nonpoint sources of the pollutant.

The state is required to assemble and evaluate all existing and readily available water-quality related data and information when determining which waterbodies belong on the CWA section 303(d) list (40 CFR 130.7(b)(5)). If multiple types of data and information are collected at a site, they must be assembled and evaluated consistent with the final structure of the mercury criterion. If the final criterion has a hierarchical structure as proposed, the fish tissue criterion elements would supersede the water column criterion element. If only water column data are available, assessment decisions can be made by comparing those data to the water column criterion element. If the final criterion does not have a hierarchical structure, each element would be its own criterion, and the waterbody would be listed if any criterion is exceeded. The water column criterion element proposed here would apply unless site-specific water column criterion elements were adopted by Idaho and approved by the EPA pursuant to CWA section 303(c) and the EPA's implementing regulation. Regardless of the structure of the fish tissue vs. water column elements (hierarchical or independent criteria), the trophic level hierarchy applies within the fish tissue criterion element. As noted above (section IV.B.6. in this preamble), the EPA is proposing that data from TL4 fish would supersede data from TL3 or TL2 fish, and data from TL3 fish would supersede data from TL2 fish.

Idaho has flexibility to determine how to evaluate individual and composite samples for fish tissue. Tissue data provide instantaneous point measurements that reflect integrative accumulation of mercury over time and space in fish at a given site. The proposed mercury criterion provides Idaho with flexibility in how the state can interpret a discrete fish tissue sample to represent a given species' population at a site. Generally, fish tissue samples collected to calculate average tissue concentrations (often in composites) for a species at a site are collected during one sampling event, or over a short interval due to logistical constraints and the cost for obtaining samples. Consistent with the EPA's [39] and Idaho's [40] current recommendations for implementation of selenium fish tissue criterion elements, a central tendency of fish tissue data may be calculated, or a composite of fish tissue samples may be analyzed, within a fish species but should not be calculated or analyzed across species to determine whether a fish tissue element of this proposed mercury criterion is met. The EPA recommends that the state clearly describe its decision-making process in its assessment methodology.

Although the frequency component is expressed as ''The average tissue concentration must not be exceeded,'' not meeting a fish tissue criterion element does not mean that fish populations cannot recover. As such, if Idaho determines that a fish tissue criterion element is not met and identifies the water as impaired on their CWA section 303(d) list, Idaho may determine in the future that the criterion is met based on readily available data and information and remove the waterbody-pollutant combination from the list. The EPA recommends that Idaho include in their assessment methodology a discussion of how the fish tissue criterion elements will be implemented, including information on how the criterion will be determined to be met after an exceedance of the fish tissue criterion elements.

2. NPDES Permitting

Under the CWA, WQS are used to derive Water Quality-Based Effluent Limits (WQBELs) in NPDES permits for point source discharges, thereby limiting the concentrations or levels of pollutants that may be discharged into a waterbody to attain and maintain its designated uses. The EPA is proposing a water column criterion element, which can be used for NPDES permitting as well as other aspects of implementation. To account for the 30-day duration of the proposed water column criterion element, adjustments can be made to WQBEL calculation methods that assume a 4-day averaging period [41] as the EPA described in its Notice of Availability for the 1999 ambient water quality criteria for

[38] Idaho Department of Environmental Quality. 2005. *Implementation Guidance for the Idaho Mercury Water Quality Criteria.* Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/4836.*

[39] USEPA. 2021. *Frequently Asked Questions: Implementing EPA's 2016 Selenium Criterion in Clean Water Act Sections 303(d) and 305(b) Assessment, Listing, and Total Maximum Daily Load Programs: Draft.* U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2021-10/selenium-faq-cwa305-draft-2021.pdf.*

[40] Idaho Department of Environmental Quality. 2022. *Implementation Guidance for the Idaho Selenium Criteria for Aquatic Life.* Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/16846.*

[41] USEPA. 1991. *Technical Support Document For Water Quality-based Toxics Control.* EPA/505/2–90–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www3.epa.gov/npdes/pubs/owm0264.pdf.*

ammonia,[42] which also included a 30-day duration. However, this water column criterion element would not prevent Idaho from using the fish tissue criterion elements for monitoring and regulating pollutant discharges at the state's discretion.

Determination of critical low flows and mixing zones for any criterion that results from this proposed rulemaking should proceed in the same manner as for other aquatic life criteria for toxic pollutants in Idaho, with appropriate adjustments to account for the 30-day duration of the water column element.

V. Endangered Species Act

On May 7, 2014, the National Marine Fisheries Service (NMFS) finalized a Biological Opinion [43] which evaluated whether the EPA's 1996 approval of Idaho's mercury aquatic life criteria—along with EPA actions in Idaho related to several other pollutants—would jeopardize the continued existence of threatened and endangered species in Idaho for which NMFS is responsible. NMFS concluded that the EPA's approval of the chronic mercury criterion (0.012 µg/L) would jeopardize Snake River spring/summer Chinook salmon, Snake River fall Chinook salmon, Snake River sockeye salmon and Snake River Basin steelhead—as well as adversely modify designated critical habitat for rearing Snake River salmon and steelhead—due to potential bioaccumulation occurring from exposure to mercury in the diet. In contrast, NMFS concluded that exposure of listed salmon and steelhead to mercury at the acute criterion (2.1 µg/L) was unlikely to result in death or sub-lethal effects that would result in injury or reduced survival.

The NMFS biological opinion contained Reasonable and Prudent Alternatives (RPAs) for the chronic criterion that would avoid the likelihood of jeopardy to the species. The RPAs directed the EPA to promulgate a new chronic mercury criterion that would be protective of aquatic life in Idaho, unless the EPA was able to approve such a criterion promulgated by the state. NMFS also specified an RPA for interim protection until this criterion was effective, stating that ''until a new chronic criterion is adopted EPA will use the 2001 EPA/2005 Idaho human health fish tissue criterion of 0.3 mg/kg wet weight for WQBELs and reasonable potential to exceed criterion calculations using the current methodology for developing WQBELs to protect human health.'' The biological opinion also stated that ''implementation of the Idaho methylmercury criterion shall be guided by EPA's methylmercury water quality criteria implementation guidance [44] or IDEQ's methylmercury water quality criteria implementation guidance,[45] '' and that ''for water bodies for which appropriate fish tissue data are not available, if the geometric mean of measured concentrations of total mercury in water is less than 2 ng/L, then the water body will be presumed to meet the fish tissue criterion of 0.3 mg/kg wet weight. If the water column concentration is greater than 2 ng/L, fish tissue data shall be collected.'' In the biological opinion, NMFS also opined that one significant digit was the appropriate level of precision for the total mercury water column value included in their RPA in light of the limitations of the data set from which it had been derived. The U.S. Fish and Wildlife Service reached the same conclusion for bull trout and Kootenai River white sturgeon and their associated critical habitats in its 2015 Biological Opinion evaluating the EPA's 1996 approval of Idaho's mercury aquatic life criteria and included the same RPAs for mercury.

The EPA's proposed chronic mercury criterion is consistent with the Services' RPAs, with the proposed muscle tissue criterion element being more stringent than the human health criterion (0.225 vs. 0.3 mg/kg [46] wet weight) and the proposed water column element being comparable to the RPA water column value (both 2 ng/L using one significant digit). The EPA will continue to work closely with the Services to ensure that the mercury criterion that the EPA ultimately finalizes is protective of federally listed species in Idaho.

VI. Applicability of EPA-Promulgated Water Quality Standards When Final

Under the CWA, Congress gave states primary responsibility for developing and adopting WQS for their waters (CWA section 303(a) through (c)). Although the EPA is proposing a mercury criterion for the protection of aquatic life in Idaho, Idaho continues to have the option to adopt and submit to the EPA mercury criteria for the state's waters consistent with CWA section 303(c) and the EPA's implementing regulation at 40 CFR part 131. The EPA encourages Idaho to consider adoption of mercury criteria protective of aquatic life uses. Consistent with CWA section 303(c)(4) and the Stipulated Order on Remedy, if Idaho adopts and submits mercury criteria for the protection of aquatic life, and the EPA approves such criteria before finalizing this proposed rulemaking, the EPA will not proceed with the promulgation for those waters for which the EPA approves Idaho's criteria. Under those circumstances, Federal promulgation would no longer be necessary to meet the requirements of the Act.

If the EPA finalizes this proposed rulemaking and Idaho subsequently adopts and submits mercury criteria for the protection of aquatic life in Idaho, the EPA would review Idaho's criteria to determine whether the criteria meet the requirements of section 303(c) of the CWA and the EPA's implementing regulation at 40 CFR part 131 and if so, the EPA would approve such criteria. If the EPA's federally promulgated criterion is more stringent than the EPA-approved state's criteria, the EPA's federally promulgated criterion would remain the applicable WQS for purposes of the CWA until the Agency withdraws that federally promulgated standard. The EPA would expeditiously undertake such a rulemaking to withdraw the Federal criterion if and when Idaho adopts and the EPA approves corresponding criteria. After the EPA's withdrawal of the federally promulgated criterion, the state's EPA-approved criteria would become the applicable criteria for CWA purposes. If the EPA-approved state's criteria are as stringent or more stringent than the federally promulgated criterion, then the state's criteria would become the CWA applicable WQS upon the EPA's approval of such criteria (40 CFR 131.21(c)).

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[42] USEPA. 1999. *Water Quality Criteria; Notice of Availability; 1999 Update of Ambient Water Quality Criteria for Ammonia.* 64 FR 71974–71980 (December 22, 1999). U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.govinfo.gov/content/pkg/FR-1999-12-22/pdf/99-33152.pdf.*

[43] National Marine Fisheries Service (NMFS). 2014. Endangered Species Act Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) Consultation: Idaho Water Quality Standards for Toxic Substances. Biological Opinion. NMFS Consultation Number: 2000–1484.

[44] USEPA. 2010. *Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion.* EPA 823–R–10–001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/sites/default/files/2019-02/documents/guidance-implement-methylmercury-2001.pdf.*

[45] Idaho Department of Environmental Quality. 2005. *Implementation Guidance for the Idaho Mercury Water Quality Criteria.* Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/4836.*

[46] Idaho's framework for implementing their mercury human health criterion in their TMDL and NPDES programs uses a mercury tissue concentration of 0.24 mg/kg, which represents a 20 percent margin of safety below the 0.3 mg/kg; Idaho Department of Environmental Quality. 2005. *Implementation Guidance for the Idaho Mercury Water Quality Criteria.* Boise, ID. *https://www2.deq.idaho.gov/admin/LEIA/api/document/download/4836.*

VII. Implementation and Alternative Regulatory Approaches

The Federal WQS regulation at 40 CFR part 131 provides several approaches that Idaho may utilize, at its discretion, when implementing or deciding how to implement the final aquatic life criterion resulting from this proposed rulemaking. Among other things, the EPA's WQS regulation: (1) allows states and authorized Tribes to authorize the use of compliance schedules in NPDES permits to meet water quality-based effluent limits (WQBELs) derived from the applicable WQS (40 CFR 131.15); (2) specifies the requirements for adopting criteria to protect designated uses, including criteria modified to reflect site-specific conditions (40 CFR 131.11); (3) authorizes and provides a regulatory framework for states and authorized Tribes to adopt WQS variances where it is not feasible to attain the applicable designated use and criterion for a period of time (40 CFR 131.14); and (4) specifies how states and authorized Tribes adopt, revise, or remove designated uses (40 CFR 131.10). Each of these approaches is discussed in more detail in the next sections.

A. NPDES Permit Compliance Schedules

The EPA's NPDES regulations at 40 CFR 122.47 address how a permitting authority can use compliance schedules in a permit if a discharger needs additional time to undertake actions like facility upgrades or operation changes that will lead to compliance with a WQBEL based on an applicable WQS that was issued or revised after July 1, 1977. *See In The Matter of Star-Kist Caribe,* 3 E.A.D. 172, 175, 177 (1990). 40 CFR 122.47 allows a permitting authority to include a compliance schedule in an NPDES permit, when appropriate, and the schedule must require compliance with the final WQBEL as soon as possible. Schedules longer than 1 year must include interim requirements and dates for their achievement. The EPA's Office of Wastewater Management 2007 Memorandum, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits,*[47] provides additional information about implementing 40 CFR 122.47 compliance schedule requirements. The EPA's WQS program regulation at 40 CFR 131.15 requires that a state that intends to allow the use of NPDES permit compliance schedules adopt specific provisions authorizing their use and obtain EPA approval under CWA section 303(c) to ensure that a decision to allow permit compliance schedules is transparent and allows for public input.[48] Consistent with 40 CFR 131.15, Idaho has an EPA-approved WQS for compliance schedules. This WQS allows IDEQ to include compliance schedules in NPDES permits to meet WQBELs that are established to ensure that the discharge does not cause or contribute to an exceedance of the final Federal mercury criterion. In Idaho, compliance schedules can only be included in permits for new WQBELs that are more stringent than the WQBEL in a facility's previous NPDES permit.

B. Site-Specific Criteria

The regulation at 40 CFR 131.11 specifies requirements for modifying water quality criteria to reflect site-specific conditions. In the context of this rulemaking, a site-specific criterion (SSC) is an alternative value to the Federal mercury criterion that would be applied on an area-wide or water body-specific basis that meets the regulatory standard of protecting the designated uses, being based on sound science, and ensuring the protection and maintenance of downstream WQS. A SSC may be more or less stringent than the otherwise applicable Federal criterion. A SSC may be called for when further scientific data and analyses indicate that a different mercury concentration (*e.g.,* a different fish tissue element) may be needed to protect the aquatic life designated uses in a particular water body or portion of a water body. A SSC may also be called for when the relationship between fish tissue and water column mercury concentrations at a site differs significantly from the relationship between fish tissue and water column mercury concentrations in the Idaho-specific dataset that the EPA used to derive the statewide water column criterion element.

C. WQS Variances

Idaho could adopt and submit WQS variances for the EPA's approval, consistent with 40 CFR 131.14, to aid in implementation of this federally promulgated criterion. The Federal regulation at 40 CFR 131.3(o) defines a WQS variance as a time-limited designated use and criterion, for a specific pollutant or water quality parameter, that reflects the highest attainable condition (HAC) during the term of the WQS variance. A WQS variance may be appropriate if attaining the use and criterion would not be feasible during a given time period because of one of the seven factors specified in 40 CFR 131.14(b)(2)(i)(A) but may be attainable in the future. These factors include where complying with NPDES permit limits more stringent than technology-based effluent limits would result in substantial and widespread economic and social impact. When adopting a WQS variance, states and authorized Tribes specify the interim requirements by identifying a quantifiable expression that reflects the HAC during the term of the WQS variance, establishing the term of the WQS variance, and justifying the term by describing the pollutant control activities expected to occur over the specified term of the WQS variance. WQS variances provide a legal avenue by which NPDES permit limits can be written to comply with the WQS variance rather than the underlying WQS for the term of the WQS variance. WQS variances adopted in accordance with 40 CFR 131.14 (including a public hearing consistent with 40 CFR 25.5) provide a flexible but defined pathway for states and authorized Tribes to issue NPDES permits with limits that are based on the HAC during the term of the WQS variance, thus allowing dischargers to make incremental water quality improvements. If dischargers are still unable to meet the WQBELs derived from the applicable designated use and criterion once a WQS variance term ends, the regulation allows the state to adopt a subsequent WQS variance if it is adopted consistent with 40 CFR 131.14.

D. Designated Uses

The EPA's proposed mercury criterion, once finalized, would apply to Idaho waters where the protection of aquatic life is a designated use. The Federal regulation at 40 CFR 131.10 provides requirements for adopting, revising, and removing designated uses related to aquatic life and recreation when attaining the use is not feasible based on one of the six factors specified in the regulation. If Idaho removes the aquatic life designated use from any of the waters to which the EPA is proposing to apply this mercury criterion (*i.e.,* from any water designated for an aquatic life use at the time this criterion is finalized), the state must adopt the highest attainable aquatic life

[47] USEPA. 2007. *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits.* Memo from James A. Hanlon, Director, Office of Wastewater Management to Alexis Strauss, Director, Water Division, EPA Region 9. 10 May 2007. *https://www3.epa.gov/npdes/pubs/memo_complianceschedules_may07.pdf.*

[48] 80 FR 51022, August 21, 2015.

use [49] and criteria, including a mercury criterion, to protect the newly designated highest attainable use consistent with 40 CFR 131.11 for those waters. It is possible that criteria other than the federally promulgated criteria would protect the highest attainable use. If the EPA were to find Idaho's designated use revision to be consistent with CWA section 303(c) and the implementing regulation at 40 CFR part 131, the Agency would approve the revised WQS. The mercury criterion proposed here, once finalized, would not apply to those waters to which the aquatic life use no longer applies upon the EPA's approval.

VIII. Economic Analysis

The complete economic analysis for this proposed rulemaking is documented in ''*Economic Analysis for Proposed Mercury Criterion to Protect Aquatic Life in Idaho,*'' which can be found in the docket for this rulemaking. For the economic analysis, the EPA assumed the baseline to be full implementation of Idaho's existing water quality criteria (*i.e.,* ''baseline criteria''), and then estimated the incremental impacts for compliance with the mercury criterion in this proposed rulemaking. Specifically, the EPA assumed full implementation of Idaho's existing 2.1 µg/L acute (1-hour) and 0.012 µg/L chronic (4-day) aquatic life water column total mercury criteria and Idaho's existing 0.3 mg/kg human health fish tissue methylmercury criterion. To estimate the incremental impacts of compliance, the EPA focused its economic analysis on two types of costs. First, the EPA estimated the potential cost impacts to current holders of NPDES permits. Second, the EPA estimated costs the state of Idaho may bear to develop Total Maximum Daily Loads (TMDLs) for waters newly identified as impaired under CWA section 303(d) using the proposed criterion.

Costs might also arise to sectors with operations that include nonpoint sources of mercury through implementation of TMDLs or through other voluntary, incentivized, or state-imposed controls. However, these costs were not included in this economic analysis for several reasons. First, the CWA, and therefore this proposed rulemaking, does not regulate nonpoint sources. The EPA recognizes that controls for nonpoint sources may be part of implementing future TMDLs, but those decisions would be at the state's discretion. Furthermore, to reasonably estimate those decisions, the EPA would need to have today the detailed water quality data that Idaho would have in hand in the future when they reach those decision points. Second, nonpoint sources are intermittent, variable, and occur under hydrologic or climatic conditions associated with precipitation events. As such, any estimate of these costs would be associated with significant uncertainty.

The EPA seeks public comment on all aspects of the economic analysis including, but not limited to, its assumptions relating to the baseline, affected entities, implementation, and compliance costs.

A. Identifying Affected Entities

The proposed criterion would serve as a basis for development of new or revised NPDES permit conditions for point source dischargers. The EPA cannot be certain of whether a particular discharger would change their operations if this proposed criterion were finalized and the discharger were found to have reasonable potential to cause or contribute to an exceedance of the criterion. Moreover, the EPA cannot anticipate how Idaho would implement the criterion. Idaho is authorized to administer the NPDES program and retains discretion in implementing WQS. Despite this discretion, if Idaho determines that a permit is necessary, such permit would need to comply with the EPA's regulations at 40 CFR 122.44(d)(1)(i). Still, to best inform the public of the potential impacts of this proposed rulemaking, the EPA made some assumptions to evaluate the potential costs associated with state implementation of the EPA's proposed criterion.

Any NPDES permitted facility discharging mercury could potentially incur incremental compliance costs. The EPA identified 146 facilities in Idaho with effective or administratively continued individual permits (for any discharge, not just permits with mercury limits). The types of affected facilities include sewage treatment facilities and industrial facilities discharging wastewater to surface waters. In its analysis of point sources, the EPA did not include facilities on Tribal lands with permits issued by the EPA because the proposed rulemaking would not cover Tribal lands.

Of the 146 facilities with individual permits, 17 are stormwater discharges. The EPA excluded facilities with individual permits for stormwater discharges (*e.g.,* large or medium municipal separate storm sewer systems) and facilities covered under general permits for stormwater discharges because of limited data for such facilities and permit requirements that typically focus on best management practices (BMPs). This left 129 point source facilities with individual permits. In addition, the EPA identified one facility covered under an NPDES general permit that could be affected by the proposed rulemaking based on the general permit requirements and available effluent data, bringing the total number of potentially affected facilities to 130. Of these, 38 are major dischargers and 92 are minor dischargers.

The EPA reviewed Discharge Monitoring Report (DMR) data for the 130 facilities to identify facilities with effluent limitations and/or monitoring requirements for mercury in their NPDES permits. The EPA's review of DMR data indicates that 31 facilities with individual permits (24 majors, 7 minors) have effluent limitations and/or monitoring requirements for mercury. Of these, 20 (18 majors, 2 minors) are publicly owned treatment works (POTWs) categorized under North American Industry Classification System (NAICS) Industry 221320 (Sewage Treatment Facilities) and 11 (6 majors, 5 minors) are facilities categorized under other NAICS Industries. The one facility covered under a non-stormwater general permit with mercury data reported on DMRs operates under an EPA-issued general permit for Groundwater Remediation Discharge Facilities in Idaho, which includes mercury limits applicable to the facility. Table 1 in this preamble summarizes the potentially affected facilities by type (major or minor) and category (NAICS Industry 221320 or other NAICS Industries). Table 1 in this preamble also shows the number of facilities for which DMRs indicate there are effluent limits and/or monitoring requirements for mercury, including the facility covered by a general permit for groundwater remediation discharges.

[49] If a state or authorized Tribe adopts a new or revised WQS based on a required use attainability analysis, then it must also adopt the highest attainable use (40 CFR 131.10(g)). Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in 40 CFR 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the state demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable (see 40 CFR 131.3(m)).

TABLE 1—POTENTIALLY AFFECTED FACILITIES, WITH FACILITIES HAVING MERCURY EFFLUENT LIMITATIONS AND/OR MONITORING REQUIREMENTS FOR MERCURY SHOWN IN PARENTHESES

Category	Major facilities	Minor facilities
Sewage Treatment Facilities (NAICS Industry 221320)	30 (18)	74 (2)
Industrial (Other NAICS Industries)	8 (6)	18 (6)
Total	38 (24)	92 (8)

B. Method for Estimating Costs

The EPA grouped facilities with individual permits by major or minor status and further grouped major facilities in NAICS Industry 221320 by design flow range. The EPA identified the facilities in each grouping with effluent concentration data for mercury. The EPA reviewed data for these facilities reported on DMRs accessed through the EPA's Enforcement and Compliance History Online (ECHO) site and the facilities' NPDES permits and fact sheets. The EPA used this information to characterize baseline conditions; determine whether a discharge would cause, have the reasonable potential to cause, or contribute to an exceedance of baseline or proposed mercury criteria; and assess whether the discharge is likely to exceed water quality-based effluent limitations (WQBELs) derived from baseline and proposed mercury criteria. Based on this analysis, the EPA identified facilities that may need to implement additional actions to achieve compliance with the proposed mercury criterion.

The EPA assumed that dischargers would pursue the least cost means of compliance with WQBELs derived from the proposed mercury criterion. Only the costs of compliance actions above the level of controls needed to comply with baseline criteria are attributable to the proposed rulemaking. To determine these incremental compliance costs, the EPA considered potential one-time costs (*e.g.,* costs for developing or revising a pollutant minimization program (PMP), or applying for a WQS variance) and annual costs (*e.g.,* costs for implementing a new PMP or for additional treatment).

For purposes of the analysis, the EPA assumed that major facilities in NAICS Industry 221320 with no mercury data reported in DMRs for the past five years would still likely discharge quantifiable concentrations of mercury, though not at high enough concentrations for mercury to be a pollutant of concern under the baseline Idaho mercury criteria (*i.e.,* the facilities currently have no mercury effluent limits or monitoring requirements). The EPA also assumed that mercury may become a pollutant of concern at these facilities under the proposed mercury criterion. Based on these assumptions, the EPA extrapolated estimated one-time and annual incremental compliance costs for major facilities in NAICS Industry 221320 for which effluent data for mercury are available to major facilities in NAICS Industry 221320 with no available effluent data for mercury. Specifically, the EPA extrapolated cost within each facility flow rate range grouping proportionally by number of facilities for one-time costs and annual costs that are not flow-dependent (*e.g.,* if 25% of the facilities with mercury data would incur one-time costs that do not depend on effluent flow rate, then the EPA assumed that 25% of facilities not reporting mercury data would also incur such costs). For flow-dependent annual costs, the EPA extrapolated based on design flow rate.

The EPA did not extrapolate costs for minor facilities in NAICS Industry 221320 or for facilities categorized in other NAICS Industries (major and minor industrial facilities). The EPA assumed that minor POTWs (NAICS Industry 221320) are less likely than major POTWs to receive influent from industrial and commercial sources of mercury, which reduces the likelihood of mercury being a pollutant of concern for those facilities where it has not already been identified as such. The EPA also assumed that facilities in other NAICS Industries (industrial discharges) for which mercury is a potential pollutant of concern based on the proposed criterion typically would already have effluent limits or monitoring requirements based on Idaho's baseline mercury criteria.

The EPA also evaluated potential administrative costs to the state for developing additional TMDLs under CWA section 303(d) for waters that may be newly identified as impaired as a result of the proposed mercury criterion, as well as potential costs for revising existing TMDLs. Idaho assesses water bodies by assessment units (AUs). AUs are subdivisions of water body units (WBIDs) which are subdivisions of 8-digit hydrologic unit codes (HUCs). Using available fish tissue and ambient water column monitoring data, the EPA compared mercury concentrations to baseline Idaho mercury criteria and the proposed mercury criterion, and identified AUs that may be incrementally impaired (*i.e.,* impaired under the proposed criterion but not under the baseline criteria). For waters impaired under the baseline criteria, the EPA assumes that the state will develop TMDLs and implementation plans to bring all these waters into compliance with baseline criteria. Therefore, only incremental costs identified to comply with the proposed criterion above and beyond the baseline are attributable to this proposed rulemaking.

C. Results

Based on the results for the 32 major and minor facilities (31 with individual permits and 1 covered under a general permit) with available effluent monitoring data for mercury, and extrapolation within each design flow rate range to the 12 additional major NAICS Industry 221320 facilities without mercury data, the EPA estimated a range of total one-time and total annual costs as shown in Table 2 in this preamble.

TABLE 2—ESTIMATED ONE-TIME AND ANNUAL COSTS TO POINT SOURCES

[2022 Dollars]

Total estimated one-time cost		Total estimated annual cost (capital costs annualized over 20 years at 2%)	
Low	High	Low	High
$253,000	$1,220,000	$120,000	$16,800,000

The low end of the one-time cost range reflects an assumption that most facilities potentially impacted would be able to comply with revised effluent limitations or would revise an existing PMP to achieve compliance. The high end of the one-time cost range assumes that facilities would revise or develop a new PMP and, in some cases, conduct the studies needed to apply for a WQS variance.

The low end of the annual cost range reflects an assumption that, for most facilities, one-time actions, if needed, would result in compliance with revised effluent limitations. The low end annual cost estimate includes the costs for a limited number of facilities to implement a new PMP and assumes that facilities implementing a revised PMP plan do not incur incremental annual costs. The high end of the annual cost range assumes that some facilities would incur the cost of implementing a new PMP plan and some facilities would incur capital and operation and maintenance costs associated with installing and operating new or additional treatment, in this case non-membrane filtration for mercury removal.

Based on available fish tissue data, the EPA identified four instances of lake or reservoir AUs and two instances of river or stream AUs that may be considered incrementally impaired under the proposed criterion. In addition, based on ambient water quality data for mercury, the EPA identified an additional 7 AUs that may be considered incrementally impaired under the proposed criterion. The EPA estimated a range for the total cost to develop TMDLs for the 13 AUs potentially placed on Idaho's CWA section 303(d) list for mercury as a result of the proposed criterion. These costs were based on single-cause single-waterbody TMDL development costs. Actual costs may be lower if the state develops multi-cause or multi-waterbody TMDLs. In addition, Idaho currently has one approved TMDL for mercury for ID17040213SK007L_0L: Salmon Falls Creek Reservoir. This TMDL may need to be revised based on the proposed criterion and any new information that has become available since the TMDL was approved. Based on administrative costs associated with TMDL development for the 13 AUs identified as incrementally impaired and for potential revision of 1 TMDL, the EPA estimated total costs associated with incremental impairments to be $586,000 to $629,000.

IX. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

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

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection requirements activities contained in the existing regulation and has assigned OMB control number 2040–0049. This action does not directly contain any information collection, reporting, or record-keeping requirements.

C. Regulatory Flexibility Act (RFA)

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

EPA-promulgated WQS are implemented through various water quality control programs, including the NPDES program, which limits discharges to navigable waters except in compliance with a NPDES permit. CWA section 301(b)(1)(C) [50] and the EPA's implementing regulation at 40 CFR 122.44(d)(1) provide that all NPDES permits shall include any limits on discharges that are necessary to meet applicable WQS. Thus, under the CWA, the EPA's promulgation of WQS establishes standards that the state implements through the NPDES permit process.

After the EPA promulgates a final mercury criterion, the state of Idaho must ensure that NPDES permits it issues include any limitations on discharges necessary to comply with the WQS established in the final rule. While Idaho's implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, including small entities, the EPA's action, by itself, does not impose any of these requirements on small entities; that is, these requirements are not self-implementing.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandates as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or Tribal governments or the private sector.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. The EPA believes, however, that this action may be of significant interest to state governments. Consistent with the EPA's policy to promote communications between the EPA and state and local governments, the EPA consulted with Idaho officials early in the process of developing this rulemaking to permit them to have meaningful and timely input into its development.

On several occasions starting on July 12, 2023, the EPA discussed the development of this rulemaking with the Idaho Department of Environmental Quality. Early in this process, the EPA clarified that if and when the state decides to revise its own mercury aquatic life criteria, the EPA would assist the state in its process. During these discussions, the EPA also explained: the scientific basis for the

[50] 301(b) Timetable for achievement of objectives. In order to carry out the objective of this chapter there shall be achieved—(1)(C): not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

fish tissue and water column elements of the mercury criterion; the external peer review process and the comments the EPA received on the derivation of the criterion; the EPA's consideration of those comments and responses; the assumptions and data being used in the economic analysis associated with the rulemaking; and the overall timing of the Federal rulemaking effort. The EPA took these discussions with the state into account during the drafting of this proposed rulemaking.

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

This action does not have Tribal implications as specified in Executive Order 13175. This rule does not impose substantial direct compliance costs on federally recognized Tribal governments, nor does it substantially affect the relationship between the Federal government and Tribes, or the distribution of power and responsibilities between the Federal government and Tribes. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with Tribal officials during the development of this action. A *Summary of Consultation, Coordination and Outreach with Federally Recognized Tribes on the EPA's Proposed Federal Promulgation of a Mercury Criterion to Protect Aquatic Life in Idaho* is available in the docket.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, the EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act of 1995

This rulemaking does not involve technical standards.

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

The EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on communities with environmental justice (EJ) concerns. In the EPA's *Economic Analysis for Proposed Mercury Criterion to Protect Aquatic Life in Idaho* (economic analysis), which can be found in the docket for this rulemaking, Exhibit 5–3 illustrates the geographic distribution of waters where available data indicate levels of mercury that exceed Idaho's existing mercury criteria. These waters are located throughout the state, and waters with the highest levels of exceedance are similarly found in multiple parts of the state. Given the widespread nature of these impaired waters across the entire state, it is unlikely that impaired waters are disproportionately located in proximity to communities with potential EJ concerns.

The EPA believes that this action is not likely to result in new disproportionate and adverse effects on communities with EJ concerns. The EPA's proposed criterion for mercury in Idaho applies to aquatic life uses and does not directly address human health impacts. However, this rulemaking, if finalized and implemented, would support the health and abundance of aquatic life in Idaho and would, therefore, not only benefit those aquatic species but also benefit human communities that rely on or use these ecosystems. Compared to higher-income populations, low-income populations tend to rely more on fishing as a food source,[51] and therefore, this rulemaking may especially benefit low-income communities.

To achieve the benefits associated with a final rule, the EPA recognizes that some facilities may need to add pollution control measures and incur additional compliance costs over time to meet any new permit conditions or limits resulting from the mercury criterion, once finalized. The EPA's economic analysis identified three wastewater treatment plants and one mine that may need to install additional treatment technologies (*e.g.,* non-membrane filtration) if the criterion is finalized as proposed. For the wastewater treatment plants, the EPA analyzed the compliance costs that might be passed on to residential households alongside the socioeconomic characteristics of those households.

For the West Boise Water Renewal Facility, the high end of the estimated annual cost range from the economic analysis is $6.7M. For the Nampa Wastewater Treatment Facility, the high end of the estimated annual cost range is $5.1M. For the City of Caldwell Wastewater Treatment Plant, the high end of the estimated annual cost range is $2.4M. Based on the estimated number of households served by each facility [52] and conservatively assuming that 100% of the additional treatment costs are borne by residential ratepayers, these costs would translate to monthly household sewer bill increases of approximately $7.93, $11.78, and $10.16 for households served by the West Boise, Nampa, and Caldwell facilities, respectively. These amounts would represent approximately a 20–30% increase relative to current sewer bills in these areas.[53] After this increase, household sewer bills would represent approximately 0.85%, 1.17%, and 1.05% of the median household income [54] in Boise, Nampa, and Caldwell, respectively.

Using EJScreen, the EPA performed a screening-level analysis of the socioeconomic characteristics of these communities, focusing on EJScreen's

[51] Von Stackelberg, K., et al. (2017). Results of a national survey of high-frequency fish consumers in the United States. *Environmental Research* 158, 126–136. *https://bgc.seas.harvard.edu/assets/vonstackelberg2017.pdf.*

[52] The EPA estimated the number of households served by the West Boise Water Renewal Facility from the 2022 IPDES Permit Fact Sheet. The EPA estimated the number of households served by the Nampa Wastewater Treatment Facility and the City of Caldwell Wastewater Treatment Plant from 2018–2022 American Community Survey 5-year data, since the most recent Permit Fact Sheets for these facilities were from 2015 and their service areas could be approximated by U.S. Census Places (Nampa City and Caldwell City).

[53] *https://www.idahopress.com/news/local/boise-voters-overwhelmingly-pass-sewer-bond/article_a72230a4-6875-5708-a41b-c7a9fbce8e6e.html; https://www.cityofnampa.us/1397/2021-Rate-Increase#:~:text=Sewer%20Rate%20Increase%20Approved%20as%20Part%20of%20Bond%20Repayment%20Plan&text=Beginning%20October%201%2C%20the%20average,per%20month%20for%20residential%20customers.*

[54] 2018–2022 American Community Survey 5-year data. *https://www.census.gov/data/developers/data-sets/acs-5year.html.*

individual socioeconomic indicators.[55] To interpret EJScreen results, the EPA used an 80th percentile filter for each indicator,[56] using percentiles reflecting comparison to the Idaho population and to the entire U.S. population. The percentile indicates what percent of the comparison population (here, Idaho or entire U.S.) has an equal or more favorable value.

When comparing each of the three communities to the entire U.S. population, the EPA found limited indication of potential EJ concern that would warrant further analysis; only one indicator in one community just reached the 80th percentile threshold (the percentage of people under age 5 in Caldwell, ID was at the 80th percentile). At the same time, comparing each of the communities to the Idaho population highlighted some differences in their socioeconomic situations. While Boise did not exceed the 80th percentile (relative to the Idaho population) for any of the eight socioeconomic indicators, Nampa exceeded for two indicators (people of color and limited English speaking households) and Caldwell exceeded for three indicators (people of color, limited English speaking households, and less than high school education) and had another two indicators (under age 5 and unemployment rate) at the 77th percentile. Therefore, due to the potentially greater socioeconomic vulnerability as indicated by this screening-level analysis, these potential (albeit relatively modest) sewer rate increases may have disproportionate economic impacts in Caldwell relative to Boise, Nampa, and other Idaho communities.

However, actual impacts would depend on a number of factors, including how the state implements the criterion, how costs are financed, and how costs are distributed among ratepayers. States have wide latitude in how they implement criteria, including the authority to adopt variances for those facilities for which meeting WQS would cause substantial and widespread economic and social impact. Communities can apply for various grants to finance wastewater treatment upgrades or the state may share part of the cost burden. In addition, the Bipartisan Infrastructure Law included $50 billion in funding for infrastructure improvements to the Nation's wastewater and drinking water systems. Moreover, municipalities may implement customer assistance or progressive rate structures that reduce the cost burden on low income households.[57] Finally, the costs of wastewater treatment upgrades must be balanced against the potential benefits of having access to cleaner water. The EPA seeks comment on all potential EJ impacts of the rulemaking.

In addition to Executive Order 12898, and in accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin. With that directive in mind, in August 2011 the Environmental Justice Interagency Working Group established a Title VI Committee to address the intersection of agencies' EJ efforts with their Title VI enforcement and compliance responsibilities. While the EPA only has an oversight role for CWA implementation, if Idaho receives Federal funds for CWA implementation, the state is legally prohibited from discriminating on the basis of race, color, or national origin under Title VI when engaging in CWA implementation activities. Additionally, and in compliance with Executive Order 12898, the EPA expects that Idaho will consider disproportionately high adverse human health and environmental effects on communities with EJ concerns when implementing this rulemaking under the CWA.

The information supporting this Executive Order review is contained in the EPA's *Economic Analysis for Proposed Mercury Criterion to Protect Aquatic Life in Idaho.*

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

■ 1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

■ 2. Add § 131.XX to read as follows:

§ 131.XX Mercury criterion to protect aquatic life in Idaho.

(a) *Scope.* This section promulgates an aquatic life criterion for mercury in Idaho.

(b) *Criterion for mercury in Idaho.* The applicable aquatic life criterion for mercury is shown in Table 1 to Paragraph (b).

TABLE 1 TO PARAGRAPH (b)—PROPOSED CHRONIC MERCURY AMBIENT WATER QUALITY CRITERION FOR THE PROTECTION OF AQUATIC LIFE IN IDAHO

Media type	Fish muscle tissue [1 2 3] total mercury (ng THg/g wet weight)	Fish whole body tissue [1 2] total mercury (ng THg/g wet weight)	Water column [1 4] total mercury (ng/L) in whole water
Magnitude	225	162	2.1.
Duration	Instantaneous measurement [5].		30 day average.
Frequency	The average tissue concentration must not be exceeded.		Not more than once in three years on average.

[1] The proposed criterion elements are hierarchical, with both tissue elements superseding the water column element. The fish muscle tissue and fish whole body tissue criterion elements are independently applicable.

[55] People of color, low income, unemployment rate, limited English speaking households, less than high school education, under age 5, over age 64, and low life expectancy. See *EJScreen Technical Documentation for Version 2.2* for indicator definitions (*https://www.epa.gov/system/files/documents/2023-06/ejscreen-tech-doc-version-2-2.pdf*).

[56] *https://www.epa.gov/ejscreen/how-interpret-ejscreen-data.*

[57] USEPA. 2023. *Clean Water Act Financial Capability Assessment Guidance.* 800b21001. U.S. Environmental Protection Agency, Office of Water, Washington, DC. *https://www.epa.gov/system/files/documents/2023-01/cwa-financial-capability-assessment-guidance.pdf.*

[2] Tissue sample measurements must be based on measurement(s) of the total mercury concentration (in a composited tissue sample from each fish species or a central tendency estimate of individual tissue samples from each fish species) collected from a given site or waterbody in a discrete sampling period. These criterion elements support Idaho's aquatic life uses. Only samples of adult life stage trophic level (TL) 4 fish can be directly compared to the muscle or whole-body criterion elements.

[3] If adult life stage TL2 or TL3 fish are sampled, a Bioaccumulation Trophic Adjustment Factor (BTAF) must be applied to the muscle concentrations of those fish. If whole-body tissue from TL2 or TL3 fish is sampled, the fish whole body—muscle conversion factor of 0.72 must be applied to generate a translated muscle value before a BTAF is applied to the sample concentration. A TL2 sampled fish concentration must be multiplied by the TL2 BTAF of 5.6 and the resultant value compared to the muscle tissue criterion element. A TL3 sampled fish concentration must be multiplied by the TL3 BTAF of 3.5 and the resultant value compared to the muscle tissue criterion element. If multiple adults of different TLs are sampled, the TL4 fish result would supersede TL3 BTAF-applied or TL2 BTAF-applied value outcomes. If TL3 and TL2 fish are sampled, the TL3 BTAF-applied values supersede the TL2 BTAF-applied values.

[4] Water column values are based on total mercury in unfiltered or ''whole water'' samples. Total mercury includes all inorganic and organic species of mercury in the water column. Water samples collected during baseflow conditions would be most representative of the data used to derive this criterion element. This criterion element supports Idaho's aquatic life uses.

[5] Fish tissue data provide integrative measurements that reflect accumulation of mercury over time and space in aquatic organisms from a given site or waterbody in a discrete sampling period.

(c) *Applicability.* (1) The criterion in paragraph (b) of this section applies to all of Idaho's aquatic life use designations and applies concurrently with other applicable water quality criteria.

(2) The criterion established in this section is subject to Idaho's general rules of applicability in the same way and to the same extent as are other federally promulgated and state-adopted numeric criteria when applied to waters in Idaho designated to protect aquatic life uses.

(3) For all waters with mixing zone regulations or implementation procedures, the criterion applies at the appropriate locations within or at the boundary of the mixing zones and outside of the mixing zones; otherwise the criterion applies throughout the water body including at the end of any discharge pipe, conveyance or other discharge point within the water body.

[FR Doc. 2024–07450 Filed 4–8–24; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 102–118

[FMR Case 2023–02; Docket No. GSA–FMR–2023–0014; Sequence No. 1]

RIN 3090–AK73

Federal Management Regulation; Transportation Payment and Audit Regulations—Correction

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Proposed rule; correction.

SUMMARY: The General Services Administration (GSA) is issuing a correction to FMR Case 2023–02: Transportation Payment and Audit Regulations. The document contained an incorrect background paragraph. This document contains the correct paragraph.

DATES: The subject FMR case continues to have a comment due date of April 16, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Ron Siegel, Policy Analyst, at 202–702–0840 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 FMR Case 2023–02—Correction.

SUPPLEMENTARY INFORMATION:

Background

GSA intended to make it clear that agencies are required to submit their payment documentation for a post payment audit through GSA's Transportation Audits Management System (TAMS) to comply with Office of Management and Budget (OMB) Memorandum, M–23–07. This OMB Memorandum reaffirms the Federal Government's overarching objective to shift towards electronic records. However, the initial publication failed to adequately articulate the reasons behind GSA's regulatory modification.

Correction

In proposed rule FR Doc. 2024–0279, beginning on page 12296 in the issue of February 16, 2024, make the following correction. On page 12297, in the first column, revise the first sentence of the last paragraph and add two additional sentences to read as follows:

''GSA Transportation Audits Division maintains a central repository of electronic transportation billing records for legal and auditing purposes. Therefore, to comply with the Office of Management and Budget Memorandum M–23–07, GSA now requires agencies to submit their payment documentation for a post payment audit via the Transportation Audits Management System (TAMS). Other documents that may need to be sent to GSA Transportation Audits Division will only be accepted electronically via email. * * * ''

Krystal J. Brumfield,

Associate Administrator, Office of Government-wide Policy.

[FR Doc. 2024–07302 Filed 4–8–24; 8:45 am]

BILLING CODE 6820–14–P

Notices

Federal Register
Vol. 89, No. 69
Tuesday, April 9, 2024

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by May 9, 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: Understanding Risk Assessment in Supplemental Nutrition Assistance Program (SNAP) Payment Accuracy.

OMB Control Number: 0584–NEW.

Summary of Collection: The Payment Integrity Information Act of 2019 continues the work of previous related legislation in requiring Federal agencies to track and mitigate improper payments, which are defined as payments that either should not have been made or were made in an incorrect amount. FNS and the SNAP State agencies use SNAP Quality Control (QC) to closely monitor the program for improper payments. SNAP State agencies must conduct a QC review of a random sample of current cases each month (referred to as active cases) to identify underpayments and overpayments and calculate total payment error. At the end of the review period for each month's cases, the SNAP State agencies share the case files and results with Federal SNAP staff, who review a subsample of the cases for accuracy and use the results to calculate an annual official payment error rate for each State agency's official payment error rate.

Need and Use of the Information: FNS is conducting a study, Understanding Risk Assessment in Supplemental Nutrition Assistance Program (SNAP) Payment Accuracy, to develop a comprehensive picture of whether and how SNAP State agencies use RA tools and determine if these tools create disparate impacts on protected classes. The key research objectives follow: (1) determine which States use RA tools to reduce error rates; (2) determine what factors and variables are being used in RA tools; (3) identify how SNAP State agencies act on the results of their RA tools; (4) determine whether SNAP State agencies' RA tools are successful in reducing error rates; (5) determine if the RA tools create (or relieve) racial or other disparities by which individuals are flagged for further review; and (6) determine best practices in the development and use of RA tools.

Description of Respondents: State, Local and Tribal Governments, Individuals and Households.

Number of Respondents: 100.

Frequency of Responses: Reporting: On Occasion.

Total Burden Hours: 111.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–07465 Filed 4–8–24; 8:45 am]

BILLING CODE 3410–30–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Minnesota Advisory Committee; Cancellation

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of meeting.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** concerning a meeting of the Minnesota Advisory Committee. The meeting, scheduled for Wednesday, April 10, 2024, at 1:00 p.m. CT, has been cancelled. The notice is in the **Federal Register** on Tuesday, February 20, 2024, in FR Document Number 2024–03390 on page 12821.

FOR FURTHER INFORMATION CONTACT: Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* or (202) 770–1856.

Dated: April 4, 2024.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2024–07488 Filed 4–8–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–64–2023]

Foreign-Trade Zone (FTZ) 94; Authorization of Production Activity; PREH INC.; (Automotive Display Assemblies); Laredo, Texas

On December 6, 2023, the City of Laredo, grantee of FTZ 94, submitted a notification of proposed production activity to the FTZ Board on behalf of PREH INC., within FTZ 94, in Laredo, Texas.

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 87751, December 19, 2023). On April 4, 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: April 4, 2024.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2024–07526 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–847]

Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes From Mexico: Final Results of Antidumping Duty Administrative Review; 2021–2022

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that producers/exporters of heavy-walled rectangular welded carbon steel pipes and tubes (HWR pipes and tubes) 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 April 9, 2024.

FOR FURTHER INFORMATION CONTACT: David Crespo, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3693.

SUPPLEMENTARY INFORMATION:

Background

On October 5, 2023, Commerce published in the **Federal Register** the preliminary results of the 2021–2022 administrative review [1] of the antidumping duty order on heavy-walled rectangular welded carbon steel pipes and tubes from Mexico.[2] The review covers 12 companies, including two mandatory respondents, Maquilacero S.A. de C.V. (Maquilacero) and Productos Laminados de Monterrey S.A. de C.V. (Prolamsa), for individual examination. We invited interested parties to comment on the *Preliminary Results*.[3] We received case briefs from Maquilacero, Prolamsa, and Nucor Tubular Products Inc. (*i.e.,* the petitioner) [4] and received rebuttal briefs from Maquilacero, Prolamsa, and the petitioner.[5] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[6] 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

The products covered by the *Order* are HWR pipes and tubes from Mexico. A complete description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in case and rebuttal briefs by interested parties in this administrative review are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and 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 regarding the *Preliminary Results,* and for the reasons explained in the Issues and Decision Memorandum, we made certain changes to the weighted-average dumping margin calculations for Maquilacero and Prolamsa for the final results of the review.[7]

Rates for Companies Not Selected for Individual Examination

The statute and Commerce's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides for calculating the all-others rate in an investigation, for guidance when calculating the rate for companies which Commerce did not examine in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding rates that are zero, *de minimis* (*i.e.,* less than 0.5 percent), or determined entirely on the basis of facts available.

For these final results of review, we calculated a weighted-average dumping margin for both mandatory respondents, Maquilacero and Prolamsa, that are not zero, *de minimis,* or based entirely on the basis of facts available. Accordingly, Commerce is assigning to the companies not individually examined, listed in the chart below, a margin which is the weighted average of Maquilacero's and Prolamsa's calculated weighted-average dumping margins.[8]

Final Results of Review

As a result of this review, we determine the following weighted-average dumping margins exist for the period September 1, 2021, through August 31, 2022:

[1] *See Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 69127 (October 5, 2023) (*Preliminary Results*).

[2] *See Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, Mexico, and the Republic of Turkey: Antidumping Duty Orders,* 81 FR 62865 (September 13, 2016) (*Order*).

[3] *See Preliminary Results.*

[4] *See* Maquilacero's Letter, ''Maquilacero S.A. de C.V's Case Brief,'' dated November 10, 2023; Prolamsa's Letter, ''Case Brief and Request to Participate in Hearing, if Held,'' dated November 13, 2023; and Petitioner's Letter, ''Case Brief,'' dated November 14, 2023.

[5] *See* Maquilacero's Letter, ''Maquilacero S.A. de C.V's Rebuttal Brief,'' dated November 21, 2023; Prolamsa's Letter, ''Rebuttal Brief,'' dated November 21, 2023; and Petitioner's Letter, ''Rebuttal Brief,'' dated November 21, 2023.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] *Id.*

[8] *See* Memorandum, ''Calculation of the Weighted-Average Dumping Margin for Non-Selected Companies for the Final Results,'' dated concurrently with this notice. As the weighting factor, we relied on the publicly ranged sales data reported in the quantity and value charts submitted by Maquilacero and Prolamsa.

Exporter or producer	Weighted-average dumping margin (percent)
Maquilacero S.A. de C.V	5.06
Productos Laminados de Monterrey S.A. de C.V	2.28
Review-Specific Average Rate Applicable to the Following Companies:	
Aceros del Toro S.A. de C.V	3.28
Aceros El Fraile S.A. de C.V	3.28
Border Assembly S. de R.L. de C.V	3.28
Buffalo Tube S.A. de C.V	3.28
Fortacero S.A. de C.V	3.28
Grupo Collado S.A. de C.V	3.28
Perfiles y Herrajes L.M. S.A. de C.V	3.28
P.J. Trailers Company S.A. de C.V	3.28
Placa y Fierro de Monterrey S.A. de C.V	3.28
Regiomontana de Perfiles y Tubos S.A. de C.V	3.28

Disclosure

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

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), where the respondents reported the entered value of their U.S. Sales, Commerce calculated importer-specific *ad valorem* antidumping duty 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 those same sales. Where the respondents 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 either a 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.

For entries of subject merchandise during the POR produced by Maquilacero and Prolamsa for which it did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate established in the less-than-fair-value (LTFV) investigation of 4.91 percent *ad valorem,*[9] if there is no rate for the intermediate company(ies) involved in the transaction.

For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries at the rate equal to the weighted-average dumping margin identified above in the ''Final Results of Review'' section.

Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the final results of this review in the **Federal Register**, in accordance with 19 CFR 356.8(a).

Cash Deposit Requirements

Upon publication of this notice in the **Federal Register**, the following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for the companies subject to this review will be equal to the weighted-average dumping margin established in these finals results of the review; (2) for merchandise exported by producers or exporters 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 LTFV investigation, but the producer is, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 4.91 percent, the all-others rate established in the LTFV investigation.[10] 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 doubled antidumping duties.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the 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

[9] *See Order,* 81 FR 62865.

[10] *Id.*

notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: April 2, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–07471 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Ruling Applications Filed in Antidumping and Countervailing Duty Proceedings

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

SUMMARY: The U.S. Department of Commerce (Commerce) received scope ruling applications, requesting that scope inquiries be conducted to determine whether identified products are covered by the scope of antidumping duty (AD) and/or countervailing duty (CVD) orders and that Commerce issue scope rulings pursuant to those inquiries. In accordance with Commerce's regulations, we are notifying the public of the filing of the scope ruling applications listed below in the month of February 2024.

DATES: Applicable April 9, 2024.

FOR FURTHER INFORMATION CONTACT: Terri Monroe, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–1384.

SUPPLEMENTARY INFORMATION:

Notice of Scope Ruling Applications

In accordance with 19 CFR 351.225(d)(3), we are notifying the public of the following scope ruling applications related to AD and CVD orders and findings filed in or around the month of February 2024. This notification includes, for each scope application: (1) identification of the AD and/or CVD orders at issue (19 CFR 351.225(c)(1)); (2) concise public descriptions of the products at issue, including the physical characteristics (including chemical, dimensional and technical characteristics) of the products (19 CFR 351.225(c)(2)(ii)); (3) the countries where the products are produced and the countries from where the products are exported (19 CFR 351.225(c)(2)(i)(B)); (4) the full names of the applicants; and (5) the dates that the scope applications were filed with Commerce and the name of the ACCESS scope segment where the scope applications can be found.[1] This notice does not include applications which have been rejected and not properly resubmitted. The scope ruling applications listed below are available on Enforcement and Compliance's online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS) at *https://access.trade.gov.*

Scope Ruling Applications

Certain Freight Rail Couplers and Parts Thereof from Mexico (A–201–857); certain steel freight rail yokes; [2] produced in and exported from Mexico; submitted by Amsted Rail Company, Inc. and ASF–K de Mexico, S. de R.L. de C.V.; February 2, 2024; ACCESS scope segment ''SCO—Steel Freight Rail Yokes.'' [3]

Notification to Interested Parties

This list of scope ruling applications is not an identification of scope inquiries that have been initiated. In accordance with 19 CFR 351.225(d)(1), if Commerce has not rejected a scope ruling application nor initiated the scope inquiry within 30 days after the filing of the application, the application will be deemed accepted and a scope inquiry will be deemed initiated the following day—day 31.[4] Commerce's practice generally dictates that where a deadline falls on a weekend, Federal holiday, or other non-business day, the appropriate deadline is the next business day.[5] Accordingly, if the 30th day after the filing of the application falls on a non-business day, the next business day will be considered the ''updated'' 30th day, and if the application is not rejected or a scope inquiry initiated by or on that particular business day, the application will be deemed accepted and a scope inquiry will be deemed initiated on the next

[1] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300, 52316 (September 20, 2021) (''It is our expectation that the **Federal Register** list will include, where appropriate, for each scope application the following data: (1) identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed with Commerce.'')

[2] The products are Association of American Railroads (AAR) approved steel freight rail yokes. The products subject to the request are E type yokes and F type yokes as defined in the AAR specification of M–211 ''Foundry and Product Approval Requirements for the Manufacture of Couplers, Coupler Yokes, Knuckles, Follower Blocks, and Coupler Parts.''

[3] A scope application was filed on the same day by the same interested parties with respect to Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China (China) (A–570–145/C–570–146). However, the products at issue in that application appear to be Mexican in origin and unrelated to the AD and CVD orders covering Chinese merchandise.

[4] In accordance with 19 CFR 351.225(d)(2), within 30 days after the filing of a scope ruling application, if Commerce determines that it intends to address the scope issue raised in the application in another segment of the proceeding (such as a circumvention inquiry under 19 CFR 351.226 or a covered merchandise inquiry under 19 CFR 351.227), it will notify the applicant that it will not initiate a scope inquiry, but will instead determine if the product is covered by the scope at issue in that alternative segment.

[5] *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

business day which follows the ''updated'' 30th day.[6]

In accordance with 19 CFR 351.225(m)(2), if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the scope inquiry will be conducted on the record of the AD proceeding. Further, please note that pursuant to 19 CFR 351.225(m)(1), Commerce may either apply a scope ruling to all products from the same country with the same relevant physical characteristics (including chemical, dimensional, and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter, or importer of those products, or on a company-specific basis.

For further information on procedures for filing information with Commerce through ACCESS and participating in scope inquiries, please refer to the Filing Instructions section of the Scope Ruling Application Guide, at *https://access.trade.gov/help/Scope_Ruling_Guidance.pdf.* Interested parties, apart from the scope ruling applicant, who wish to participate in a scope inquiry and be added to the public service list for that segment of the proceeding must file an entry of appearance in accordance with 19 CFR 351.103(d)(1) and 19 CFR 351.225(n)(4). Interested parties are advised to refer to the case segment in ACCESS as well as 19 CFR 351.225(f) for further information on the scope inquiry procedures, including the timelines for the submission of comments.

Please note that this notice of scope ruling applications filed in AD and CVD proceedings may be published before any potential initiation, or after the initiation, of a given scope inquiry based on a scope ruling application identified in this notice. Therefore, please refer to the case segment on ACCESS to determine whether a scope ruling application has been accepted or rejected and whether a scope inquiry has been initiated.

Interested parties who wish to be served scope ruling applications for a particular AD or CVD order may file a request to be included on the annual inquiry service list during the anniversary month of the publication of the AD or CVD order in accordance with 19 CFR 351.225(n) and Commerce's procedures.[7]

[6] This structure maintains the intent of the applicable regulation, 19 CFR 351.225(d)(1), to allow day 30 and day 31 to be separate business days.

[7] *See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021).

Interested parties are invited to comment on the completeness of this monthly list of scope ruling applications received by Commerce. Any comments should be submitted to James Maeder, Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, via email to *CommerceCLU@trade.gov.*

This notice of scope ruling applications filed in AD and CVD proceedings is published in accordance with 19 CFR 351.225(d)(3).

Dated: April 3, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–07479 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–331–806]

Frozen Warmwater Shrimp From Ecuador: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination; Withdrawal

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

DATES: Applicable April 9, 2024, FR Doc. 2024–06949, published at 89 FR 22666 on April 2, 2024, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Reginald Anadio or Zachary Shaykin, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3166 or (202) 482–2638, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 2, 2024, the U.S. Department of Commerce (Commerce) erroneously published a duplicate **Federal Register** notice titled *Frozen Warmwater Shrimp from Ecuador: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination.* Commerce is withdrawing the above-mentioned notice, **Federal Register** Doc. 2024–06949.

Notification to Interested Parties

This notice is issued and published pursuant to section 733(c)(2) of the Tariff Act of 1930, as amended, and 19 CFR 351.205(f)(1).

Dated: April 3, 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. 2024–07448 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

SUMMARY: The U.S. Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders with February anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable April 9, 2024.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders with February anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Respondent Selection

In the event that Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision

regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

In the event that Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether particular companies should be ''collapsed'' (*e.g.,* treated as a single entity for purposes of calculating AD rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this AD proceeding (*e.g.,* investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (Q&V) Questionnaire for purposes of respondent selection, in general, each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Notice of No Sales

With respect to AD administrative reviews, we intend to rescind the review where there are no suspended entries for a company or entity under review and/or where there are no suspended entries under the company-specific case number for that company or entity. Where there may be suspended entries, if a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it may notify Commerce of this fact within 30 days of publication of this notice in the **Federal Register** for Commerce to consider how to treat suspended entries under that producer's or exporter's company-specific case number.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of a particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single AD deposit rate. It is Commerce's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below.

For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement

[1] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

for submitting a Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Exporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for individual examination. Furthermore, exporters and producers who submit a Separate Rate Application or Certification and subsequently are selected as mandatory respondents will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than February 28, 2025.

	Period to be reviewed
AD Proceedings	
BRAZIL: Lemon Juice, A–351–858	8/4/22–1/31/24
Citrus Juice Eireli.	
INDIA: Certain Frozen Warmwater Shrimp, A–533–840	2/1/23–1/31/24
Aachi Masala Foods (P) Ltd.	
Aarshi Overseas Private Ltd.	
Abad Fisheries; Abad Fisheries Pvt. Ltd.	
Abad Overseas Private Limited.	
Accelerated Freeze Drying Co., Ltd.	
ADF Foods Ltd.	
Aerath Business Corp.	
AJS Enterprises LLP.	
Akshay Food Impex Private Limited.	
Alashore Marine Exports (P) Ltd.	
Albys Agro Private Limited.	
Al-Hassan Overseas Private Limited.	
Allana Frozen Foods Pvt. Ltd.	
Allanasons Ltd.	
Alpha Marine.	
Alps Ice & Cold Storage Private Limited.	
Amaravathi Aqua Exports Private Ltd.	
Amarsagar Seafoods Private Limited.	
Amulya Seafoods.	
Ananda Aqua Applications; Ananda Aqua Exports (P) Limited; Ananda Foods.	
Ananda Enterprises (India) Private Limited.	
Anantha Seafoods Private Limited.	
Andaman Sea Foods Pvt. Ltd.	
Anjaneya Sea Foods.	
Apar Industries Limited.	
Aparna Marine Exports.	
Apex Frozen Foods Limited.	
Aquamarine Food Products Ltd.	
Aquastar Marine Exports.	
Aquatica Frozen Foods Global Pvt. Ltd.	
Ariba Foods Pvt. Ltd.	
Arya Sea Foods Private Limited.	
Asvini Agro Exports.	
Asvini Exports.	
Asvini Fisheries Ltd.; Asvini Fisheries Private Ltd.	
Aswin Associates.	
Atlas Fisheries Private Limited.	
Avanti Feeds Limited.	
Avanti Frozen Foods Private Limited.	

[2] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[3] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be reviewed
Avla Nettos Exports.	
Ayshwarya Sea Food Private Limited.	
B R Traders.	
Baby Marine Eastern Exports.	
Baby Marine Exports.	
Baby Marine International.	
Baby Marine Sarass.	
Baby Marine Ventures.	
Bafna Enterprises.	
Balasore Marine Exports Private Limited.	
Bakemill Foods.	
Baraka Overseas Traders.	
Basu International.	
BB Estates & Exports Private Limited.	
Bell Foods (Marine Division); Bell Exim Private Limited (Bell Foods (Marine Division)).	
Bergwerff Organic India Private Limited.	
Bhatsons Aquatic Products.	
Bhavani Seafoods.	
Bhimraj Exports Private Limited.	
Bijaya Marine Products.	
Blue-Fin Frozen Foods Pvt Ltd.	
Bluepark Seafoods Pvt. Ltd.	
Blue Sea Resources Private Limited.	
Bluetide Eservices Pvt., Ltd.	
Blue Water Foods & Exports P. Ltd.	
BMR Exports; BMR Exports Private Limited.	
BMR Industries Private Limited.	
B-One Business House Pvt. Ltd.	
Britannia Industries Limited.	
Britto Seafoods Exp. Pvt. Ltd.; Britto Exports; Britto Exports Pvt. Ltd.	
C Private Limited.	
C.P. Aquaculture (India) Pvt. Ltd.	
Calcutta Seafoods Pvt. Ltd.; Bay Seafood Pvt. Ltd.; Elque Ventures Private Limited [4].	
Canaan Marine Products.	
CAP Seafoods Private Limited.	
Capital Foods Private Limited.	
Capithan Exporting Co.	
Cargomar Private Limited.	
Castlerock Fisheries Ltd.	
Charoen Pokphand Group Co., Ltd.	
Chakri Fisheries Private Limited.	
Chemmeens (Regd).	
Cherukattu Industries (Marine Div); Cherukattu Industries.	
Choice Canning Company.	
Choice Trading Corporation Pvt. Ltd.	
Coastal Aqua Private Limited.	
Coastal Corporation Ltd.	
Cochin Frozen Food Exports Pvt. Ltd.	
Cofoods Processors Private Limited.	
Continental Fisheries India Private Limited.	
Coreline Exports.	
Corlim Marine Exports Private Limited.	
Costar Processor.	
CPF India Private Ltd.	
Crystal Sea Foods Private Limited.	
Crystalnova Foods Pvt., Ltd.	
Danica Aqua Exp. Private Ltd.	
Datla Sea Foods.	
Deepak Nexgen Foods And Feeds Private Limited.	
Deepmala Marine Exports.	
Delsea Exports Pvt. Ltd.	
Desai Foods Private Ltd.	
Devi Fisheries Limited; Satya Seafoods Private Limited; Usha Seafoods; Devi Aquatech Private Limited.	
Devi Sea Foods Limited [5].	
Diamond Seafoods Exports; Edhayam Frozen Foods Pvt. Ltd.; Kadalkanny Frozen Foods; Theva & Company.	
DN Sea Shells Private Limited.	
DSF Aquatech Private Limited.	
Dwaraka Sea Foods.	
Eden Garden Exports.	
Ega Trade Center No. 809.	
Empire Industries Limited.	
Entel Food Products Private Limited.	
Esmario Export Enterprises.	

	Period to be reviewed
Everblue Sea Foods Private Limited.	
Fair Exp. (India) Pvt., Ltd.	
Falcon Marine Exports Limited; KR Enterprises.	
Febin Marine Foods Private Limited; Febin Marine Foods.	
Fedora Sea Foods Private Limited.	
Five Star Marine Exports Private Limited.	
Food Products Pvt., Ltd.; Parayil Food Products Pvt., Ltd.	
Forstar Frozen Foods Private Limited.	
Fouress Food Products Pvt. Ltd.	
Frontline Exports Pvt. Ltd.	
G A Randerian Ltd.; G A Randerian (P) Limited.	
Gadre Marine Export P Ltd.	
Gaurav International.	
Galaxy Maritech Exports P. Ltd.	
Geo Aquatic Products (P) Ltd.	
Geo Seafoods.	
Ghan Marine Products.	
GKS Business Associates Private Limited.	
Global Gourmet Private Limited.	
Glossy Impex Private Limited.	
Goana Foods Prop. Cyd Paes.	
Godavari Mega Aqua Food Park Private Limited.	
Gokul Overseas Ltd.	
Grand Marine Foods.	
Grandtrust Overseas (P) Ltd.	
Green Asia Impex Private Limited.	
Growel Processors Private Limited.	
GVR Exports Pvt. Ltd.	
Hari Marine Private Limited.	
Haripriya Marine Exports Pvt. Ltd.	
Heiploeg Seafood India Pvt., Ltd.	
HIC ABF Special Foods Pvt. Ltd.	
High Care Marine Foods Exports Private Limited.	
Highland Agro Food Private Limited[6].	
Hiravati Exports Pvt. Ltd.	
Hiravati International Pvt. Ltd.	
Hiravati Marine Products Private Limited.	
HMG Industries Ltd.	
HN Indigos Private Ltd.	
HT Foods Private Limited.	
Hyson Exports Private Limited.	
Hyson Logistics and Marine Exports Private Limited.	
IFB Agro Industries Ltd.	
India Gills.	
Indian Aquatic Products.	
Indo Aquatics.	
Indo Fisheries.	
Indo French Shellfish Company Private Limited.	
Innovative Foods Limited.	
Intl Exporters Foodparks Private Ltd.	
International Freezfish Exports.	
ITC Ltd.	
Jagadeesh Marine Exports.	
Jaya Lakshmi Sea Foods Pvt. Ltd.	
Jeelani Marine Products.	
Jinny Marine Traders.	
Jigar Enterprises.	
Joecons Marine Exp. Pvt., Ltd.	
Jude Foods India Private Limited.	
K R Sea Foods Private Limited.	
K.V. Marine Exports.	
Kader Exports Private Limited[7].	
Kalyan Aqua & Marine Exp. India Pvt. Ltd.	
Kanu Krishna Corporation.	
Karunya Marine Exports Private Limited.	
Karam Chand Thapar & Bros. Ltd.	
Kaushalya Aqua Marine Product Exports Pvt. Ltd.	
Kay Kay Exports; Kay Kay Foods.	
Kiefer Sea Foods.	
Kings Infra Ventures Limited.	
Kings Marine Products.	
KNC Agro Limited; KNC AGRO PVT. LTD.	
Koluthara Exports Ltd.	

	Period to be reviewed
Kohinoor Foods Limited.	
Kumars Foods.	
Kyobashi Premier Freeze Dry Private Ltd.	
Latecoere India Private Ltd.	
Libran Foods.	
Lito Marine Exports Private Limited.	
LNSK Greenhouse Agro Products LLP.	
Magnum Export; Magnum Exports Pvt. Ltd.	
Magnum Sea Foods Limited; Magnum Estates Limited; Magnum Estates Private; Magnum Estates Private Limited.	
Mangala Marine Exim India Pvt. Ltd.	
Mangala Sea Products.	
Mangala Seafoods; Mangala Sea Foods.	
Manjilas Food Tech Private Ltd.	
Marine Harvest India.	
Megaa Moda Pvt. Ltd.	
Meghmani Industries Ltd.	
Milesh Marine Exports Private Limited.	
Milsha Agro Exports Pvt. Ltd.	
Milsha Sea Products.	
Minaxi Fisheries Private Limited.	
Mindhola Foods LLP.	
Minh Phu Group.	
MMC Exports Limited.	
Monsun Foods Pvt. Ltd.	
Mourya Aquex Pvt. Ltd.	
MTR Foods.	
Munnangi Seafoods (Pvt) Ltd.	
Naga Hanuman Fish Packers.	
Naik Frozen Foods Private Limited; Naik Frozen Foods.	
Naik Oceanic Exports Pvt. Ltd.; Rafiq Naik Exports Pvt. Ltd.	
Naik Seafoods Ltd.	
Nanak Nutritions Food (Taloja) Pvt., Ltd.	
Naq Foods India Private Limited.	
Nas Fisheries Pvt. Ltd.	
Nector Exp. Pvt., Ltd.	
Neeli Aqua Private Limited.	
Nekkanti Mega Food Park Private Limited.	
Nekkanti Sea Foods Limited.	
New Faizan Foods.	
Nezami Rekha Sea Foods Private Limited; Nezami Rekha Sea Food Private Limited.	
Nila Sea Foods Exports; Nila Sea Foods Pvt. Ltd.	
Nilamel Exp.	
Nine Up Frozen Foods.	
N.K. Marine Exports LLP.	
Nutrient Marine Foods Limited.	
Oceanic Edibles International Limited.	
Orchid Marine Exports Private Limited.	
Oriental Export Corporation.	
Paragon Sea Foods Pvt. Ltd.	
Parayil Food Products Private Limited.	
Paramount Seafoods.	
Pasupati Aquatics Private Limited.	
Penver Products (P) Ltd.	
Pesca Marine Products Pvt., Ltd.	
Phillips Foods India Private Ltd.	
Pijikay International Exports P Ltd.	
Pohoomal Kewalram Sons Exports Pvt Ltd.	
Poyilakada Fisheries Private Limited.	
Pravesh Seafood Private Limited.	
Premas Enterprises Private Ltd.	
Premier Exports International.	
Premier Marine Foods.	
Premier Mills Private Limited.	
Premier Seafoods Exim (P) Ltd.	
Pridel Pvt., Ltd.	
Protech Organo Foods Private Limited.	
RDR Exports.	
RF Exports Private Limited.	
R.K. Industries IV.	
R V R Marine Products Private Limited.	
Rajyalakshmi Marine Exports.	
Ram's Assorted Cold Storage Limited.	
Ramoji Group Of Companies.	

	Period to be reviewed
Raju Exports. Raunaq Ice & Cold Storage. Razban Seafoods Ltd. Relish Custom Foods. Rising Tide. Riyarchita Agro Farming Private Limited. Rizwan Ice & Cold Storage Partnership Firm Pvt Ltd. Ronisha Exp. Royal Exports. Royal Imports and Exports. Royale Marine Impex Pvt. Ltd. Royalux Exports Private Limited. RSA Marines; Royal Oceans. Rupsha Fish Private Limited. Ruthi Imp. & Exp. S Chanchala Combines. S.A. Exports. Safera Food International. S.H. Marine Exim. Sagar Grandhi Exports Pvt. Ltd. Sagar Marine Imp. & Exp. Sagar Samrat Seafoods. Sahada Exports. Sai Aquatechs Private Limited. Sai Marine Exports Pvt. Ltd. Sai Sea Foods. Salet Seafoods Pvt. Ltd. Sam Aqua Exports LLP. Samaki Exports Private Limited. Sanchita Marine Products Private Limited. Sandhya Aqua Exports Pvt. Ltd.; Sandhya Aqua Exports. Sandhya Marines Limited. Sandy Bay Seafoods India Private Limited. Sassoondock Matsyodyog Sahakari Society Ltd. Sas Exports. Satish Marine Exim Private Limited. Sea Doris Marine Exports. Sea Foods Private Limited. Seagold Overseas Pvt. Ltd. Seasaga Enterprises Private Limited; Seasaga Group. Seaeyes Stem Limited. Sealands. Seema Enterprises. Sharat Industries Ltd. Sheseema Exp. Shimpo Exports Private Limited. Shimpo Seafoods Private Limited. Shiva Frozen Food Exp. Pvt. Ltd. Shree Datt Aquaculture Farms Pvt. Ltd. Shree Ram Agro Industries. Shroff Processed Food & Cold Storage P Ltd. Sigma Seafoods. Silver Seafood. Sita Marine Exports. SKML Exim Private Limited. SMD Rays. Sonia Fisheries. Sonia Marine Exports Private Limited. Southern Tropical Foods Pvt. Ltd. Sprint Exports Pvt. Ltd. Sreeragam Export Private Limited. Sresta Natural Bioproducts Pvt., Ltd. Sri Sakkthi Cold Storage. Sri Ayyanar Exp. Sri Sai Marine Exp. Srikanth International. SSF Ltd. St. Peter and Paul Sea Food Exports Private Limited. Star Agro Marine Exports Private Limited. Star Organic Foods Private Limited. Stellar Marine Foods Private Limited. Sterling Foods. Subu Sea Foods.	

	Period to be reviewed
Summit Marine Exports Private Limited.	
Sun Agro Exim.	
Sunrise Aqua Food Exports.	
Sunrise Seafoods India Private Limited.	
Supran Exim Private Limited.	
Suryamitra Exim Pvt. Ltd.	
Suvarna Rekha Exports Private Limited.	
Suvarna Rekha Marines P Ltd.	
Swadam Exp. (Opc) Pvt., Ltd.	
TBR Exports Private Limited.	
Teekay Marines Private Limited; Teekay Marine P. Ltd.	
Tej Aqua Feeds Private Limited.	
The Waterbase Ltd.	
Torry Harris Seafoods Ltd.	
TRDP Happy World Private Limited.	
Triveni Fisheries P Ltd.	
U & Company Marine Exports.	
Ulka Sea Foods Private Limited.	
Uniroyal Marine Exports Limited.	
Unitriveni Overseas Private Limited; Unitriveni Overseas.	
Uniloids Biosciences Private Limited.	
Upasana Exports.	
Ushodaya Enterprises Private Ltd.	
V.V. Marine Products.	
Vaibhav Global Ltd.	
Vaisakhi Bio-Marine Private Limited.	
Varma Marine.	
Vasai Frozen Food Co.	
Vasista Marine.	
Veerabhadra Exports Private Limited.	
Veronica Marine Exports Private Ltd.	
Victoria Marine & Agro Exports Ltd.	
Vinner Marine.	
Vitality Aquaculture Pvt. Ltd.	
Vivek Agro Products.	
VKM Foods Private Limited.	
VRC Marine Foods LLP.	
Wellcome Fisheries Limited.	
West Coast Fine Foods (India) Private Limited.	
West Coast Frozen Foods Private Limited.	
Z.A. Sea Foods Pvt. Ltd.	
Zeal Aqua Limited.	
INDIA: Sodium Nitrite, A–533–906	8/17/22–1/31/24
Deepak Nitrite Limited.	
Kutch Chemical Industries Ltd.	
INDIA: Stainless Steel Bar, A–533–810	2/1/23–1/31/24
Aamor Inox Limited.	
Ambica Steels Limited.	
Astrabite LLP.	
Atlas Stainless Corporation Private Limited.	
Bhansali Bright Bars.	
Chandan Steels Limited.	
Laxcon Steels Limited; Ocean Steels Private Limited; Metlax International Private Limited; Parvati Private Limited; Mega Steels Private Limited.	
Meltroll Engineering Pvt. Ltd.	
Venus Wire Industries Pvt. Ltd. Precision Metals, Hindustan Inox Ltd., Siev Manufacturers (India) Pvt. Ltd.	
MALAYSIA: Stainless Steel Butt-Weld Pipe Fittings, A–557–809	2/1/23–1/31/24
New Courage Global Ltd.	
Pantech Stainless & Alloy Industries Sdn. Bhd.	
Statewell Co., Ltd.	
MEXICO: Large Residential Washers, A–201–842	2/1/23–1/31/24
Electrolux Home Products, Inc.; Electrolux Home Products Corp. NV; Electrolux Home Products de Mexico S.A. de C.V.	
REPUBLIC OF KOREA: Certain Cut-To-Length Carbon-Quality Steel Plate, A–580–836	2/1/23–1/31/24
Ajin Industrial Co., Ltd.	
Daeik Eng Co., Ltd.	
Dongkuk Steel Mill Co., Ltd.	
Hyundai Steel Company.	
Ohsung Co., Ltd.	
Samjin Lnd Co., Ltd.	
SOCIALIST REPUBLIC OF VIETNAM: Certain Frozen Warmwater Shrimp, A–552–802 [8]	2/1/23–1/31/24
AFoods.	
Amanda Seafood Co., Ltd.	

	Period to be reviewed
An Nguyen Investment Production and Group.	
Anh Khoa Seafood.	
Anh Minh Quan Corp.	
APT Co.	
Au Vung One Seafood.	
Bac Lieu Fis.	
Bac Lieu Fisheries Joint Stock Company.	
Baclieufis.	
Bentre Forestry and Aquaproduct Import Export Joint Stock Company.	
Bentre Seafood Joint Stock Company.	
Beseaco.	
Bien Dong Seafood Co., Ltd.	
BIM Foods Joint Stock Company.	
Binh Dong Fisheries Joint Stock Company.	
Binh Thuan Import-Export Joint Stock Company.	
Blue Bay Seafood Co., Ltd.	
C.P. Vietnam Corporation.	
Ca Mau Frozen Seafood Processing Import Export Corporation.	
Ca Mau Seafood Joint Stock Company.	
Ca Mau Seafood Processing and Service Joint Stock Corporation.	
Cadovimex.	
Cadovimex II Seafood Import Export and Processing Joint Stock Company.	
Cadovimex Seafood Import-Export and Processing Joint Stock Company.	
Cafatex Fishery Joint Stock Corporation.	
CAFISH.	
Camau Seafood Processing and Service Joint Stock Corporation.	
Camau Seafood Processing and Service Joint-Stock Corporation.	
Camimex.	
Camimex Foods Joint Stock Company.	
Camimex Group.	
Camimex Group Joint Stock Company [9].	
Cantho Import Export Fishery Limited Company.	
Caseamex.	
CASES.	
CJ Cau Tre Foods Joint Stock Company.	
Coastal Fisheries Development Corporation.	
COFIDEC.	
Cuu Long Seapro.	
Cuulong Seapro.	
Cuulong Seaproducts Company.	
Dai Phat Tien Seafood Co., Ltd.	
Danang Seafood Import Export.	
Danang Seaproducts Import-Export Corporation.	
Dong Hai Seafood Limited Company.	
Dong Phuong Seafood Co., Ltd.	
Duc Cuong Seafood Trading Co., Ltd.	
Duong Hung Seafood.	
FAQUIMEX.	
FFC.	
FIMEX VN/Sao Ta Seafood Factory [10].	
Fine Foods Company.	
Frozen Seafoods Factory No. 32.	
Gallant Dachan Seafood Co., Ltd.	
Gallant Ocean (Vietnam) Co. Ltd.	
Gallant Ocean (Vietnam) Joint Stock Company.	
GN Foods Joint Stock Company.	
Go Dang Joint Stock Company.	
GODACO Seafood.	
Green Farms Seafood Joint Stock Company.	
Hai Viet Corporation.	
HaiViet Corporation.	
Hanh An Trading Service Co., Ltd.	
HAVICO.	
Hoang Anh Fisheries Trading Company Limited.	
Hoang Phong Seafood Co.	
Hong Ngoc Seafood Co., Ltd.	
Hung Bang Company Limited.	
Hung Dong Investment Service Trading Co., Ltd.	
HungHau Agricultural Joint Stock Company.	
INCOMFISH.	
Investment Commerce Fisheries Corporation.	
JK Fish Co., Ltd.	
Khang An Foods Joint Stock Company.	

	Period to be reviewed
Khanh Hoa Seafoods Exporting Company. Khanh Sung Co., Ltd. KHASPEXCO. Kim Anh Co., Ltd. Kim Anh Company Limited. Long Toan Frozen Aquatic Products Joint Stock Company. MC Seafood. Minh Bach Seafood Company Limited. Minh Cuong Seafood Import Export Processing Joint Stock Company. Minh Hai Export Frozen Seafood Processing Joint-Stock Company. Minh Hai Joint Stock Seafoods. Minh Hai Joint-Stock Seafood Processing Company. Minh Hai Jostoco. Minh Phat Seafood Company Limited [11]. Minh Phu Hau Giang Seafood [12]. Minh Phu Seafood Corporation [13]. Minh Qui Seafood Co., Ltd. [14]. My Son Seafoods Factory. Nam Hai Foodstuff and Export Company Ltd. Nam Phuong Foods Import Export Company Limited. Nam Viet Seafood Import Export Joint Stock Company. Namcan Seaproducts Import Export Joint Stock Company. NAVIMEXCO. New Generation Seafood Joint Stock Company. New Wind Seafood Company Limited. Ngoc Tri. Ngoc Tri Seafood Joint Stock Company. Ngoc Trinh Bac Lieu Seafood Co., Ltd. Nguyen Chi Aquatic Product Trading Company Limited. Nha Trang Seafoods F89 Joint Stock Company; Nha Trang Seaproduct Company; NT Seafoods Corporation; NTSF Seafoods Joint Stock Company; Nha Trang Seafoods Group [15]. Nhat Duc Co., Ltd. Nigico Co., Ltd. Phuong Nam Foodstuff Corp. Q N L Company Limited. QAIMEXCO. QNL Company Limited. QNL One Member Company. Quang Minh Seafood Co., Ltd. Quoc Ai Seafood Processing Import Export Co., Ltd. Quoc Toan PTE. Quoc Toan Seafood Processing Factory. Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. Quy Nhon Frozen Seafoods Joint Stock Company. Safe And Fresh Aquatic Products Joint Stock Company. Saigon Aquatic Product Trading Joint Stock Company. Saigon Food Joint Stock Company. Sao Ta Foods Joint Stock Company. Saota Seafood Factory. Sea Minh Hai. SEADANANG. Seafood Direct 2012 One Member Limited. Seafood Joint Stock Company No. 4. Seafood Travel Construction Import Export Joint Stock Company. SeafoodDirect2012 One Member Limited Liability Company. Seafoods and Foodstuff Factory. Seanamico. Seaprimexco Vietnam. Seaprodex Min Hai. Seaprodex Minh Hai. Seaprodex Minh Hai Factory No. 69. Seaprodex Minh Hai Workshop 1. Seaprodex Minh Hai-Factory No. 78. Seaproducts Joint Stock Company. Seaproducts Joint Stock Company No. 5. Seaspimex Vietnam. Seavina. Seavina Joint Stock Company. Simmy Seafood Company Limited. Soc Trang Seafood Joint Stock Company. Soc Trang Seafood Joint Stock Company. South Ha Tinh Seaproducts Import-Export Joint Stock Company. South Vina Shrimp.	

	Period to be reviewed
SVS.	
Southern Shrimp Joint Stock Company.	
Special Aquatic Products Joint Stock Company.	
STAPIMEX.	
T & P Seafood Company Limited.	
T&T.	
T&T Cam Ranh.	
Tacvan Frozen Seafood Processing Export Company.	
Tacvan Seafoods Company.	
Tai Kim Anh Seafood Joint Stock Corporation.	
Tai Nguyen Seafood Co., Ltd.	
TAIKA Seafood Corporation.	
Tan Phong Phu Seafood Co., Ltd.	
Tan Thanh Loi Frozen Food Co., Ltd.	
Tay Do Seafood Enterprise.	
THADIMEXCO.	
Thai Hoa Foods Joint Stock Company.	
Thai Minh Long Seafood Company Limited.	
Thaimex.	
Thanh Doan Fisheries Import-Export Joint Stock Company.	
Thanh Doan Sea Products Import & Export Processing Joint-Stock Company.	
Thanh Doan Seafood Import Export Trading Joint-Stock Company.	
The Light Seafood Company Limited.	
Thien Phu Export Seafood.	
Thinh Hung Co., Ltd.	
Thinh Phu Aquatic Products Trading Co., Ltd.	
Thong Thuan Cam Ranh Seafood Joint Stock Company.	
Thong Thuan Company Limited.	
Thuan Phuoc Corp.	
Thuan Phuoc Seafoods and Trading Corporation.	
Thuan Thien Producing Trading Ltd. Co.	
TPP Co. Ltd.	
Trang Corporation (Vietnam).	
Trang Khanh Seafood Co., Ltd.	
Trong Nhan Seafood Co., Ltd.	
Trung Son Seafood Processing Joint Stock Company.	
UTXI Aquatic Products Processing Corporation.	
UTXICO.	
VAFCO.	
Van Duc Food Company Limited.	
Viet Asia Foods Company Limited.	
Viet Foods Co., Ltd.	
Viet Hai Seafood Co., Ltd.	
Viet I-Mei Frozen Foods Co., Ltd.	
Viet Nam Clean Seafood Corporation.	
Viet Phu Foods and Fish Corp.	
Viet Shrimp Corporation.	
Vietnam Clean Seafood Corporation.	
Vietnam Fish One Co., Ltd.	
Vietrosco.	
VIFAFOOD.	
Vina Cleanfood.	
Vinh Hoan Corp.	
Vinh Phat Food Joint Stock Company.	
VIPAFOOD.	
XNK Thinh Phat Processing Company.	
TAIWAN: Crystalline Silicon Photovoltaic Products, A–583–853	2/1/23–1/31/24
EEPV Corp.	
THAILAND: Certain Frozen Warmwater Shrimp, A–549–822	2/1/23–1/31/24
A. Wattanachai Frozen Products Co., Ltd.	
A.P. Frozen Foods Co., Ltd.	
A.S. Intermarine Foods Co., Ltd.	
ACU Transport Co., Ltd.	
Ampai Frozen Food Co., Ltd.	
Andaman Seafood Co., Ltd.[16]	
Anglo-Siam Seafoods Co., Ltd.	
Apex Maritime (Thailand) Co., Ltd.	
Apitoon Enterprise Industry Co., Ltd.	
Applied DB Ind.; Applied DB.	
Asia Pacific (Thailand) Co., Ltd.	
Asian Alliance International Co., Ltd.	
Asian Sea Corporation Public Company Limited.	
Asian Seafood Coldstorage (Sriracha).	

	Period to be reviewed
Asian Seafoods Coldstorage PLC.	
Asian Seafoods Coldstorage Public Co., Ltd.; Asian Seafoods Coldstorage (Suratthani) Co.	
Asian Star Trading Co., Ltd.	
Assoc. Commercial Systems.	
B.S.A. Food Products Co., Ltd.	
Bangkok Dehydrated Marine Product Co., Ltd.	
Bright Sea Co., Ltd.; The Union Frozen Products Co., Ltd.[17]	
C N Import Export Co., Ltd.	
C Y Frozen Food Co., Ltd.	
C.K. Frozen Fish and Food Co., Ltd.	
C.P. Intertrade Co. Ltd.	
C.P. Mdse.	
C.P. Retailing and Marketing Co., Ltd.	
Calsonic Kansei (Thailand) Co. Ltd.	
Century Industries Co., Ltd.	
Chaivaree Marine Products Co., Ltd.	
Chaiwarut Company Limited.	
Chanthaburi Frozen Food Co., Ltd.[18]	
Chanthaburi Seafoods Co., Ltd.[19]	
Charoen Pokphand Foods Public Company Limited; CP Merchandising Co., Ltd.[20]	
Charoen Pokphand Petrochemical Co., Ltd.	
Chonburi LC.	
Chue Eie Mong Eak.	
Commonwealth Trading Co., Ltd.	
Core Seafood Processing Co. Ltd.	
CPF Food Network Co., Ltd.	
CPF Food Products Co., Ltd.	
Crystal Frozen Foods Co., Ltd.	
Crystal Seafood.	
Daedong (Thailand) Co., Ltd.	
Daiei Taigen (Thailand) Co., Ltd.	
Daiho (Thailand) Co., Ltd.	
Dynamic Intertransport Co. Ltd.	
Earth Food Manufacturing Co., Ltd.	
F.A.I.T. Corporation Limited.	
Far East Cold Storage Co., Ltd.	
Fimex Vn.	
Findus (Thailand) Ltd.	
Fortune Frozen Foods (Thailand) Co., Ltd.	
Gallant Ocean (Thailand) Co., Ltd.	
Gallant Seafoods Corporation.	
Global Maharaja Co., Ltd.	
Golden Sea Frozen Foods Co. Ltd.	
Golden Seafood International Co., Ltd.	
Golden Thai Imp. & Exp. Co., Ltd.	
Good Fortune Cold Storage Ltd.	
Good Luck Product Co., Ltd.	
Grobest Frozen Foods Co., Ltd.	
Gulf Coast Crab Intl.	
H.A.M. International Co., Ltd.	
Haitai Seafood Co., Ltd.	
Handy International (Thailand) Co., Ltd.	
Heng Seafood Limited Partnership.	
Heritrade Co., Ltd.; Heritrade.	
HIC (Thailand) Co., Ltd.	
High Way International Co., Ltd.	
I.T. Foods Industries Co., Ltd.	
Intersia Foods Co., Ltd.[21]	
Inter-Oceanic Resources Co., Ltd.	
Inter-Pacific Marine Products Co., Ltd.	
K & U Enterprise Co., Ltd.	
K Fresh.	
K.D. Trading Co., Ltd.	
K.L. Cold Storage Co., Ltd.	
Kiang Huat Sea Gull Trading Frozen Food Public Co., Ltd.	
Kibun Trdg.	
Kingfisher Holdings Ltd.; KF Foods Limited; KF Foods[22].	
Kitchens of the Ocean (Thailand) Company, Ltd.; Kitchens of the Ocean (Thailand) Ltd.	
Klang Co., Ltd.	
Kongphop Frozen Foods Co., Ltd.	
Kyokuyo Global Seafoods Co., Ltd.	
Lee Heng Seafood Co., Ltd.	
Leo Transports.	

	Period to be reviewed
Li-Thai Frozen Foods Co., Ltd.	
Lucky Union Foods Co., Ltd.	
Magnate & Syndicate Co., Ltd.	
Mahachai Food Processing Co., Ltd.	
Mahachai Marine Foods Co. Ltd.	
Marine Gold Products Ltd.[23]	
May Ao Foods Co., Ltd.; A Foods 1991 Co., Limited[24].	
Merit Asia Foodstuff Co., Ltd.	
Merkur Co., Ltd.	
Mild Foods Co., Ltd.	
Ming Chao Ind Thailand.	
N&N Foods Co., Ltd.	
N.R. Instant Produce Co., Ltd.	
Namprik Maesri Ltd. Part.	
Narong Seafood Co., Ltd.	
Nongmon SMJ Products.	
Pacific Fish Processing Co., Ltd.	
Pacific Queen Co., Ltd.	
Pakpanang Coldstorage Public Co., Ltd.	
Penta Impex Co., Ltd.	
Phatthana Frozen Food Co., Ltd.[25]	
Phatthana Seafood Co., Ltd.[26]	
Pinwood Nineteen Ninety Nine.	
Piti Seafood Co., Ltd.	
Premier Frozen Products Co., Ltd.	
Preserved Food Specialty Co., Ltd.	
Queen Marine Food Co., Ltd.	
Rayong Coldstorage (1987) Co., Ltd.	
Royal Andaman Seafood Co., Ltd.	
S.C.C. Frozen Seafood Co., Ltd.[27]	
S&D Marine Products Co., Ltd.	
S&P Syndicate Public Company Ltd.	
S. Chaivaree Cold Storage Co., Ltd.	
S. Khonkaen Food Ind Public; S. Khonkaen Food Industry Public Co., Ltd.	
S.K. Foods (Thailand) Public Co. Limited.	
S2K Marine Product Co., Ltd.	
Samui Foods Company Limited.	
SB Inter Food Co., Ltd.	
SCT Co., Ltd.	
Seafoods Enterprise Co., Ltd.	
Sea Bonanza Food Co., Ltd.	
SEA NT'L CO., LTD.	
Sea Wealth Frozen Food Co., Ltd.[28]	
Seafresh Industry Public Co., Ltd.; Seafresh Fisheries[29].	
SEAPAC.	
Search and Serve.	
Sea-Tech Intertrade Co., Ltd.	
Sethachon Co., Ltd.	
Shianlin Bangkok Co., Ltd.	
Shing Fu Seaproducts Development Co.	
Siam Food Supply Co., Ltd.	
Siam Haitian Frozen Food Co., Ltd.	
Siam Intersea Co., Ltd.	
Siam Marine Products Co., Ltd.	
Siam Ocean Frozen Foods Co., Ltd.	
Siam Union Frozen Foods; The Siam Union Frozen Foods Co., Ltd.	
Siamchai International Food Co., Ltd.	
Smile Heart Foods; Smile Heart Foods Co. Ltd.	
SMP Food Product Co., Ltd.; SMP Foods Products Co., Ltd.; SMP Products, Co., Ltd.; SMP Food Products Co., Ltd.	
Songkla Canning Public Co., Ltd.	
Southeast Asian Packaging and Canning Ltd.	
Southport Seafood; Southport Seafood Co., Ltd.	
Star Frozen Foods Co., Ltd.	
Starfoods Industries Co., Ltd.	
STC Foodpak Ltd.	
Suntechthai Intertrading Co., Ltd.	
Surapon Seafood; Surapon Seafoods Public Co. Ltd; Surat Seafoods Public Co., Ltd.; Surapon Foods Public Co. Ltd[30].	
Surapon Nichirei Foods Co., Ltd.	
Suratthani Marine Products Co., Ltd.	
Suree Interfoods Co.,Ltd.	
T.S.F. Seafood Co., Ltd.	
Takzin Samut Co., Ltd.	
Teppitak Seafood Co., Ltd.	

	Period to be reviewed
Tep Kinsho Foods Co., Ltd.	
Tey Seng Cold Storage Co., Ltd.; Chaiwarut Co., Ltd.; Chaiwarut Company Limited [31].	
Thailand Fishery Cold Storage Public Co., Ltd.[32].	
Thai Agri Foods Public Co., Ltd.	
Thai Hanjin Logistics Co., Ltd.	
Thai-Ger Marine Co.; Ongkorn Cold Storage Co., Ltd.	
Thai I-Mei Frozen Foods Co., Ltd.[33]	
Thai International Seafoods Co., Ltd.[34]	
Thai Mahachai Seafood Products Co., Ltd.	
Thai Ocean Venture Co., Ltd.	
Thai Pak Exports Co., Ltd.	
Thai Patana Frozen Co., Ltd.	
Thai Prawn Culture Center Co., Ltd.	
Thai Royal Frozen Food Co., Ltd.	
Thai Spring Fish Co., Ltd.	
Thai Union Frozen Products Public Co., Ltd.	
Thai Union Group Public Co., Ltd.; Thai Union Seafood Co., Ltd.; Pakfood Public Co., Ltd.; Asia Pacific (Thailand) Co., Ltd.; Chaophraya Cold Storage Co., Ltd.; Okeanos Co., Ltd.; Okeanos Food Co., Ltd.; Takzin Samut Co., Ltd.[35]	
Thai Union Manufacturing Company Limited.	
Thai World Import and Export Co., Ltd.; Thai World Imports and Exports Co., Ltd.	
Thai Yoo Ltd., Part.	
The Siam Union Frozen Foods Co., Ltd.	
The Union Frozen Products Co., Ltd.	
Thong Thuan Co., Ltd.	
Top Product Food Co., Ltd.	
Trang Seafood Products Public Co., Ltd.	
Transamut Food Co., Ltd.	
Tung Lieng Tradg.	
Unicord Public Co., Ltd.	
United Cold Storage Co., Ltd.	
V. Thai Food Product Co., Ltd.	
Wales & Co. Universe Limited [36].	
Wann Fisheries Co., Ltd.	
Xian-Ning Seafood Co., Ltd.	
Yeenin Frozen Foods Co., Ltd.	
ZAFCO TRDG	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Frozen Warmwater Shrimp, A–570–893	2/1/23–1/31/24
Allied Kinpacific Food (Dalian) Co.	
Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd./Allied Pacific Food (Dalian) Co., Ltd.[37]	
Anhui Fuhuang Sungem Foodstuff Group Co., Ltd.	
Asian Seafoods (Zhanjiang) Co., Ltd.	
Beihai Anbang Seafood Co., Ltd.	
Beihai Boston Frozen Food Co., Ltd.	
Beihai Evergreen Aquatic Product Science and Technology Company Limited.	
Beihai Tianwei Aquatic Food Co. Ltd.	
Changli Luquan Aquatic Products Co., Ltd.	
Chengda Development Co Ltd	
Colorful Bright Trade Co., Ltd.	
Dalian Beauty Seafood Company Ltd.	
Dalian Changfeng Food Co., Ltd.	
Dalian Guofu Aquatic Products and Food Co., Ltd.	
Dalian Haiqing Food Co., Ltd.	
Dalian Hengtai Foods Co., Ltd.	
Dalian Home Sea International Trading Co., Ltd.	
Dalian Honghefeng International Tr.	
Dalian Philica International Trade Co., Ltd.	
Dalian Rich Enterprise Group Co., Ltd.	
Dalian Shanhai Seafood Co., Ltd.	
Dalian Sunrise Foodstuffs Co., Ltd.	
Dalian Taiyang Aquatic Products Co., Ltd.	
Dandong Taihong Foodstuff Co., Ltd.	
Dongwei Aquatic Products (Zhangzhou) Co., Ltd.	
Ferrero Food (Hangzhou) Co., Ltd.	
Fujian Chaohui Group.	
Fujian Chaowei International Trading.	
Fujian Dongshan County Shunfa Aquatic Product Co., Ltd.	
Fujian Dongwei Food Co., Ltd.	
Fujian Dongya Aquatic Products Co., Ltd.	
Fujian Fuding Seagull Fishing Food Co., Ltd.	
Fujian Haihun Aquatic Product Company.	
Fujian Hainason Trading Co., Ltd.	
Fujian Min Tong Wan Hai Fishery Ltd.	
Fujian R & J Group Ltd.	

	Period to be reviewed
Fujian Rongjiang Import and Export Co., Ltd.	
Fujian Zhaoan Haili Aquatic Co., Ltd.	
Fuqing Chaohui Aquatic Food Co., Ltd.	
Fuqing Dongwei Aquatic Products Industry Co., Ltd.	
Fuqing Longhua Aquatic Food Co., Ltd.	
Fuqing Minhua Trade Co., Ltd.	
Fuqing Yihua Aquatic Food Co., Ltd.	
Fuzhou Shuixi Food Inc.	
Gallant Ocean Group.	
Guangdong Evergreen Aquatic Food Co., Ltd.	
Guangdong Foodstuffs Import & Export (Group) Corporation.	
Guangdong Gourmet Aquatic Products Co., Ltd.	
Guangdong Jinhang Foods Co., Ltd.	
Guangdong Rainbow Aquatic Development.	
Guangdong Savvy Seafood Inc.	
Guangdong Shunxin Marine Fishery Group Co., Ltd.	
Guangdong Universal Aquatic Food Co. Ltd.	
Guangdong Wanshida Holding Corp.	
Guangdong Wanya Foods Fty. Co., Ltd.	
HaiLi Aquatic Product Co., Ltd.	
Hainan Brich Aquatic Products Co., Ltd.	
Hainan Golden Spring Foods Co., Ltd.	
Hainan Qinfu Foods Co., Ltd.	
Hainan Xintaisheng Industry Co., Ltd.	
Huazhou Xinhai Aquatic Products Co. Ltd.	
Kuehne Nagel Ltd. Xiamen Branch.	
Leizhou Bei Bu Wan Sea Products Co., Ltd.	
Longhai Gelin Foods Co., Ltd.	
Maoming Xinzhou Seafood Co., Ltd.	
New Continent Foods Co., Ltd.	
Ningbo Prolar Global Co., Ltd.	
North Seafood Group Co.	
Pacific Andes Food Ltd.	
Penglai Huiyang Foodstuff Co., Ltd.	
Penglai Yuming Foodstuff Co., Ltd.	
Qingdao Fusheng Foodstuffs Co., Ltd.	
Qingdao Yihexing Foods Co., Ltd.	
Qingdao Yize Food Co., Ltd.	
Qingdao Zhongfu International.	
Qinhuangdao Gangwan Aquatic Products Co., Ltd.	
Raoping Yuxiang Aquaculture Co., Ltd.	
Rizhao Meijia Aquatic Foodstuff Co., Ltd.	
Rizhao Meijia Keyuan Foods Co. Ltd.	
Rizhao Rongjin Aquatic.	
Rizhao Rongxing Co. Ltd.	
Rizhao Smart Foods Company Limited.	
Rongcheng Sanyue Foodstuff Co., Ltd.	
Rongcheng Yinhai Aquatic Product Co., Ltd.	
Ruian Huasheng Aquatic Products.	
Rushan Chunjiangyuan Foodstuffs Co., Ltd.	
Rushan Hengbo Aquatic Products Co., Ltd.	
Savvy Seafood Inc.	
Sea Trade International Inc.	
Shanghai Finigate Integrated.	
Shanghai Zhoulian Foods Co., Ltd.	
Shantou Freezing Aquatic Product Foodstuffs Co.	
Shantou Haili Aquatic Product Co. Ltd.	
Shantou Haimao Foodstuff Factory Co., Ltd.	
Shantou Jiazhou Food Industrial Co., Ltd.	
Shantou Jinping Oceanstar Business Co., Ltd.	
Shantou Jintai Aquatic Product Industrial Co., Ltd.	
Shantou Longsheng Aquatic Product Foodstuff Co., Ltd.	
Shantou Ocean Best Seafood Corporation.	
Shantou Red Garden Food Processing Co., Ltd./Shantou Red Garden Foodstuff Co., Ltd.[38]	
Shantou Ruiyuan Industry Co., Ltd.	
Shantou Wanya Foods Fty. Co., Ltd.	
Shantou Yuexing Enterprise Company.	
Shengyuan Aquatic Food Co., Ltd.	
Suizhong Tieshan Food Co., Ltd.	
Thai Royal Frozen Food Zhanjiang Co., Ltd.	
Time Seafood (Dalian) Company Limited.	
Tongwei Hainan Aquatic Products Co., Ltd.	
Xiamen East Ocean Foods Co., Ltd.	

	Period to be reviewed
Xiamen Golden Huanan Imp. & Exp. Co., Ltd.	
Xiamen Granda Import and Export Co., Ltd.	
Xiamen Lixing Imp. & Exp. Co., Ltd.	
Yangjiang Dawu Aquatic Products Co., Ltd.	
Yangjiang Guolian Seafood Co., Ltd.	
Yangjiang Haina Datong Trading Co.	
Yantai Longda Foodstuffs Co., Ltd.	
Yantai Tedfoods Co., Ltd.	
Yantai Wei-Cheng Food Co., Ltd.	
Yixing Magnolia Garment Co., Ltd.	
Zhangzhou Donghao Seafoods Co., Ltd.	
Zhangzhou Fuzhiyuan Food Co., Ltd.	
Zhangzhou Hongwei Foods Co., Ltd.	
Zhangzhou Tai Yi Import & Export Trading Co., Ltd.	
Zhangzhou Xinhui Foods Co., Ltd.	
Zhangzhou Xinwanya Aquatic Product Co., Ltd.	
Zhangzhou Yanfeng Aquatic Product & Foodstuff Co., Ltd.	
Zhanjiang Evergreen Aquatic Product Science and Technology Co., Ltd.	
Zhanjiang Fuchang Aquatic Products Co., Ltd.	
Zhanjiang Fuchang Aquatic Products Freezing Plant.	
Zhanjiang Go-Harvest Aquatic Products Co., Ltd.	
Zhanjiang Guolian Aquatic Products Co., Ltd.[39]	
Zhanjiang Longwei Aquatic Products Industry Co., Ltd.	
Zhanjiang Regal Integrated Marine Resources Co., Ltd.[40]	
Zhanjiang Universal Seafood Corp.	
Zhanjiang Weipinwei Aquatic Products Co., Ltd.	
Zhaoan Yangli Aquatic Co., Ltd.	
Zhejiang Evernew Seafood Co.	
Zhejiang Tianhe Aquatic Products.	
Zhejiang Xinwang Foodstuffs Co., Ltd.	
Zhenye Aquatic (Huilong) Ltd.	
Zhoushan City Shengtai Aquatic.	
Zhoushan Genho Food Co., Ltd.	
Zhoushan Green Food Co., Ltd.	
Zhoushan Haizhou Aquatic Products.	
Zhuanghe Yongchun Marine Products.	
THE PEOPLE'S REPUBLIC OF CHINA: Common Alloy Aluminum Sheet, A–570–073	2/1/23–1/31/24
Henan Mingtai Al. Industrial Co., Ltd.	
Yinbang Clad Material Co., Ltd.	
Zhengzhou Mingtai Industry Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Crystalline Silicon Photovoltaic Products, A–570–010	2/1/23–1/31/24
Anji Dasol Solar Energy Science & Technology Co., Ltd.	
BYD (Shangluo) Industrial Co., Ltd.	
Canadian Solar International Limited	
Canadian Solar Manufacturing (Changshu) Inc.	
Canadian Solar Manufacturing (Luoyang) Inc.	
Changzhou Trina Hezhong Photoelectric Co., Ltd.	
Changzhou Trina Solar Energy Co., Ltd.	
Changzhou Trina Solar Yabang Energy Co., Ltd.	
Chint Energy (Haining) Co., Ltd.; Chint Solar (Hong Kong) Company Limited; Chint Solar (Jiuquan) Co., Ltd.	
Chint Solar (Zhejiang) Co., Ltd.; Chint New Energy Technology (Haining) Co. Ltd.	
CSI Cells Co., Ltd.	
CSI Solar Power (China) Inc.	
CSI–GCL Solar Manufacturing (Yancheng) Co., Ltd.	
De-Tech Trading Limited HK.	
Hefei JA Solar Technology Co., Ltd.	
Hengdian Group DMEGC Magnetics Co. Ltd.	
Hubei Trina Solar Energy Co., Ltd.	
JA Solar Co., Ltd.	
JA Solar Technology Yangzhou Co., Ltd.	
Jiangsu Jinko Tiansheng Solar Co., Ltd.	
Jiawei Solarchina (Shenzhen) Co., Ltd.	
Jiawei Solarchina Co., Ltd.	
JingAo Solar Co., Ltd.	
Jinko Solar Co. Ltd.	
Jinko Solar Import and Export Co., Ltd.	
Jinko Solar International Limited	
JinkoSolar Technology (Haining) Co., Ltd.	
Jiujiang Shengchao Xinye Technology Co., Ltd.	
Jiujiang Shengzhao Xinye Trade Co., Ltd.	
Lightway Green New Energy Co., Ltd.	
Longi (HK) Trading Ltd.	
Longi Solar Technology Co. Ltd.; Lerri Solar Technology Co., Ltd.	

	Period to be reviewed
Luoyang Suntech Power Co., Ltd.	
Ningbo ETDZ Holdings, Ltd.	
Ningbo Qixin Solar Electrical Appliance Co., Ltd.	
Perlight Solar Co., Ltd.	
Renesola Jiangsu Ltd.	
ReneSola Zhejiang Ltd.	
Risen (Luoyang) New Energy Co., Ltd.	
Risen (Wuhai) New Energy Co., Ltd.	
Risen Energy Co. Ltd.; Risen Energy (Changzhou) Co., Ltd.	
Ruichang Branch, Risen Energy (HongKong) Co., Ltd.	
Shanghai BYD Co., Ltd.	
Shenzhen Sungold Solar Co., Ltd.	
Shenzhen Topray Solar Co., Ltd.	
Shenzhen Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co., Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; Yingli Energy (China) Company Limited.	
Sumec Hardware & Tools Co., Ltd.	
Sunny Apex Development Ltd.	
Suntech Power Co., Ltd.	
Taizhou BD Trade Co., Ltd.	
tenKsolar (Shanghai) Co., Ltd.	
Trina Solar (Changzhou) Science & Technology Co., Ltd.	
Trina Solar (Changzhou) Science and Technology Co., Ltd.	
Trina Solar (Hefei) Science and Technology Co., Ltd.	
Trina Solar Co., Ltd.	
Turpan Trina Solar Energy Co., Ltd.	
Wuxi Suntech Power Co., Ltd.	
Wuxi Tianran Photovoltaic Co., Ltd.	
Xiamen Yiyusheng Solar Co., Ltd.	
Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd.	
Yingli Green Energy International Trading Company Limited.	
Yuhuan Jinko Solar Co., Ltd.	
Zhejiang Aiko Solar Energy Technology Co., Ltd.	
Zhejiang Jinko Solar Co., Ltd.	
Zhejiang Twinsel Electronic Technology Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Wood Mouldings and Millwork Products, A–570–117	2/1/23–1/31/24
Anji Huaxin Bamboo & Wood Products Co., Ltd.	
Baixing Import and Export Trading Co., Ltd Youxi Fujian.	
Bel Trade Wood Industrial Co., Ltd. Youxi Fujian.	
Composite Technology International Limited.	
Fotiou Frames Limited.	
Fujian Hongjia Craft Products Co., Ltd.	
Fujian Jinquan Trade Co., Ltd.	
Fujian Sanming City Donglai Wood Co., Ltd.	
Fujian Shunchang Shengsheng Wood Industry Limited Company.	
Fujian Wangbin Decorative Material Co., Ltd.	
Fujian Yinfeng Imp & Exp Trading Co., Ltd.	
Fujian Youxi Best Arts & Crafts Co. Ltd.	
Fujian Zhangping Kimura Forestry Products Co., Ltd.	
Gaomi Hongtai Home Furniture Co., Ltd.	
Homebuild Industries Co., Ltd.	
Huaan Longda Wood Industry Co., Ltd.	
Jiangsu Chen Sheng Forestry Development Co., Ltd.	
Jiangsu Wenfeng Wood Co., Ltd.	
Jim Fine Wooden Products Co., Ltd.	
Longquan Jiefeng Trade Co., Ltd.	
Nanjing Hualianxing Electronics Co., Ltd.	
Nanping Huatai Wood & Bamboo Co., Ltd.	
Omni One Co., Limited.	
Perfect Window Fashions Co., Ltd.	
Putian Yihong Wood Industry Co., Ltd.	
Raoping HongRong Handicrafts Co., Ltd. (d.b.a. Chen Chui Global Corp.).	
Sanming Lintong Trading Co., Ltd.	
Shandong Miting Household Co., Ltd.	
Shaxian Hengtong Wood Industry Co., Ltd.	
Shaxian Shiyiwood, Ltd.	
Shenzhen Xinjintai Industrial Co., Ltd.	
Shuyang Kevin International Co., Ltd.	
Sun Valley Shade Co., Ltd.	
Suqian Sulu Import & Export Trading Co., Ltd.	
Tim Feng Manufacturing Co., Ltd.	
Wuxi Boda Bamboo & Wood Industrial Co., Ltd.	

	Period to be reviewed
Zhangzhou Wangjiamei Industry & Trade Co., Ltd.	
Zhangzhou Yihong Industrial Co., Ltd.	
Zhejiang Senya Board Industry Co., Ltd.	
SOUTH AFRICA: Lemon Juice, A–791–827	8/4/22–1/31/24
Cape Fruit Processors Pty. Ltd.	
Granor Passi Pty Ltd.	
Magaliesberg Citrus Company.	
Onderberg Verwerkingskooperasie Beperk.	
Venco Fruit Processors Pty. Ltd.	
UNITED ARAB EMIRATES: Prestressed Concrete Steel Wire Strand, A–520–809	2/1/23–1/31/24
Essen Steel Industry L.L.C.	
CVD Proceedings Period To Be Reviewed	
CANADA: Certain Softwood Lumber Products, C–122–858	1/1/23–12/31/23
Portbec Forest Products Ltd (aka Les Produits Forestiers Portbec Ltee) [41].	
INDIA: Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel, C–533–874	1/1/23–12/31/23
Goodluck India Limited.	
INDIA: Sodium Nitrite, C–533–907	6/21/22–12/31/23
Deepak Nitrite Limited.	
Kronox Lab Sciences Pvt Ltd.	
Kutch Chemical Industries.	
Palvi Industries Limited.	
Lotus Global Pvt. Ltd.	
ITALY: Forged Steel Fluid End Blocks,[42] C–475–841	1/1/23–12/31/23
REPUBLIC OF KOREA: Certain Cut-To-Length Carbon-Quality Steel Plate, C–580–837	1/1/23–12/31/23
Ajin Industrial Co., Ltd.	
BDP International.	
Daeik Eng Co., Ltd.	
Dongkuk Steel Mill Co., Ltd.	
Hyundai Steel Company.	
Ohsung Co., Ltd.	
Samjin Lnd Co., Ltd.	
Sung Jin Steel Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Common Alloy Aluminum Sheet, C–570–074	1/1/23–12/31/23
Alcha International Holdings Limited.	
Henan Mingtai Al. Industrial, Co., Ltd.	
Jiangsu Alcha Aluminium Co., Ltd.	
Yinbang Clad Material Co., Ltd.	
Zhengzhou Mingtai Industry, Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Truck and Bus Tires, C–570–041	1/1/23–12/31/23
Bridgestone (Shenyang) Tire Co. Ltd.	
Bridgestone Tire Co., Ltd.	
Bridgestone Corporation.	
Jiangsu General Science Technology Co., Ltd.	
Jiangsu Hankook Tire Co., Ltd.	
Chongqing Hankook Tire Co., Ltd.	
Shandong Hugerubber Co., Ltd.	
Weifang Shunfuchang Rubber and Plastic Products Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Wood Mouldings and Millwork Products, C–570–118	1/1/23–12/31/23
Anji Huaxin Bamboo & Wood Products Co., Ltd.	
Aventra Inc.	
Baixing Import and Export Trading Co., Ltd. Youxi Fujian.	
Bel Trade Wood Industrial Co.	
Bel Trade Wood Industrial Co., Ltd. Youxi Fujian.	
Cao County Hengda Wood Products Co., Ltd.	
China Cornici Co. Ltd.	
Composite Technology International Limited.	
Fotiou Frames Limited.	
Fujian Hongjia Craft Products Co., Ltd.	
Fujian Jinquan Trade Co., Ltd., and Fujian Province Youxi County Baiyuan Wood Machining Co., Ltd.[43]	
Fujian Sanming City Donglai Wood Co., Ltd.	
Fujian Shunchang Shengsheng Wood Industry Limited Company.	
Fujian Wangbin Decorative Material Co., Ltd.	
Fujian Yinfeng Imp & Exp Trading Co., Ltd.; Fujian Province Youxi City Mangrove Wood Machining Co., Ltd.; and Fujian Province Youxi City Mangrove Wood Machining Co., Ltd. Youxi Xicheng Branch [44].	
Fujian Youxi Best Arts & Crafts Co. Ltd.	
Fujian Zhangping Kimura Forestry Products Co., Ltd.	
Homebuild Industries Co., Ltd.	

	Period to be reviewed
Huaan Longda Wood Industry Co., Ltd. Jiangsu Chensheng Forestry Development Co., Ltd. Jiangsu Wenfeng Wood Co., Ltd. Longquan Jiefeng Trade Co., Ltd. Nanjing Hualianxing Electronics Co., Ltd. Nanping Huatai Wood & Bamboo Co., Ltd. Omni One Co., Limited. Perfect Window Fashions Co., Ltd. Putian Yihong Wood Industry Co., Ltd. Raoping HongRong Handicrafts Co., Ltd. (d.b.a. Chen Chui Global Corp.). Sanming Lintong Trading Co., Ltd. Shandong Miting Household Co., Ltd. Shaxian Hengtong Wood Industry Co., Ltd. Shaxian Shiyiwood, Ltd. Shenzhen Xinjintai Industrial Co., Ltd. Shuyang Kevin International Co., Ltd. Wuxi Boda Bamboo & Wood Industrial Co., Ltd. Zhangzhou Wangjiamei Industry & Trade Co., Ltd. Zhangzhou Yihong Industrial Co., Ltd. Zhejiang Senya Board Industry Co., Ltd.	
Suspension Agreements Period to be Reviewed	
None.	

[4] On March 11, 2024, Commerce determined that Elque Ventures Private Limited is the successor-in-interest to Elque & Co. Therefore, the results of this review will be applicable to the Elque Group comprised of the companies listed above. *See Certain Frozen Warmwater Shrimp From India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 89 FR 17386 (March 11, 2024).

[5] Shrimp produced and exported by Devi Sea Foods Limited (Devi) was excluded from the order effective February 1, 2009. *See Certain Frozen Warmwater Shrimp from India: Final Results of the Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part,* 75 FR 41813, 41814 (July 19, 2010). Accordingly, we are initiating this administrative review with respect to Devi only for shrimp produced in India where Devi acted as either the manufacturer or exporter (but not both).

[6] On October 18, 2023, Commerce determined that Highland Agro Food Private Limited is the successor-in-interest to Highland Agro. *See Certain Frozen Warmwater Shrimp From India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 88 FR 71825 (October 18, 2023).

[7] On December 23, 2022, Commerce determined that Kader Exports Private Limited is the successor-in-interest to the Liberty Group, which is comprised of Devi Marine Food Exports Private Ltd.; Kader Exports Private Limited; Kader Investment and Trading Company Private Limited; Liberty Frozen Foods Private Limited; Liberty Oil Mills Limited; Premier Marine Products Private Limited; and Universal Cold Storage Private Limited. *See Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 87 FR 78941 (December 23, 2022).

[8] Where interested parties requested review of a company name combined with an abbreviation of the company name or alternative (*i.e.,* doing-business-as) name, Commerce treated the company names separately from those abbreviations/alternatives for review initiation purposes.

[9] Interested parties requested a review of Camau Frozen Seafood Processing Import Export Corporation, but Commerce has previously determined that Camimex Group Joint Stock Company is the successor-in-interest to Camau Frozen Seafood Processing Import Export Corporation, so has only listed Camimex Group Joint Stock Company in this notice. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 86 FR 47617, August 26, 2021.

[10] Interested parties requested a review of FIMEX VN and Sao Ta Seafood Factory separately, but Commerce has listed them together here because it previously determined that these two entries are affiliated within the meaning of section 771(33) of the Act and comprise a single entity pursuant to 19 CFR 351.401(f). *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2017–2018,* 84 FR 44859, August 27, 2019.

[11] Shrimp produced and exported by Minh Phat Seafood Company Limited were excluded from the antidumping duty order on certain frozen warmwater shrimp from Vietnam, effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–47758 (July 22, 2016). Accordingly, we are initiating this administrative review for this exporter only with respect to subject merchandise produced by another entity.

[12] Shrimp produced and exported by Minh Phu Hau Giang Seafood were excluded from the antidumping duty order on certain frozen warmwater shrimp from Vietnam, effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–47758 (July 22, 2016). Accordingly, we are initiating this administrative review for this exporter only with respect to subject merchandise produced by another entity.

[13] Shrimp produced and exported by Minh Phu Seafood Corporation were excluded from the antidumping duty order on certain frozen warmwater shrimp from Vietnam, effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–47758 (July 22, 2016). Accordingly, we are initiating this administrative review for this exporter only with respect to subject merchandise produced by another entity.

[14] Shrimp produced and exported by Minh Qui Seafood Co., Ltd. were excluded from the antidumping duty order on certain frozen warmwater shrimp from Vietnam, effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–47758 (July 22, 2016). Accordingly, we are initiating this administrative review for this exporter only with respect to subject merchandise produced by another entity.

[15] Interested parties requested a review of these companies separately, but Commerce has listed them together here because it previously determined that these entities are affiliated within the meaning of section 771(33) of the Act and comprise a single entity pursuant to 19 CFR 351.401(f). *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review,* 76 FR 12054, 12056 (March 4, 2011), unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 56158 (September 12, 2011).

[16] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd. (Andaman Seafood); Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Andaman Seafood and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[17] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2015–2016,* 82 FR 30836 (July 3, 2017) (*2015–2016 AR Final*). Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[18] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd. (Chanthaburi Frozen); Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Chanthaburi Frozen and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[19] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd. (Chanthaburi Seafoods); Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Chanthaburi Seafoods and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[20] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2015–2016 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[21] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.(Intersia Foods); Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Intersia Foods and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[22] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2006–2007,* 73 FR 50933 (August 29, 2008) (*2006–2007 AR Final*). Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[23] Certain frozen warmwater shrimp produced and exported by Marine Gold Products Ltd. (Marine Gold) were excluded from the order effective February 1, 2012. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Revocation of the Order (in Part); 2011–2012,* 78 FR 42497 (July 16, 2013). This exclusion is not applicable to merchandise exported to the United States by Marine Gold in any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by Marine Gold; (2) produced by Marine Gold and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination.

[24] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2015–2016 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[25] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd. (Phatthana Frozen); and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Phatthana Frozen and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[26] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd. (Phatthana Seafood); Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Phatthana Seafood and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[27] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd. (S.C.C. Frozen); Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by S.C.C. Frozen and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[28] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (Sea Wealth) (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Sea Wealth and exported to the United States by any of the Single Entity companies This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[29] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2015–2016 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[30] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2015–2016 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[31] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2006–2007 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[32] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd. (Thailand Fishery); Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Thailand Fishery and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[33] Certain frozen warmwater shrimp produced and exported by Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei) were excluded from the order effective January 16, 2009. *See Section 129 Determination.* This exclusion is not applicable to merchandise exported to the United States by Thai I-Mei in any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by Thai I-Mei; (2) produced by Thai I-Mei and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination.

[34] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd. (Thai International); Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd.; S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Thai International and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[35] In past reviews, Commerce has treated these companies as a single entity. *See, e.g., 2015–2016 AR Final.* Absent information to the contrary, we intend to continue to treat these companies as a single entity for the purpose of this administrative review.

[36] In the investigation, we found it appropriate to treat the following companies as a single entity: Andaman Seafood Co., Ltd.; Chanthaburi Seafoods Co., Ltd.; Chanthaburi Frozen Food Co., Ltd.; Phatthana Seafood Co., Ltd.; Thai International Seafood Co., Ltd.; Thailand Fishery Cold Storage Public Co., Ltd.; Wales & Company Universe Ltd. (Wales & Company); S.C.C. Frozen Seafood Co., Ltd.; Intersia Foods Co., Ltd.; Phatthana Frozen Food Co., Ltd.; and Sea Wealth Frozen Food Co, Ltd. (collectively, the Single Entity). *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand,* 69 FR 76918, 76920 n.4, December 23, 2004, unchanged in *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 70 FR 5145, February 1, 2005. Certain frozen warmwater shrimp produced and exported by the Single Entity were subsequently excluded from the order effective January 16, 2009. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand,* 74 FR 5638 (January 30, 2009) (*Section 129 Determination*). This exclusion is applicable only to merchandise produced by Wales & Company and exported to the United States by any of the Single Entity companies. This exclusion does not apply to any other producer/exporter combination or by third parties that sourced subject merchandise from the excluded producer/exporter combination. Accordingly, this initiation covers merchandise: (1) produced by a third party and exported by the companies listed above that are part of the single entity; (2) produced by a company that is part of the single entity and exported by a third party; or (3) exported by a third party that sourced subject merchandise from the excluded producer/exporter combination. Additionally, Commerce received a request for review of Y2K Frozen Co., Ltd., a company now known as Intersia Foods Co., Ltd., one of the companies within the entity. *See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 50933, 50935 (August 29, 2008). As such, Y2K Frozen Co., Ltd. is not listed in this initiation notice.

[37] Allied Pacific Food (Dalian) Co., Ltd., Allied Pacific (HK) Co., Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd; and Allied Pacific Aquatic Products (Zhongshan) Co., Ltd. comprise the single entity Allied Pacific. *See Certain Frozen Warmwater Shrimp from the People's Republic of China and Diamond Sawblades and Parts Thereof from the People's Republic of China: Notice of Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Orders,* 78 FR 18958, 18959 (March 28, 2013) (*China Shrimp Exclusion*). Additionally, this *Order* was revoked with respect to merchandise exported by Allied Pacific (HK) Co., Ltd., or Allied Pacific Food (Dalian) Co., Ltd., and manufactured by Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd., or Allied Pacific Aquatic Products (Zhongshan) Co., Ltd., or Allied Pacific Food (Dalian) Co., Ltd. *See China Shrimp Exclusion,* 78 FR at 18959. Accordingly, we are initiating this review for these exporters only with respect to subject merchandise produced by entities other than the aforementioned producers.

[38] Shantou Red Garden Food Processing Co., Ltd. and Shantou Red Garden Foodstuff Co., Ltd. comprise the single entity Shantou Red Garden Foods. *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019,* 85 FR 83891 (December 23, 2020).

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether ADs have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

[39] This *Order* was revoked with respect to subject merchandise produced and exported by Zhanjiang Guolian Aquatic Products Co., Ltd. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China,* 70 FR 5149, 5152 (February 1, 2005). Accordingly, we are initiating this review for this exporter only with respect to subject merchandise produced by another entity.

[40] This *Order* was revoked with respect to subject merchandise produced and exported by Zhanjiang Regal Integrated Marine Resources Co., Ltd. *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Administrative Review; 2011–2012,* 78 FR 56209, 56210 (September 12, 2013). Accordingly, we are initiating this review for this exporter only with respect to subject merchandise produced by another entity.

[41] Portbec Forest Products Ltd (aka Les Produits Forestiers Portbec Ltee) was inadvertently included in the initiation notice that published on March 5, 2024 (89 FR 15827, 15838). Through this notice, we are removing Portbec Forest Products Ltd (aka Les Produits Forestiers Portbec Ltee) from the January 1, 2023, through December 31, 2023, administrative review of the CVD order of certain softwood lumber products from Canada (C–122–858).

[42] In the March 5, 2024 Initiation Notice (89 FR 15827) for India: Forged Steel Fluid End Blocks, C–533–894, we incorrectly listed the companies under review. The only party for which we have a review request is Bharat Forge Limited. Further, for Italy: Forged Steel Fluid End Blocks, C–475–841, there are two additional companies under review. These companies include Cogne Acciai Speciali S.p.A. and Metalcam S.p.A.

[43] In past reviews, Commerce has found these entities to be cross-owned. *See Wood Mouldings and Millwork Products from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2020–2021,* 88 FR 62319 (September 11, 2023) and *Wood Mouldings and Millwork Products From the People's Republic of China: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2022,* 89 FR 15816 (March 5, 2024). Absent information to the contrary, we intend to continue to treat these entities as cross-owned for the purpose of this administrative review.

[44] *Id.*

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant ''gap'' period of the order (*i.e.,* the period following the expiry of provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce's regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the *Final Rule,*[45] available at *https://www.govinfo.gov/content/pkg/FR-2013-07-17/pdf/2013-17045.pdf,* prior to submitting factual information in this segment. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[46]

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule*.[47] Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by Commerce.[48] In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the

[45] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[46] *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule,* 88 FR 67069 (September 29, 2023).

[47] *See* section 782(b) of the Act; *see also Final Rule;* and the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[48] *See* 19 CFR 351.302.

circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule,* available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: April 3, 2024.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2024–07407 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Advisory Committee on Earthquake Hazards Reduction Meeting

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

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Earthquake Hazards Reduction (ACEHR or Committee) will hold an open virtual meeting via web conference on Wednesday, June 12, 2024, from 1:30 p.m. to 4:30 p.m. and Thursday, June 13, 2024, from 1:30 p.m. to 4:30 p.m. Eastern Time. The primary purpose of this meeting is for the Committee to review the activities of the National Earthquake Hazards Reduction Program (NEHRP). The agenda may change to accommodate Committee business. The final agenda will be posted on the NEHRP website at *https://nehrp.gov/committees/meetings.htm.*

DATES: The ACEHR will meet on Wednesday, June 12, 2024, from 1:30 p.m. to 4:30 p.m. and Thursday, June 13, 2024, from 1:30 p.m. to 4:30 p.m. Eastern Time.

ADDRESSES: The meeting will be held via web conference. For instructions on how to participate in the meeting, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Tina Faecke, Management and Program Analyst, NEHRP, Engineering Laboratory, NIST. Ms. Faecke's email address is *tina.faecke@nist.gov* and her phone number is (240) 477–9841.

SUPPLEMENTARY INFORMATION:

Authority: 42 U.S.C. 7704(a)(5) and the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 1001 *et seq.* The Committee is composed of 12 members, appointed by the Director of NIST, who were selected for their established records of distinguished service in their professional community, their knowledge of issues affecting NEHRP, and to reflect the wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. In addition, the Chairperson of the U.S. Geological Survey Scientific Earthquake Studies Advisory Committee serves as an ex-officio member of the Committee.

Pursuant to the FACA, as amended, 5 U.S.C. 1001 *et seq.,* notice is hereby given that the ACEHR will meet on Wednesday, June 12, 2024, from 1:30 p.m. to 4:30 p.m. and Thursday, June 13, 2024, from 1:30 p.m. to 4:30 p.m. Eastern Time. The meeting will be open to the public and will be held via web conference. Interested members of the public will be able to participate in the meeting from remote locations. The primary purpose of this meeting is for the Committee to review the activities of NEHRP. The agenda may change to accommodate Committee business. The final agenda will be posted on the NEHRP website at *https://nehrp.gov/committees/meetings.htm.*

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's business are invited to request a place on the agenda. Approximately fifteen minutes will be reserved for public comments and speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received. This meeting will be recorded. Public comments can be provided via email or by web conference attendance. Questions from the public will not be considered during this period. All those wishing to speak must submit their request by email to Tina Faecke at *tina.faecke@nist.gov* by 5:00 p.m. Eastern Time, June 5, 2024. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to participate are invited to submit written statements electronically by email to *tina.faecke@nist.gov.*

Anyone wishing to attend this meeting via web conference must register by 5:00 p.m. Eastern Time, June 5, 2024, to attend. Please submit your full name, the organization you represent (if applicable), email address, and phone number to Tina Faecke at *tina.faecke@nist.gov.* After pre-registering, participants will be provided with instructions on how to join the web conference.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2024–07431 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD847]

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold four Best Fishing Practices Master Volunteer Program (BFP MVP) workshops covering best fishing practices, specifically for snapper grouper species, how to get involved in Citizen Science projects, and how to get involved in the Council process.

DATES: The BFP MVP workshops will take place April 25, May 7, May 8, and May 29, 2024. The workshops will begin at 6 p.m., local time. See **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Meeting addresses: The workshops will be held in Charleston, SC; Myrtle Beach, SC; Okatie, SC; and Savannah, GA. See **SUPPLEMENTARY INFORMATION**.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Ashley Oliver, Best Fishing Practices Outreach Specialist, SAFMC; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *ashley.oliver@safmc.net.*

SUPPLEMENTARY INFORMATION: The Council is hosting a series of Best Fishing Practices Master Volunteer Program (BFP MVP) workshops along the South Atlantic coast throughout 2024 empowering key members of the fishing community to share information on best fishing practices and opportunities to get involved in the Council process. The agenda for the in-person workshops is as follows: Council staff will introduce BFP MVP and the Council's goals and objectives; Best Fishing Practices including the topics of barotrauma and barotrauma mitigation devices; the Council's Citizen Science

projects, regional fishery management councils and the South Atlantic Fishery Management Council; and how to get involved in the federal fishery management process. If applicable, State agencies will share information pertaining to their efforts. Throughout the workshop, attendees will have the opportunity to share their expertise and ideas with staff on improving outreach efforts in their community. Information provided during workshops will be summarized and presented to the Council for use in ongoing outreach efforts. Additional workshops will be scheduled along the South Atlantic coast throughout the remainder of 2024 and noticed as needed.

Workshop Locations

Thursday, April 25, 2024: SC Department of Natural Resources Outdoor Classroom, 412–418 Fort Johnson Rd., Charleston, SC 29412; phone: (843) 953–9300;

Tuesday, May 7, 2024: Bass Pro Classroom, 10177 N Kings Hwy., Myrtle Beach, SC 29572; phone: (843) 361–4800;

Wednesday, May 8, 2024: Port Royal Maritime Center, 310 Okatie Hwy., Okatie, SC 29909; phone: (843) 645–7774;

Wednesday, May 29, 2024: Georgia Southern University Armstrong Campus: 11935 Abercorn Street, Savannah, GA 31419; phone: (912) 478–4636.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aid should be directed to the Council office (see **ADDRESSES**) 3 days prior to the meeting.

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

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

Dated: April 3, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–07442 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD856]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Bluefish Advisory Panel will hold a public meeting, jointly with the Atlantic States Marine Fisheries Commission (ASMFC) Bluefish Advisory Panel.

DATES: The meeting will be held on Tuesday, April 23, 2024, from 4 p.m. to 5:30 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar. Webinar connection, agenda items, and any additional information will be available at *www.mafmc.org/council-events.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their website at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is for the Advisory Panel to develop a fishery performance report (FPR) that describes recent performance of the bluefish commercial and recreational fisheries. The intent of the FPR is to facilitate a venue for structured input from the Advisory Panel for the bluefish specifications process. The FPR will be used by the MAFMC's Scientific and Statistical Committee (SSC) and the Bluefish Monitoring Committee (MC) when reviewing 2025 management measures designed to achieve the recommended bluefish catch and landings limits.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Spedden at the Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: April 3, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–07439 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Western Pacific Community Development Program Process

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Information Collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before June 10, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0612 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Pua Borges, National Marine Fisheries Service, Pacific Islands Regional Office, 1845 Wasp Blvd. 176, Honolulu, HI 96818. Telephone: (808) 725–5184; Email: *pua.borges@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection. The Federal regulations at 50 CFR 665 authorize the Regional Administrator of the National Marine Fisheries Service (NMFS), Pacific Island Region to provide eligible western Pacific communities with access to fisheries that they have traditionally depended upon, but may not have the capabilities to support continued and substantial participation, possibly due to economic, regulatory, or other

barriers. To be eligible to participate in the western Pacific community development program, a community must meet the criteria set forth in 50 CFR 665.20, and submit a community development plan that describes the purposes and goals of the plan, the justification for proposed fishing activities, and the degree of involvement by the indigenous community members, including contact information.

This collection of information provides NMFS and the Western Pacific Fishery Management Council (Council) with data to determine whether a community that submits a community development plan meets the regulatory requirements for participation in the program, and whether the activities proposed under the plan are consistent with the intent of the program, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws. The information is also important for evaluating potential impacts of the proposed community development plan activities on fish stocks, endangered species, marine mammals, and other components of the affected environment for the purposes of compliance with the National Environmental Policy Act, the Endangered Species Act and other applicable laws.

II. Method of Collection

The collection of information of a community development plan involves no forms and respondents have a choice of submitting information by electronic transmission or by mail. Instructions on how to submit a community development plan can be found on the Council's website at *http://www.wpcouncil.org/western-pacific-community-development-program/.*

III. Data

OMB Control Number: 0648–0612.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for profit organizations, and individuals or households.

Estimated Number of Respondents: 5.

Estimated Time per Response: 6 hours.

Estimated Total Annual Burden Hours: 30 hours.

Estimated Total Annual Cost to Public: $50 in recordkeeping/reporting costs.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 50 CFR 665.20.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this information collection request (ICR). Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–07511 Filed 4–8–24; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

Per 45 CFR chapter XXI, section 2102.3, the next meeting of the U.S. Commission of Fine Arts is scheduled for April 18, 2024, at 9 a.m. and will be held via online videoconference. Items of discussion may include buildings, infrastructure, parks, memorials, and public art.

Draft agendas, the link to register for the online public meeting, and additional information regarding the Commission are available on our website: *www.cfa.gov.* Inquiries regarding the agenda, as well as any public testimony, should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *cfastaff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated April 4, 2024 in Washington, DC.

Zakiya N. Walters,

Administrative Officer.

[FR Doc. 2024–07510 Filed 4–8–24; 8:45 am]

BILLING CODE 6330–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intended Disinterment From Carlisle Barracks Post Cemetery

AGENCY: Department of the Army, DoD.

ACTION: Notice of intended disinterment.

SUMMARY: The Office of Army Cemeteries (OAC) is honoring the requests of the family members and Tribes to disinter the human remains of eleven Native American students from the Carlisle Barracks Post Cemetery, Carlisle, Pennsylvania. The decedent names are: William Norkok from the Eastern Shoshone Tribe; Almeda Heavy Hair, Bishop L. Shield, and John Bull from the Gros Ventre Tribe of the Fort Belknap Indian Community; Fanny Chargingshield, James Cornman, and Samuel Flying Horse from the Oglala Sioux Tribe; Leonidas Chawa from the Pechanga Band of Indians; Albert Mekko from the Seminole Nation of Oklahoma; and Alfred Charko and Kati Rosskidwits from the Wichita and Affiliated Tribes. These students died between 1880 and 1910 while attending the Carlisle Indian Industrial School. See the **SUPPLEMENTARY INFORMATION** section for more details.

DATES: The Army intends to begin disinterment activities on September 3, 2024. Transportation to and reinterment in private cemeteries will take place as soon as practical after the disinterment. If other living relatives object to the disinterment of these remains, please provide written objection to MAJ Andrew Clark at the email addresses listed below prior to July 1st, 2024. Such objections may delay the disinterment for the decedent in question.

ADDRESSES: Public comments or objections may be mailed to MAJ Andrew Clark, OAC Project Manager, 1 Memorial Avenue, Arlington, VA 22211 or emailed to *usarmy.pentagon.hqda-anc-osa.mbx.carlisle-barracks-operations@army.mil* (preferred).

FOR FURTHER INFORMATION CONTACT: MAJ Andrew Clark OAC Project Manager at

703–346–8015 or the email address listed above.

SUPPLEMENTARY INFORMATION: OAC has received written requests for disinterment from the closest living descendent of each of the eleven individuals. OAC will disinter and facilitate the transport and reinterment of the remains to private cemeteries chosen by the families and Tribes at government expense. This disinterment will be conducted under the authority of Army Regulation 290–5, in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA) savings clauses at 25 U.S. Code § 3009. Additional information related to Native Americans buried at the Carlisle Barracks Post Cemetery can be found at *https://armycemeteries.army.mil/Cemeteries/Carlisle-Barracks-Main-Post-Cemetery.*

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2024–07457 Filed 4–8–24; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0032]

Proposed Collection; Comment Request

AGENCY: Washington Headquarters Services, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Washington Headquarters Services announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 10, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to: Washington Headquarters Service, 1155 Defense Pentagon, Room 3B139A, Washington, DC 20301–0904; Hugh McGloin, 703–697–1850.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Pentagon Commuter Survey; OMB Control Number 0704–PCTS.

Needs and Uses: This information collection assesses commute patterns to and from the Pentagon and Mark Center. This will capture information from individuals that are either federal government employees or contractors of the U.S. Government. This data will be aggregated and support annual evaluation of Pentagon and Mark Center transportation management plans to confirm National Capital Planning Commission Guidelines.

Affected Public: Individuals or households.

Annual Burden Hours: 50.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Annual Responses: 1,000.

Average Burden per Response: 3 minutes.

Frequency: Annually.

Dated: April 3, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–07459 Filed 4–8–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0031]

Proposed Collection; Comment Request

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

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the OUSD(P&R) announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 10, 2024.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to, Defense Manpower Data

Center, 400 Gigling Rd., Seaside, CA 93955, Ruben Chavez, 571–480–2357, email: *ruben.chavez49.civ@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Application for Surrogate Association for DoD Self-Service (DS) Logon; DD Form 3005; OMB Control Number 0704–0559.

Needs and Uses: This information collection is needed to obtain the necessary data to establish an individual's eligibility for Defense Enrollment Eligibility Reporting System (DEERS) and DoD Self-service Logon (DS) Logon credential issuance as a surrogate. Information is collected via the DD Form 3005, ''Application for Surrogate Association for DS Logon,'' and used to establish a record in DEERS and issue a DS Logon credential in accordance with DoDM 1341.02, Volume 1. The information that is collected may be released to Federal and State agencies and private entities, on matters relating to utilization review, professional quality assurance, program integrity, civil and criminal litigation, and access to Federal government facilities, computer systems, networks, and controlled areas.

Affected Public: Individuals or households.

Annual Burden Hours: 333.

Number of Respondents: 2,500.

Responses per Respondent: 1.

Annual Responses: 2,500.

Average Burden per Response: 8 minutes.

Frequency: On Occasion.

Dated: April 3, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–07462 Filed 4–8–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0033]

Privacy Act of 1974; System of Records

AGENCY: Defense Manpower Data Center (DMDC), Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Office of the Secretary of Defense is modifying and reissuing a current system of records titled, ''Joint Duty Assignment Management Information System (JDAMIS),'' DMDC 05. The records are used for the purpose of tracking military officers in joint duty assignments and to document Joint Qualified Officer levels. Records are also used as a management tool for analyzing statistics, tracking, reporting as required by Congress, evaluating program effectiveness, and conducting research. This system of records name is changing from ''Joint Duty Assignment Management Information System'' to ''Joint Management Information System (JMIS).'' In addition to the name change, this system of records is being updated to incorporate the DoD standard routine uses (routine uses A through J). The DoD is also modifying various other sections within the SORN to improve clarity or update information that has changed.

DATES: This system of records is effective upon publication; however, comments on the Routine Uses will be accepted on or before May 9, 2024. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by either of the following methods:

* *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Samuel Peterson, DHRA Component Privacy Officer, 400 Gigling Rd., Rm. DODC–MB 7028, Seaside, CA 93955, *dodhra.mc-alex.dhra-hq.mbx.privacy@mail.mil* or 831–220–7330.

SUPPLEMENTARY INFORMATION:

I. Background

The Joint Management Information System (JMIS) records are used to track military officers in joint duty assignments and to document Joint Qualified Officer levels. Records are also used as a management tool for analyzing statistics, tracking, reporting as required by Congress, evaluating program effectiveness, and conducting research. This system of records name is changing from ''Joint Duty Assignment Management Information System'' to ''Joint Management Information System (JMIS).'' Subject to public comment, the OSD will add the standard DoD routine uses (A through J). Additional modifications are as follows: (1) to the System Location and System Manager section to update the address; (2) to the Purpose section to clarify the scope of the collection; (3) to the Categories of Records section to remove the SSN and replace it with the DoD ID number; (4) to the Records Source Categories to add additional sources; (5) to the Administrative, Technical, and Physical Safeguards section to update the individual safeguards protecting the personally identifiable information; and (6) to the Record Access, Notification, and Contesting Record Procedures section, to reflect the need for individuals to identify the appropriate DoD office and/or component to direct their request and to update the appropriate citation for contesting records. Furthermore, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

DoD SORNs have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or on the Privacy and Civil Liberties Directorate website at *https://dpcld.defense.gov/privacy.*

II. Privacy Act

Under the Privacy Act, ''a system of records'' is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying point assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident.

In accordance with 5 U.S.C. 552a(r) and Office of Management and Budget (OMB) Circular No. A–108, OATSD(PCLT) has provided a report of this system of records to the OMB and to Congress.

Dated: April 2, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Joint Management Information System (JMIS), DMDC 05.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Manpower Data Center Privacy Office, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6784.

SYSTEM MANAGER(S):

Deputy Director, Defense Manpower Data Center, 4800 Mark Center Drive, Alexandria, VA 22350–6000. Email: *dodhra.dodc-mb.dmdc.mbx.webmaster@mail.mil.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. Chapter 38, Joint Officer Management; 10 U.S.C. Chapter 107, Professional Military Education; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; Chairman of the Joint Chiefs of Staff Instruction 1330.05, Joint Officer Management Program Procedures; DoD Instruction 1300.19, DoD Joint Officer Management (JOM) Program; and E.O. 9397 (SSN), as amended.

PURPOSE(S) OF THE SYSTEM:

To enable consolidated tracking of joint experiences for the purpose of awarding joint qualification experience and training and to provide an annual report to Congress as required by title 10, chapter 38, section 667. Records are also used as a management tool for analyzing statistics, tracking, reporting to Congress, evaluating program effectiveness, and conducting research.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All military officers of the U.S. Armed Forces who: (1) are serving or have served in billets designated as joint duty assignment positions; are attending or have completed joint professional military education schools; are designated as joint qualified at various levels of qualification; or, (2) are eligible to be nominated and designated at various joint qualification levels and have earned approved joint experience or discretionary points.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personal Information such as: name, DoD ID Number, date of birth, gender, race, and ethnicity. Employment Information such as: rank, date of rank, military branch, occupation, duty station, joint professional military education status, pay grade, joint qualification level, skill code, departure reason, DoD email address, billets such as service, unit identification code, tour length, job title, and critical billet code.

RECORDS SOURCE CATEGORIES:

Records and information stored in this system of records are obtained from: Individuals, DMDC Data Center Data Base; Defense Enrollment Eligibility Reporting System; Military Services, and Office of the Joint Chiefs of Staff.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, all or a portion of the records or information contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government when necessary to accomplish an agency function related to this system of records.

B. To the appropriate Federal, State, local, territorial, Tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

C. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

E. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. 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.

G. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (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 the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

H. To another Federal agency or Federal entity, when the DoD 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.

I. To another Federal, State, or local agency for the purpose of comparing to the agency's system of records or to non-Federal records, in coordination with an Office of Inspector General in conducting an audit, investigation, inspection, evaluation, or some other review as authorized by the Inspector General Act of 1987, as amended.

J. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic storage media.

POLICIES AND PRACTICES FOR RETREIVAL OF RECORDS:

Records may be retrieved by name and DoD ID Number.

POLICES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained for 5 years or until no longer needed for operational purposes—whichever is later, and then destroyed.

ADMINISTRATIVE, TECHNICAL AND PHYSICAL SAFEGUARDS:

Computerized records are maintained in a controlled area accessible only to authorized personnel. Entry to these areas is restricted to those personnel with a valid requirement and authorization to enter. Physical entry is restricted using locks, guards, and administrative procedures (*e.g.,* fire protection regulations). Access to personal information is restricted to those who require the records in the performance of their official duties, and to the individuals who are the subjects of the record or their authorized representatives. Access to personal information is further restricted using passwords, which are changed

periodically. All individuals granted access to this system of records are to have received Information Assurance and Privacy Act training.

RECORDS ACCESS PROCEDURES:

Individuals seeking access to their records should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155. Signed, written requests should contain the name and number of this system of records notice along with name, DoD ID Number, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 310; or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should follow the instructions for Record Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

October 29, 2015, 80 FR 66510. March 15, 2011, 76 FR 13992.

[FR Doc. 2024–07476 Filed 4–8–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[Permit No. NAN–2022–00901]

Notice of Final Federal Agency Action on the Authorization for the Empire Wind 1 Energy Project Offshore New York

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

ACTION: Notice of limitation on claims for judicial review of actions by the U.S. Army Corps of Engineers (USACE).

SUMMARY: USACE announces final agency action on the USACE authorization for the proposed construction and maintenance of the Empire Wind 1 project offshore New York. USACE has issued a permit authorizing the construction and maintenance of the Empire Wind 1 project under section 10 of the Rivers and Harbors Act of 1899 (RHA), section 404 of the Clean Water Act (CWA), and section 14 of the Rivers and Harbors Act of 1899. The Empire Wind 1 project is a ''covered project'' under title 41 of the Fixing America's Surface Transportation Act.

DATES: A claim seeking judicial review of the USACE authorization of construction and maintenance of the Empire Wind 1 project will be barred unless the claim is filed not later than two years after this notice's publication date. If the Federal law that allows for judicial review of the USACE authorization specifies a shorter time period for filing such a claim, then that shorter time period will apply.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Minck, Regulatory Project Manager, Regulatory Branch, USACE, New York District, 26 Federal Plaza, New York, New York 10278, (917) 790–8511 or *cenan.publicnotice@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that USACE has taken final agency action on its authorization for the proposed Empire Wind 1 project by issuing a permit authorizing construction and maintenance of the project under section 10 of the RHA, section 404 of the CWA, and section 14 of the Rivers and Harbors Act of 1899. The majority of the authorized work will occur in the Atlantic Ocean within Bureau of Ocean Energy Management (BOEM) Renewable Energy Lease Area OCS–0512, which is approximately 14 miles south of Long Island, New York and approximately 19.5 miles east of Long Branch, New Jersey.

The work authorized under the USACE permit includes the following: (1) installation of up to fifty-seven (57) wind turbine generators (WTGs) and one (1) offshore substation (OSS) with associated scour protection, (2) installation of approximately 116 nautical miles of inter-array cables connecting the WTGs and the OSS with associated secondary cable protection, (3) installation of up to 2 export transmission cables with associated secondary cable protection within an approximately 40 nautical mile long offshore export cable corridor extending from the lease area to the cable landfall location at the South Brooklyn Marine Terminal in Brooklyn, New York, and (4) bulkhead and shoreline replacement activities at the cable landfall location.

The USACE's decision to issue a permit for the Empire Wind 1 project, and the laws under which the action was taken, are described in the Empire Wind Final Environmental Impact Statement (FEIS) published by BOEM on September 15, 2023, in the BOEM Record of Decision (ROD) issued on November 21, 2023, and in other project records. The FEIS, ROD, and other documents can be viewed and downloaded from the BOEM project website at *https://www.boem.gov/renewable-energy/state-activities/empire-wind.* The USACE permit can be viewed and downloaded from the USACE website at *https://www.nan.usace.army.mil/Missions/Regulatory/Commonly-Requested-Issued-Permits-and-Nationwide-Permit-Verifications/.* By this notice, USACE is advising the public of final agency action subject to 42 U.S.C. 4370m–6(a)(1)(A).

Authority: 42 U.S.C. 4370m–6(a)(1)(A).

John P. Lloyd,

Brigadier General, USA, Commanding.

[FR Doc. 2024–07466 Filed 4–8–24; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[DA Permit No. NAO–2013–00418 and Section 408 Request ID No. 408–NAO–2022–0056]

Notice of Final Federal Agency Action on the Authorization for the Coastal Virginia Offshore Wind Commercial Project

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

ACTION: Notice of limitation on claims for judicial review of actions by the U.S. Army Corps of Engineers (USACE).

SUMMARY: USACE announces final agency action on the USACE authorization for the proposed construction and maintenance of the Coastal Virginia Offshore Wind (CVOW) Commercial Project offshore Virginia. USACE has issued a permit authorizing the construction and maintenance of the CVOW Project under sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA) and section 404 of the Clean Water Act (CWA). The CVOW Project is a ''covered project'' under Title 41 of the Fixing America's Surface Transportation Act.

DATES: A claim seeking judicial review of the USACE authorization of construction and maintenance of the CVOW Project will be barred unless the claim is filed not later than two years after this notice's publication date. If the Federal law that allows for judicial review of the USACE authorization specifies a shorter time period for filing such a claim, then that shorter time period will apply.

FOR FURTHER INFORMATION CONTACT: Nicole Woodward, Regulatory Project Manager, Regulatory Branch, USACE, Norfolk District, 803 Front Street, Norfolk, Virginia 23510, (757) 201–7122, or *nicole.l.woodward@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that USACE has taken final agency action on its authorization for the proposed CVOW Project by issuing a permit authorizing construction and maintenance of the Project under sections 10 and 14 of the RHA and section 404 of the CWA. The authorized work will occur within the Atlantic Ocean off the coast of Virginia at the mouth of the Chesapeake Bay within the Bureau of Ocean Energy Management (BOEM) Lease Area No. OCS–A–0483, extending along an offshore cable corridor to a point on the shore at the Virginia State Military Reservation (SMR) in Virginia Beach, Virginia, then extending along an onshore utility corridor within the cities of Virginia Beach and Chesapeake, Virginia.

The offshore portion of the project will include the installation of one hundred seventy-six (176) 14.7 MW wind turbine generators (WTGs) located within a 112,799-acre lease area approximately 27 miles off the Virginia Beach, Virginia coastline. Approximately 180-foot maximum diameter of stone scour protection will be installed around the WTGs. The project will also include the construction of three (3) offshore substations (OSS) with approximately 0.95 acres of scour protection, and approximately 229 miles of 660-kilovolt (kV) inter-array cables. In addition, nine (9) buried 230 kV offshore export cables will extend from the lease area to the onshore cable landing area. The offshore export cables will cross Cells 2 and 5 of the Dam Neck Ocean Disposal Site (DNODS) and three (3) existing fiber optic, in-service telecommunications cables; twenty-seven (27) 39.5-foot-long by 9-foot-wide by 0.5-foot-tall bottom protection concrete mattresses and twenty-seven (27) 138-foot-long by 9-foot-wide by 0.5-foot-tall top protection concrete mattresses will be installed to protect the proposed offshore export cables at these locations. Nine (9) temporary cofferdams will be installed at the nearshore trenchless installation punch-out locations to facilitate lowering the direct pipe within the transition zones where the offshore export cables exit the sea floor. If it is determined that the use of cofferdams is not feasible during construction, then nine (9) 82-foot-long by 6.6-foot-wide by 1-foot-high concrete mattresses will be installed above the transition zones as added cable protection. In addition, up to 108 temporary steel pipe piles may be installed along the HDD pipe alignments to act as ''goal-posts'' to the punch-out locations during construction.

Prior to construction, the offshore project area will be surveyed using a remotely operated vehicle (ROV) with a suction pump attachment to identify potential munitions and explosives of concern (MEC) and unexploded ordnance (UXO) targets that cannot be avoided. The proposed mitigation of MEC/UXO for the project is limited to relocation via ''lift and shift'' measures. The Permittee does not intend to conduct deflagration or detonation of MEC/UXO. It is anticipated that an average disturbance of 161.5 square feet of ocean bottom per mitigation of one MEC/UXO will be required as detailed in the MEC/UXO Disposition Plan and MEC/UXO Identification Survey Reports.

The onshore portion of the project will begin where the offshore export cables come onshore at the cable landing location at the State Military Reservation (SMR) in Virginia Beach, Virginia. The cables will then transition to nine (9) underground 230 kV onshore export cables, which will extend underground approximately 4.4 miles from the SMR to the proposed Harpers Switching Station located on Naval Air Station Oceana. From the Harpers Switching Station, the onshore export cables will transition to overhead interconnection cables and extend approximately 14.2 miles along new, existing, and expanded right-of-way corridors to the existing Fentress Substation in Chesapeake, Virginia. The onshore work will result in permanent impacts to approximately 1.70 acres of palustrine emergent wetlands, 0.68 acres of palustrine scrub/shrub wetlands, 7.98 acres of palustrine forested wetlands, and 153 linear feet of stream, and the conversion of approximately 29.70 acres of palustrine forested wetlands to palustrine scrub/shrub wetlands, and temporary impacts to approximately 0.38 acres of palustrine scrub/shrub and 25.46 acres of palustrine emergent wetlands.

The USACE's decision to issue a permit, and the laws under which the action was taken, are described in the Coastal Virginia Offshore Wind Commercial Project Final Environmental Impact Statement (FEIS) published on September, 29, 2023, in the Record of Decision (ROD) issued on January 29, 2024, and in other project records. The FEIS and other documents can be viewed and downloaded from the BOEM project website at *https://www.boem.gov/renewable-energy/state-activities/CVOW-C.* The USACE permit and ROD can be viewed and downloaded from the USACE website at *https://www.nao.usace.army.mil/Missions/Regulatory/Offshore-Wind-Projects/.* By this notice, USACE is advising the public of final agency action subject to 42 U.S.C. 4370m–6(a)(1)(A).

Authority: 42 U.S.C. 4370m–6(a)(1)(A).

John P. Lloyd,

Brigadier General, USA, Commanding.

[FR Doc. 2024–07470 Filed 4–8–24; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[Permit No. NAN–2020–01079]

Notice of Final Federal Agency Action on the Authorization for the South Fork Wind Energy Project Offshore New York and Rhode Island

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

ACTION: Notice of limitation on claims for judicial review of actions by the U.S. Army Corps of Engineers (USACE).

SUMMARY: USACE announces final agency action on the USACE authorization for the proposed

construction and maintenance of the South Fork Wind project offshore New York and Rhode Island. USACE has issued a permit authorizing the construction and maintenance of the South Fork Wind project under section 10 of the Rivers and Harbors Act of 1899 (RHA), section 404 of the Clean Water Act (CWA). The South Fork Wind project is a ''covered project'' under Title 41 of the Fixing America's Surface Transportation Act.

DATES: A claim seeking judicial review of the USACE authorization of construction and maintenance of the South Fork Wind project will be barred unless the claim is filed not later than two years after this notice's publication date. If the Federal law that allows for judicial review of the USACE authorization specifies a shorter time period for filing such a claim, then that shorter time period will apply.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Minck, Regulatory Project Manager, Regulatory Branch, USACE, New York District, 26 Federal Plaza, New York, New York 10278, (917) 790–8511 or *cenan.publicnotice@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that USACE has taken final agency action on its authorization for the proposed South Fork Wind project by issuing a permit authorizing construction and maintenance of the project under section 10 of the RHA and section 404 of the CWA. The majority of the authorized work will occur in the Atlantic Ocean within Bureau of Ocean Energy Management (BOEM) Renewable Energy Lease Area OCS–0517, which is approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York.

The work authorized under the USACE permit includes the following: (1) installation of up to twelve (12) wind turbine generators (WTGs) and one (1) offshore substation (OSS) with associated scour protection, (2) installation of approximately 21.4 miles of inter-array cables connecting the WTGs and the OSS with associated secondary cable protection, (3) installation of an export transmission cable with associated secondary cable protection within an approximately 61.66 mile long offshore export cable corridor extending from the lease area to the cable landfall location in Wainscott, New York, and (4) construction of an Operations and Maintenance Facility in Lake Montauk in Montauk, New York.

The USACE's decision to issue a permit for the South Fork Wind project, and the laws under which the action was taken, are described in the South Fork Wind Final Environmental Impact Statement (FEIS) published by BOEM on August 16, 2021, in the BOEM Record of Decision (ROD) issued on November 24, 2021, and in other project records. The FEIS, ROD, and other documents can be viewed and downloaded from the BOEM project website at *https://www.boem.gov/renewable-energy/state-activities/south-fork.* The USACE permit can be viewed and downloaded from the USACE website at *https://www.nan.usace.army.mil/Missions/Regulatory/Commonly-Requested-Issued-Permits-and-Nationwide-Permit-Verifications/.* By this notice, USACE is advising the public of final agency action subject to 42 U.S.C. 4370m–6(a)(1)(A).

Authority: 42 U.S.C. 4370m–6(a)(1)(A).

John P. Lloyd,

Brigadier General, USA, Commanding.

[FR Doc. 2024–07467 Filed 4–8–24; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[Permit No. NAP–2017–00135–84]

Notice of Final Federal Agency Action on the Authorization for the Ocean Wind 1 Offshore Wind Farm Project Offshore New Jersey

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

ACTION: Notice of limitation on claims for judicial review of actions by the U.S. Army Corps of Engineers (USACE).

SUMMARY: USACE announces final agency action on the USACE authorization for the proposed construction and maintenance of the Ocean Wind 1 Offshore Wind Farm Project (the Ocean Wind 1 Project). USACE has issued a permit authorizing the construction and maintenance of the Ocean Wind 1 Project under section 10 of the Rivers and Harbors Act of 1899 (RHA) and section 404 of the Clean Water Act (CWA). The Ocean Wind 1 Project is a ''covered project'' under title 41 of the Fixing America's Surface Transportation Act.

DATES: A claim seeking judicial review of the USACE authorization of construction and maintenance of the Ocean Wind 1 Project will be barred unless the claim is filed not later than two years after this notice's publication date. If the Federal law that allows for judicial review of the USACE authorization specifies a shorter time period for filing such a claim, then that shorter time period will apply.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Anthony, Biologist, Regulatory Branch, USACE, Philadelphia District, 1650 Arch Street, Philadelphia, Pennsylvania 19103, (215) 656–6728 or *napregulatory@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that USACE has taken final agency action on its authorization for the proposed Ocean Wind 1 Project by issuing a permit authorizing construction and maintenance of the project under Section 10 of the RHA and Section 404 of the CWA. The majority of the authorized work will occur in the Atlantic Ocean within the Bureau of Ocean Energy Management (BOEM) Renewable Energy Lease Area OCS–A 0498, which is approximately 13 nautical miles (nm) southeast of Atlantic City, New Jersey.

The work authorized under the USACE permit includes the following: (1) the installation of up to 98 wind turbine generators (WTGs) and up to 3 offshore substations (OSSs) with associated scour protection, (2) the installation of 142.7 miles of inter-array cables connecting the WTGs and OSSs, (3) installation of up to 3 export transmission cables with associated secondary cable protection within a 147-mile long offshore export cable corridor extending from the lease area into Lacey Township to the northwest and Ocean City to the southwest, and (4) up to 2 specialized converter substations.

The USACE decision to issue a permit, and the laws under which the action was taken, are described in the BOEM Ocean Wind 1 Final Environmental Impact Statement (FEIS) published on May 26, 2023, in the BOEM Record of Decision (ROD) issued on July 5, 2023, in the USACE ROD issued on October 5, 2023, and in other project records. The BOEM FEIS, ROD, and other documents can be viewed and downloaded from the BOEM project website at *https://www.boem.gov/renewable-energy/state-activities/ocean-wind-1.* The USACE permit and ROD can be viewed and downloaded from the USACE website at *https://www.nap.usace.army.mil/Missions/Regulatory/Wind-Turbine.* By this notice, USACE is advising the public of final agency action subject to 42 U.S.C. 4370m–6(a)(1)(A).

Authority: 42 U.S.C. 4370m–6(a)(1)(A).

John P. Lloyd,

Brigadier General, USA, Commanding.

[FR Doc. 2024–07468 Filed 4–8–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF EDUCATION

Applications for New Awards; Disability Innovation Fund—Creating a 21st Century Workforce of Youth and Adults With Disabilities Through the Transformation of Education, Career, and Competitive Integrated Employment Model Demonstration Project

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2024 for the Disability Innovation Fund (DIF)—Creating a 21st Century Workforce of Youth and Adults with Disabilities Through the Transformation of Education, Career, and Competitive Integrated Employment Model Demonstration Project, Assistance Listing Number 84.421F. This notice relates to the approved information collection under OMB control number 1894–0006, Applications for New Grants under the Rehabilitation Services Administration (RSA).

DATES:

Applications Available: April 9, 2024.

Deadline for Notice of Intent to Apply: April 23, 2024.

Deadline for Transmittal of Applications: July 8, 2024.

Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information about the Rehabilitation Services Administration's discretionary grants and a PowerPoint presentation specifically about the Disability Innovation Fund: Creating a 21st Century Workforce of Youth and Adults with Disabilities Through the Transformation of Education, Career, and Competitive Integrated Employment Model Demonstration Project at *https://ncrtm.ed.gov/grant-info.* In addition to posting the PowerPoint, OSERS will conduct a pre-application meeting specific to this competition via conference call to respond to questions. Information about the pre-application meeting will be available at *https://ncrtm.ed.gov/grant-info* prior to the date of the call. OSERS invites interested applicants to email questions to *84.421F@ed.gov* in advance of the pre-application meeting. The teleconference information, including a summary of the 84.421F pre-application meeting will be available at *https://ncrtm.ed.gov/grant-info* within 10 business days after the pre-application meeting.

Deadline for Intergovernmental Review: September 6, 2024.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Cassandra P. Shoffler, U.S. Department of Education, Lyndon Baines Johnson Building, 400 Maryland Avenue SW, Room 4A10, Washington, DC 20202. Telephone: (202) 987–0118. Email: *84.421F@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Disability Innovation Fund (DIF) Program, as provided by the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), is to support innovative (as defined in this notice) activities aimed at increasing competitive integrated employment (CIE) as defined in section 7 of the Rehabilitation Act of 1973 (Rehabilitation Act) (29 U.S.C. 705(5)) [1] for youth and other individuals with disabilities.

Priority: This competition contains one absolute priority. We are establishing the absolute priority for the FY 2024 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Background

In 2018, the Centers for Disease Control and Prevention (CDC) reported that 61 million (one in four or 26 percent) adults in the United States live with a disability (Okoro et al., 2018). During the 2022–23 school year, 7.1 million students, ages 5 through 21, received special education services and/or related services under the IDEA (Source: U.S. Department of Education, EDFacts Data Warehouse (EDW): ''IDEA Part B Child Count and Educational Environments Collection'', available at *https://data.ed.gov/dataset/idea-section-618-state-part-b-child-count-and-educational-environments/resources*). Additionally, during the 2020–21 school year, 1.6 million students with disabilities were served solely under Section 504 of the Rehabilitation Act. (Source: U.S. Department of Education, Office for Civil Rights, 2020–21 Civil Rights Data Collection, available at *https://civilrightsdata.ed.gov*).[2]

Individuals with disabilities, including youth with disabilities (as defined in this notice), experience diverse disabilities that include physical disabilities (such as mobility impairments or chronic health conditions), sensory disabilities (such as visual or hearing impairments), intellectual disabilities (such as developmental delays or cognitive impairments), and mental health disabilities (such as depression, anxiety, or bipolar disorder). It is important to recognize that all individuals with disabilities have unique strengths, talents, and contributions to offer; and it is essential for service providers to adopt a person-centered approach to support individuals with disabilities to achieve their goals for CIE. This means recognizing their individual needs, preferences, and goals, and involving them in decision-making processes that affect their lives. Supporting self-determination and empowerment are crucial for promoting independence, economic self-sufficiency, and CIE.

[1] See 34 CFR 361.5(c)(9) for the regulatory definition of ''competitive integrated employment,'' which further clarifies the definition in the Rehabilitation Act.

[2] The IDEA Part B Child Count and Educational Environments Collection includes all 50 States, the District of Columbia, Puerto Rico, the Outlying Areas (United States Virgin Islands, Guam, American Samoa, and the Commonwealth of Northern Mariana Islands), and the Freely Associated States (Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau). In addition, if a public school's enrollment for a school year was less than five students for fewer than 60 days, the Office for Civil Rights may exempt that school from Civil Rights Data Collection reporting.

The 21st century brings numerous changes that will affect youth and adults with disabilities. As we look to the future, technological innovations can provide new opportunities for individuals with disabilities by improving mobility, communication, learning, daily living activities, education, career training, and CIE. However, it is crucial that these technologies are accessible and affordable, and more importantly, that individuals with disabilities and professionals, including educators (as defined in this notice), service professionals, and employers, are knowledgeable and use, as appropriate, the options available. In addition, with the advancement of technology across all sectors, education, employment, and communities are constantly changing. Advanced technology (as defined in this notice) can result in knowledge-based jobs and support remote work, providing individuals with disabilities increased CIE opportunities.

Additionally, individuals with disabilities, including justice-involved youth with disabilities, youth and adults with acquired disabilities (as defined in this notice), disconnected youth with disabilities (as defined in this notice) and disconnected adults with disabilities (as defined in this notice), may benefit from a range of services, and supports to address their unique needs and challenges to ensure access to CIE. Examples of services and supports include: (1) receiving case management services (*i.e.,* assistance with coordinating services and supports); (2) accessing high quality education and vocational training programs to acquire the necessary skills and knowledge to secure CIE, including opportunities in advanced technology careers; (3) obtaining counseling and mental health services needed to address issues and improve overall well-being and to help ensure the ability to obtain and maintain CIE; (4) obtaining rehabilitation services such as physical therapy, occupational therapy, and speech therapy to regain or improve functional abilities and independence to obtain or maintain CIE; (5) receiving assistance with job placement, job coaching, and ongoing support in the workplace; (6) securing safe and stable housing, as well as services needed to address housing needs necessary to improve quality of life, which can be a barrier to CIE; (7) connecting with mentors or peers who have similar experiences for guidance, support, and a sense of belonging, the lack of which can be a barrier to obtaining or maintaining CIE; and (8) identifying accessible transportation options to increase access to education, CIE, healthcare, and other essential services. However, there are challenges in ensuring all youth and adults with disabilities receive the support, education, training, and advocacy they may need to succeed in the workplace. There are also opportunities to address these challenges by exploring new ideas, methods, or technologies to improve existing processes, products, or services that have the potential to affect how many of these individuals with disabilities achieve their CIE goals.

The focus of this program on increasing CIE is aligned to the Administration's Good Jobs Initiative, which is led by the Department of Labor and focused on providing information to workers, employers, and government to promote good jobs for all workers. This includes eight Good Jobs Principles that create a framework for workers, businesses, labor unions, advocates, researchers, State and local governments, and Federal agencies for a shared vision of job quality. The Department encourages applicants to this grant program to consider how these principles could further support increasing CIE opportunities for individuals with disabilities. Additional information about the Good Jobs Initiative is available at *https://www.dol.gov/general/good-jobs.*

Absolute Priority: For FY 2024 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Creating a 21st Century Workforce of Youth and Adults with Disabilities through the Transformation of Education, Career, and CIE.

Purpose of Priority

The purpose of this priority is to fund model demonstration projects designed to develop, implement, refine (as defined in this notice), evaluate, and disseminate, for easy adoption, new or substantially improved model strategies or programs to transition youth and adults with disabilities to CIE in any one of five topic areas, or a sixth topic, for field-initiated topic areas that includes the opportunity to address more than one topic as outlined in this notice.

Topic Areas

Within this absolute priority, the Secretary intends to support innovative model demonstration projects under the following topic areas: (1) Broadening Access to Advanced Technology Careers and Creating A 21st Century Workforce of Youth and/or Adults with Disabilities Leading to CIE; (2) Innovative Applications (as defined in this notice) of Advanced Technology to Support Youth and/or Adults with Disabilities Leading to CIE; (3) Justice-Involved Youth with Disabilities—Early Intervention (as defined in this notice) and Reintegration (as defined in this notice) from the Juvenile Justice System to the Community, Leading to CIE; (4) Early Intervention and Workforce Reintegration Strategies for Youth and/or Adults with Acquired Disabilities that Lead to CIE; (5) Early Intervention and Workforce Reintegration Strategies for Disconnected Youth and/or Disconnected Adults with Disabilities that Lead to CIE; and (6) Field Initiated, under which applicants address innovative topic areas not otherwise included in this priority, or combine two or more topic areas described in this priority into one application. If an applicant intends to address multiple topic areas, the applicant must combine the topic areas in one application and submit it under topic area 6, Field Initiated. For example, an applicant could apply under topic area 6 with a proposed project that combines topic area 1 with any of topic areas 2 to 5. Multiple applications from a single applicant will not be reviewed. If multiple applications are submitted by a single applicant, the last completed application submitted will be reviewed.

Note: The numbering of the topic areas does not reflect an established hierarchy or preference among the topic areas.

Note: The geographical distribution of projects factor will be applied to fund applications out of rank order if the top-ranked applications do not represent a geographical distribution throughout the country.

Note: The topic area distribution of projects factor will be applied to fund applications out of rank order to ensure a range of topic areas are funded.

For each of the topic areas, we identify a background section, if applicable, and a section that sets forth the requirements for projects that address the topic area.

Topic Area 1: Broadening Access to Advanced Technology Careers and Creating a 21st Century Workforce of Youth and/or Adults with Disabilities Leading to CIE.

Background

Advanced and emerging technology careers require specialized knowledge and skills in areas such as computer science, engineering, data analysis,

artificial intelligence, microelectronics, cybersecurity, and robotics. Demand for workers in advanced technology fields is likely to increase in the next 10 years (Ellingrud et al., 2023). At the same time, these advanced technologies, and the products they enable will cause disruption across nearly every sector of the economy. Both trends have major impacts on CIE.

According to a report by the World Economic Forum, it is predicted that 97 million new roles will be created, as humans, machines, and algorithms increasingly work together (Masterson, 2022). Understanding how advanced technology influences the strategies to support high-quality CIE opportunities for youth with disabilities and adults with disabilities is crucial to global economic competitiveness. The rise of advanced technology and the automation that often comes with it is transforming the workplace. Positions in nearly every industry are evolving into new roles and responsibilities that require new skills. These shifts may provide new opportunities for youth with disabilities and adults with disabilities to participate in this critical area of the workforce. Doing so will require using all available strategies, including those that leverage the products created by advanced technology fields, to remove barriers that have traditionally made it difficult for youth with disabilities and adults with disabilities to find and maintain CIE in advanced technology careers.

Requirements

A project in this topic area must assist youth with disabilities and/or adults with disabilities to: (1) obtain certifications or participate in training (education or employment) to help secure CIE in a changing job market and employment landscape; and (2) identify and secure CIE in advanced technology careers that are in high demand and pay a livable wage, such as computer science, engineering, data analysis, artificial intelligence, microelectronics, cybersecurity, machine learning, machine programming, and robotics. Project activities must include, but are not limited to: (1) Employer Engagement and Partnerships (as defined in this notice): Developing employer engagement and creating partnerships in advanced technology industries to support project participants interested in pursuing CIE in these areas; (2) Advanced Technology Utilization: Incorporating advanced technology into work-based learning opportunities and CIE experiences in these areas; (3) Advanced Technology Training: Developing, facilitating, incorporating and implementing training of employers and personnel, such as educators and service professionals, in strategies to transform service delivery to support project participants moving toward CIE in advanced technology careers; and (4) Removing Barriers to Entry: Providing flexible, personalized, and/or interactive learning experiences (*e.g.,* online learning platforms, virtual reality and augmented reality technologies, artificial intelligence and machine learning technologies, mobile learning), to reduce barriers to entry into CIE.

Topic Area 2: Innovative Applications of Advanced Technology to Support Youth with Disabilities and/or Adults with Disabilities Leading to CIE.

Background

Advanced technology may help improve the independence for individuals with disabilities at work, school, and in the community (Weitzman, 2023). It can also influence the delivery of services and trainings, daily living skills development and devices, communication strategies and devices, information access for youth with disabilities and/or adults with disabilities with sensory impairments, or other types of assistive devices or technology.

Further, advanced technology plays a role in helping youth with disabilities and/or adults with disabilities obtain and be successful in jobs across all sectors (*e.g.,* Healthcare, Information Technology, Finance and Banking, Education, Manufacturing, Retail and Hospitality, Construction, Professional Services, Transportation and Logistics) of the economy (Paige 2023). For example, through accessible and flexible options like online learning platforms, webinars, virtual training programs, virtual reality and augmented reality, artificial intelligence, machine learning, and mobile learning, youth with disabilities and/or adults with disabilities have opportunities to re-skill or up-skill and improve their competitiveness in the job market. In addition, advanced technology utilization can increase access to a wide range of job opportunities. Applications such as online job portals, professional networking platforms, and digital recruitment platforms make it possible to identify promising CIE opportunities. Through high-speed internet, video conferencing tools, and online collaboration platforms, advanced technology can also help enable remote work, increasing the opportunities for youth with disabilities and/or adults with disabilities who may have limitations related to commuting or working in a traditional office setting. Advanced technology facilitates networking and professional development opportunities through professional networking platforms, online professional learning communities, and social media platforms that allow youth with disabilities and/or adults with disabilities to connect with professionals in their field, join industry-specific groups, and access resources and mentorship opportunities that can help them keep current or advance in CIE.

Requirements

A project in this topic area must focus on using advanced technology, which could include innovative and promising techniques, tools, and systems, to create or expand opportunities for youth and/or adults with disabilities to prepare for, identify, secure, obtain, and maintain CIE in any employment sector. Activities must include, but are not limited to, (1) Engagement: Engaging project participants, educators, service professionals, and employers to better understand the ways advanced technology can address their needs; (2) Personalized Advanced Technology (as defined in this notice): Incorporating personalized advanced technology into project participants' activities of daily living, education, training and employment; (3) Training on Advanced Technology: Identifying, developing, and implementing training of project participants, service professionals, educators, and employers, in the use of advanced technology; (4) Advanced Technology to Support Partnerships: Utilizing innovative and promising strategies, including virtual platforms, that can support connection and collaboration between diverse stakeholders (*e.g.,* State agencies, local agencies, employers, community based organizations, or education/training institutions) to support project participants in obtaining CIE.

Topic Area 3: Justice-Involved Youth with Disabilities—Early Intervention and Workforce Reintegration from the Juvenile Justice System to the Community Resulting in CIE.

Background

Data from the American Civil Liberties Union (2024) indicates that roughly 60,000 youth under age 18 are incarcerated in juvenile jails and prisons in the United States. It is estimated that the percentage of incarcerated youth with disabilities, that reside in the juvenile corrections facilities, typically range from 30 percent to 60 percent, with some estimates as high as 85 percent (U.S.

Department of Education, 2017). According to the National Center on Education, Disability and Juvenile Justice, more than one in three youths entering juvenile justice or young adult corrections facilities have previously received special education services. This highlights the disproportionate representation of youth with disabilities in juvenile justice populations (National Center on Education, Disability and Juvenile Justice, 2021). Compared to youth without disabilities, youth with disabilities encounter the juvenile justice system at an earlier age, stay for a longer period, and experience additional challenges as they reintegrate into the community (Taylor, 2011).

It is vital to recognize the distinct obstacles faced by youth with disabilities in the juvenile justice system and prioritize meeting their needs to ensure equitable treatment and inclusive support (McLellan et al., 2022). For example, research has shown that a significant number of individuals impacted by the criminal justice system have dyslexia, which can negatively impact academic and behavioral outcomes. Therefore, screening for dyslexia and offering related intervention services as appropriate is critical to promoting positive outcomes for youth with disabilities (Cassidy et al., 2021). By understanding and addressing these types of issues, we can strive for a system that provides appropriate accommodations and services to all youth with disabilities. Juvenile justice corrections facilities often face challenges providing special education services and meeting the needs of youth with disabilities. This is in part due to the complexities of the population (*e.g.,* the high numbers of youth with disabilities and the high mobility of youth), the physical context (*e.g.,* restrictions associated with providing education in a secured facility), and the system (*e.g.,* poor linkages among schools and juvenile justice facilities, including inability of facilities to get educational records from previous educational placements) (Houchins et al., 2010). Due to these challenges, youth with disabilities in the juvenile justice system are at risk for a range of negative outcomes, including struggling academically, not graduating high school or being able to access postsecondary education opportunities, recidivism, and unemployment (Taylor, 2011). The reintegration of youth involved in the juvenile justice system is a critical component of ensuring their successful transition back into society; however, there are challenges associated with reintegrating these youth into school or community settings, including CIE, following a stay in a residential or juvenile corrections facility (Trout et al., 2008).

Transitioning from the juvenile justice system to CIE can be a challenging process for youth with disabilities. However, there are several strategies and resources available to support their successful transition: (1) Vocational rehabilitation (VR) services may be available to assist youth with disabilities in obtaining and maintaining CIE. These services provide a range of supports, including vocational assessment, career counseling, pre-employment transition services for school-aged youth, job training, job placement assistance, and ongoing support in the workplace. (2) For youth with disabilities who are still school age, an individualized education program (IEP) or a plan under section 504 of the Rehabilitation Act of 1973 can help outline specific goals, accommodations, and services to support their transition to CIE. The IEP team, which includes the student, parents or caregivers, educators, and other professionals, can work together to develop a plan that addresses the student's unique needs and goals. (3) Job readiness programs specifically designed for youth with disabilities can provide training and support in areas such as resume writing, interview skills, workplace etiquette, and job search strategies. These programs can help youth with disabilities develop the necessary skills and confidence to enter the workforce. (4) Work-based learning opportunities, such as internships, apprenticeships, and job shadowing, can provide valuable hands-on experience and exposure to different career paths. These opportunities allow youth with disabilities to gain practical skills, explore their interests, and make connections with potential employers. It is important for youth with disabilities to understand their rights regarding disclosure of their disability and prepare to advocate for the accommodations they need to succeed in CIE. (5) Mentoring programs and peer support groups can provide youth with disabilities with guidance, encouragement, and role models who have successfully navigated the transition from juvenile justice confinement to CIE. These relationships can help youth with disabilities build confidence, develop important skills, and access valuable networks. (6) Connecting with community resources, such as disability advocacy organizations, parent organizations, vocational training centers, and employment agencies, can provide additional support and guidance during the transition process. These organizations can offer specialized services, workshops, and resources tailored to the needs of youth with disabilities. By using various strategies and resources, youth with disabilities can increase their chances of successfully transitioning from the juvenile justice system to CIE and achieve their career goals.

Requirements

A project in this topic area must focus on early intervention and reintegration strategies for justice-involved youth with disabilities designed to lead to CIE and otherwise improve CIE opportunities for justice-involved youth with disabilities who are returning to their community. Activities must include, but are not limited to: (1) Plans: Develop multifaceted pre- and post-release reentry plans for project participants transitioning from the juvenile justice system to the community, including but not limited to, providing and connecting to transition services, community services, trauma-informed services, wraparound support (as defined in this notice) and life coaching services (as defined in this notice) to assist in obtaining and maintaining CIE; (2) Skills and Tools: Identify the skills and tools necessary to improve opportunities for CIE and reduce recidivism once project participants return to the community; (3) Partnerships: Develop and expand community-based partnerships and linkages that provide wrap-around supports to project participants that foster positive reentry into the community and create opportunities for CIE; (4) Risk and Needs Factors: Identify, assess, and address general risk and need factors to address prevention and early intervention for project participants vulnerable to entering or reentering the juvenile justice system, including by developing models to navigate various systems (*e.g.,* transition from juvenile justice to community services); (5) Professional Development Trainings: Identify, develop, and implement training opportunities, including but not limited to service professionals, stakeholders, and employers, involved in the community reintegration process for project participants transitioning from the juvenile justice system on issues, tools, and resources; (6) Transition Services: Identify transitional services to assist reentering youth with disabilities to successfully reintegrate into communities, including but not limited to educational services, postsecondary

education and training, employment, housing, parent and family information and services, mentoring, treatment, and counseling, and social activities which can lead to achieving CIE; and (7) Project Advisory Committee: Develop a project advisory committee that includes representation from the target population to be served by the project, partners (as defined in this notice) relevant to the project, and project activities (*e.g.,* State agencies, employers, youth service programs, parent organizations, local agencies, support systems).

Topic Area 4: Early Intervention and Workforce Reintegration for Youth and/or Adults with Acquired Disabilities Leading to CIE.

Background

While some youth and adults with disabilities have congenital disabilities that they have lived with since birth, others have acquired disabilities through various means such as traumatic accidents, diagnosis of chronic illnesses, or through other life-changing means (Okoro et al, 2018). Examples of acquired disabilities include but are not limited to spinal cord injuries, traumatic brain injury, vision loss, and Long COVID. An individual's life, both physically and mentally, can be significantly altered after acquiring a disability.

The differences between a youth and/or adult with a congenital disability and a youth and/or adult who acquires a disability later in life can vary depending on the individual and the specific disability. For youth and/or adults with a congenital disability, the disability is all the youth or adult has known, and they may have a different perspective on what is considered a limitation or barrier (Bateman, 2023). Those who acquire a disability later in life may have an awareness of the differences between their previous abilities and their current abilities. It is important to note that these differences are generalizations, and each individual's experience may vary (Bateman, 2023). The responses to a disability can be influenced by various factors, including the type and severity of the disability, social support, and individual differences in coping mechanisms and can significantly impact CIE.

As an individual with an acquired disability navigates changes in their circumstances, there are potential new challenges to face related to education, employment, social well-being, and health, including a need for mental health support. Acquired disabilities can present unique challenges when it comes to finding and maintaining CIE. However, with the right support and accommodations, youth and adults with acquired disabilities can pursue meaningful and fulfilling CIE opportunities. There are several considerations and strategies to keep in mind when working with youth and adults with acquired disabilities who are seeking to obtain or maintain CIE, such as the importance of advocating for oneself and communicating needs to employers (Morgan, 2021). This may involve discussing accommodations, such as reasonable modifications to the work environment and flexible work arrangements, that can help them perform their job duties effectively (U.S. Department of Labor, 2024). In addition, VR services are available to assist youth and adults with disabilities in obtaining and maintaining CIE. These services can provide vocational assessments, career counseling, job training, job placement assistance, and ongoing support in the workplace. When searching for jobs, youth and/or adults with acquired disabilities can focus on industries or positions that align with their abilities and interests. Networking, attending job fairs, and using online job boards and disability-specific job portals can be helpful in finding suitable CIE opportunities. Building a support network in the workplace can also be beneficial for youth and/or adults with acquired disabilities. A support network may include colleagues, supervisors, and mentors who can provide guidance, understanding, and assistance when needed. Lastly, youth and/or adults with acquired disabilities can continue to enhance their skills and knowledge through professional development opportunities, such as attending workshops, conferences, or online courses to increase marketability.

Studies have shown that early intervention, providing services shortly after a disability is acquired, is critical to promoting improved employment outcomes (Smalligan & Boyens, 2018). Wickizer et al. (2018) found that providing services to injured workers in the first 1–2 months following injury is critical to reducing the likelihood individuals exit the workforce and transition to long-term disability. Therefore, it has been found that efforts to more quickly identify, enroll and provide services to individuals with disabilities in vocational rehabilitation programs have increase employment and wage outcomes as well (Martin & Sevak, 2020).

Requirements

A project in this topic area must focus on securing CIE for youth and/or adults with acquired disabilities, by addressing the unique employment, training, emotional, cognitive, and life adjustment factors experienced by youth or adults who acquired a disability from an accident or illness in a timely manner. Activities must include, but are not limited to: (1) Outreach and Enrollment: Develop, implement, and conduct outreach and enrollment strategies, including but not limited to promoting early intervention to project participants that fall within 6 months of an acquired or identification of acquired disability; (2) Transition and Reintegration Services: Identify support services (*e.g.,* personal care assistance services, education support services, independent living services, counseling and support groups, government programs, employment services, disability support services, housing and transportation services, rehabilitation and medical services, and government programs, such as VR services) and resources (*e.g.,* nonprofit organizations, assistive technology centers, advocacy services, and online resources) to create a seamless transition to CIE for project participants, including identification and utilization of advanced technology supports and identification of advanced technology career opportunities leading to CIE; (3) Family Engagement and Social Support: Partner with service providers supporting project participants to achieve their goals of CIE (*e.g.,* Designated State unit (DSU) for VR services, State educational agencies, parent organizations, community-based services; local educational agencies; and other local agencies); (4) Advanced Technology and Accommodations: Explore, identify, and utilize advanced technology and workplace accommodations to enable project participants to obtain and/or maintain CIE. This may include adaptive equipment and/or devices, computer software, ergonomic modifications, remote monitoring systems, cognitive assistive technology, mobility aids, and other advanced technology, including artificial intelligence, that help project participants overcome barriers and maximize productivity; and (5) Professional Development Training: Identify, develop, and implement professional development training opportunities, including using virtual reality training opportunities, for service professionals.

Topic Area 5: Early Intervention and Workforce Reintegration for Disconnected Youth and/or Disconnected Adults with Disabilities Leading to CIE.

Background

Disconnected youth with disabilities and disconnected adults with disabilities often face multiple barriers (*e.g.,* criminal records, lack of academic accreditation) that prevent them from actively participating in education, employment, or training, and can be at risk of experiencing negative outcomes such as unemployment, poverty, and social disconnection (Lewis et al., 2019). There are several factors that can contribute to youth or adults becoming disconnected. For example, disconnected youth and disconnected adults may not have completed a specific level of education, such as high school or college for various reasons, limiting opportunities for further education or CIE. Economic factors, such as poverty, limited job opportunities, or financial instability, can make it difficult for disconnected youth and disconnected adults to find and maintain CIE. Disconnected youth and disconnected adults may not have had the opportunity to receive the necessary training to enter the workforce or pursue further education. This can be due to limited access to quality education or training programs. Lastly, mental health challenges, substance abuse, and involvement in the juvenile justice and criminal justice systems can also contribute to youth with disabilities and adults with disabilities becoming disconnected. Addressing the issue of disconnected youth with disabilities and disconnected adults with disabilities requires a comprehensive and multifaceted approach.

There are numerous strategies that can be used to help re-engage disconnected youth and disconnected adults: (1) Providing accessible and relevant education and training programs that provide the skills and qualifications needed for CIE; (2) Offering mentoring programs and support services that provide guidance, encouragement, and assistance in navigating education and CIE opportunities; (3) Creating high-quality job placement programs, apprenticeships, and internships that provide hands-on experience and opportunities for skill development; (4) Providing comprehensive support services, such as counseling, mental health services, substance abuse treatment, and housing assistance; (5) Implementing targeted outreach efforts to identify and engage disconnected youth with disabilities and disconnected adults with disabilities, including those who may be unknown or hard to reach; and (6) Collaboration among government agencies, community organizations, educational institutions, and employers to re-engage disconnected youth with disabilities and disconnected adults with disabilities. By addressing the barriers and providing the necessary supports and opportunities, it is possible to re-engage disconnected youth with disabilities and disconnected adults with disabilities to transition into education, employment, and training, leading to improved outcomes.

Requirements

A project in this topic area must focus on securing CIE for disconnected youth with disabilities and/or disconnected adults with disabilities, by addressing the unique employment, training, emotional, cognitive, and life adjustment factors experienced by disconnected youth and/or disconnected adults with disabilities. Activities must include, but are not limited to: (1) Transition and Reintegration Services: Identify support services and resources to create a seamless transition to CIE for project participants; (2) Family Engagement and Social Support: Partner with service providers supporting project participants to achieve their goals for CIE (*e.g.,* DSU for VR services, State educational agencies, parent organizations, community-based services, local educational agencies, other local agencies); (3) Pre-employment Related activities: Provide pre-employment related activities, such as career exploration, resume writing and job search skills, interview preparation, soft skills development, job readiness training, networking and mentoring, internships, apprenticeships, and job trials, to prepare project participants for the workforce by developing essential skills, knowledge, and abilities needed to obtain and maintain CIE; (4) Professional Development: Develop and implement professional development trainings specific to the professionals serving project participants; (5) Transition Coordinators/Career Navigators: Create, identify, and provide a wide variety of services to project participants pertaining to early intervention and reintegration, including career planning, exploration, and counseling; educational planning; support to navigate systems; learner skill building; and CIE placement; (6) Project Advisory Committee: Develop a project advisory committee that includes representation from the target population to be served by the project and partners relevant to the project and project activities (*e.g.,* State agencies, local agencies, employers, youth service programs, support systems); and (7) Advanced Technology: Identify and use advanced technology to enhance accessibility, education, and CIE for project participants, through the identification and development of strategies that will support access to trainings and education to equip them with the skills needed for CIE.

Topic Area 6: Field Initiated.

Requirements

A field-initiated project must (1) address an innovative topic area not otherwise included in this priority, or (2) combine two or more topic areas described in this priority into one application. If an applicant intends to address multiple topic areas, the applicant must combine the topic areas in one application and submit it under Topic Area 6, Field Initiated.

General Application Requirements

Applicants must identify the specific topic area (1, 2, 3, 4, 5, or 6) under which they are applying as part of the competition title on the application cover sheet (SF form 424, line 4).

Application Requirements

Under this priority, the model demonstration project must, at a minimum, meet the following application requirements.

(a) Logic model (as defined in this notice). In the narrative section of the application under ''Quality of the Project Design'', include a logic model for the proposed project as described in the following paragraphs. The logic model must describe how—

(1) The proposed project will achieve its intended outcomes that depicts, at a minimum, the goals, activities, outputs, and intended outcomes of the proposed project.

(2) The proposed project components (as defined in this notice) are intended to affect the proposed project outcomes. Applicants must specifically note the proposed project activities that are supported by evidence that demonstrates a rationale and are depicted in the logic model.

Note: The following website provides more information on logic models: ''Logic models: ''Logic models: A tool for designing and monitoring program evaluations'' *https://ies.ed.gov/ncee/edlabs/regions/pacific/pdf/rel_2014007.pdf.*

(b) Proposed *Project Management Plan*. In the narrative section of the application under ''Quality of the management plan,'' include a proposed project management plan as described in the following paragraphs. The

proposed project management plan must describe how—

(1) The intended proposed project outcomes will be achieved on time and within budget. To address this requirement, the applicant must provide a proposed project management plan that includes—

(i) Clearly defined responsibilities for key project personnel, including level of effort, consultants, and subcontractors, as applicable;

(ii) Timelines, milestones, and deliverables for accomplishing the project tasks;

(iii) A description of how time commitments of proposed key project personnel and any consultants and subcontractors will be allocated and how these allocations are appropriate and adequate to achieve the intended proposed project outcomes;

(iv) A description of how the products and services provided are of high quality, evidence-based, relevant, and useful to recipients; and

(v) A detailed description of how activities will continue to be sustained once the grant performance period is over.

(c) *Proposed Project Evaluation Plan.* In the narrative section of the application under ''Quality of the project evaluation,'' include a proposed project evaluation plan for the proposed project as described in the following paragraphs. The proposed project evaluation plan must describe measures of progress in implementation, including the criteria for determining the extent to which the proposed project's products and services have met the goals for reaching its target population; measures of intended outcomes or results of the proposed project activities to evaluate those activities; and how well the goals or objectives of the proposed project, as described in its logic model, have been met. Grantees must dedicate sufficient funds throughout the project period to cover the costs of developing, refining, and implementing the project evaluation plan, as well as the costs associated with collaborating throughout the period of performance with an independent evaluator identified by RSA. The proposed project evaluation plan and process must—

(1) Identify formative and summative evaluation questions that align to the logic model;

(2) Describe how progress in and fidelity of implementation, as well as project outcomes, will be measured to answer the evaluation questions;

(3) Specify the measures and associated instruments or sources for data appropriate to the evaluation questions. Include information regarding reliability and validity of measures where appropriate;

(4) Describe strategies for analyzing data and how data collected as part of this proposed project will be used to inform and refine the logic model and evaluation plan, including subsequent data collection;

(5) Include a timeline for conducting the evaluation and include staff assignments for completing the plan. The timeline must indicate that data will be available bi-annually, for the annual performance report (October 1–March 31) and end of year performance report (October 1–September 30);

(6) Describe how the proposed project will collect data, during the project performance period, regarding the project participants, including but not limited to, demographics (*e.g.,* gender, race, ethnic group), disability type, pre- and post-project participation, employment and wage outcomes, and regional information;

(7) Describe how the proposed project will identify and evaluate the innovative strategies that were effective for systemic change in partnerships (*e.g.,* relationship building, resource sharing, funding mechanism for services);

(8) Describe how the proposed project will evaluate the relationship between project participants' engagement with or use of specific practices and strategies implemented by the proposed project and key outcomes;

(9) Describe how the proposed project will make broadly available the results of any evaluations conducted of funded activities, digitally and free of charge, through formal (*e.g.,* peer reviewed journals) or informal (*e.g.,* newsletters) mechanisms;

(10) Describe how the proposed project will ensure that data from the grantee's evaluation can be made available to any evidence building support contractor identified by RSA consistent with applicable privacy requirements;

(11) Describe how the proposed project will leverage data collection, analysis, and research methodologies to result in an evaluation that can build evidence; and

(12) Include an assurance that the project will cooperate on an ongoing basis with any technical assistance provided by the Department or its contractors and comply with the requirements of any other evaluation of the program conducted by the Department, including the need to share project data.

(d) Proposed Project website. In the narrative section of the application, include a description of the proposed project website as described in the following paragraph. The narrative must describe how—

(1) The proposed project will develop (year 1), refine, and implement (years 2–5) a project website that is a centralized location for maintaining age-appropriate materials for project participants and resources for service professionals to include, but not limited to: project details, project results, and resources for project participants that will be incorporated into the applicant's website at the end of the proposed project.

(e) Non-DSU for VR Eligible Applicants: For eligible applicants who are not DSU for VR, how the project will share progress and outcomes of the proposed project with the DSU for VR; and as appropriate, how the project will work to ensure that youth with disabilities and/or adults with disabilities are referred to the DSU for VR for services.

References

American Civil Liberties Union. (2024). America's addiction to juvenile incarceration: State by State. ACLU. *https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state.*

Bateman, J. (2023, November 7). Is there a distinction between those who acquire disabilities and those who are born with them? The Mobility Resource. *https://www.themobilityresource.com/blog/post/were-you-born-a-crip-or-did-you-become-one/.*

Brown, J.S., Finney, M., Korgaonkar, N., McMillan, M., & Perkins, C. (2023, December 19). The impact of Generative AI on Black Communities. McKinsey & Company. *https://www.mckinsey.com/bem/our-insights/the-impact-of-generative-ai-on-black-communities.*

Cassidy, L., Reggio, K., Shaywitz, B.A., Holahan, J.M., & Shaywitz, S.E. (2021). Dyslexia in Incarcerated Men and Women: A New Perspective on Reading Disability in the Prison Population. Journal of Correctional Education, 72(2), 61–81. *https://www.proquest.com/scholarly-journals/dyslexia-incarcerated-men-women-new-perspective/docview/2622815331/se-2*

Ellingrud, K., Sanghvi, S., Dandona, G.S., Madgavkar, A., Chui, M., White, O., & Hasebe, P. (2023, July 26). Generative AI and the future of work in America. McKinsey & Company. *https://www.mckinsey.com/mgi/our-research/generative-ai-and-the-future-of-work-in-america.*

Houchins, D.E., Jolivette, K., Shippen, M.E., & Lambert, R. (2010). Advancing high-quality literacy research in juvenile justice: Methodological and practical considerations. Behavioral Disorders, 36(1), 61–69. *http://www.jstor.org/stable/*

43153831.

Lewis, K., Burd-Sharps, S., & Ofrane, B. (2018, April 3). Youth disconnection rates highlight structural barriers to achievement in the US. ITEMS Social Science Research Council. *https://items.ssrc.org/from-our-programs/youth-disconnection-rates-highlight-structural-barriers-to-achievement-in-the-us/.*

Martin, Frank and Sevak, Purvi. 'Implementation and Impacts of the Substantial Gainful Activity Project Demonstration in Kentucky'. 1 Jan. 2020: 297–305.

Masterson, V. (Ed.). (2022, May 25). From medicine drones to coral cleaners: 3 ''jobs of the future'' that are already here. World Economic Forum. *https://www.weforum.org/agenda/2022/05/robots-help-humans-future-jobs/.*

McLellan, S.E., Mann, M.Y., Scott, J.A., & Brown, T.W. (2022). A blueprint for change: guiding principles for a system of services for children and youth with special health care needs and their families. *Pediatrics, 149* (Supplement 7). *https://publications.aap.org/pediatrics/article-abstract/149/Supplement%207/e2021056150C/188225.*

Morgan, P. (2021, April 27). Employee self-advocacy: How to talk to your employer about your disability. Forbes. *https://www.forbes.com/sites/paulamorgan/2021/04/27/employee-self-advocacy-how-to-talk-to-your-employer-about-your-disability/.*

National Center for Education Statistics. (2023). Students With Disabilities. National Center for Education Statistics. *https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities#:~:text=In%202021%E2%80%9322%2C%20the%20number,of%20all%20public%20school%20students.*

National Center on Education, Disability and Juvenile Justice. (2021). *https://www.air.org/project/national-center-education-disability-and-juvenile-justice-edjj.*

Okoro, C., Hollis, N., Cyrus, A., & Friffin-Blake, S. (2018, August 16). Prevalence of disabilities and health care access by disability status and type among adults—United States, 2016. Centers for Disease Control and Prevention. *https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm?s_cid=mm6732a3_w.*

Paige, C. (2023, April 21). 7 Ways Technology Can Help You in your Career. IT Briefcase. *https://www.itbriefcase.net/7-ways-technology-can-help-you-in-your-career.*

Smalligan, J., & Boyens, C. (2018, October). Expanding early intervention for newly ill and injured workers. Urban Institute. *https://www.urban.org/sites/default/files/publication/99250/expanding_early_intervention.pdf.*

Taylor, K. (2011). A summary of research on Youth with Disabilities & the Juvenile Justice System. *https://ies.ed.gov/ncser/pdf/JuvenileJustice.pdf.*

Trout, A.L., Hagaman, J., Casey, K., Reid, R., & Epstein, M.H. (2008). The academic status of children in out-of-home care: A review of the literature. Children and Youth Services Review, 30(9), 979–994.

Waldman, B., Garey, M., Rader, R., & Perlman, S.P. (2016, June 29). Children with acquired disabilities. Special Needs Resource. *https://www.eparent.com/wellness/children-with-acquired-disabilities/.*

U.S. Department of Education. (2017, May 23). Supporting Youth with Disabilities in Juvenile Corrections. Office of Special Education and rehabilitative services blog. *https://sites.ed.gov/osers/2017/05/supporting-youth-with-disabilities-in-juvenile-corrections/.*

U.S. Department of Education. (2020, October). 2017–18 Civil Rights Data Collection—The use of restraint and seclusion on children with disabilities in K–12 schools. Office of Civil Rights. *https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf.*

U.S. Department of Labor. (2024). Job accommodations. *https://www.dol.gov/general/topic/disability/jobaccommodations.*

Weitzman, T. (2023, October 5). Empowering individuals with disabilities through AI technology. Forbes. *https://www.forbes.com/sites/forbesbusinesscouncil/2023/06/16/empowering-individuals-with-disabilities-through-ai-technology/?sh=11e84d276c73.*

Wickizer, Thomas M. Ph.D.; Franklin, Gary M. MD.; Fulton-Kehoe, Deborah Ph.D.§ . Innovations in Occupational Health Care Delivery Can Prevent Entry into Permanent Disability: 8-Year Follow-up of the Washington State Centers for Occupational Health and Education. Medical Care 56(12): p 1018–1023, December 2018. | DOI: 10.1097/MLR.0000000000000991.

Definitions

For the FY 2024 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of GEPA, 34 CFR 77.1, and 2 CFR 200.1, we establish definitions of ''Acquired disabilities,'' ''Advanced Technology,'' ''Disconnected adult with a disability,'' ''Disconnected youth with a disability,'' ''Early Intervention,'' ''Educator,'' ''Innovative,'' ''Innovative Applications,'' ''Indian Tribe,'' ''Life Coaching Services,'' ''Logic Model,'' ''Nonprofit,'' ''Nonpublic,'' ''Partners,'' ''Partnerships,'' ''Personalized Advanced Technology,'' ''Project Components,'' ''Public,'' ''Refine,'' ''Reintegration,'' ''Wraparound support,'' and ''Youth with disabilities''. The authority for each definition is noted following the text of the definition.

''Acquired disabilities'' means physical, mental, sensory, or cognitive impairments, typically resulting from injury, illness, or medical conditions that are not presented at birth but acquired later in life. (Section 437(d)(1) of GEPA.)

''Advanced Technology'' means cutting edge innovations, tools, systems, or solutions that represent the latest advancements in science, engineering, and technology.

''Disconnected adult with a disability'' means an individual with a disability, over the age of 24 who may be from a low-income background, experiences homelessness, is involved in the corrections system, or is not working. (Section 437(d)(1) of GEPA.)

''Disconnected youth with a disability'' means an individual with a disability between the ages 14 and 24, who may be from a low-income background, experiences homelessness, is in foster care, is involved in the justice system, or is not working or not enrolled in (or at risk of dropping out of) an educational institution. (Section 437(d)(1) of GEPA.)

''Early intervention'' means a timely and systematic provision of support and services to individuals with disabilities with the goal of identifying, assessing, and addressing potential challenges and/or concerns as early as possible, using strategies and techniques that offer redirection and rehabilitation in order to promote positive outcomes whereby leading to CIE. (Section 437(d)(1) of GEPA.)

''Educator'' means an individual who is an early learning educator, teacher, principal, or other school leader, specialized instructional support personnel (*e.g.,* school psychologist, counselor, school social worker, early intervention service personnel), paraprofessional, or faculty. (Section 437(d)(1) of GEPA.)

''Indian Tribe'' means any Indian tribe, band, Nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services. (2 CFR 200.1)

''Innovative'' means featuring new methods, ideas, or approaches. (Section 437(d)(1) of GEPA.)

''Innovative Applications'' means the creative and groundbreaking uses of technology in various fields, leveraging the latest advancements in technology to solve problems, improve efficiency,

and enhance user experiences to a given scenario that enables forms of interactivity, adaptivity, or support that would otherwise be impracticable without that technology intervention. (Section 437(d)(1) of GEPA.)

''Life coaching services'' means a collaborative and goal-oriented approach to help youth with disabilities and/or adults with disabilities make positive changes, set, and achieve personal or professional goals, and improve various aspects of their lives. (Section 437(d)(1) of GEPA.)

''Logic model'' (also referred to as a theory of action) means a framework that identifies key proposed project components (as defined in 34 CFR 77.1) of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes (as defined in 34 CFR 77.1)) and describes the theoretical and operational relationships among the key proposed project components and relevant outcomes. (34 CFR 77.1.)

''Nonprofit'', means as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity. (34 CFR part 77)

''Nonpublic'', as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control. (34 CFR part 77)

''Partners'' means organizations or entities that join forces, collaborate, and work together towards implementing the project. (Section 437(d)(1) of GEPA.)

''Partnership'' means two or more agencies, employers, or nonprofits working together cooperatively to reach a common goal pursuant to a formal Memorandum of Understanding among the partners and subject to the requirements of 2 CFR 200.332 and other relevant provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards found at 2 CFR part 200. (Section 437(d)(1) of GEPA)

''Personalized Advanced Technology'' means the use of state-of-the-art devices and programs to tailor experiences, products, or services to meet the specific needs and preferences of the individual with a disability. (Section 437(d)(1) of GEPA.)

''Project components'' means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers). (34 CFR 77.1(c)).

''Public'' as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government. (34 CFR part 77)

''Refine'' means to include a process of continuous improvement to ensure that project activities are reviewed against the project's goals and objectives, including securing feedback, through various methods (*e.g.,* in-person, phone, virtual) from program participants throughout years two, three, four, and five. (Section 437(d)(1) of GEPA.)

''Reintegration'' means the process, including activities and tasks, for successful reentry into the community, home, or workforce from the juvenile justice or criminal justice system. (Section 437(d)(1) of GEPA.)

''Wraparound Support'' means a comprehensive and holistic approach to providing individualized care and services to support youth and/or adults with disabilities with complex needs, emphasizing a collaborative, strengths-based, family-centered approach to addressing the diverse needs of youth with disabilities and adults with disabilities and their support system.

''Youth with disabilities'' means an individual between the ages of 14 and 24 who has a physical or mental impairment that results in a substantial impediment to competitive integrated employment. (Section 437(d)(1) of GEPA.)

Program Authority: Consolidated Appropriations Act, 2023 (Pub. L. 117–328), 136 Stat. 4892.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, selection criteria, requirements, and definitions. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under the authority given in the Consolidated Appropriations Act, 2023, and, therefore, qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priority, requirements, definitions, and selection criteria under section 437(d)(1) of GEPA. The priority, requirements, definitions, and selection criteria will apply to the FY 2024 grant competition and any subsequent year in which we make awards from the list of unfunded applications for this competition.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Discretionary grants negotiated as cooperative agreements.

Estimated Available Funds: $236,313,221.00.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2025 from the list of unfunded applications from this competition.

Estimated Range of Awards: $8,000,000–$10,000,000 (frontloaded for the 60-month project period).

Estimated Average Size: $9,000,000.

Estimated Number of Awards: 23–29.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

Note: The Final Performance Report must be completed and submitted by the end of the project period, September 30, 2029. Therefore, the project must complete core project activities to allow sufficient time for the evaluation and final performance report to be completed and submitted by the end of the project period on September 30, 2029.

Note: Applicants under this competition must provide detailed budget information for the total grant period, including detailed budget information for each of the five years of the proposed project. Applicants are encouraged to consider the impact of implementation of the proposed project when creating a year 1 budget. Applicants are also encouraged to consider the impact of the period of performance end date, September 30, 2029, when creating the year 5 budget.

Note: Grantees are expected to complete at least monthly drawdowns of expenditures.

Note: Subgrantees and Contractors are expected to report monthly invoices of expenditures to the grantees.

III. Eligibility Information

1. *Eligible Applicants:*

• State agencies or their equivalents under State law: (1) State Educational Agency; (2) State Juvenile Justice agency; (3) State Developmental Disabilities agency; (4) State Department of Health; (5) State Department of Human Services; or (6) Designated State unit for Vocational Rehabilitation Services.

• Public, Private and Nonprofit Entities, including Indian Tribes and Institutions of Higher Education.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to Institutions of Higher Education only.

Note: The regulation 34 CFR 75.51 How to prove nonprofit status applies to nonprofits and requires documentation to prove its nonprofit status. (a) Under some programs, an applicant must show that it is a nonprofit organization. (See the definition of nonprofit in 34 CFR 77.1.) (b) An applicant may show that it is a nonprofit organization by any of the following means: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) A statement from a State taxing body or the State attorney general certifying that: (i) The organization is a nonprofit organization operating within the State; and (ii) No part of its net earnings may lawfully benefit any private shareholder or individual; (3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; (4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate; or (5) For an entity that holds a sincerely held religious belief that it cannot apply for a determination as an entity that is tax-exempt under section 501(c)(3) of the Internal Revenue Code, evidence sufficient to establish that the entity would otherwise qualify as a nonprofit organization under paragraphs (b)(1) through (4) of this section.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to the Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

d. *Administrative Expenses:*

(i) All administrative expenses incurred under the DIF program must be reasonable and necessary for the administration of the DIF program and must conform to the requirements of the Federal Cost Principles described in 2 CFR 200.403 through 200.405.

(ii) Although, in certain circumstances, proposed project participants served and services provided are the same under both the DIF programs and the State programs (*e.g.,* State Educational Agency, State Juvenile Justice Agency, State Developmental Disabilities Agency, State Department of Health, DSU for VR Services, State Department of Human Services) and/or public, private, nonprofit entities, including Indian Tribes and Institutions of Higher Education) these are separate and distinct with separate and distinct funding streams and requirements. As such, when allocating administrative costs between the DIF programs and State programs and/or public, private, nonprofit entities, including Indian Tribes and Institutions of Higher Education, grantees must allocate the costs in accordance with the requirements of 2 CFR 200.405. This means that both DIF program and State program and/or public, private, nonprofit entities, including Indian Tribes and Institutions of Higher Education funds could be used to pay administrative costs associated with staff time providing services under certain circumstances; however, with respect to those administrative activities limited to the DIF program, such as submitting progress reports, grantees must use only DIF program funds (or other allowable funds) to pay these costs. This applies to grantees and subgrantees.

3. *Subgrantees and Contracts:* Under the Consolidated Appropriations Act, 2023, a grantee under this competition may award subgrants and contracts. Under this competition, subgrants and contracts may not exceed 75 percent of the funds. Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants and contracts—to directly carry out project activities described in its application—to the following types of entities: public and private, nonprofit entities, including DSU for VR services, State educational agencies, local educational agencies, parent training and information centers, Centers for Independent Living, Developmental Disabilities agencies, Juvenile Justice agencies, or independent and capable evaluation experts and organizations, such as institutions of higher education or nonprofit or for-profit research firms. The grantee may only award subgrants and contracts to entities it has identified in an approved application. Subrecipients may not further subgrant funds received under this award. The administration of the grant award must be conducted by the grant recipient and administrative costs of the project allocated to the DIF award.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the DIF, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your

application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

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 45 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; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 or established for the FY 2024 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition. The criteria are as follows:

(a) *Significance. (up to 15 points)*

(1) The Secretary considers the Significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.

(ii) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(iii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in employment, independent living services, or both, as appropriate.

(b) *Quality of the project design. (up to 25 points)*

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives.

(ii) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(iii) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(iv) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.

(v) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(c) *Quality of project services. (up to 10 points)*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(ii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(d) *Quality of project personnel. (up to 5 points)*

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel.

(e) *Adequacy of resources. (up to 15 points)*

(1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The extent to which the budget is adequate to support the proposed project.

(ii) The extent to which the costs are reasonable in relation to the objectives,

design, and potential significance of the proposed project.

(iii) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(f) *Quality of the management plan. (up to 15 points)*

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(g) *Quality of the project evaluation. (up to 15 points)*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

(iii) The qualifications, including relevant training, experience, and independence of the evaluator.

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 the FY 2024 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition, in accordance with section 437(d)(1) of GEPA, in selecting an application for an award under this program, we also consider the geographical distribution of projects in the DIF program throughout the country. This factor will be applied after non-Federal reviewers score the applications. The geographical distribution of projects factor will be applied to fund applications out of rank order if the top-ranked applications do not represent a geographical distribution throughout the country. The topic area distribution of projects factor will be applied to fund applications out of rank order to ensure a range of topic areas are funded.

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 your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We also may notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department

grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of the project period, September 30, 2029, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit annual performance reports and end of year performance reports that provide the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case, the Secretary establishes a data collection period.

5. *Performance Measures:*

The performance measures consist of both the program and project measures.

Program Measures: The program measures will be developed in collaboration with the Department and/or its contracted independent evaluator during the first three months (October 1, 2024–December 31, 2024) of the awards, program measure targets will be developed in collaboration with the Department and/or its contracted independent evaluator and reported during the second three months (January 1, 2025–March 31, 2025). Program performance measures may, for example, assess the impact of project activities on effective identification of resources and the sustainability and replicability of the project.

Project Measures: Under the absolute priority, grant recipients must develop and implement a plan to measure the innovative model demonstration project's performance and outcomes, including an evaluation of the practices and strategies implemented by the project. Grantees must evaluate project performance based on the following measures, as well as any measures individually developed by the project and include targets in the application:

(a) Number of individuals to be served by the project.

(b) Number of project referrals.

(c) Number of individuals participating in the project.

(d) Of the individuals participating in the project, the number of individuals who received services and did not achieve competitive integrated employment.

(e) Of the individuals participating in the project, the Pre- and post- project participation employment and wage outcomes.

(f) Of the individuals participating in the project, the demographics (*e.g.,* gender, race, ethnic group).

(g) Of the individuals participating the project, the disability type.

(h) Of the individuals participating in the project, the number of individuals who achieve competitive integrated employment.

(i) The number of services professionals, including but not limited to employers, who completed professional training through the project.

(j) Of the services professionals who completed professional training, including but not limited to employers, the number who reported the training is high in quality, relevant, and useful to their work.

Note: The performance measures will be reported in the Annual Performance Report (Reporting Period October 1–March 30) and End of Year Performance Reports (Reporting Period October 1–September 30). For all five years of the project period, the cooperative agreement, as reviewed and amended as necessary during years 2–5, will specify the program and project measures that will be used to assess the grantees' performance in achieving the goals and objectives of the competition.

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.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2024–07502 Filed 4–8–24; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2024–0029; FRL–11666–01–OCSPP]

Polychlorinated Biphenyls (PCBs); TSCA Section 21 Petition for Rulemaking Under TSCA Section 6; Reasons for Agency Response; Denial of Requested Rulemaking

AGENCY: Environmental Protection Agency (EPA).

ACTION: Petition; reasons for agency response.

SUMMARY: This action announces the availability of the Environmental Protection Agency (EPA or the Agency) response to a petition received on January 4, 2024, from the Washington State Department of Ecology (the petitioner), asking EPA to initiate rulemaking under the Toxic Substances Control Act (TSCA) to safeguard public health against PCBs in consumer products. EPA shares the petitioner's concerns regarding risks to human health and the environment posed by PCBs, and the Agency continues to work towards better understanding and reducing exposures to PCBs. However, the petitioner failed to point with any

specificity to deficiencies in the Agency's 1984 final rule and determination of no unreasonable risk under TSCA. As a result, the petitioner has not provided adequate justification—based on the rulemaking process and record for the 1984 final rule and information provided or otherwise available to the Agency—to support reassessing the limits on allowable inadvertent PCBs in consumer products. Thus, EPA finds that the petition is insufficiently specific, and that the petitioner did not meet their burden under TSCA of establishing that it is necessary to amend the 1984 final rule. These deficiencies, among other findings, are detailed in this notice and serve as the reasons for the Agency's denial of the petition. As necessary and appropriate to supplement ongoing Agency efforts, EPA may consider information gathering activities under TSCA to collect data needed to better understand and characterize exposure and risk associated with inadvertently generated PCBs.

DATES: EPA's response to this petition was signed April 3, 2024.

ADDRESSES: The docket for this petition, identified by docket identification (ID) number EPA–HQ–OPPT–2024–0029, is available online at *https://www.regulations.gov.* Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those persons who manufacture (including import), process, distribute in commerce, use, or dispose of PCBs. Since other entities may also be interested, EPA has not attempted to describe all the specific entities that may be affected by this action.

B. What is EPA's authority for taking this action?

Under TSCA section 21 (15 U.S.C. 2620), any person can petition EPA to initiate a proceeding for the issuance, amendment, or repeal of a rule under TSCA sections 4, 6, or 8, or to issue an order under TSCA sections 4, 5(e), or 5(f). A TSCA section 21 petition must set forth the facts which it is claimed establish that it is necessary to initiate the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. If EPA denies the petition, the Agency must publish its reasons for the denial in the **Federal Register**. A petitioner may commence a civil action in a U.S. district court seeking to compel initiation of the requested proceeding within 60 days of a denial or, if EPA does not issue a decision, within 60 days of the expiration of the 90-day period.

C. What criteria apply to a decision on this TSCA section 21 petition?

1. Legal Standard Regarding TSCA Section 21 Petitions

TSCA section 21(b)(1) requires that the petition ''set forth the facts which it is claimed establish that it is necessary'' to initiate the proceeding requested. 15 U.S.C. 2620(b)(1). Thus, in addition to a petitioner's burden under TSCA section 21 itself, TSCA section 21 implicitly incorporates the statutory standards that apply to the requested actions. Accordingly, EPA has reviewed this TSCA section 21 petition by considering the standards in TSCA section 21 and in the provisions under which actions have been requested.

2. Legal Standard Regarding TSCA Section 6(e)

TSCA section 6(e)(1) gives EPA authority to promulgate rules regarding the disposal and marking of PCBs. 15 U.S.C. 2605(e)(1). TSCA section 6(e)(2) and (e)(3) generally prohibit the manufacture, processing, distribution in commerce, and use (other than totally enclosed use) of PCBs. 15 U.S.C. 2605(e)(2) and (e)(3). Under TSCA section 6(e)(2)(B), EPA may by rule authorize the use of PCBs in other than a totally enclosed manner if EPA finds that such use will not present an unreasonable risk of injury to health or the environment. 15 U.S.C. 2605(e)(2)(B). Under TSCA section 6(e)(3)(B), EPA may grant by rule an exemption from the general prohibitions in TSCA section 6(e)(3)(A) on the manufacturing, processing, and distribution in commerce of PCBs if EPA finds that such activities would not result in an unreasonable risk of injury to health or the environment, and good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for PCBs. 15 U.S.C. 2605(e)(3)(B). As provided in TSCA section 6(e)(5), section 6(e) does not limit EPA's authority to take action on PCBs under any other provision of TSCA or any other federal law. 15 U.S.C. 2605(e)(5).

3. Legal Standard Regarding TSCA Section 26

To the extent that EPA makes a decision based on science, TSCA section 26(h) requires EPA, in carrying out TSCA sections 4, 5, and 6, to use ''scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science,'' while also taking into account other considerations, including the relevance of information and any uncertainties. 15 U.S.C. 2625(h). TSCA section 26(i) requires that decisions under TSCA sections 4, 5, and 6 be ''based on the weight of the scientific evidence.'' 15 U.S.C. 2625(i). TSCA section 26(k) requires that EPA consider information that is reasonably available in carrying out TSCA sections 4, 5, and 6. 15 U.S.C. 2625(k).

II. Summary of the TSCA Section 21 Petition

A. What action was requested?

On January 4, 2024, EPA received a TSCA section 21 petition (Ref. 1) from the Washington State Department of Ecology. The petition requests EPA in general to ''initiate rulemaking to safeguard public health against polychlorinated biphenyls . . . in consumer products'' (Ref. 1, p. 1). More specifically, the petition asks that ''EPA commence rulemaking to eliminate the current allowances for PCBs in consumer products'' (Ref. 1, p. 1) via five actions: ''1. Commence rulemaking to reassess limits on allowable inadvertent PCBs found in consumer products . . . as detailed in the definitions of [']excluded manufacturing process['] and [']recycled PCBs['] found in 40 CFR 761.3. . . . 2. Adopt a new rule that identifies use of pigments containing PCBs as a [']use['] of PCBs. . . . 3. In collaboration with state and tribal governments, establish new, lower limits on allowable inadvertent PCBs in consumer products. . . . 4. In collaboration with state and tribal governments, establish priority consumer products that will be subject to lower allowable limits of inadvertent PCBs at an earlier date. . . . 5. In collaboration with state and tribal governments, reassess limits on all allowable PCBs found in commercial products, as detailed in 40 CFR 761, *et*

seq., and establish a rulemaking schedule for the adoption of revised regulations'' (Ref. 1, p. 3).

For the purposes of assessing the petition within the scope of TSCA section 21, EPA is interpreting these requests generally and collectively as requesting the Agency to initiate a proceeding for the amendment of a final rule issued under TSCA section 6(e) in 1984 (Ref. 2) (see Ref. 1, p. 4: ''This petition requests EPA to reassess rules adopted June 27, 1984, pursuant to authority under [TSCA section 6], thereby making it subject to a Section 21 petition.''). More specifically, EPA is interpreting this request to amend the definitions of ''excluded manufacturing process'' and ''recycled PCBs'' at 40 CFR 761.3, established in the 1984 final rule, to the extent that they refer to and establish limits for ''PCBs in products leaving any manufacturing site or imported into the United States'' and ''PCBs in paper products leaving any manufacturing site processing paper products, or in paper products imported into the United States.'' EPA is also interpreting this request to amend the exemptions for excluded manufacturing processes and recycled PCBs at 40 CFR 761.1(f)(2) and (3), also established in the 1984 final rule, to the extent that they refer to ''[p]ersons who . . . use products containing PCBs generated in excluded manufacturing processes defined in § 761.3'' and ''[p]ersons who . . . use products containing recycled PCBs defined in § 761.3.''

1. Request for Rulemaking Associated With Limits for Inadvertently Generated PCBs in ''Consumer Products''

The petition requests that EPA take three actions related to the authorized limits for inadvertently generated PCBs in consumer products: (1) Commence rulemaking to reassess limits on allowable inadvertent PCBs in consumer products; (2) Collaborate with state and tribal governments to establish new, lower regulatory limits on inadvertent PCBs in consumer products and identify appropriate test methods; and (3) Collaborate with state and tribal governments to phase in lower limits on inadvertently generated PCBs in consumer products, starting with priority consumer products. The requested actions include collaboration with state and local governments, which EPA believes is attendant to the petitioner's general request for rulemaking under TSCA section 6. The Agency's policy on conducting rulemaking encourages appropriate and meaningful consultation with external stakeholders, including state, tribal and local officials. As the petitioner is seeking to amend an existing rule under TSCA section 6, this **Federal Register** document addresses this request.

2. Request for Rulemaking Associated With ''Use of Pigments Containing PCBs''

The petition requests that EPA adopt a new rule that identifies the use of pigments containing inadvertent PCBs to be a ''use'' of PCBs, subject to the applicable limitations under 40 CFR 761.20(a). EPA interprets this request as the petitioner seeking to amend an existing rule under TSCA section 6; this **Federal Register** document addresses this request.

3. Request for Rulemaking Associated With ''All Allowable PCBs Found in Commercial Products''

The petition requests that EPA collaborate with state and tribal governments to reassess limits on allowable non-inadvertent PCBs in commercial products. The requested action includes collaboration with state and local governments, which EPA believes is attendant to the petitioner's general request for rulemaking under TSCA section 6. The Agency's policy on conducting rulemaking encourages appropriate and meaningful consultation with external stakeholders, including state, tribal and local officials. As the petitioner is seeking to amend an existing rule under TSCA section 6, this **Federal Register** document addresses this request.

B. What support did the petitioner offer?

To support the requests for rulemaking under TSCA section 6(e), the petitioner provided a discussion of legislative and regulatory authorities related to PCBs and inadvertently generated PCBs (Ref. 1, pp. 5–6), as well as information on the historical manufacture and uses of PCBs (Ref. 1, pp. 7–8), impacts of PCBs on human health and the environment, including sensitive species (Ref. 1, pp. 8–11), the presence of and potential for exposure to inadvertently generated PCBs in consumer products (Ref. 1, pp. 11–14), and the availability of safer alternatives to paints and inks that contain inadvertently generated PCBs (Ref. 1, pp. 14–15). The petitioner also provided a bibliography of references cited (Ref. 1, pp. 16–20). The Agency appreciates the information provided in the petition and finds it generally consistent with decades of peer-reviewed and published data on PCBs.

III. Disposition of TSCA Section 21 Petition

A. What is EPA's response?

EPA shares the petitioner's concerns regarding risks to human health and the environment posed by PCBs, including information related to indigenous populations in Washington State and to sensitive species like orcas and seals, and the Agency continues to work towards better understanding and reducing exposures to PCBs. However, as described in Unit III.B.1., the petitioner failed to point with any specificity to deficiencies in the Agency's promulgation of the 1984 final rule and determination of no unreasonable risk under TSCA section 6(e). As a result, the petitioner has not provided adequate justification—based on the rulemaking process and record for the 1984 final rule, as well as information provided or otherwise available to the Agency—for reassessing the limits on allowable inadvertent PCBs in consumer products. Thus, EPA finds that the petition is insufficiently specific and that the petitioner did not meet their burden under TSCA section 21(b)(1) of establishing that it is necessary to amend the 1984 final rule under TSCA section 6(e). Therefore, after careful consideration, EPA has denied this TSCA section 21 petition. As necessary and appropriate to supplement ongoing Agency efforts (see Unit III.B.1.e.), EPA may consider information gathering activities under TSCA (*e.g.,* TSCA sections 4 or 8) to collect data needed to better understand and characterize exposure and risk associated with inadvertently generated PCBs.

A copy of the Agency's response, which consists of the letter to the petitioner and this document, is posted on the EPA TSCA petition website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-section-21#PCBs.* The response, the petition (Ref. 1), and other information is available in the docket for this TSCA section 21 petition (see **ADDRESSES**).

B. What was EPA's reason for this response?

TSCA section 21 provides for the submission of a petition seeking the initiation of a proceeding for the issuance, amendment, or repeal of a rule under TSCA section 6. The petition must set forth the facts which it is claimed establish that it is necessary to initiate the action requested. 15 U.S.C. 2620(b)(1). EPA considered whether the petition established that it is necessary to amend the 1984 TSCA section 6(e) final rule establishing definitions of

''excluded manufacturing process'' and ''recycled PCBs'' at 40 CFR 761.3 and exemptions for excluded manufacturing processes and recycled PCBs at 40 CFR 761.1(f)(2) and (3). For EPA to be able to conclude within the statutorily-mandated 90 days of receiving the petition that the initiation of a proceeding for the amendment of the 1984 final rule is necessary, the petition needs to be sufficiently clear and robust.

EPA evaluated the information presented in the petition and considered that information in the context of the applicable authorities and requirements of TSCA sections 6, 21, and 26. Notwithstanding that the burden is on the petitioner to set forth the facts which it is claimed establish that it is necessary for EPA to initiate the action requested, EPA nonetheless also considered relevant information that was reasonably available to the Agency during the 90-day petition review period. As detailed further in Units III.B.1., 2., and 3., EPA finds that the petition is insufficiently specific and that the petitioner did not meet their burden under TSCA section 21(b)(1) of establishing that it is necessary to amend the 1984 final rule under TSCA section 6(e). These deficiencies, among other findings, are detailed in this notice.

1. Necessity of Rulemaking Associated With Limits for Inadvertently Generated PCBs in Consumer Products

The ''primary issue'' (Ref. 1, p. 4) raised by the petitioner is the ''Recommendation of the Parties for a Final EPA Rule on Inadvertent Generation of PCBs'' (hereinafter ''consensus proposal''), which formed part of the framework for the finding of no unreasonable risk in the 1983 proposed rule ''Polychlorinated Biphenyls (PCBs); Exclusions, Exemptions and Use Authorizations; Proposed Rule'' (Ref. 3), and 1984 final rule, ''Toxic Substances Control Act; Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Exclusions, Exemptions, and Use Authorizations'' (Ref. 2), and led to the establishment of the definitions for ''excluded manufacturing process'' and ''recycled PCBs'' (see 40 CFR 761.3). The former definition contains the allowance related to inadvertently generated PCBs in consumer products in general: ''The concentration of inadvertently generated PCBs in products leaving any manufacturing site or imported into the United States must have an annual average of less than 25 [parts per million (ppm)], with a 50 ppm maximum'' (see 40 CFR 761.3). The latter definition contains a similar allowance for PCBs that appear in the processing of paper products from PCB-contaminated raw materials: ''The concentration of PCBs in paper products leaving any manufacturing site processing paper products, or in paper products imported into the United States, must have an annual average of less than 25 ppm with a 50 ppm maximum'' (see 40 CFR 761.3). The petitioner states ''[t]here is no indication in the 1984 rulemaking notice that the limits proposed [in the consensus proposal] and adopted by EPA are based on any specific scientific study or reasoning.'' (Ref. 1, p. 4). The Agency disagrees with this characterization.

a. 1983 Proposed Rule for Inadvertently Generated PCBs

In the 1983 proposed rule (Ref. 3), EPA described the litigation and related processes that led to the submission of the consensus proposal to the Agency, as well as the receipt of comments and information related to inadvertently generated PCBs and recycled PCBs. The Agency also described how it determined that it was appropriate to use, in part, the consensus proposal as a framework for rulemaking, based on ''data analyses EPA had completed when it received the consensus proposal'' (Ref. 3). EPA also described modifications that EPA intended to make to the underlying framework linked to the consensus proposal, including consideration of recycled PCBs and lower concentration limits for certain products with a greater potential for exposure, as well as the rejection of provisions that could result in high level releases of PCBs in air, water, or products that could cause injury to health or the environment (Ref. 3).

The Agency then summarized several approaches it considered and rejected in its effort to ''provide regulatory relief from the prohibitions of section 6(e) for PCBs at very low levels that do not present unreasonable [risks] to public health,'' including the exemption process of TSCA section 6(e)(3)(B) and developing regulatory limits on concentration levels for each chemical process in which inadvertently generated PCBs are generated (Ref. 3). EPA also considered the use of ''generic exposure assessments'' that could be used to estimate ''risks of cancer and reproductive/developmental health'' and, ultimately ''in developing generic exclusions, if warranted, based on a determination that particular classes of processes generating PCBs at low levels would not present unreasonable risks'' (Ref. 3). The generic risk assessments were then focused on a group of 70 chemical processes determined to have a high potential for PCB generation, which the Agency narrowed from an initial list of approximately 200 chemical processes with a potential for generating PCBs (Ref. 3). EPA then acknowledged that ''[t]he generic exposure assessment approach is less resource-intensive than the chemical-specific approach; however, it is protective of human health and the environment'' (Ref. 3). In addition, EPA explained ''[t]he regulatory strategy initially pursued by EPA, based on generic exclusions, is more detailed and specific than the consensus approach which sets a simple regulatory limit. EPA has adopted the generic exclusion approach in developing this rulemaking; however, EPA's approach supports the regulatory framework submitted . . . in the consensus proposal'' and ''in using the consensus proposal to develop this proposed rule, EPA has also used the Closed and Controlled Waste Manufacturing Processes Rule as a framework. Furthermore, the PCB analytical chemistry methodology developed to determine PCB concentration under that rule serves this proposed rule'' (Ref. 3).

The Agency then declared ''EPA has considered the consensus proposal in terms of the required findings of sections 6(a) and 6(e) of TSCA and has decided to adopt an unreasonable risk test to support this proposed rule. By adopting this approach, EPA believes . . . that the Agency is consistent with congressional intent and is reasonably regulating inadvertently generated and recycled PCBs'' (Ref. 3). The Agency then arrived at its determination of no unreasonable risk (including the listing of applicable risk and hazard assessments and a regulatory impact analysis) by stating ''[a]fter the Closed and Controlled Waste Manufacturing Processes rule was published, EPA completed quantitative risk assessments for PCBs. Based on the risk assessment for carcinogenicity as well as information on reproductive/developmental effects, environmental effects, and costs, EPA has determined that the manufacture, processing, distribution in commerce, and use of PCBs below the limits proposed in the consensus proposal would not present an unreasonable risk of injury to human health or the environment'' (Ref. 3). EPA then concluded ''[b]ased on the risk assessments conducted by EPA and the consensus proposal, the Agency is proposing to exclude from the prohibitions of section 6(e) of TSCA those activities (including manufacture, processing, distribution in commerce,

and use) that meet'' a list of criteria (Ref. 3) that would become the requirements listed in the definition of ''excluded manufacturing process'' at 40 CFR 761.3, including the current concentration limits for inadvertently generated PCBs in products. EPA also evaluated the risk of exposure to recycled PCBs and concluded that ''these risks are substantially similar to those risks for the inadvertently generated PCBs'' and therefore proposed to establish the same concentration limits for recycled PCBs in products (Ref. 3).

b. 1984 Final Rule for Inadvertently Generated PCBs

In the 1984 final rule (Ref. 2), the Agency largely repeated the discussion of its process to reach the no unreasonable risk determination presented in the 1983 proposed rule, but also provided a summary of the general comments submitted. The comments discussed mentioned recommendations to modify the proposed rule and supporting documents, including requested edits to the nomenclature for specific consumer products (*i.e.,* ''detergent bars'' and ''plastic building materials''), uncertainty among commenters about which Aroclor products were to be included under the definition of ''recycled PCBs,'' the limit of quantification for Aroclor PCBs in water, and the designation of certain chemical processes as having a high potential to inadvertently generate PCBs (Ref. 2). The Agency also stated that the ''majority of the comments received in this rulemaking generally agreed with the exclusions proposed'' (Ref. 2). Absent from this summary were comments that questioned or otherwise challenged key aspects of the process the Agency used, including the framework involving the consensus proposal, to reach the no unreasonable risk determination (Ref. 2).

c. 2010 Advance Notice of Proposed Rulemaking

In 2010, EPA issued an advance notice of proposed rulemaking (ANPRM) for the use and distribution in commerce of certain classes of PCBs and PCB items, as well as other PCB regulations (Ref, 4). Among the items in the ANPRM's request for public comment was reassessment of definitions of ''excluded manufacturing process'' and ''recycled PCBs'' (Ref. 4). EPA stated the ''objective of this ANPRM is to announce the Agency's intent to reassess the current use authorizations for certain PCB uses to determine whether they may now pose an unreasonable risk to human health and the environment. This reassessment will be based in part upon information and experience acquired in dealing with PCBs over the past 3 decades'' (Ref. 4). Related to the definitions of ''excluded manufacturing process'' and ''recycled PCBs,'' as well as other topics related to inadvertently generated PCBs, EPA received an array of comments available in the docket at *https://www.regulations.gov/docket/EPA-HQ-OPPT-2009-0757.* Commenters seeking to lower or eliminate allowances for excluded manufacturing processes mentioned concerns related to PCBs in dyes, pigments, and inks in imported products; elimination of all federal exclusions or exceptions for inadvertently generated PCBs; the status of monochloro-biphenyls and dichloro-biphenyls from total PCB regulation due to lower potential for bioaccumulation and human health toxicity; and lowering the allowable concentration of PCBs in dyes, inks and pigments using a phased approach and in concert with federal and state actions involved in developing water quality criteria and implementation. Commenters seeking to maintain the allowances for excluded manufacturing processes offered that establishing a 1 ppm threshold would eliminate three important pigment groups from commerce and affect color printing, paint, and plastics due to the absence of technology to eliminate PCBs in all organic pigments to a level below 1 ppm; and raised concerns that U.S. pigment and product manufacturers could be at additional competitive disadvantage versus pigment and product importers. After reviewing comments received, the Agency took no actions related to the definitions of ''excluded manufacturing process'' and ''recycled PCBs,'' which remain as defined in the 1984 final rule (Ref. 2).

d. Petition's Lack of Specificity in Citing Flaws in EPA's 1984 Determination of No Unreasonable Risk

As described in Unit III.B.1.a. and b., the Agency articulated in both the 1983 proposed rule and 1984 final rule how and why it used, in part, the consensus proposal as part of the rule framework, as well as its additional processes to gather information and perform scientific and regulatory analyses to support its no unreasonable risk determination for excluded manufacturing processes and recycled PCBs. As part of the discussion, EPA described its own assessment of the consensus proposal, as well as the statements of the organizations that negotiated and presented it. Through the course of the rulemaking, the Agency solicited, received, and responded to public comment on various aspects and processes set forth in the proposed and final rules, as well as supporting documents. In addition, the 2010 ANPRM provided opportunity for public comment on the definitions of ''excluded manufacturing process'' and ''recycled PCBs'' (Ref. 4).

Thus, while the petitioners assert that the 1984 final rule does not indicate that the ''limits proposed [in the consensus proposal] and adopted by EPA are based on any specific scientific study or reasoning'' (Ref. 1, p. 4), the rulemaking record shows that EPA applied a pragmatic, transparent, and appropriate scientific approach to reach its no unreasonable risk determination. As described in Unit III.B.1.a., the 1983 proposed rule (Ref. 3) describes in detail the Agency's scientific risk assessments; and copies of these documents are included in the docket for this notice (see EPA–HQ–OPPT–2024–0029). The petitioner did not provide details about how the Agency failed to meet its burden when it promulgated the 1984 final rule. In fact, the 1984 final rule states how the Agency carefully considered each of the factors for determining unreasonable risk and concluded that the exclusions for inadvertently generated PCBs and recycled PCBs are ''based on a finding that such PCBs present no unreasonable risk of injury to human health and the environment'' (Ref. 2).

Furthermore, the 1984 final rule requires that manufacturers or importers of products containing inadvertently generated PCBs must notify EPA within 90 days if those products contain greater than 2 ppm PCB concentration in any resolvable gas chromatographic peak (see 40 CFR 761.185). Since 1994, EPA has received about 80 notices from 28 companies, and the frequency of such notifications has been decreasing; EPA has not received any new notice in several years. The infrequency of notification indicates that there may be little ongoing manufacture or import of products containing inadvertently generated PCBs at concentrations greater than 2 ppm PCBs. Similarly, after issuing the 2010 ANPRM and receiving comments on the definitions of ''excluded manufacturing process'' and ''recycled PCBs,'' the Agency did not find a compelling rationale to take immediate action to reassess the no unreasonable risk determination. Therefore, based on the robust rulemaking record for the 1984 rule, and limited information indicating that EPA's unreasonable risk determination supporting the rule was flawed or is now outdated, the Agency has decided

not to reassess the limits for inadvertently generated PCBs or recycled PCBs at this time. Nonetheless, EPA recognizes the concerns related to human health and the environment posed by PCBs in general and is working towards better understanding those concerns, as described in Unit III.B.1.e.

e. Information Provided and Substantial Ongoing and Expected Agency Actions

As previously mentioned, the Agency appreciates the information provided in the petition and finds it generally consistent with decades of peer-reviewed and published data on PCBs. In a discussion of EPA actions, activities, and regulations (Ref. 1, pp. 3–4), the petitioner focuses on the legislative, regulatory, and adjudicative milestones spanning the enactment of TSCA to the 1984 final rule. The petitioner also summarizes comprehensive information developed by EPA, other government authorities, and scientific researchers, which contribute to the collective scientific knowledge about the characteristics, sources, exposure pathways, and environmental and human health effects of PCBs. In addition, EPA is mindful of the information submitted regarding the impacts of PCBs among sensitive wildlife and human populations in Washington, including local indigenous populations whose diet typically consists of greater amounts of fish than other communities. EPA also notes the petitioner's acknowledgment that among the 209 identified PCB congeners, which have ''different physical properties, toxicity, and environmental fates, [. . .] there are characteristics that are applicable to all PCBs [and the] petition is based on these common characteristics'' (Ref. 1, pp. 5–6). Finally, EPA finds that the product category for which the petitioner provides the bulk of the information for inadvertently generated PCBs is paints and printing inks, as well as other components of those products (*e.g.,* pigments and dyes).

Throughout the implementation of TSCA section 6(e), the Agency has generated and collected a large amount of information related to PCBs. In addition, the widespread presence of PCBs in the environment is reflected by the manner in which EPA programs study, regulate, and enforce the PCB program under TSCA and other authorities across multiple offices within the Agency. The Agency's Integrated Risk Information System (IRIS) established in 1994 a non-cancer reference dose for oral exposure (RfD) for the PCB mixture Aroclor 1254 of 20 ng PCB/kg body weight per day and an RfD for Aroclor 1016 of 70 ng PCB/kg body weight per day. A 1996 weight-of-evidence characterization classified PCBs as a probable human carcinogen, and IRIS currently provides cancer dose oral slope factors of 2 per mg PCB/kg body weight per day (high risk and persistence, upper bound), 0.4 per mg PCB/kg body weight per day (low risk and persistence), and 0.07 per mg PCB/kg body weight per day (lowest risk and persistence). Additionally, the IRIS program is currently in the process of updating its non-cancer assessment of PCB mixtures available at *https://iris.epa.gov/ChemicalLanding/&substance_nmbr=294.*

While EPA has substantial information on PCBs in general, inadvertently generated PCBs remain an area of interest for the Agency. EPA is currently studying and anticipates continuing to study the complex issues involved in the generation, release, exposure, hazards, and risks to human health and the environment associated with inadvertently generated PCBs. For example, EPA has a workgroup on inadvertently generated PCBs, with members from the Office of Land and Emergency Management (OLEM), the Office of Research and Development (ORD), and EPA Regions, that has been conducting and assessing water samples from watersheds in EPA Region 10 and other watersheds in the United States.

Before proposing more stringent regulations on the inadvertent generation of PCBs in consumer products, EPA would seek to further understand the complexities and contributions of individual PCB congeners associated with inadvertently generated PCBs that may be present in U.S. waters. At present, there are not sufficient data to assess such PCB congeners. However, in a step toward addressing this deficiency, in 2014, the Agency requested toxicity testing for PCB–11, a PCB congener often associated with inadvertent PCB generation, through the National Toxicology Program (NTP) at the National Institute of Environmental Health Sciences (NIESH). As of November 2021, NTP had completed several steps for evaluating toxicity in liver cells: (1) Evaluated and compared activation of three different receptors in rat and human hepatocytes; (2) Performed hepatocyte clearance on rat and human hepatocytes; and (3) Estimated rat and human equivalent exposures at the point of departure.

In 2016 (Ref. 5) and again in 2022 (Ref. 6), the Agency's Office of Water promulgated science-based federal human health criteria for PCBs and other pollutants in Washington surface waters pursuant to the Clean Water Act. The implementation of those criteria is ongoing.

EPA's Office of Chemical Safety and Pollution Prevention operates the Pollution Prevention (P2) program, which supports the development and implementation of P2 solutions through grant programs, technical assistance, and by connecting researchers, industry experts, and others to develop innovative solutions to environmental challenges. In October 2019, the Washington State Department of Ecology used EPA P2 grant funds to host a workshop (see *https://www.epa.gov/sites/default/files/2021-04/documents/p2-pcb-factsheet-508.pdf* and *https://srrttf.org/?page_id=10745*) on inadvertently generated PCBs in partnership with EPA Region 10, the Spokane River Regional Toxics Task Force (SRRTTF), the Color Pigments Manufacturers Association, Northwest Green Chemistry, the Bullitt Foundation, and industry representatives to discuss opportunities to reduce inadvertently generated PCBs in inks and pigments and the downstream products and processes using those inks and pigments. The workshop helped establish lines of communication between chemical manufacturers, product manufacturers, purchasers, and end-of-life managers with the intention of formulating actionable steps to stimulate innovation and create markets for safer products. Since the October 2019 workshop, participants have continued to participate on working groups facilitated by Northwest Green Chemistry.

In EPA Region 10, the regional PCB and P2 programs have collaborated to address inadvertently generated PCBs. The programs have worked together to evaluate potential options for reducing inadvertently generated PCBs in products and to support state environmental agencies, ORD, and industry experts in developing upstream P2 approaches to reduce the release of inadvertently generated PCBs into the environment. In addition, the EPA regional PCB and P2 programs and inadvertently generated PCBs workgroup collaborated with the EPA Small Business Innovation Research Grant program, which provides research and development funding to small businesses to support commercialization of innovative technologies that help support EPA's mission of protecting human health and the environment, to solicit proposals in 2020 for innovative coloration technologies that do not result in the

generation of inadvertently generated PCBs. Collaboration led to furthering research of innovative technologies that seek to develop PCB-free pigments (Refs. 7 and 8).

ORD, with support from the EPA PCB and P2 programs, is conducting testing to determine the range of concentrations of inadvertently generated PCBs within consumer products, with a special emphasis on children's products. Since 2017, ORD has led cross-Agency efforts to conduct consumer product testing for inadvertently generated PCBs. In 2022, EPA staff from across the Agency published findings related to concentrations, fate and transport, and a preliminary exposure assessment associated with inadvertently generated PCBs in consumer products (Ref. 9). In that publication, the authors stated ''[w]hether the solution lies in preferred purchasing programs, green chemistry, effluent controls, regulatory changes, or elsewhere, understanding the fate, transport, and exposure pathways is a critical step in designing the ultimate solution'' and ''[t]his research will be foundational for additional future research to better understand the concentrations, fate, and transport of [inadvertently generated PCBs] in yellow pigmented consumer products and their cumulative risk assessment'' (Ref. 9). The authors also mentioned ''data generated from this study will be valuable to contextualize the toxicity data for PCB–11 generated by the NTP, once it is released'' (Ref. 9). As summarized above, the NTP toxicity testing for PCB–11 remains ongoing.

Thus, after assessing information provided by the petitioner, as well as information otherwise available, the Agency cannot conclude that it currently has information necessary to reassess the limits on allowable inadvertent PCBs in consumer products. For example, EPA is interested in new information pertaining to the toxicity of PCB–11 (including data on how PCB–11 bioaccumulates in fish), how PCBs in products leach to water, and efforts to reduce uncertainties in the data associated with testing inadvertently generated PCBs in consumer products.

TSCA section 21 requires a petitioner to set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule under TSCA section 6. As described in Unit III.B.1., the petitioner failed to point with any specificity to deficiencies in the Agency's promulgation of the 1984 final rule and determination of no unreasonable risk under TSCA section 6(e). In addition, while EPA acknowledges that pigments and dyes are the most reported product category per reporting and recordkeeping requirements for manufacturers, importers, processors, distributors, and users of inadvertently generated PCBs (see 40 CFR 761.1(f)), the petitioner's focus on paints, printing inks, pigments, and dyes and omit other categories of reported consumer products. This renders the petitioner's request applicable to all consumer products to be overly broad. As a result, the petitioner has not provided adequate justification—based on the rulemaking process and record for the 1984 final rule, as well as information provided or otherwise available to the Agency—for reassessing the limits on allowable inadvertent PCBs in consumer products. Nonetheless, as necessary and appropriate to supplement the ongoing efforts previously listed (including the new information EPA cited to be of interest), the Agency may consider information gathering activities under TSCA (*e.g.,* TSCA sections 4 or 8) to collect data needed to better understand and characterize exposure and risk associated with inadvertently generated PCBs.

2. Necessity of Rulemaking for ''Use of Pigments Containing PCBs''

The petitioner requests that EPA ''adopt a regulation that identifies the use of pigments containing inadvertent PCBs to be a [']use['] of PCBs, subject to the applicable limitations under 40 CFR 761.20(a) . . . [or] identify use of pigments containing inadvertent PCBs is a ['] use['] of PCBs when an alternate process is available and does not create inadvertent PCBs'' (Ref. 1, p. 2). The petitioner advocates that ''non-essential uses of PCBs be eliminated'' and ''scientific evidence demonstrates that PCBs in pigments result in both human exposures and environmental contamination'' (Ref. 1, p. 2). The petitioner provides several studies that attribute human exposure and environmental releases of PCBs to inadvertently generated PCBs linked to pigments, paints, inks, and dyes, and—more specifically—PCB–11 (Ref. 1, pp. 11–13). The petitioner also provides information on the availability of ''low-PCB or PCB-free'' paints and printed material products, as well as organizations that have implemented purchasing policies to prohibit certain products based on PCB concentration levels (Ref. 1, pp. 14–15). As such, the petitioner argues ''there is insufficient justification to allow continued use of processes that knowingly create PCBs in paints, inks, and pigments'' (Ref. 1, p. 15).

Although the petitioner generally requests that EPA adopt a new rule identifying the use of pigments containing inadvertently generated PCBs to be a use of PCBs, the existing regulations at 40 CFR 761.1(f)(2) and (3), established in the 1984 final rule, already identify the use of products containing PCBs generated in excluded manufacturing processes and the use of products containing recycled PCBs as uses of PCBs exempt from the general use prohibition in 40 CFR part 761, subpart B. Moreover, 40 CFR 761.20(a)(2) provides that a use authorization is not required to use PCBs resulting from an excluded manufacturing process or recycled PCBs, provided that all applicable conditions of 40 CFR 761.1(f) are met. Therefore, as stated in Unit II.A.2., EPA is interpreting this request as one seeking to amend the exemptions at 40 CFR 761.1(f)(2) and (3) to the extent they exempt the use of pigments containing inadvertently generated PCBs from the general prohibition against the use of PCBs.

As stated in Unit III.B.1.e., the Agency is aware of and intends to continue to gather and assess information related to the generation, release, exposure, hazards, and risks to human health and the environment associated with inadvertently generated PCBs. The 2022 study conducted by EPA staff acknowledged PCB–11, as well as other congeners found in pigments and consumer products such as PCB–5, PCB–8, PCB–12, PCB–13, PCB–15, PCB–28, PCB–35, PCB–36, PCB–40, PCB–52, PCB–56, PCB–77, PCB–206, PCB–207, PCB–208, and PCB–209 (Ref. 9). That study was designed to ''to collect data to quantify the transport of [inadvertently generated PCBs] from consumer products to the environment'' and generated the ''first data on migration pathways of [inadvertently generated PCBs] from consumer products into the environment and potential routes of human exposure.'' Those efforts also included: ''(1) Identification of [inadvertently generated PCBs] from 39 consumer products purchased on the current retail market; (2) Selection of PCB–11 as the major [congener] to be studied for fate and transport and exposure assessment; (3) Measurement of PCB–11 emissions from consumer products; (4) Investigation of PCB–11 migration from the source to settled dust; and (5) Preliminary assessment of potential exposure to PCB–11'' (Ref. 9). The study found that ''generated data enhances our ability to predict [inadvertently generated PCB] exposure'' and could ''assist the regional efforts of the SRRTTF and state and local partners

who are trying to find upstream solutions to [inadvertently generated PCB] contamination'' (Ref. 9). Finally, as mentioned in Unit III.B.1.e., the study generally concluded that more information was required to better understand and characterize the concentrations, fate, transport, exposure, hazard, and risk associated with inadvertently generated PCBs in pigmented consumer products.

Similarly, after assessing information provided by the petitioner, as well as information otherwise available and in light of ongoing and expected Agency actions, EPA cannot conclude that it currently has information necessary to reassess the exemptions for the use of pigments containing inadvertently generated PCBs.

3. Necessity of Rulemaking for ''All Allowable PCBs Found in Commercial Products''

The petitioner requests that EPA ''reassess limits on any PCBs currently allowed in all commercial products, including instances where EPA has determined the PCBs are ['']totally enclosed['] or result from an ['']excluded manufacturing process['] (Ref. 1, p. 2). The petitioner also asks that EPA set a ''rulemaking schedule for the adoption of revised regulations'' (Ref. 1, p. 2). Thereafter, there is no discussion or data offered by the petitioner on such products or occurrences of PCBs beyond the enumerated requests.

As stated in Unit III.B.1.e., the Agency is aware of and intends to continue to gather and assess information related to the generation, release, exposure, hazards, and risks to human health and the environment associated with inadvertently generated PCBs. However, aside from overall discussion of PCBs in general, the petitioner does not provide a clear argument or data to support this request. Thus, after assessing information provided by the petitioner, as well as information otherwise available and in light of ongoing and expected Agency actions, EPA cannot conclude that it currently has information necessary to reassess the limits on any PCBs currently allowed in all commercial products.

C. What were EPA's conclusions?

TSCA section 21 requires a petitioner to set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule under TSCA section 6. In general, the petitioner failed to point with any specificity to deficiencies in the Agency's promulgation of the 1984 final rule and determination of no unreasonable risk under TSCA section 6(e). Furthermore, the petitioner did not provide sufficiently complete scientific information (including hazard and exposure information indicating unreasonable risk) with regard to inadvertently generated PCBs to enable the Agency to make a determination that its approach in the 1984 rule was in error or ripe for revision. As a result, the petitioner is not able to provide adequate justification—based on the rulemaking process and record for the 1984 final rule, as well as information provided to or otherwise available to the Agency—for reassessing the limits on allowable inadvertent PCBs in consumer products. Similarly, after assessing information provided by the petitioner, as well as information otherwise available and in light of ongoing and anticipated Agency efforts, EPA cannot conclude that it currently has information necessary to reassess the exemptions for the use of pigments containing inadvertently generated PCBs or the limits on any PCBs currently allowed in all commercial products. Thus, EPA finds that the petition is insufficiently specific and that the petitioner did not meet their burden under TSCA section 21(b)(1) of establishing that it is necessary to amend the 1984 final rule under TSCA section 6(e). Accordingly, EPA denied the request to initiate a proceeding for the amendment of a rule under TSCA section 6(e).

IV. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. State of Washington Department of Ecology. 2024. Petition under TSCA Section 21—Polychlorinated Biphenyls. January 4, 2024.
2. EPA. Toxic Substances Control Act; Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Exclusions, Exemptions, and Use Authorizations; Final Rule. **Federal Register**. 49 FR 28172, July 10, 1984 (TSH–FRL–2587–1).
3. EPA. Polychlorinated Biphenyls (PCBs); Exclusions, Exemptions and Use Authorizations; Proposed Rule. **Federal Register**. 48 FR 55076, December 8, 1983 (TSH–FRL–2456–6).
4. EPA. Polychlorinated Biphenyls (PCBs); Reassessment of Use Authorizations; Advance Notice of Proposed Rulemaking (ANPRM). **Federal Register**. 75 FR 17645, April 7, 2010 (FRL–8811–7).
5. EPA. Revision of Certain Federal Water Quality Criteria Applicable to Washington; Final Rule. **Federal Register**. 81 FR. 85417, November 28, 2016 (FRL–9955–40–OW).
6. EPA. Restoring Protective Human Health Criteria in Washington; Final Rule. **Federal Register**. 87 FR 69183, November 18, 2022 (FRL–7253.1–02–OW).
7. Cypris Materials, Inc. Easy to Apply, Tunable Structural Color: Color Without Pigments, Dyes, Metals, or PCBs. (May 31, 2022). Available at *https://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract_id/11249.*
8. Kebotix, Inc. Machine-Learning-Assisted Development of Alternatives to Diarylide Pigments. (May 31, 2022). Available at *https://cfpub.epa.gov/ncer_abstracts/index.cfm/fuseaction/display.abstractDetail/abstract_id/11246/report/F.*
9. Xiaoyu Liu, Michelle R. Mullin, Peter Egeghy, Katherine A. Woodward, Kathleen C. Compton, Brian Nickel, Marcus Aguilar, and Edgar Folk IV. Inadvertently Generated PCBs in Consumer Products: Concentrations, Fate and Transport, and Preliminary Exposure Assessment. Environ. Sci. Technol. 2022, 56, 17, 12228–12236. (August 9, 2022). Available at *https://doi.org/10.1021/acs.est.2c02517.*

Authority: 15 U.S.C. 2601 *et seq.*

Dated: April 4, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–07492 Filed 4–8–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2024–0159; FRL–11684–02–OCSPP]

Certain New Chemicals or Significant New Uses; Statements of Findings for January and February 2024

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Toxic Substances Control Act (TSCA) requires EPA to publish in the **Federal Register** a statement of its findings after its review of certain TSCA submissions when EPA makes a finding that a new chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment. Such statements apply to premanufacture notices (PMNs), microbial commercial

activity notices (MCANs), and significant new use notices (SNUNs) submitted to EPA under TSCA. This document presents statements of findings made by EPA on such submissions during the period from January 1, 2024, to February 29, 2024.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2024–0159, is available online at *https://www.regulations.gov* or in-person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. 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 OPPT Docket is (202) 566–0280. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Rebecca Edelstein, New Chemical Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–1667 email address: *edelstein.rebecca@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action provides information that is directed to the public in general.

B. What action is the Agency taking?

This document lists the statements of findings made by EPA after review of submissions under TSCA section 5(a) that certain new chemical substances or significant new uses are not likely to present an unreasonable risk of injury to health or the environment. This document presents statements of findings made by EPA during the reporting period.

C. What is the Agency's authority for taking this action?

TSCA section 5(a)(3) requires EPA to review a submission under TSCA section 5(a) and make one of several specific findings pertaining to whether the substance may present unreasonable risk of injury to health or the environment. Among those potential findings is that the chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment per TSCA Section 5(a)(3)(C).

TSCA section 5(g) requires EPA to publish in the **Federal Register** a statement of its findings after its review of a submission under TSCA section 5(a) when EPA makes a finding that a new chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment. Such statements apply to PMNs, MCANs, and SNUNs submitted to EPA under TSCA section 5.

Anyone who plans to manufacture (which includes import) a new chemical substance for a non-exempt commercial purpose and any manufacturer or processor wishing to engage in a use of a chemical substance designated by EPA as a significant new use must submit a notice to EPA at least 90 days before commencing manufacture of the new chemical substance or before engaging in the significant new use.

The submitter of a notice to EPA for which EPA has made a finding of ''not likely to present an unreasonable risk of injury to health or the environment'' may commence manufacture of the chemical substance or manufacture or processing for the significant new use notwithstanding any remaining portion of the applicable review period.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

II. Statements of Findings Under TSCA Section 5(a)(3)(C)

In this unit, EPA provides the following information (to the extent that such information is not claimed as Confidential Business Information (CBI)) on the PMNs, MCANs and SNUNs for which, during this period, EPA has made findings under TSCA section 5(a)(3)(C) that the new chemical substances or significant new uses are not likely to present an unreasonable risk of injury to health or the environment:

The following list provides the EPA case number assigned to the TSCA section 5(a) submission and the chemical identity (generic name if the specific name is claimed as CBI).

- P–22–0181, Fatty acids, polymers with polyethylene glycol ether with polyol (Generic Name).

To access EPA's decision document describing the basis of the ''not likely to present an unreasonable risk'' finding made by EPA under TSCA section 5(a)(3)(C), look up the specific case number at *https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/chemicals-determined-not-likely.*

Authority: 15 U.S.C. 2601 *et seq.*

Dated: April 3, 2024.

Shari Z. Barash,

Director, New Chemicals Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2024–07503 Filed 4–8–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Appointment of Board Member to FASAB

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

SUMMARY: Notice is hereby given that Diane Dudley has been appointed to the Federal Accounting Standards Advisory Board (FASAB or ''the Board''). Ms. Dudley's five-year term will begin on July 1, 2024.

ADDRESSES: The news release is available on the FASAB website at *https://www.fasab.gov/news-releases/.* Copies can be obtained by contacting FASAB at (202) 512–7350.

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: April 3, 2024.

Monica R. Valentine,

Executive Director.

[FR Doc. 2024–07515 Filed 4–8–24; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Reappointment of Board Member to FASAB

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

SUMMARY: Notice is hereby given that Mr. Terry Patton has been reappointed to the Federal Accounting Standards Advisory Board (FASAB or ''the

Board''). Mr. Patton's second and final five-year term begins on July 1, 2024, and will conclude on June 30, 2029.

ADDRESSES: The news release is available on the FASAB website at *https://www.fasab.gov/news-releases/*. Copies can be obtained by contacting FASAB at (202) 512–7350.

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: April 3, 2024.

Monica R. Valentine,

Executive Director.

[FR Doc. 2024–07516 Filed 4–8–24; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1215; FR ID 213397]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before June 10, 2024. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1215.

Title: Use of Spectrum Bands Above 24 GHz for Mobile Radio Services.

Form Number: N/A.

Type of Review: Revision of an existing collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents: 478 respondents; 1,846 responses.

Estimated Time per Response: 0.5–10 hours.

Frequency of Response: On occasion reporting requirement; third party disclosure requirement; upon commencement of service, at end of license term, or 2024 for incumbent licensees.

Obligation to Respond: Statutory authority for this collection are contained in sections 1, 2, 3, 4, 5, 7, 10, 201, 225, 227, 301, 302, 302a, 303, 304, 307, 309, 310, 316, 319, 332, and 336 of the Communications Act of 1934, 47 U.S.C. 151, 152, 153, 154, 155, 157, 160, 201, 225, 227, 301, 302, 302a, 303, 304, 307, 309, 310, 316, 319, 332, 336, Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 1302.

Total Annual Burden: 2,574 hours.

Annual Cost Burden: $533,500.

Needs and Uses: The Commission is activating sections 30.104 and 30.107, because existing 28 GHz licensees shall be required to make a performance requirement showing pursuant to section 30.104 by June 16, 2024, and after that date, the obligation to report discontinuance pursuant to section 30.107 will apply. The activation of the rules will change the number of respondents, the annual number of responses, annual burden hours and annual costs under this collection. The other rule sections previously approved under OMB Control Number 3060–1215 have not changed.

§ 30.104, Subpart B—Applications and Licenses—Construction Requirements

(a) UMFUS (Upper Microwave Flexible Use Service) licensees must make a buildout showing as part of their renewal applications. Licensees relying on mobile or point-to-multipoint service must show that they are providing reliable signal coverage and service to at least 40 percent of the population within the service area of the licensee, and that they are using facilities to provide service in that area either to customers or for internal use. Licensees relying on point-to-point service must demonstrate that they have four links operating and providing service, either to customers or for internal use, if the population within the license area is equal to or less than 268,000. If the population within the license area is greater than 268,000, a licensee relying on point-to-point service must demonstrate it has at least one link in operation and is providing service for each 67,000 population within the license area.

(b) Existing 39 GHz licensees shall not be required to make a showing pursuant to this rule and shall be governed by the provisions of § 101.17 of this chapter if the expiration date of their license is prior to March 1, 2021. Showings that rely on a combination of multiple types of service will be evaluated on a case-by-case basis.

(c) If a licensee in this service is also a Fixed-Satellite Service (FSS) licensee and uses the spectrum covered under its UMFUS license in connection with a satellite earth station, it can demonstrate compliance with the requirements of this section by demonstrating that the earth station in question is in service, operational, and using the spectrum associated with the license. This provision can only be used to demonstrate compliance for the county in which the earth station is located.

(d) Failure to meet this requirement will result in automatic cancellation of the license. In bands licensed on a Partial Economic Area basis, licensees will have the option of partitioning a license on a county basis in order to reduce the population within the license area to a level where the licensee's buildout would meet one of the applicable performance metrics.

(e) Existing 28 GHz and 39 GHz licensees shall be required to make a showing pursuant to this rule by June 1, 2024.

§ 30.107, Subpart B—Applications and Licenses—Discontinuance of Service

An Upper Microwave Flexible Use License authorization will automatically terminate, without specific Commission action, if the licensee permanently discontinues service after the initial license term.

(a) For licensees with common carrier regulatory status, permanent discontinuance of service is defined as 180 consecutive days during which a licensee does not provide service to at least one subscriber that is not affiliated with, controlled by, or related to the licensee in the individual license area. For licensees with non-common carrier status, permanent discontinuance of service is defined as 180 consecutive days during which a licensee does not operate.

(b) A licensee that permanently discontinues service as defined in this section must notify the Commission of the discontinuance within 10 days by filing FCC Form 601 or 605 requesting license cancellation. An authorization will automatically terminate, without specific Commission action, if service is permanently discontinued as defined in this section, even if a licensee fails to file the required form requesting license cancellation.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–07551 Filed 4–8–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1147; FR ID 212328]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before May 9, 2024.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–1147.

Title: Wireless E911 Phase II Location Accuracy Requirements (Third Report and Order in PS Docket No. 07–114).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, State, Local or Tribal Government, and Federal Government.

Number of Respondents and Responses: 4,104 respondents; 4,272 responses.

Estimated Time per Response: 1 hour–8 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 151, 154(i), 301, 303(r), and 332 of the Communications Act, as amended.

Total Annual Burden: 30,812 hours.

Total Annual Cost: No cost.

Needs and Uses: The Commission is seeking Office of Management and Budget (OMB) approval for an extension of this information collection and will submit this information collection after this 60-day comment period.

The Commission's *Third Report and Order* in PS Docket No. 07–114 adopted a rule providing that new CMRS network providers meeting the definition of covered CMRS providers in Section 9.10 and deploying new stand-alone networks must meet the handset-based location accuracy standard in delivering emergency calls for Enhanced 911 service. The rule requires that new stand-alone CMRS providers must satisfy the handset-based location accuracy standard at either a county-based or Public Safety Answering Point (PSAP)-based geographic level. Additionally, in accordance with the pre-existing requirements for CMRS providers using handset-based location

technologies, new stand-alone CMRS providers are permitted to exclude up to 15 percent of the counties or PSAP areas they serve due to heavy forestation that limits handset-based technology accuracy in those counties or areas but are required to file a an initial list of the specific counties or portions of counties where they are utilizing their respective exclusions.

A. *Updated Exclusion Reports.* Under this information collection and pursuant to current rule section 9.10(h) new stand-alone CMRS providers and existing CMRS providers that have filed initial exclusion reports are required to file reports informing the Commission of any changes to their exclusion lists within thirty days of discovering such changes. The permitted exclusions properly but narrowly account for the known technical limitations of either the handset-based or network-based location accuracy technologies chosen by a CMRS provider, while ensuring that the public safety community and the public at large are sufficiently informed of these limitations.

B. *Confidence and Uncertainty Data.* Under this information collection and pursuant to current rule section 9.10(h), all CMRS providers and other entities responsible for transporting confidence and uncertainty data between the wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)) must continue to provide confidence and uncertainty data of wireless 911 calls to Public Safety Answering Points (PSAP) on a per call basis upon a PSAP's request. New stand-alone wireless carriers also incur this obligation. The transport of the confidence and uncertainty data is needed to ensure the delivery of accurate location information with E911 service.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–07426 Filed 4–8–24; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1113; FR ID 212430]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before June 10, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–1113.

Title: Election Whether to Participate in the Wireless Emergency Alerts.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents and Responses: 1,253 respondents; 5,176 responses.

Estimated Time per Response: 0.50–12 hours.

Frequency of Response: On occasion and semi-annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection is contained in 47 U.S.C. 151, 152, 154, 301, 303, 307, 309, 403, and 606, of the Communications Act of 1934, as amended, and 1201, 1203, 1204, and 1206 of the Warning Alert and Response Network Acts.

Total Annual Burden: 106,943 hours.

Total Annual Cost: $ 7,050,800.

Needs and Uses: This modification to an existing collection will require all CMS providers to file their election regarding participation in the WEA system by submitting the information to an FCC-created and maintained WEA database that will be accessible to the FCC, FEMA, alerting authorities and the public. This will refresh CMS provider WEA-elections that were last required over a decade ago and provide a single source of information on WEA availability. The modifications proposed herein will also provide WEA messages to be made available by Participating CMS providers in English and the 13 most commonly spoken languages in the U.S., as well as American Sign Language. This will make these alerts available for the first time to the millions of Americans who are not native English speakers and to our hearing impaired population.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–07427 Filed 4–8–24; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[ET Docket No. 19–138; FR ID 212490]

Use of the 5.850–5.925 Band

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Federal Communications Commission (Commission) rejects a Petition for Reconsideration and a Petition for Partial Reconsideration of the *First Report and Order* filed by the Alliance for Automotive Innovation (Auto Innovators) and the 5G Automotive Association (5GAA), respectively. In the *First Report and Order,* the Commission repurposed the 5.850–5.895 GHz portion of the 5.850–5.925 GHz (5.9 GHz) band (lower 45 megahertz) from intelligent transportation system (ITS)

use to provide more flexible unlicensed use, while continuing to dedicate the 5.895–5.925 GHz portion of the 5.9 GHz band (upper 30 megahertz) for vital ITS applications. It also adopted technical and operating rules to minimize the potential for unlicensed operations in the lower 45 megahertz to cause harmful interference to incumbent 5.9 GHz band services—including federal incumbents and ITS operations. Auto Innovators, through its petition, sought reconsideration of the Commission's decision to redesignate the lower 45 megahertz for unlicensed use. 5GAA, through its petition, sought reconsideration of the unlicensed device out-of-band emissions (OOBE) limits into the upper 30 megahertz retained for ITS operations. For the reasons discussed below, the Commission denied the petitions and affirmed the Commission's decision to repurpose spectrum previously designated for ITS services to provide more flexibility for unlicensed device uses to help meet the burgeoning demand for wireless broadband in the United States.

FOR FURTHER INFORMATION CONTACT: Howard Griboff, Office of Engineering and Technology, (202) 418–0657 or Howard *Griboff@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration—Use of the 5.850–5.925 GHz Band, ET Docket No. 19–138; FCC 24–32, adopted March 15, 2024, and released March 18, 2024. The full text of this document is available at: *https://www.fcc.gov/document/fcc-affirms-repurposing-59-ghz-band-between-wi-fi-and-auto-safety.* The full text of this document is also available for public inspection and copying during regular business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format) by sending an email to *FCC504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Procedural Matters

Regulatory Flexibility Act Analysis. In this present Order on Reconsideration, the Commission promulgates no additional final rules. Our present action is, therefore, not an RFA matter.

Paperwork Reduction Act. This Order on Reconsideration does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. Thus, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506 (c)(4).

Congressional Review Act. The Commission will not send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because no rule was adopted or amended.

Synopsis

Background

In 1999, in consultation with the Department of Transportation (DOT), the Commission designated 75 megahertz of spectrum in the 5.9 GHz band for Dedicated Short Range Communications (DSRC) systems in the ITS radio service, setting forth the rules and protocols for the radio systems designed to enable transportation and vehicle safety-related communications. A subsequent order in 2003 established licensing and service rules for DSRC operations. Under the adopted service rules, DSRC licensees shared the 5.9 GHz band with several other services, including amateur radio service and fixed-satellite service (for uplinks) as well as with federal radiolocation service (radar) systems. When the Commission designated the 5.9 GHz band for ITS, it was expected that the band would support widespread deployment of systems that would improve efficiency and promote safety within the nation's transportation infrastructure. However, in the time since the Commission designated the 5.9 GHz band for ITS service, DSRC deployment was minimal. Many automotive safety functions originally contemplated for the 5.9 GHz band over 20 years ago—such as alerting drivers to vehicles or other objects, lane-merging alerts, and emergency braking—are being met in other spectrum bands (*e.g.,* 76–81 GHz) or by other technologies like radar, light detection and ranging (LiDAR), cameras, and other sensors.

Given the technological shift for delivering automotive safety functions and the public interest benefits that would be gained by repurposing spectrum lying fallow, the Commission adopted the *First Report and Order,* wherein it removed the lower 45 megahertz from ITS use and adopted rules expanding unlicensed national information infrastructure (U–NII) operations such as Wi-Fi into that spectrum. The Commission made this decision partially because the DSRC services once contemplated for the 5.9 GHz band had not come to fruition in the 20 years since it allocated the spectrum for the ITS service. It concluded that rather than reserving the entire 75 megahertz of the 5.9 GHz band for vehicle-safety features that can be or are already being provided using other spectrum bands or alternative technology, 30 megahertz would be sufficient for ITS licensees to effectively use the spectrum for vehicle safety-related applications. The Commission found unconvincing claims about future plans for advanced DSRC-based ITS services and indicated that the future ITS services were too uncertain or remote to justify retaining the full 75 megahertz of the 5.9 GHz for ITS. Accordingly, the Commission concluded that reserving the entire 5.9 GHz band for possible additional ITS services would not be the most efficient or effective use of that band, nor in the public interest to continue to do so.

The Commission determined that its action modifying all existing ITS authorizations to transition such operations to only the upper 30 megahertz was well within the Commission's statutory authority under 47 U.S.C. 316, section 316 of the Communications Act of 1934, as amended, consistent with prior Commission practice, and furthers the promotion of the public interest, convenience, and necessity. The Commission found that this modification was manifestly in the public interest because it would make room for additional valuable unlicensed use in the lower 45 megahertz of the band, while allowing existing ITS operations sufficient spectrum to continue to provide substantially the same basic vehicular safety services. The Commission also found that its decision to repurpose the lower 45 megahertz to provide more flexible unlicensed use was not in conflict with any role assigned to it by Congress.

In making the lower 45 megahertz available for more flexible unlicensed use, the Commission found that, when added to U–NII spectrum in the adjacent 5.725–5.850 GHz (denoted as U–NII–3) band, the 45 megahertz of spectrum from the 5.850–5.895 GHz (denoted as U–NII–4) band would provide for increased high-throughput broadband applications in spectrum that is a core component of today's unlicensed ecosystem, thereby providing the American public with the most efficient and effective use of this valuable mid band spectrum. At the same time, the Commission recognized the importance of maintaining some spectrum to

support ITS applications, even though DSRC had sparsely been deployed and failed to become ubiquitously used for the broad range of traffic safety applications that were originally anticipated in the 5.9 GHz band. The Commission designated the upper 30 megahertz to improve automotive safety through ITS applications, and required that, within one year of the effective date of the First Report and Order, ITS licensees must cease operations on channels in the lower 45 megahertz and move to channels in the upper 30 megahertz. To help enhance the roll-out of ITS services and promote the most efficient and effective use of this ITS spectrum, the Commission updated the associated service rules for vehicular communications in the upper 30 megahertz to transition from the original DSRC protocol adopted in 1999 to a wireless technology-based protocol known as Cellular Vehicle-To-Everything (C–V2X), at the end of a transition period to be determined through the record generated by the FNPRM in this proceeding.

To protect incumbent 5.9 GHz band services, including federal incumbents and ITS operations, from potential harmful interference by unlicensed operations, the Commission imposed stringent power limits and operating requirements on unlicensed devices (*i.e.,* access points, subordinate devices, and client devices) operating in the lower 45 megahertz, restricting unlicensed use of the lower 45 megahertz to indoor locations. In addition, to protect the ITS operations during and after their transition to the upper 30 megahertz, the Commission set OOBE limits allowed in the upper 30 megahertz for indoor unlicensed operations in the lower 45 megahertz based on, but not identical to, the previously-affirmed OOBE limits for unlicensed operations in the 5.725–5.850 GHz (U–NII–3) band. Since the Commission restricted unlicensed use of the lower 45 megahertz to indoor use only, the Commission took advantage of building attenuation, as well as other factors such as path loss, to increase the OOBE limits allowed in the upper 30 megahertz from the indoor unlicensed operations by an additional 20 dB as compared to the 5.725–5.850 GHz (U–NII–3) band OOBE limits. The Commission found these OOBE limits from indoor unlicensed operations mirror the OOBE limits for unlicensed operations in the 5.725–5.850 GHz (U–NII–3) band after accounting for building attenuation. The Commission also permitted a root mean square (RMS) detector, instead of requiring a peak detector, to be used to conduct all 5.9 GHz band unlicensed device OOBE measurements. The Commission found that RMS measurement is more appropriate for ensuring that the potential for U–NII devices to cause harmful interference to adjacent-band operations is minimized because RMS measurements represent the continuous power being generated from a device, as opposed to peak power, which may only be reached occasionally and for short periods of time.

Discussion

In response to the *First Report and Order,* Auto Innovators and 5GAA filed petitions for reconsideration on June 2, 2021. 86 FR 37982 (July 19, 2021) (corrected notice). In its Petition for Reconsideration, Auto Innovators asks the Commission to reconsider its designation of the lower 45 megahertz for unlicensed uses and restore that portion of the 5.9 GHz band for ITS. In its Petition for Partial Reconsideration, 5GAA asks the Commission to reduce the OOBE limits permitted in the upper 30 megahertz designated for ITS services from indoor unlicensed access points, subordinate devices, and client devices operating in the lower 45 megahertz. The Petitions for Reconsideration were collectively denied in this Order on Reconsideration.

While the reconsideration process remained pending, the Intelligent Transportation Society of America (ITS America) and the American Association of State Highway and Transportation Officials (AASHTO) petitioned the United States Court of Appeals for the D.C. Circuit to vacate the part of the *First Report and Order* repurposing the lower 45 megahertz for unlicensed operations. The Amateur Radio Emergency Data Network (AREDN) filed a separate petition asking the court to vacate the entire *First Report and Order.* As discussed below, many of the arguments presented by the reconsiderations petitioners overlap with the court petitioners' arguments. In *ITS America* v. *FCC,* the D.C. Circuit rejected each of those arguments and affirmed the Commission's decisions in the *First Report and Order.* 45 F.4th 406 (D.C. Cir. 2022).

Redesignation of the 5.850–5.895 Band for Unlicensed Use

In its Petition for Reconsideration, Auto Innovators asks the Commission to reconsider its decision to redesignate the lower 45 megahertz for unlicensed uses and to restore the lower 45 megahertz block to the ITS service. Auto Innovators contends the Commission exceeded its legal authority in issuing the First Report and Order ''over the objection of DOT [the Department of Transportation] . . . , particularly in light of Congress's grant of authority to DOT to administer a nationwide ITS program.'' Auto Innovators argues in the alternative that the First Report and Order merits reconsideration because the DOT and Congressional interests under the Biden Administration continue to express support for maintaining the entire 5.9 GHz band for automotive safety applications, as they did under the previous administration. Auto Innovators also claims that the entire 75 megahertz of the 5.9 GHz band is needed to facilitate the future of transportation (*e.g.,* automated driving, 5G technologies, advanced vehicle to everything (V2X) applications).

In *ITS America* v. *FCC,* the D.C. Circuit considered each of these arguments in upholding the Commission's First Report and Order. First, the court rejected the arguments that the Commission exceeded its legal authority by repurposing the lower 45 megahertz for unlicensed use. The court recognized that allocating spectrum among competing needs ''is a difficult, highly technical task,'' that ''figuring out how much of the spectrum is needed to support a particular activity is exactly what the FCC does,'' and that ''the FCC is entitled to great deference when predicting the likelihood of [future] developments.'' As the court explained, the 1998 Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, ''did not transfer away from the FCC its broad authority to manage the spectrum related to [ITS],'' but instead ''simply required the FCC to account for the [DOT]'s views and the needs of [ITS] when it does so,'' which is what the Commission did.

Second, the court rejected the argument that the change in administration requires the Commission to revisit its decision. Specifically, the court stated that ''the Department of Transportation's concerns with the FCC's order are no longer espoused by the Executive Branch'' and in fact, ''through the Department of Justice, the Executive Branch—which of course includes the Department of Transportation—joined the FCC's brief defending the FCC's order.'' Finally, the court also upheld the Commission's conclusion that retaining the upper 30 megahertz for ITS will be adequate to serve transportation safety needs. It agreed with the Commission that ''other [non-5.9 GHz] technologies have alleviated the need for all 75 megahertz of the [5.9 GHz band] to remain dedicated to [ITS].'' In addition, the

court refused to require the Commission to hold additional spectrum in reserve for ''yet-to-arrive technologies'' that the Commission found ''too uncertain and remote to warrant the further reservation of spectrum.'' The Commission affirms its decision to repurpose the lower 45 megahertz for the reasons discussed in the *First Report and Order,* including the cost-benefit analysis therein, because nothing in the petition by Auto Innovators persuades us otherwise. Moreover, the D.C. Circuit Court's decision makes clear that the decision to repurpose that spectrum was well within the Commission's authority.

Out-of-Band Emissions Limits Permitted in the 5.895–5.925 GHz Band From Unlicensed Operations in the 5.850–5.895 GHz Band

In its Petition for Partial Reconsideration, 5GAA asks the Commission to reconsider ''the unwanted emission limits permitted from new indoor unlicensed access points and client devices operating in the [lower 45 megahertz]'' to better protect ITS operations in the upper 30 megahertz. Specifically, 5GAA asks the Commission to protect ITS operating in the upper 30 megahertz by ''afford[ing] C–V2X an additional 20 dB of protection from these [5.850–5.895 GHz] U–NII–4 emissions.'' 5GAA objects to the Commission's decision to base the OOBE limits for unlicensed devices operating in the 5.850–5.895 GHz (U–NII–4) band on the existing OOBE limits for unlicensed devices in the 5.725–5.850 GHz (U–NII–3) band, as ''the technical realities of [5.850–5.895 GHz] U–NII–4 operations necessitate greater protection levels than afforded from [5.725–5.850 GHz] U–NII–3 operations.'' 5GAA rejects the Commission's assumption of 20 dB building attenuation loss for all indoor access points, contending that ''[w]hile many unlicensed access points will experience some building attenuation loss, a 20 dB loss cannot be assumed in every instance.'' Further, 5GAA claims the Commission's choice of RMS measurement, rather than peak measurement, results in an additional 10–20 dB of unwanted emissions into the C–V2X frequencies. 5GAA concludes that, combined, these decisions permit an unwanted emission limit into the upper 30 megahertz that is 30–40 dB more relaxed than the 5.725–5.850 GHz (U–NII–3) band limit. 5GAA asserts that its suggestion to reduce the allowed 5.850–5.895 GHz (U–NII–4) band OOBE limits by 20 dB ''would provide necessary protection for critical safety services'' in the upper 30 megahertz, while ''still provid[ing] for robust indoor unlicensed operations.''

5GAA also contends that the Commission's choice of acceptable 5.850–5.895 GHz (U–NII–4) band OOBE limits based on the existing OOBE limits for unlicensed devices in the 5.725–5.850 GHz (U–NII–3) band is arbitrary and capricious as it fails to satisfy the Administrative Procedure Act (5 U.S.C. 551–559) obligation to fully consider the relevant facts underlying its assumptions and articulate a reasoned explanation to support its decision. 5GAA argues that C–V2X will have a ''much more robust deployment'' than the ''thinly deployed'' DSRC, while the ''heavy use of the [5.850–5.895 GHz] U–NII–4 band will result in longer sustained periods of interference'' to the upper 30 megahertz. Therefore, 5GAA claims that the more extensive C–V2X operations warrant greater protections than those provided from 5.725–5.850 GHz (U–NII–3) band operations. 5GAA also contends that the Commission's choice of the RMS measurement standard is arbitrary and capricious because the First Report and Order offers ''no meaningful analysis of whether C–V2X operations will be able to tolerate the additional unwanted emissions that the RMS measurement approach will permit.'' 5GAA further states that the Commission does not explain why the RMS measurement technique approved to evaluate the indoor unlicensed operations' OOBE levels ''is more suitable for assessing the impact of unwanted emissions on C–V2X services'' than the peak measurement approach.

In its Petition, 5GAA incorporates by reference a study submitted with its comments on the FNPRM, referred to here as ''5GAA's Coexistence Analysis.'' 5GAA claims this study demonstrates the Commission's OOBE limits adopted in the First Report and Order are detrimental to C–V2X, *i.e.,* that the adopted OOBE levels for unlicensed operations ''significantly reduce C–V2X's communications range by more than 50% when compared against 5GAA's preferred approach.'' 5GAA argues that ''permitting excessive unwanted emissions could raise concerns about the viability of safety services in the [upper 30 megahertz], delaying or even denying the network effects policymakers and transportation stakeholders hope and expect to achieve.''

5GAA's Coexistence Analysis does not convince us to reconsider the OOBE limits decision for indoor unlicensed operations adopted in the First Report and Order. First, 5GAA's Coexistence Analysis assumes an average activity factor (also known as duty cycle) of 2 percent for the percentage of time when an individual indoor unlicensed device is transmitting in the lower 45 megahertz, *i.e.,* adjacent to the lower edge of the upper 30 megahertz. In contrast, in the 6 GHz First Report and Order (89 FR 874) (expanding unlicensed operations in 6 GHz U–NII bands, *i.e.,* adjacent to the upper edge of the upper 30 megahertz), the Commission assessed the potential for Low Power Indoor unlicensed devices operating in the 6 GHz U–NII bands to cause harmful interference and determined that the appropriate activity factor per unlicensed device is only 0.4%. That activity factor was based on measurement data for 5 GHz U–NII routers. Therefore, unlicensed 5.850–5.895 GHz (U–NII–4) band devices operating in the lower 45 megahertz can be assumed to operate with that same activity factor in determining 5.850–5.895 GHz (U–NII–4) devices' potential to cause harmful interference to ITS operations in the upper 30 megahertz. Thus, 5GAA's assumption leads to approximately 7 dB over-estimation in the average duty cycle power per unlicensed device's transmissions over time.

Second, 5GAA's Coexistence Analysis uses a relatively low 20 dBm (100 mW) on-board unit (OBU) transmit power, where under our current rules, it could have used a higher OBU transmit power limit as currently permitted in the 47 CFR 95.3189 OBU technical standards. Section 95.3189 (47 CFR 95.3189) currently requires compliance with the Institute of Electrical and Electronics Engineers (IEEE) 802.11p–2010 standard: Amendment 6: Wireless Access in Vehicular Environments. Under the IEEE standard, OBUs operated by entities other than state and local governments are allowed up to 33 dBm EIRP, *i.e.,* 20 times as strong as 5GAA used in the Coexistence Study. By using 20 dBm in its analysis, 5GAA artificially sets the OBU EIRP at a level that significantly increases the potential for 5.850–5.895 GHz (U–NII–4) band OOBE to cause harmful interference to ITS operations in the upper 30 megahertz.

5GAA's claims that while ''there may be 20 dB [of building] attenuation in some cases, [ ] there exist other situations where very little attenuation would lead to harmful interference to C–V2X operations'' do not persuade us to reconsider the OOBE limits adopted in the First Report and Order. 5GAA concedes that 20 dB of building attenuation as compared to the 5.725–5.850 GHz (U–NII–3) OOBE limits is appropriate ''in some cases.'' 5GAA

does not take into account other factors the Commission considered that would accommodate cases with less building attenuation, such as the path loss due to the separation distance between indoor unlicensed devices and C–V2X receivers. 5GAA's Coexistence Analysis also fails to adequately consider the reduction in antenna gain caused by the directionality of C–V2X receiving antennas. 5GAA assumes the randomness of peaks and nulls in the real antenna gain patterns of both unlicensed devices and C–V2X devices to have a zero dB average. However, C–V2X antennas are typically horizontal in nature in front of and behind vehicles and positioned to maximize coverage along road surfaces. This orientation generally will provide some measure of isolation between unlicensed devices' transmissions and OBU receivers and help reduce unlicensed devices' OOBE levels received by a C–V2X device in the upper 30 megahertz. Because the antenna patterns and coverage requirements differ between unlicensed and C–V2X operations, the assumption of a zero dB average gain is incorrect. C–V2X transmissions received by an OBU from other OBUs is more likely to occur in or near the main lobe of the OBU receiving antenna, which will result in a higher average gain for the reception of C–V2X transmissions than the zero dB average assumed in 5GAA's Coexistence Analysis. In sum, building attenuation, coupled with attenuation due to path loss and the C–V2X OBU receiving antenna angular discrimination, sufficiently support the Commission's decision that its adopted 5.850–5.895 GHz (U–NII–4) band OOBE limits that fall in the upper 30 megahertz will not cause harmful interference to C–V2X operations.

5GAA notes that in *Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U–NII) Devices in the 5 GHz Band,* Memorandum Opinion and Order, 81 FR 19896 (2016), the Commission adopted relaxed OOBE limits for 5.725–5.850 GHz (U–NII–3) band (which form the basis of the 5.850–5.895 GHz (U–NII–4) band OOBE limits adopted in the First Report and Order) to accommodate unlicensed fixed point-to-point antennas in that band; since 5.850–5.895 GHz (U–NII–4) indoor unlicensed access points do not use such antennas, the Commission should not have established even more relaxed 5.850–5.895 GHz (U–NII–4) band OOBE limits than those for 5.725–5.850 GHz (U–NII–3). However, in 2016, the Commission chose to provide ''a single, consistent OOBE requirement for all equipment'' that operates in the 5.725–5.850 GHz (U–NII–3) band rather than ''apply different OOBE requirements based on a variety of situations.'' As such, 5GAA's distinction between types of unlicensed equipment in this case is inapplicable and thus, the Commission's decision to base OOBE limits for the 5.850–5.895 GHz (U–NII–4) band equipment on the OOBE limits for the 5.725–5.850 GHz (U–NII–3) band was appropriate.

The Commission disagrees with 5GAA's assertion that RMS measurement of unlicensed devices' OOBE power, as opposed to peak measurement, permits more power from these OOBE in the adjacent band, resulting in the receipt of an additional 10–20 dB of unwanted OOBE on the C–V2X frequencies in the upper 30 megahertz. Measurements of infrequent worst-case peak OOBE of short duration are not an accurate or realistic assessment of the potential for a device to cause harmful interference. As the Commission explained in the First Report and Order, instances of peak OOBE power in an unlicensed device's transmitted signal only occur occasionally and are of limited duration; RMS measurement of OOBE will provide a more accurate assessment of an unlicensed device's potential to cause harmful interference because RMS measurements represent the continuous power being generated from a device.

The Commission also disagrees with 5GAA's assertion that the Commission ''traditionally'' uses a peak measurement for assessing 5 GHz U–NII OOBE. As a general rule, the Commission establishes OOBE measurement procedures based on the technical and operational characteristics of the equipment operating in the specific band under consideration and the design characteristics of equipment used in adjacent-bands. Peak measurements may be required when the Commission determines that peak emissions would have significant interference effects, as was the case for compliance testing of 5.725–5.850 GHz (U–NII–3) band devices' unwanted emissions to protect federal terminal Doppler weather radars in the 5.470–5.725 GHz (denoted as U–NII–2C) band. In contrast, in the 6 GHz Order, the Commission adopted OOBE levels based on RMS measurement (as well as other appropriate techniques for measuring average power) to protect ITS operations in the 5.9 GHz band from the OOBE of unlicensed operations in the adjacent 5.925–6.425 GHz (denoted as U–NII–5) band. Compliance testing of 5.850–5.895 GHz (U–NII–4) band devices' unwanted emissions to protect ITS operations above the 5.850–5.895 GHz (U–NII–4) band is comparable to compliance testing of 5.925–6.425 GHz (U–NII–5) band devices' unwanted emissions to protect ITS operations below the 5.925–6.425 GHz (U–NII–5) band, and thus, RMS detection is appropriate in the case of measuring 5.850–5.895 GHz (U–NII–4) band OOBE levels. Moreover, allowing the flexible RMS measurement technique will help promote shared spectrum technologies and drive greater productivity and efficiency in spectrum usage.

Accounting for the above-noted weaknesses in 5GAA's Coexistence Analysis, as well as considering the restriction on unlicensed use of the lower 45 megahertz to indoor locations and the requirement for RMS measurements for analyzing the potential impact of the adopted unlicensed device OOBE limits, the Commission concludes that the indoor unlicensed device OOBE limits the Commission adopted in the First Report and Order will sufficiently protect C–V2X communications in the upper 30 megahertz from harmful interference. Consequently, the Commission would not expect that C–V2X operations will experience reduced communications range from unlicensed OOBE falling within the ITS band.

In response to 5GAA's claim that the Commission's choices of acceptable OOBE limits and RMS measurement of OOBE levels are arbitrary and capricious, the Commission notes that in *ITS America* v. *FCC,* the U.S. Court of Appeals for the District of Columbia Circuit determined that the Commission was not acting arbitrarily and capriciously when it implemented ''restrictions on unlicensed devices using the lower 45 megahertz—such as emissions limits and indoor-use-only rules—to keep those devices from interfering with intelligent transportation systems in the upper 30 megahertz.'' The court reiterated its inclination to ''uphold the Commission if it makes a technical judgment that is supported with even a modicum of reasoned analysis, absent highly persuasive evidence to the contrary.'' The Commission has explained in detail its technical judgment that the adopted restrictions will minimize the potential for harmful interference to the extent appropriate in this context and 5GAA has not provided highly persuasive evidence to refute the Commission's judgment. 5GAA's argument that the Commission was arbitrary and capricious by not increasing OOBE protections of C–V2X in anticipation of possible heavier uses of both the lower 45 megahertz by unlicensed operations

and the upper 30 megahertz via C–V2X deployment is speculative and similarly fails. Therefore, the Commission rejects 5GAA's claim that the Commission's decisions regarding protecting ITS operations in the upper 30 megahertz from unlicensed devices' OOBE are arbitrary and capricious, and the Commission declines to reconsider the indoor unlicensed device OOBE limits adopted in the First Report and Order.

Ordering Clauses

Accordingly, *it is ordered* that pursuant to 47 CFR 1.429, the Petition for Reconsideration filed on June 2, 2021 by Auto Innovators and the Petition for Partial Reconsideration filed on June 2, 2021 by 5GAA *are denied.*

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2024–07428 Filed 4–8–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS24–09]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council

ACTION: Notice of Special Closed Meeting.

Description: In accordance with Section 1104(b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a Special Closed Meeting on this date.

Location: Virtual meeting via Webex.

Date: April 3, 2024.

Time: 10:55 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter pursuant to section 1104(b) of Title XI (12 U.S.C. 3333(b)). No action was taken by the ASC.

James R. Park,

Executive Director.

[FR Doc. 2024–07472 Filed 4–8–24; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL RESERVE SYSTEM

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

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

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

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than April 24, 2024.

A. Federal Reserve Bank of Minneapolis (Stephanie Weber, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291. Comments may also be sent electronically to *MA@mpls.frb.org:*

1. *Frederick C. Lewis II, Duluth, Minnesota;* to retain voting shares of North Shore Financial Corporation and thereby indirectly retain voting shares of North Shore Bank of Commerce, both of Duluth, Minnesota.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–07506 Filed 4–8–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

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

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

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

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than May 9, 2024.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments may also be submitted at *Applications.Comments@atl.frb.org:*

1. *Volunteer State Bancshares, Inc., Portland, Tennessee;* to merge with Fourth Capital Holdings, Inc., and therefore indirectly acquire Fourth Capital Bank, both of Nashville, Tennessee.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–07504 Filed 4–8–24; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–IE–2024–03; Docket No. 2024–0001; Sequence No. 9]

Privacy Act of 1974; Rescindment of a System of Records

AGENCY: Office of the Chief Privacy Officer; General Services Administration, (GSA).

ACTION: Rescindment of a system of records notice.

SUMMARY: Pursuant to the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A–108, notice is hereby given that the GSA proposes to rescind the GSA/Transit–1, Transportation Benefits Records, System of Records Notice (SORN). This system of records contains information entered by GSA and provides transportation fringe benefits to employees who use mass transportation to commute to and from work.

DATES: Effective immediately.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal, *http://www.regulations.gov.* Submit comments by searching for Notice–IE–2024–03, GSA/Transit–1.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, Chief Privacy Officer at 202–969–5830 and *gsa.privacyact@gsa.gov.*

SUPPLEMENTARY INFORMATION: GSA proposes to rescind a System of Records, GSA/Transit–1. This Notice is being rescinded due to the records of GSA/Transit–1 being maintained under DOT/ALL–8, Parking and Transit Benefit System, managed by the Department of Transportation (DOT). The records under GSA/Transit–1 were transitioned to the DOT in 2017 and are now being maintained under DOT/ALL–8.

SYSTEM NAME AND NUMBER:

Transportation Benefits Records, GSA/TRANSIT–1.

HISTORY:

A SORN was previously published in the **Federal Register** at 76 FR 56762 on October 14, 2011.

Richard Speidel,

Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.

[FR Doc. 2024–07430 Filed 4–8–24; 8:45 am]

BILLING CODE 6820–AB–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–1569]

Determination That NALFON (Fenoprofen Calcium) Oral Capsules, Equivalent to 300 Milligram Base, and Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs that refer to the products as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Stacy Kane, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6236, Silver Spring, MD 20993–0002, 301–796–8363, *Stacy.Kane@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, a drug is removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) before an ANDA that refers to that listed drug may be approved, (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved, and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for safety or effectiveness reasons, the Agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in the table are no longer being marketed.

Application No.	Drug name	Active ingredient(s)	Strength(s)	Dosage form/route	Applicant
NDA 017604	NALFON	Fenoprofen Calcium	Equivalent to (EQ) 300 Milligrams (mg) Base.	Capsule; Oral	Xspire Pharma.
NDA 017087	ETHRANE	Enflurane	99.9%	Liquid; Inhalation	Baxter Healthcare Corp.
NDA 018801	STERILE WATER FOR INJECTION.	Sterile Water For Injection	100% (1 Milliliter (mL)); 100% (5.2 mL).	Liquid; N/A	Hospira, A Pfizer Company.
NDA 019152	CALAN SR	Verapamil Hydrochloride	120 mg; 180 mg, 240 mg	Tablet, Extended Release; Oral.	Pfizer Inc.
NDA 019885	ACCUPRIL	Quinapril Hydrochloride	EQ 5 mg Base; EQ 10 mg Base; EQ 20 mg Base; EQ 40 mg Base.	Tablet; Oral	Pfizer Pharmaceuticals Ltd.

Application No.	Drug name	Active ingredient(s)	Strength(s)	Dosage form/route	Applicant
NDA 019941	EMLA	Lidocaine; Prilocaine	2.5%; 2.5%	Cream; Topical	Teva Branded Pharmaceutical Products R & D Inc.
NDA 020105	TRIOSTAT	Liothyronine Sodium	EQ 0.01 mg Base/mL	Injectable; Injection	Par Sterile Products, LLC.
NDA 020125	ACCURETIC	Hydrochlorothiazide; Quinapril Hydrochloride.	12.5 mg, EQ 10 mg Base; 12.5 mg, EQ 20 mg Base; 25 mg, EQ 20 mg Base.	Tablet; Oral	Pfizer Pharmaceuticals Ltd.
NDA 020406	PREVACID	Lansoprazole	15 mg	Capsule, Delayed Release Pellets; Oral.	Takeda Pharmaceuticals USA, Inc.
NDA 020666	ALBENZA	Albendazole	200 mg	Tablet; Oral	Impax Laboratories Inc.
NDA 020723	ALDARA	Imiquimod	5%	Cream; Topical	Bausch Health US LLC.
NDA 020972	SUSTIVA	Efavirenz	50 mg; 200 mg	Capsule; Oral	Bristol Myers Squibb Co.
NDA 021009	ALOCRIL	Nedocromil Sodium	2%	Solution/Drops; Ophthalmic.	Allergan Inc.
NDA 021526	RANEXA	Ranolazine	500 mg; 1 g	Tablet, Extended Release; Oral.	Menarini International Operations Luxembourg SA.
NDA 021565	ELESTAT	Epinastine Hydrochloride	0.05%	Solution/Drops; Ophthalmic.	Allergan Inc.
NDA 021775	ENTEREG	Alvimopan	12 mg	Capsule; Oral	Cubist Pharmaceuticals, Inc.
NDA 021790	DACOGEN	Decitabine	50 mg/Vial	Injectable; Intravenous	Otsuka Pharmaceutical Co., Ltd.
NDA 050095	CAPASTAT SULFATE	Capreomycin Sulfate	EQ 1 g Base/Vial	Injectable; Injection	Epic Pharma, LLC.
NDA 050795	DORYX	Doxycycline Hyclate	EQ 50 mg Base; EQ 100 mg Base; EQ 120 mg Base.	Tablet, Delayed Release; Oral.	Mayne Pharma International Pty Ltd.
NDA 050801	EVOCLIN	Clindamycin Phosphate	1%	Aerosol, Foam; Topical	Mylan Pharmaceuticals Inc.
NDA 200179	STAXYN	Vardenafil Hydrochloride	10 mg	Tablet, Orally Disintegrating; Oral.	Bayer Healthcare Pharmaceuticals Inc.
NDA 202515	MORPHINE SULFATE	Morphine Sulfate	15 mg/mL	Injectable; Injection	Hospira, A Pfizer Company.
NDA 203667	MINASTRIN 24 FE	Ethinyl Estradiol; Norethindrone Acetate.	0.02mg, 1mg	Tablet; Oral	Allergan Pharmaceuticals International, Ltd.
NDA 210854	XOFLUZA	Baloxavir Marboxil	20 mg	Tablet; Oral	Genentech, Inc.

FDA has reviewed its records and, under § 314.161, has determined that the drug products listed were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the Agency will continue to list the drug products in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the drug products listed are unaffected by the discontinued marketing of the products subject to these applications. Additional ANDAs that refer to these products may also be approved by the Agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: April 4, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–07494 Filed 4–8–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–1875]

Financial Transparency and Efficiency of the Prescription Drug User Fee Act, Biosimilar User Fee Act, and Generic Drug User Fee Amendments; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the following public meeting entitled ''Financial Transparency and Efficiency of the Prescription Drug User Fee Act, Biosimilar User Fee Act, and Generic Drug User Fee Amendments.'' The topic to be discussed is the financial transparency and efficiency of the Prescription Drug User Fee Act, Biosimilar User Fee Act, and Generic Drug User Fee Amendments.

DATES: The public meeting will be held on June 6, 2024, from 9:30 a.m. to 10:40 a.m. via ZoomGov. Either electronic or written comments on this public meeting must be submitted by July 6, 2024. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public meeting will be held virtually due to extenuating circumstances.

You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 6, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or

confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–1875 for ''Financial Transparency and Efficiency of the Prescription Drug User Fee Act, Biosimilar User Fee Act, and Generic Drug User Fee Amendments; Public Meeting; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Kichelle Joseph, Office of Finance, Budget, Acquisitions, and Planning, Food and Drug Administration, 4041 Powder Mill Rd., Rm. 72064, Beltsville, MD 20705, 301–796–7251, *OFBAPBusinessManagementServices@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The meeting will include presentations from FDA on the 5-year plan for the Prescription Drug User Fee Act (PDUFA) VII, Biosimilar User Fee Act (BsUFA) III, and Generic Drug User Fee Amendments (GDUFA) III; and the Agency's progress in implementing resource capacity planning as part of fee setting and modernized time reporting. This meeting is intended to satisfy FDA's commitment to host an annual public meeting in the third quarter of each fiscal year and can be found in the Commitment Letters listed below (sections II.B.2 of PDUFA VII (p. 58), III.B.2 of BsUFA III (p. 33), and VIII.D.3 of GDUFA III (p.40–41)).

PDUFA VII, BsUFA III, and GDUFA III represent the reauthorization of these user fee programs for FYs 2023–2027 as part of the FDA User Fee Reauthorization Act of 2022, which was signed by the President on September 30, 2022. The complete set of performance goals for each program are available at:

- *PDUFA VII: https://www.fda.gov/media/151712/download*
- *BsUFA III: https://www.fda.gov/media/152279/download*
- *GDUFA III: https://www.fda.gov/media/153631/download*

Each of these user fee programs' Commitment Letters included a set of commitments related to financial management. These included commitments to publish a 5-year financial plan and update that plan annually, continue activities to mature FDA's resource capacity planning capability, and modernize time reporting practices. In addition, each user fee program includes a commitment to host a public meeting in the third quarter of each fiscal year to discuss specific topics.

II. Topics for Discussion at the Public Meeting

This meeting will provide FDA with the opportunity to update interested public stakeholders on topics related to the financial management of PDUFA VII, BsUFA III, and GDUFA III. These topics include the 5-year financial plans for each of these programs and FDA's progress toward implementing resource capacity planning as part of fee setting and modernized time reporting.

III. Participating in the Public Meeting

Registration: To register for the public meeting, please visit the following website: *https://fda.zoomgov.com/webinar/register/WN_RyzDcgPYQ8uJT9TWfgyPOw.* Please provide complete contact information for each attendee, including name, title, affiliation, and email.

Persons interested in attending this public meeting must register by June 3, 2024, at 11:59 p.m. Eastern Time. If registration closes before the day of the public meeting, the Webinar Registration website will be updated.

If you need special accommodations due to a disability, please indicate this during registration or contact Kichelle Joseph at *OFBAPBusinessManagementServices@fda.hhs.gov* no later than June 3, 2024.

Streaming Webcast of the Public Meeting: This public meeting will be webcast. To register for the public meeting and obtain the webcast information, please visit the following website: *https://fda.zoomgov.com/webinar/register/WN_RyzDcgPYQ8uJT9TWfgyPOw.*

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov.* It may also be viewed at the Dockets Management Staff (see **ADDRESSES**).

Dated: April 4, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–07493 Filed 4–8–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–5925]

21st Century Cures Act: Annual Compilation of Notices of Updates From the Susceptibility Test Interpretive Criteria Web Page; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of the Agency's annual compilation of notices of updates to the Agency's Susceptibility Test Interpretive Criteria web page. The Agency established the Susceptibility Test Interpretive Criteria web page on December 13, 2017, and since establishment has provided updates to both the format of the web pages and the susceptibility test interpretive criteria identified and recognized by FDA on the web pages. FDA is publishing this notice in accordance with procedures established by the 21st Century Cures Act (Cures Act).

DATES: This notice is published in the **Federal Register** on April 9, 2024.

ADDRESSES: You may submit either electronic or written comments and information as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed below (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2017–N–5925 for ''Susceptibility Test Interpretive Criteria Recognized and Listed on the Susceptibility Test Interpretive Web Page; Request for Comments.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Deborah (Wang) Kim, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6349, Silver Spring, MD 20993–0002, 301–796–9053, *Deborah.Wang@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 511A of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360a–2), as added by section 3044 of the Cures Act (Pub. L. 114–255), was signed into law on December 13, 2016. This provision clarified FDA's authority to identify and efficiently update susceptibility test interpretive criteria, including through the recognition by FDA of standards established by standards development organizations (SDOs). It also clarified that sponsors of antimicrobial susceptibility testing devices may rely upon listed susceptibility test interpretive criteria to support premarket authorization of their devices, provided they meet certain conditions, which allows for a more streamlined process for incorporating up-to-date information into such devices.

In the **Federal Register** notice of December 13, 2017 (82 FR 58617), FDA announced the establishment of the Susceptibility Test Interpretive Criteria web page. This web page recognizes susceptibility test interpretive criteria established by an SDO that fulfills the requirements under section 511A(b)(2)(A) of the FD&C Act; identifies when FDA does not recognize, in whole or in part, susceptibility test interpretive criteria established by an SDO; and lists susceptibility test interpretive criteria identified by FDA outside the SDO process. The susceptibility test interpretive criteria listed by FDA on the Susceptibility Test Interpretive Criteria web page is deemed to be recognized as a standard under section 514(c)(1) of the FD&C Act (21 U.S.C. 360d(c)(1)). The Susceptibility Test Interpretive Criteria web page can be found at *https://www.fda.gov/STIC.*

On March 1, 2018, FDA published a notice in the **Federal Register** (83 FR 8883) requesting comments on FDA's initial susceptibility test interpretive criteria recognition and listing determinations on the Susceptibility Test Interpretive Criteria web page (*https://www.federalregister.gov/documents/2018/03/01/2018-04175/susceptibility-test-interpretive-criteria-recognized-and-listed-on-the-susceptibility-test*). FDA may consider information provided by interested third parties as a basis for evaluating new or updated interpretive criteria standards (section 511A(c)(2)(B) of the FD&C Act); third parties should submit any information they wish to convey to the Agency to Docket No. FDA–2017–N–5925. If comments are received, FDA will review those comments and will make, as appropriate, updates to the recognized standards or susceptibility test interpretive criteria.

At least every 6 months after the establishment of the Susceptibility Test Interpretive Criteria web page, FDA is required, as appropriate to: (1) publish on that web page a notice recognizing new or updated susceptibility test interpretive criteria standards, or recognizing or declining to recognize parts of standards; (2) withdraw recognition of susceptibility test interpretive criteria standards, or parts of standards; and (3) make any other necessary updates to the lists published on the Susceptibility Test Interpretive Criteria web page (section 511A(c)(1)(A) of the FD&C Act). FDA has provided notices of updates on the Susceptibility Test Interpretive Criteria web page, which can be found here: *https://www.fda.gov/drugs/development-resources/notice-updates.* Interested parties may also sign up to receive emails informing them of these updates as they occur by using the link provided either on the main Susceptibility Test Interpretive Criteria web page (*https://www.fda.gov/STIC*) or on the updates page.

Once a year, FDA is required to compile the new notices published on the Susceptibility Test Interpretive Criteria web page, publish them in the **Federal Register**, and provide for public comment (see section 511A(c)(3) of the FD&C Act). This **Federal Register** notice satisfies that requirement. If comments are received, FDA will review them and make updates to the recognized standards or susceptibility test interpretive criteria as needed.

II. Annual Compilation of Notices, 2023: Susceptibility Test Interpretive Criteria Web Page

A. Updates to Standards Recognition

As of April 21, 2023, the following standards are no longer recognized: ''Clinical and Laboratory Standards Institute (CLSI). Performance Standards for Antimicrobial Susceptibility Testing. 32nd ed. CLSI supplement M100. Wayne, PA: Clinical and Laboratory Standards Institute; 2022.''

As of April 21, 2023, with certain exceptions, FDA recognizes the standards published in: ''Clinical and Laboratory Standards Institute (CLSI). Performance Standards for Antimicrobial Susceptibility Testing. 33rd ed. CLSI supplement M100. Wayne, PA: Clinical and Laboratory Standards Institute; 2023.''

B. Updates by Drug

TABLE 1—NOTICES OF UPDATES TO RECOGNIZED OR UPDATED SUSCEPTIBILITY TEST INTERPRETIVE CRITERIA (STIC) BY DRUG [1]

Drug	Route of administration	Action taken	Therapeutic category	Date
Amikacin	Injection	FDA does not recognize M100 standard (MIC and disk diffusion) for Enterobacterales and *Pseudomonas aeruginosa*.	Antibacterial	4/21/2023
Cefepime	Injection	FDA recognizes M100 susceptible-dose dependent standard (MIC and disk diffusion) for Enterobacterales.	Antibacterial	6/21/2023
Cefiderocol	Injection	FDA recognizes M100 disk diffusion standards for Enterobacterales.	Antibacterial	1/31/2023
Colistimethate	Injection	FDA does not recognize M100 standard (MIC) for Enterobacterales, Pseudomonas aeruginosa, or Acinetobacter spp. (Rationale available at *https://www.fda.gov/drugs/development-resources/fda-rationale-polymyxin-breakpoints-enterobacterales-pseudomonas-aeruginosa-and-acinetobacter-spp.*).	Antibacterial	1/17/2023
Fluconazole	Injection, Oral	FDA recognizes M27M44S susceptible-dose dependent standard (MIC and disk diffusion) for *Candida* species.	Antifungal	8/10/2023
Gentamicin	Injection	FDA does not recognize M100 standard (MIC and disk diffusion) for Enterobacterales and *Pseudomonas aeruginosa*.	Antibacterial	4/21/2023
Lefamulin	Oral, Injection	FDA recognizes M100 standard (MIC and disk diffusion) for *Staphylococcus aureus* (methicillin-susceptible isolates), *Streptococcus pneumoniae,* and *Haemophilus influenzae*.	Antibacterial	2/16/2023
Piperacillin and Tazobactam.	Injection	FDA does not recognize M100 standard (MIC and disk diffusion) for *Pseudomonas aeruginosa*.	Antibacterial	4/21/2013

TABLE 1—NOTICES OF UPDATES TO RECOGNIZED OR UPDATED SUSCEPTIBILITY TEST INTERPRETIVE CRITERIA (STIC) BY DRUG [1]—Continued

Drug	Route of administration	Action taken	Therapeutic category	Date
Piperacillin and Tazobactam.	Injection	FDA has updated STIC (MIC and disk diffusion) for Enterobacterales. FDA has recognized M100 standard for susceptible and resistant breakpoints and updated an intermediate breakpoint. FDA does not recognize M100 standard for a susceptible dose dependent breakpoint. (Rationale available at *https://www.fda.gov/drugs/development-resources/fda-rationale-piperacillin-tazobactam-breakpoints-enterobacterales*.).	Antibacterial	1/17/2023
Plazomicin	Injection	FDA recognizes M100 standard (MIC and disk diffusion) for Enterobacterales.	Antibacterial	4/21/2023
Polymyxin B	Injection	FDA does not recognize M100 standard (MIC) for Enterobacterales, *Pseudomonas aeruginosa,* or *Acinetobacter* spp. (Rationale available at *https://www.fda.gov/drugs/development-resources/fda-rationale-polymyxin-breakpoints-enterobacterales-pseudomonas-aeruginosa-and-acinetobacter-spp*.).	Antibacterial	1/17/2023
Rezafungin	Injection	FDA identified STIC (MIC and disk diffusion) for *C. albicans, C. glabrata,* and *C. tropicalis*. FDA has reviewed STIC (MIC) for *C. parapsilosis,* and the M27M44S standard is recognized. FDA identified STIC (disk diffusion) for *C. parapsilosis*.	Antifungal	4/18/2023
Sulbactam and Durlobactam.	Injection	FDA identified STIC (MIC and disk diffusion) for *Acinetobacter baumannii-calcoaceticus* complex.	Antibacterial	5/25/2023
Tobramycin	Injection	FDA does not recognize M100 standard (MIC and disk diffusion) for Enterobacterales and *Pseudomonas aeruginosa*.	Antibacterial	4/21/2023

[1] M100 standard in the table refers to Clinical and Laboratory Standards Institute (CLSI) Performance Standards for Antimicrobial Susceptibility Testing, 33rd ed. CLSI supplement M100; 2023.

Dated: April 4, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–07495 Filed 4–8–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Hispanic Community Health Study—Study of Latinos (HCHS–SOL) Coordinating Center.

Date: April 30, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Susan Wohler Sunnarborg, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National, Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–Z, Bethesda, MD 20892, (301) 827–7987, *susan.sunnarborg@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: April 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–07499 Filed 4–8–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting

can be accessed from the NIH Videocast at the following link: *https://videocast.nih.gov/.*

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

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: May 7, 2024.

Closed: 10:00 a.m. to 10:50 a.m.

Agenda: To review and evaluate grant applications.

Open: 11:00 a.m. to 3:30 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Conference Rooms A, B & C, 6700B Rockledge Drive, Bethesda, MD 20817 (Hybrid Meeting).

Contact Person: Ranga V. Srinivas, Ph.D., Acting Executive Secretary, National Advisory Council, Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov.*

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism, National Cancer Advisory Board, and National Advisory Council on Drug Abuse.

Date: May 8, 2024.

Open: 10:00 a.m. to 3:30 p.m.

Agenda: Presentation of NIAAA, NCI, and NIDA Director's Update, Scientific Reports, and other topics within the scope of the Collaborative Research on Addiction at NIH (CRAN).

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Conference Rooms A, B & C, 6700B Rockledge Drive, Bethesda, MD 20817 (Hybrid Meeting).

Contact Persons: Ranga V. Srinivas, Ph.D., Acting Executive Secretary, National Advisory Council Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism National, Institutes of Health, 6700 B Rockledge Drive, Room 2114, Bethesda, MD 20892, (301) 451–2067, *srinivar@mail.nih.gov.*

Paulette S. Gray, Ph.D., Director, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive, Room 7W444, Bethesda, MD 20892, (240) 276–6340, *grayp@dea.nci.nih.gov.*

Susan R.B. Weiss, Ph.D., Director, Division of Extramural Research, Office of the Director, National Institute on Drug Abuse, National Institutes of Health, Three White Flint North, RM 09D08, 1601 Landsdown Street, Bethesda, MD 20892, (301) 443–6480, *sweiss@nida.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.niaaa.nih.gov/AboutNIAAA/AdvisoryCouncil/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: April 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–07500 Filed 4–8–24; 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 cooperative agreement applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the cooperative agreement applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Implementation Cooperative Agreement (U01 Clinical Trial Required).

Date: April 29, 2024.

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

Agenda: To review and evaluate cooperative agreement 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 20892, (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: April 4, 2024.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–07497 Filed 4–8–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; 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 Center for Advancing Translational Sciences Special Emphasis Panel; NCATS SBIR Rare Diseases Basket Clinical Trials.

Date: May 9, 2024.

Time: 11:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alumit Ishai, Ph.D., Scientific Review Officer, Office of Grants Management and Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701

Democracy Boulevard, MSC 4874, Bethesda, MD 20892, (301) 496–9539, *alumit.ishai@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 4, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–07498 Filed 4–8–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0673]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0024

AGENCY: Coast Guard, DHS.

ACTION: 30-Day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0024, Safety Approval of Cargo Containers; without change.

Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before May 9, 2024.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0673]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.*

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

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–6P), ATTN: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593–7710.

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

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

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

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0673], and must be received by May 9, 2024.

Submitting Comments

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

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0024.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 86547, December 8, 2023) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Safety Approval of Cargo Containers.

OMB Control Number: 1625–0024.

Summary: This information collection is associated with requirements for owners and manufacturers of cargo containers to submit information and keep records associated with the approval and inspection of those containers. This information is required to ensure compliance with the International Convention for Safe Containers (CSC), see 46 U.S.C. 80503.

Need: This collection of information addresses the reporting and recordkeeping requirements for containers in 49 CFR parts 450 through 453. These rules are necessary since the U.S. is signatory to the CSC. The CSC requires all containers to be safety approved prior to being used in trade. These rules prescribe only the minimum requirements of the CSC.

Forms: None.

Respondents: Owners and manufacturers of containers, and organizations that the Coast Guard

delegates to act as an approval authority.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has increased from 129,345 hours to 159,678 hours a year, due to an increase in the estimated annual number of responses.

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

Dated: February 22, 2024.

Kathleen Claffie,

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

[FR Doc. 2024–07434 Filed 4–8–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2024–0015; OMB No. 1660–0137]

Agency Information Collection Activities: Proposed Collection; Comment Request; Emergency Notification System (ENS)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of extension and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Emergency Notification System (ENS).

DATES: Comments must be submitted on or before June 10, 2024.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *http://www.regulations.gov* under Docket ID FEMA–2024–0015. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID and will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anthony Allen, ENS System Security Officer/IT Technician, FEMA/ORR, by email at *Anthony.Allen@fema.dhs.gov* or telephone at 540–326–2645. You may contact the Records Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: FEMA's Office of Response & Recovery (ORR) owns and operates the Emergency Notification System (ENS). FEMA Directive 262–3 designates ENS as the Agency's solution for all notification and alerts activities. The ENS sends electronic notifications and relays messages, whether critical in nature, routine, or for testing purposes with appropriate authorization, to Department of Homeland Security (DHS) employees and contractors, as well as emergency response personnel. In accordance with Executive Order 12656, Presidential Policy Directive 40, and Federal Continuity Directive-1, all DHS organizational components must have in place a viable Continuity of Operations Planning capability and plan that ensures the performance of their essential functions during any emergency or situation that could disrupt normal operations. An effective ENS solution is a critical part of this plan.

Collection of Information

Title: Emergency Notification System (ENS).

Type of Information Collection: Extension of a currently approved information collection.

OMB Number: 1660–0137.

FEMA Forms: FF–104–FY–24–100, Emergency Notification System (ENS).

Abstract: The Emergency Notification System (ENS) has been deemed the standard notification tool for FEMA. The purpose of this notification tool is to activate teams and disseminate information. The respondents to this information are Mobile Operation Centers and Regions that use this information to make decisions on how to meet operational missions. This revision includes a new form for data gathering, which includes the Privacy Act Statement, Paperwork Reduction Act, and Retention Period information for members of the public that receive ENS Notifications.

Affected Public: State, Local or Tribal Governments; Federal Government.

Estimated Number of Respondents: 700.

Estimated Number of Responses: 2,200.

Estimated Total Annual Burden Hours: 184.

Estimated Total Annual Respondent Cost: $7,670.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $214,836.

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. 2024–07486 Filed 4–8–24; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7080–N–20]

30-Day Notice of Proposed Information Collection: Evaluation of the Green and Resilient Retrofit Program, OMB Control No.: 2528–New

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:* May 9, 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: Anna Guido, 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: Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email: *PaperworkReductionActOffice@hud.gov.* telephone (202)–402–5535. 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. Guido.

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 November 20, 2023 at 88 FR 80740.

A. Overview of Information Collection

Title of Information Collection: Evaluation of the Green and Resilient Retrofit Program.

OMB Approval Number: 2528–New.

Type of Request: New collection.

Form Number: N/A.

Description of the need for the information and proposed use: The Office of Policy Development and Research (PD&R), at the U.S. Department of Housing and Urban Development (HUD), is proposing the collection of information to support an evaluation of the Green and Resilient Retrofit Program (GRRP). GRRP is a newly funded program through Section 30002 of the Inflation Reduction Act of 2022 (H.R. 5376) titled ''Improving Energy Efficiency or Water Efficiency or Climate Resilience of Affordable Housing.'' HUD is offering GRRP funding in the form of grants or loans through three award cohorts designed to meet the needs of properties in different situations, implemented through three parallel Notices of Funding Opportunities (NOFOs). These award cohorts are the Elements Award cohort, the Leading Edge Award cohort, and the Comprehensive Award cohort. Under all three award cohorts, owners of eligible HUD-assisted multifamily properties will receive funding in the form of grants or loans to undertake retrofits, enhancements, and upgrades to improve energy and water efficiency, indoor air quality, and climate hazard resilience; to reduce emissions; to use renewable energy; and/or to use low Embodied Carbon materials.

The ''Elements'' NOFO provides modest funding to owners to add proven and meaningful climate resilience, energy efficiency, electrification, and renewable energy measures to the construction scopes of in-progress recapitalization transactions. The ''Leading Edge'' NOFO provides funding for retrofit activities to achieve ambitious outcomes, including net zero, renewable energy generation, use of building materials with lower Embodied Carbon, and climate resilience investments. The ''Comprehensive'' NOFO will provide funding to initiate recapitalization investments designed from inception around both proven and innovative measures, including ambitious green building standards or measures, renewable energy generation, use of building materials with lower Embodied Carbon, and climate resilience investments.

The Evaluation of Green and Resilient Retrofit Program (GRRP Evaluation) will be implemented in phases. Under Phase 1, HUD plans to collect survey and interview data related to the application process, the scoping and design phase of GRRP, and the post-construction period. Energy efficiency data will also be collected using a survey.

(1) *GRRP Application Survey:* The application survey and interview will provide data necessary to assess the success of the application process, which is influenced by property owners' perceptions of the design of the application and the program.

(2) *GRRP Scoping and Design Survey:* The survey and interview related to the scoping and design phase of GRRP will provide data necessary to evaluate the process of implementing the program, including what went well and what barriers were encountered. It will cover issues related to activities such as developing the transaction plan and closing package and designing the retrofit.

(3) *GRRP Post-Construction Survey:* The post-construction survey and interview will provide data necessary to evaluate how well the program worked in terms of the perceived costs and benefits to property owners, including questions related to construction, such as whether property owners encountered barriers with construction.

(4) *Energy Efficiency Survey (Benchmarking):* The benchmarking energy efficiency survey will capture data from HUD-assisted property owners on factors affecting energy and water usage, which will support the GRRP evaluation.

This **Federal Register** Notice provides an opportunity to comment on the information collection for the Evaluation of the Green and Resilient Retrofit Program (GRRP Evaluation).

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Appendix A: Outreach Materials	900	1	900	0.17	153	$80.96	$12,387
Appendix B: GRRP Application Consent Form and Survey	900	1	900	0.75	675	80.96	54,648
Appendix C: GRRP Scoping and Design Consent Form and Survey	450	1	450	0.75	337.5	80.96	27,324
Appendix D: GRRP Post-Construction Consent Form and Survey	450	1	450	0.75	337.5	80.96	27,324
Appendix E: GRRP Application Consent Form and Interview	40	1	40	1.3	52	80.96	4,210

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Appendix F: GRRP Scoping and Design Consent Form and Interview	40	1	40	1.3	52	80.96	4,210
Appendix G: GRRP Post-Construction Consent Form and Interview	40	1	40	1.3	52	80.96	4,210
Appendix J: Energy Efficiency Survey	2,347	1	2,347	0.33	775	80.96	62,744
Total					2434		197,057

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.

Anna P. Guido,

Department Reports Management Office, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2024–07484 Filed 4–8–24; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2024–0021; FXES11140500000–245–FF05E00000]

Proposed Safe Harbor Agreement and Candidate Conservation Agreement With Assurances for the Greene County Pennsylvania, Wharton Run Bat Hibernaculum; Draft Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from CNX Gas Company LLC for an enhancement of survival permit under the Endangered Species Act. The applicant also submitted a proposed safe harbor agreement and candidate conservation agreement with assurances (SHA/CCAA) in support of the application. We request public comment on the application, which includes the applicant's proposed SHA/CCAA, and the Service's preliminary determination that the proposed permitting action may be eligible for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations, the Department of the Interior's (DOI) NEPA regulations, and the DOI Departmental Manual. To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review. We invite comment from the public and local, State, Tribal, and Federal agencies.

DATES: We will accept comments received or postmarked on or before May 9, 2024. Comments submitted online at *https://www.regulations.gov* (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Time on May 9, 2024.

ADDRESSES:

Obtaining documents: The documents this notice announces, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R5–ES–2024–0021 at *https://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by one of the following methods:

- *Online: https://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R5–ES–2024–0021.
- *U.S. mail:* Public Comments Processing; Attn: Docket No. FWS–R5–ES–2024–0021; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Pamela R. Shellenberger, by telephone at 814–234–4090, extension 7459, or by email at *Pamela_Shellenberger@fws.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), have received an application from CNX Gas Company LLC (applicant, CNX) for an enhancement of survival permit under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant also submitted a proposed safe harbor agreement and candidate conservation agreement with assurances (SHA/CCAA) in support of the application. The applicant intends to implement the agreement within the boundaries of the State of Pennsylvania, to actively manage the covered species to benefit the recovery of federally listed species and to prevent the need to list candidate or otherwise sensitive species. The Service has made a preliminary determination that the proposed agreement qualifies as low effect, categorically excluded, under the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*). To make this determination, we used our

environmental action statement and low-effect screening form, both of which are also available for public review. We provide this notice to seek comments from the public and local, State, Tribal, and Federal agencies.

Background

Section 9 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect ''listed animal species'', or to attempt to engage in such conduct'' (16 U.S.C. 1538). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

Safe Harbor Agreements and Candidate Conservation Agreements With Assurances

A SHA is an agreement between the Service, partners, and landowners, for voluntary management of non-Federal lands to contribute towards recovery of an ESA-listed species in a manner that is consistent with the Service's policy on SHAs (64 FR 32717, June 17, 1999) and applicable regulations. A CCAA is an agreement between the Service, partners, and landowners for voluntary management of non-Federal lands to remove or reduce key threats to species that may become listed under the ESA, in a manner that is consistent with the Service's policy on CCAAs (81 FR 95164, December 27, 2016) and applicable regulations. In return for implementing conservation measures in a SHA/CCAA, the Service gives participants assurances that the Service will not impose land, water, or resource use restrictions or conservation requirements on ESA-listed species, or those that may become listed, beyond those agreed to in the SHA/CCAA.

Applicant's Proposed Safe Harbor Agreement/Candidate Conservation Agreement With Assurances

The purpose of this SHA/CCAA is to support collaborative efforts between the Service and CNX Gas Company LLC, in cooperation with regional agencies and universities, to implement conservation measures that result in net conservation benefits for six covered bat species. These measures include the installation of a human-made bat hibernaculum and other artificial roosting structures to provide a refuge to bat species that exist within the enrolled property.

Covered Species

The proposed SHA/CCAA covers the following bat species.

Common name	Scientific name	Federal listing status	State listing status
Indiana bat	*Myotis sodalis*	Endangered	Pennsylvania—endangered.
Northern long-eared bat	*Myotis septentrionalis*	Endangered	Pennsylvania—endangered.
Tricolored bat	*Perimyotis subflavus*	Proposed endangered	Pennsylvania—endangered.
Little brown bat	*Myotis lucifugus*	No	Pennsylvania—endangered.
Big brown bat	*Eptesicus fuscus*	No	No.
Eastern small-footed bat	*Myotis leibii*	No	Pennsylvania—threatened.

National Environmental Policy Act Compliance

Issuance of the permit would be a Federal action that would trigger the need for compliance with NEPA. The Service has made a preliminary determination that the proposed permit issuance is eligible for categorical exclusion under NEPA, based on the following criteria: (1) Implementation of the SHA and CCAA would result in minor or negligible adverse effects on federally listed, proposed, and candidate species and their habitats; (2) implementation of the SHA and CCAA would result in minor or negligible adverse effects on other environmental values or resources; and (3) impacts of the SHA and CCAA, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative adverse effects to environmental values or resources which would be considered significant. To make this determination, we used our EAS and low-effect screening form, which are also available for public review.

Public Availability of Comments

All comments received, including names and addresses, will become part of the administrative record associated with this action. 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 request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

The Service will evaluate the application and the comments received to determine whether to issue the requested permit. We also will conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the above findings, we will determine whether the permit issuance criteria of section 10(a)(1)(A) of the ESA have been met. If met, the Service will issue a permit to the applicant for the incidental take of the covered species.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22 and 17.32) and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500–1508 and 43 CFR 46).

Sharon Marino,

Assistant Regional Director, Ecological Services Northeast Region.

[FR Doc. 2024–07482 Filed 4–8–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between the Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin and the State of Wisconsin

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the 2024 Amendments to the Lac du Flambeau Band of Lake Superior Chippewa Indians and the State of Wisconsin Gaming Compact of 1992.

DATES: The Amendment takes effect on April 9, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment permits the Tribe to engage in event wagering and adds the Tribe's minimum internal control standards for sports betting, including rules governing events wagering. The Amendment also makes technical changes to update and correct various provisions of the compact. The Amendment is approved.

Wizipan Garriott,

Principal Deputy Assistant Secretary—Indian Affairs, Exercising by delegation the authority of the Assistant Secretary—Indian Affairs.

[FR Doc. 2024–07507 Filed 4–8–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

HEARTH Act Approval of Ione Band of Miwok Indians of California Business Leasing Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Indian Affairs (BIA) approved the Ione Band of Miwok Indians of California Business Leasing Ordinance under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into business leases without further BIA approval.

DATES: BIA issued the approval on March 29, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Carla Clark, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Albuquerque, NM 87104, *carla.clark@bia.gov,* (702) 484–3233.

SUPPLEMENTARY INFORMATION:

I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal Leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the Department of the Interior's (Department) leasing regulations at 25 CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Ione Band of Miwok Indians of California.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. *See* 25 CFR 162.017. As explained further in the preamble to the final regulations, the Federal Government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72440, 72447–48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation* v. *Thurston County,* 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)). Similarly, section 5108 preempts State taxation of rent payments by a lessee for leased trust lands, because ''tax on the payment of rent is indistinguishable from an impermissible tax on the land.'' *See Seminole Tribe of Florida* v. *Stranburg,* 799 F.3d 1324, 1331, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of ''traditional notions of Indian self-government,'' requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR 72447–48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds,

and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to ''allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities.'' 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes ''flexibility to adapt lease terms to suit [their] business and cultural needs'' and to ''enable [Tribes] to approve leases quickly and efficiently.'' H. Rep. 112–427 at 6 (2012).

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. *See Michigan* v. *Bay Mills Indian Community,* 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (determining that ''[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding''). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a Tribe that, as a result, might refrain from exercising its own sovereign right to impose a Tribal tax to support its infrastructure needs. *See id.* at 810–11 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA's surface leasing regulations, Tribal regulations under the HEARTH Act pervasively cover all aspects of leasing. *See* 25 U.S.C. 415(h)(3)(B)(i) (requiring Tribal regulations be consistent with BIA surface leasing regulations). Furthermore, the Federal government remains involved in the Tribal land leasing process by approving the Tribal leasing regulations in the first instance and providing technical assistance, upon request by a Tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the Tribal regulations, including terminating the lease or rescinding approval of the Tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the Tribal regulations according to 25 CFR part 162.

Accordingly, the Federal and Tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by Tribal leasing regulations or 25 CFR part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Ione Band of Miwok Indians of California.

Wizipan Garriott,

Principal Deputy Assistant Secretary—Indian Affairs, Exercising by delegation the authority of the Assistant Secretary—Indian Affairs.

[FR Doc. 2024–07509 Filed 4–8–24; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NV_FRN_MO4500177954]

Notice of Intent To Prepare an Environmental Impact Statement for the Proposed North Bullfrog Mine Project, Nye County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Tonopah Field Office, Battle Mountain, Nevada intends to prepare an Environmental Impact Statement (EIS) to consider the effects of Corvus Gold Nevada, Inc.'s (Corvus) North Bullfrog Mine Project (Project) in Nye County, Nevada. This notice announces the beginning of the scoping process to solicit public comments and identify issues and alternatives; it also serves to initiate public consultation, as required, under the National Historic Preservation Act (NHPA).

DATES: This notice initiates the public scoping process for the EIS. The BLM requests that the public submit comments concerning the scope of the analysis, potential alternatives, and identification of relevant information and studies, no later than 30 days after the date of publication in the **Federal Register**. To afford the BLM the opportunity to consider comments in the Draft EIS, please ensure your comments are received prior to the close of the 30-day scoping period or 15 days after the last public meeting, whichever is later. In-person public scoping meetings will be held during the public scoping period, the dates of which are to be determined.

ADDRESSES: You may submit comments related to the North Bullfrog Mine Project by any of the following methods:

- *Website: https://eplanning.blm.gov/eplanning-ui/admin/project/2031869/510*
- *Email: blm_nv_bmdo_p&ec_nepa@blm.gov*
- *Fax:* (775) 635–4034
- *Mail:* BLM Battle Mountain District Office, Attn: North Bullfrog Mine Project, 50 Bastian Road, Battle Mountain, NV 89820

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/admin/project/2031869/510* and at the Tonopah Field Office.

FOR FURTHER INFORMATION CONTACT: Gene Gilseth, Project Manager, telephone: (775) 635–4020; address: BLM Battle Mountain District Office, Attn: North Bullfrog Mine Project, 50 Bastian Road, Battle Mountain, NV 89820; email: *egilseth@blm.gov.* Contact Mr. Gilseth to have your name added to our mailing list. 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 Mr. Gilseth. 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: Based on the submitted proposed plan of operations (Plan), Corvus is proposing to construct, operate, close, and reclaim a new surface mine at the northern end of the Bullfrog Hills, south of Sarcobatus Flat, in Nye County, Nevada, approximately nine miles north of the Town of Beatty.

The proposed North Bullfrog Mine Plan boundary would encompass 6,298 acres, including approximately 5,402 acres of public lands and 896 acres of private land. The total disturbance associated with the proposed action would be 3,518.4 acres, including 3,436.4 acres of new surface disturbance and 82 acres of existing exploration disturbance. Of the new surface disturbance, approximately 3,077.2 acres would occur on BLM-administered public lands, and 359.2 acres would occur on private lands. Of the existing exploration surface

disturbance, 61.2 acres is on BLM-administered public lands, and 20.8 acres is on private lands. The proposed surface mining activities for the North Bullfrog Mine would include:

- *Three open pits:* the Sierra Blanca Open Pit (which would include the Sierra Blanca pit area, Yellow Jacket pit area, and Savage Valley pit area); the Jolly Jane Open Pit; and the Mayflower Open Pit;
- Four overburden storage areas (OSAs);
- An ore crushing and conveying system;
- A gravity mill circuit with cyanide tank leaching;
- Carbon-in-columns;
- Ore stockpiles;
- Growth media stockpiles;
- A power sub-station, solar field (located within the yard area), and associated distribution system;
- A heap leach facility (HLF) including the heap leach pad (HLP) with solution channels, associated process solution tanks, and ponds;
- A water supply well field and open pit dewatering system (wells, pipelines, and pipeline corridor);
- Stormwater diversion channels and stormwater sediment basins;
- An adsorption desorption and recovery plan, refinery, and an assay laboratory;
- Access and haul roads;
- Ancillary facilities including a septic and potable water supply system, and associated maintenance area; reagent and fuel storage; stormwater controls; parking areas; lighting; growth media stockpile; water truck refill stations; emergency helipads; fencing; communication trailers; storage and laydown yards; a meteorological station; a warehouse; a truck maintenance shop; a truck wash; offices; a metallurgical laboratory; change/lunch facilities; an administration/security building; and solid and hazardous waste management facilities;
- Continued surface exploration; and
- Reclamation and closure, including the development of evapotranspiration cells.

The Project would contract a short-term maximum of 530 employees during the 12- to 18-month construction period, and approximately 230 employees during active mining and processing.

As proposed, the project would operate 24 hours per day, 365 days per year. The total life of the project would be up to 20 years, including 1 year of pre-mining and construction, 12 years of mining, 2 to 3 additional years of active gold recovery on the HLP, mine reclamation activities, and 3 to 4 additional years of heap rinsing, reclamation, and closure activities. Reclamation of disturbed areas resulting from mining operations would be completed in accordance with BLM and Nevada Division of Environmental Protection regulations. Concurrent reclamation would take place where practicable and safe.

Purpose and Need for the Proposed Action

The BLM's purpose is to respond to Corvus's proposal as described in the Plan and to analyze the environmental effects associated with the proposed action and alternatives. NEPA mandates that the BLM evaluate the effects of the proposed action and develop alternatives.

The need for action is established by the BLM's responsibilities, under section 302 of FLPMA and the BLM Surface Management Regulations at 43 CFR 3809, to respond to a Plan submitted by an applicant to exercise their rights under the General Mining Law of 1872, and to prevent unnecessary or undue degradation of public lands as a result of the actions taken to prospect, explore, assess, develop, and process locatable minerals resources on public lands.

Preliminary Proposed Action and Alternatives

The proposed action consists of the Plan as submitted by Corvus. Additional alternatives to be considered at this time include the No Action Alternative and a Revised Mill Location Alternative.

Under the No Action Alternative, the development of the North Bullfrog Mine Project would not be authorized, and Corvus would not construct, operate, and close a new surface mine. Existing exploration activities would continue per previous authorizations.

The Revised Mill Location Alternative would include consolidation of processing facilities to a central location, a revised HLF design requiring only one single process pond, and elimination of the need for a large hillside cut for the proposed run-of-mine (ROM) stockpile, resulting in reduced air emissions by eliminating the mining activity required to build the ROM stockpile and reducing travel distance to the mill site. Additionally, the footprint of the Jolly Jane OSA would be reduced by 22.8 acres due to a proposed redesign for avoidance of cultural resources. Overall, surface disturbance under this alternative would be 130 acres less than the proposed action.

The BLM welcomes comments on all preliminary options as well as suggestions for additional alternatives to be considered.

Summary of Expected Impacts

Primary impacts from the North Bullfrog Mine Project that will be analyzed in the EIS include potential impacts to cultural resources and Native American traditional values; wildlife resources, including threatened and endangered and special status species; aesthetics (visual and noise); air quality, including climate change and greenhouse gases; water resources (surface and groundwater); traffic generation; livestock grazing; and vegetation and soil resources. A summary of potential impacts include:

- *Cultural Resources and Native American Traditional Values:* There are 34 historic properties that may potentially be affected by the proposed action within the physical and/or vibrational, auditory, and visual areas of potential effects. There are an additional eight sites that are currently identified as unevaluated that may be affected by the Project. Of these 42 cultural resources, it was determined that 22 currently unevaluated or National Register of Historic Places (NRHP)-eligible and the NRHP-eligible Wild Burro Archaeological District would be adversely impacted from physical, vibrational, and/or visual effects resulting from the Project.
- *Water Resources (Surface and Groundwater):* The Project involves groundwater pumping to allow mining below the water table at the Sierra Blanca and Jolly Jane Open Pits. No dewatering requirements are anticipated at the Mayflower Open Pit. Dewatering operations would result in a lowering of the local groundwater table, with estimated recovery of the groundwater table to pre-mining conditions being approximately 85 to 200 years from the end of pit dewatering, depending on the location of the drawdown. Mining in the Mayflower Pit would occur entirely above the natural water table and as a result a pit lake is not expected to form at closure. The Sierra Blanca Pit and Jolly Jane Pit would be backfilled up to approximately 3,970 feet above mean sea level to eliminate the formation of a pit lake. Potential impacts to seep, spring, and stream flow may occur within the maximum extent of the 10-foot drawdown from proposed dewatering operations if the source of the water is connected to the regional aquifer feeding these surface water features. A monitoring and mitigation plan is currently being developed to address these potential impacts. Sedimentation and erosion may also occur due to Project-related disturbance,

but this would be addressed through appropriate mine design requirements.

- *Wildlife Resources:* Potential impacts include habitat modifications, habitat loss, potential impacts to water sources from dewatering induced drawdown from the Project, fatalities as a result of collisions with vehicles, displacement due to human activity and disturbance, and fragmentation from impediments to movement through the project area.
- *Threatened and Endangered Species:* Federally listed species that have been documented or may be present in the project area include the southwestern willow flycatcher (*Empidonax traillii extimus*), yellow-billed cuckoo (*Coccyzus americanus*), and the Mojave Desert tortoise (*Gopherus agassizii*). No direct impacts to the yellow-billed cuckoo or southwest willow flycatcher would be anticipated from the proposed action, though indirect impacts may occur from potential dewatering induced drawdown at spring sites and riparian areas where these species potentially occur. The proposed action is anticipated to disturb certain vegetation communities that support Mojave Desert tortoise, and Mojave Desert tortoise have been documented within the Project Area. Compliance with section 7 of the Endangered Species Act (16 United States Code 1536) will be required to address potential impacts to the Mojave Desert tortoise.
- *BLM Special Status Species:* Special status species that have been documented in the vicinity of the project area include the Amargosa toad (*Anaxyrus nelson*), Oasis Valley speckled dace (*Rhinichthys osculus*), Oasis Valley springsnail (*Pyrgulopsis micrococcus*), brewer's sparrow (*Spizella breweri*), loggerhead shrike (*Lanius ludovicianus*), burrowing owl (*Athene cunicularia*), ferruginous hawk (*Buteo regalis*), golden eagle (*Aquila chrysaetos*), pallid bat (*Antrozous pallidus*), Brazilian free-tailed bat (*Tadarida brasiliensis*), California myotis (*Myotis californicus*), canyon bat (*Parastrellus Hesperus*), fringed myotis (*Myotis thysanodes*), desert bighorn sheep (*Ovis canadensis nelson*), desert horned lizard (*Phrynosoma platyrhinos*), Great Basin collared lizard (*Crotaphytus bicinctores*), and long-nosed leopard lizard (*Gambelia wislizenii*). Potential impacts include habitat modifications, habitat loss, potential impacts to water sources from dewatering induced drawdown from the Project, displacement due to human activity and disturbance, and fragmentation from impediments to movement through the project area. Impacts to special status aquatic species may include potential impacts from dewatering induced drawdown at spring sites and riparian areas where these species are known to occur. A monitoring and mitigation plan is currently being developed to address potential impacts to special status aquatic species.
- *Aesthetics (visual and noise):* Potential impacts to visual resources include the addition of form, line, texture, and color to the existing landscape from proposed Project features. Potential noise impacts include an increase in noise generation in the vicinity of the Project.
- *Air Quality:* Air quality modeling has determined that impacts from the proposed action would not exceed National Ambient Air Quality Standards for particulate matter 10 microns in diameter or less (PM_{10}), particulate matter 2.5 microns in diameter or less ($PM_{2.5}$), carbon monoxide (CO), nitrogen oxide (NO_X), and sulfur oxide (SO_2). Total facility-wide Hazardous Air Pollutants (HAP) are estimated to be 7.28 tons per year (tpy), with 5.07 tpy of the highest single HAP, hydrogen cyanide. Greenhouse gas emissions (measured in carbon dioxide equivalent (CO_2e)) from operations are estimated at a maximum of 102,692 tpy CO_2e, which includes process sources, fugitive sources, and mobile mining equipment. Potential ozone (O_3) impacts are estimated at 0.75 parts per billion (ppb), which is below the O_3 Significant Impact Level of 1 ppb and therefore considered insignificant. Mercury emissions are estimated to be 16.7 pounds per year, which would be less than 0.44 percent contribution to the global background deposition within the two adjacent hydrographic basins.
- *Traffic:* Traffic on transportation routes within the area of analysis would potentially increase by up to 120 Annual Average Daily Traffic (AADT) during construction, and 88 AADT during operations. The addition of project traffic is not anticipated to lower the level of service of the roadways and intersections, which are all currently at an acceptable level of service. Corvus is proposing to coordinate with the Nevada Department of Transportation to add turn lane improvements at the intersection of Strozzi Ranch Road and US 95 to further reduce any potential impacts from heavy vehicle traffic entering and exiting the Project.
- *Livestock Grazing:* The proposed action would impact forage utilized by livestock as a result of new surface disturbance of up to 3,436.4 acres. Approximately two Animal Unit Months (268.3 acres) would be impacted in the Razorback Allotment, South Montezuma Pasture. This would represent less than 0.1 percent of the overall permitted use in the allotment.
- *Vegetation and Soils:* The proposed action would result in new disturbance to soil and removal of vegetation on 3,436.4 acres, in additional to 82 acres of existing or acknowledged exploration for a total disturbance of 3,518.4 acres.

Schedule for the Decision-Making Process

The BLM will provide additional opportunities for public participation consistent with the NEPA process, including a 45-day comment period on the Draft EIS. The Draft EIS is anticipated to be available for public review in Summer 2024 and the Final EIS is anticipated to be released in Winter 2025 with a Record of Decision in Winter 2025.

Public Scoping Process

This notice of intent initiates the scoping period. The BLM will hold two virtual public scoping meetings. The specific dates and times of these scoping meetings will be announced in advance through local newspaper publications and the BLM National NEPA Register Project page at *https://eplanning.blm.gov/eplanning-ui/admin/project/2031869/510.*

Lead and Cooperating Agencies

The BLM Tonopah Field Office is serving as the lead federal agency for preparing the EIS. Cooperating agencies for this analysis include the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Nevada Department of Wildlife, Nye County, and Town of Beatty.

Responsible Official

Douglas W. Furtado, District Manager, Battle Mountain District Office

Nature of Decision To Be Made

The BLM's decision for the North Bullfrog Mine Project will consider the following: (1) whether to approve the proposed Project Plan to authorize the proposed activities without modifications or additional mitigation measures; (2) whether to approve the proposed Project Plan with additional mitigation measures that the BLM deems necessary to prevent unnecessary or undue degradation of public lands; (3) whether to approve an alternative analyzed in the EIS for the North Bullfrog Mine Project; or (4) denial of the proposed Project Plan and associated activities.

Additional Information

The BLM will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to resources from the proposed action and all analyzed reasonable alternatives and, in accordance with 40 CFR 1502.14(e), include appropriate mitigation measures not already included in the proposed action or alternatives. Mitigation may include avoidance, minimization, rectification, reduction or elimination over time, and compensation, and may be considered at multiple scales, including the landscape scale.

The BLM will utilize and coordinate the NEPA process to help support compliance with applicable procedural requirements under the Endangered Species Act (16 U.S.C. 1536) and section 106 of the NHPA (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), including public involvement requirements of section 106. Information about historic and cultural resources and threatened and endangered species within the area potentially affected by the proposed plan will assist the BLM in identifying and evaluating impacts to such resources.

The BLM will consult with Indian Tribal Nations on a government-to-government basis in accordance with Executive Order 13175, BLM MS 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with Indian Tribal Nations and other stakeholders that may be interested in or affected by the proposed North Bullfrog Mine Project, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

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: 40 CFR 1501.9)

Douglas W. Furtado,

District Manager, Battle Mountain District.

[FR Doc. 2024–07423 Filed 4–8–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_HQ_FRN_MO4500177637]

Public Land Order No. 7936; Partial Revocation of Four Secretarial Orders for the Grand Valley Reclamation Project and Opening Order; Colorado; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice; correction.

SUMMARY: The Bureau of Land Management published a document in the **Federal Register** on January 9, 2024, concerning a Public Land Order that partially revokes four withdrawals created by Secretarial Orders dated July 2, 1902, August 26, 1902, February 28, 1908, and July 25, 1908, issued pursuant to the Reclamation Act of June 17, 1902, section 3, to support the Bureau of Reclamation's Grand Valley Reclamation Project. The document's subject heading incorrectly stated the new PLO number.

FOR FURTHER INFORMATION CONTACT: Jennifer Jardine, BLM, Colorado State Office, at 970–385–1224, email at *jjardine@blm.gov,* or write to Branch of Lands and Realty, P.O. Box 151029, Lakewood, Colorado 80215–7093. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or Tele Braille) 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.

Correction

In the **Federal Register** of January 9, 2024, in FR Doc. 2024–00266, on page 1126, in the third column, correct the subject heading to read: Public Land Order No. 7936; Partial Revocation of Four Secretarial Orders for the Grand Valley Reclamation Project and Opening Order; Colorado.

Robert T. Anderson,

Solicitor.

[FR Doc. 2024–07469 Filed 4–8–24; 8:45 am]

BILLING CODE 4331–29–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_WY_FRN_MO4500176205; WYW–34993, WYW–87111]

Notice of Proposed Withdrawal Extensions and Opportunity for Public Meeting for the Castle Gardens Recreation Area and White Mountain Petroglyphs Site, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed withdrawal extension.

SUMMARY: The Secretary of the Interior proposes to extend Public Land Order (PLO) No. 6578 and PLO No. 6597, each for an additional 20-year term, as requested by the Bureau of Land Management (BLM). PLO No. 6578, as extended by PLO No. 7612, withdrew 110 acres of BLM land from settlement, sale, location, or entry under the general land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, to protect the recreational and aesthetic values of and the capital investments made in the Castle Garden Recreation Site in Washakie County, Wyoming. PLO No. 6597, as extended by PLO No. 7621, withdrew 20 acres of BLM land from settlement, sale, location, or entry under the general land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, to protect the scientific, artistic, and educational values of the White Mountain Petroglyphs site in Sweetwater County, Wyoming. This Notice advises the public of an opportunity to comment on the two proposed withdrawal extensions and to request a public meeting for either of the proposals.

DATES: Comments and requests for a public meeting regarding the withdrawal applications must be received on or before July 8, 2024.

ADDRESSES: Comments and meeting requests should be sent to the BLM Wyoming State Director, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

FOR FURTHER INFORMATION CONTACT: Jackie Madson, Land Law Examiner, Wyoming State Office by phone at 307–775–6040 or at the address noted above. 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 has petitioned the Secretary of the Interior for permission to file two applications to extend PLO No. 6578 and PLO No. 6597 each for an additional 20-year term. The purpose of the withdrawal extensions is to continue to protect and preserve the Castle Gardens Recreation Area and the White Mountain Petroglyphs Site. The BLM's petition to file such applications has been approved by an appropriate Secretarial official, rendering it a withdrawal extension proposal.

The withdrawal established by PLO No. 6578 (49 FR 46144, November 23, 1984) as extended by PLO No. 7612 (69 FR 51320, August 18, 2004) for the Castle Gardens Recreation Site is incorporated herein by reference and expires November 22, 2024, unless the withdrawal is extended.

Sixth Principal Meridian, Wyoming

T. 46 N., R. 89 W.,
Sec. 15, S½NE¼NW¼,
NE¼SE¼NW¼NW¼,
S½SE¼NW¼NW¼,
E½NW¼SW¼NW¼, NE¼SW¼NW¼,
N½SE¼SW¼NW¼,
SE¼SE¼SW¼NW¼, SE¼NW¼, and
N½NE¼SW¼.

The area described contains 110 acres in Washakie County.

The withdrawal established by PLO No. 6597 (50 FR 11865) as extended by PLO No. 7621 (70 FR 1466) for the White Mountain Petroglyphs Site is incorporated herein by reference and expires March 25, 2025, unless the withdrawal is extended.

Sixth Principal Meridian, Wyoming

T. 22 N., R. 105 W.,
Sec. 11, NE¼SE¼SE¼,
N½SW¼SE¼SE¼;
Sec. 12, W½NW¼SW¼SW¼.

The area described contains 20 acres in Sweetwater County.

The use of a right-of-way, interagency agreement, or cooperative agreement would not constrain nondiscretionary uses.

There are no suitable alternative sites available. There are no other Federal lands in the area containing these recreational values and unique features.

No water rights would be needed to fulfill the purpose of this withdrawal extension.

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 personally identifying information—may be made publicly available at any time. While you may ask the BLM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments, including name and street address of respondents, will be available for public review at the BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming, during regular business hours 8:00 a.m. to 4:30 p.m., Monday through Friday, except holidays.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extensions. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal extensions must submit a written request to the State Director, BLM Wyoming State Office at the address in the **ADDRESSES** section, within 90 days from the date of publication of this Notice. If the authorized officer determines that a public meeting will be held, a Notice of the date, time, and place will be published in the **Federal Register** and local newspapers and will be posted on the BLM website at: *www.blm.gov* at least 30 days before the scheduled date of the meeting.

This withdrawal extension proposals will be processed in accordance with the regulations set forth in 43 CFR 2310.4.

(Authority: 43 U.S.C. 1714)

Andrew Archuleta,

Wyoming State Director.

[FR Doc. 2024–07445 Filed 4–8–24; 8:45 am]

BILLING CODE 4331–26–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLHQ430000. 245L1109AF. L12200000.PM0000; OMB Control No. 1004–0165]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Cave Management: Cave Nominations and Requests for Confidential Information

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 9, 2024.

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

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Kyle Voyles by email at *kvoyles@blm.gov,* or by telephone at (435) 688–3274. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on November 13, 2023 (88 FR 77604).

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is especially interested in public comment addressing the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Land-management agencies within the Department of the Interior seek information to comply with the Federal Cave Resources Protection Act (FCRPA), 16 U.S.C. 4301 through 4310 and the Department's regulations at 43 CFR part 37. The FRCPA requires these agencies to identify and protect ''significant'' caves on Federal lands within their respective jurisdictions and allows agencies to disclose to the public the location of significant caves only in limited circumstances. However, the FRCPA and BLM regulations also authorize certain individuals, organizations and governmental agencies to request confidential cave information. OMB Control Number 1004–0165 is currently scheduled to expire on September 30, 2024. The BLM plans to request that OMB renewal this OMB control number for an additional three (3) years.

Title of Collection: Cave Management: Cave Nominations and Requests for Confidential Information (43 CFR part 37).

OMB Control Number: 1004–0165.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Governmental agencies and the public may submit cave nominations pursuant to section 4 of the FCRPA (16 U.S.C. 4303) and 43 CFR 37.11. Requests for confidential information may be submitted pursuant to 16 U.S.C. 4304 and 43 CFR 37.12 by:

- Federal and state governmental agencies;
- Bona fide educational and research institutions; and
- Individuals and organizations assisting a land management agency with cave management activities.

Total Estimated Number of Annual Respondents: 28.

Total Estimated Number of Annual Responses: 28.

Estimated Completion Time per Response: Varies from 1 hour to 11 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 278.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: None.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2024–07505 Filed 4–8–24; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2024–0019]

Notice of Availability of a Joint Record of Decision for the Proposed New England Wind Project and New England Wind Offshore Export Cable Project

AGENCY: Bureau of Ocean Energy Management, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce; U.S. Army Corps of Engineers, Department of the Army.

ACTION: Notice of availability; record of decision.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the joint record of decision (ROD) on the final Environmental Impact Statement (EIS) for the construction and operations plan (COP) submitted by Park City Wind LLC (Park City Wind) for its proposed New England Wind Project and New England Wind Offshore Export Cable Project (Project) offshore Massachusetts. The joint ROD includes the Department of the Interior's (DOI) decision regarding the New England Wind COP, the National Marine Fisheries Service's (NMFS) decision regarding Park City Wind's request for Incidental Take Regulations (ITR) and an associated Letter of Authorization (LOA) under the Marine Mammal Protection Act (MMPA), and the Department of the Army's (DA) decision regarding authorizations under section 10 of the Rivers and Harbors Act of 1899 (RHA) and section 404 of the Clean Water Act (CWA). NMFS has adopted the final EIS to support its decision of whether or not to promulgate the requested ITR and issue a LOA to Park City Wind under the MMPA. The U.S. Army Corps of Engineers (USACE) has adopted the final EIS to support its decision to issue a DA permit under section 10 of the RHA and section 404 of the CWA. The joint ROD concludes the National Environmental Policy Act (NEPA) process for each agency.

ADDRESSES: The joint ROD and associated information are available on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/new-england-wind-formerly-vineyard-wind-south.*

FOR FURTHER INFORMATION CONTACT: For information related to BOEM's action, please contact Jessica Stromberg, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM–OREP, Sterling, Virginia 20166, (703) 787–1730 or *jessica.stromberg@boem.gov.* For information related to NMFS' action, contact Katherine Renshaw, National Oceanic and Atmospheric Administration (NOAA) Office of General Counsel, Environmental Review and Coordination Section, (302) 515–0324, *katherine.renshaw@noaa.gov.* For information related to USACE's action, contact Ruth Brien, New England District Regulatory Division, (978) 318–8054 or *ruthann.a.brien@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

Park City Wind seeks approval to construct, operate, and maintain a wind energy facility and its associated export cables on the Outer Continental Shelf (OCS) offshore Massachusetts, Rhode Island, and New York. The Project would be developed within the range of design parameters outlined in the New England Wind COP, subject to the applicable mitigation measures.

The Project as proposed in the COP would be developed in two phases. The entire Project would include up to a combined maximum 130 positions for wind turbine generators (WTGs) and electrical service platforms (ESPs), inter-array and inter-link cables connecting the individual WTGs and ESPs, five offshore export cables (two for phase I and three for phase II), onshore substations, and interconnection cables

connecting to the existing electrical grid in Massachusetts.

The WTGs, offshore substation, and inter-array cables would be located on the OCS approximately 32 kilometers (km) (20 miles (mi)) south of Martha's Vineyard and approximately 38 km (24 mi) southwest of Nantucket, within the area defined by Renewable Energy Lease OCS–A 0534. The Project would be adjacent to the Vineyard Wind 1 (VW1) project (OCS–A 0501). The EIS evaluates the potential to utilize currently unused positions of the VW1 project that VW1 could assign to the Project. The offshore export cables would be buried below the seabed surface on the OCS and State of Massachusetts-owned submerged lands. The onshore export cables, substations, and grid connections would be located in Barnstable County, MA, with the possibility of a landing site in Bristol County, MA.

BOEM considered 15 alternatives when preparing the draft EIS and carried forward three alternatives for further analysis in the final EIS. These three alternatives include the proposed action, one action alternative, and the no action alternative. After carefully considering public comments on the draft EIS and the alternatives described and analyzed in the final EIS, DOI selected a combination of the Habitat Minimization Alternative (Alternative C–1) and the Proposed Action (Alternative B). This combination would limit the installation of export cables to the Eastern Muskeget route or minimize installation of export cables to only one in the Western Muskeget route, as described in the Preferred Alternative in the final EIS.

The anticipated mitigation, monitoring, and reporting requirements, which will be included in BOEM's COP approval as terms and conditions, are included in the ROD, which is available on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/new-england-wind-formerly-vineyard-wind-south.*

NMFS has adopted BOEM's final EIS to support its decision of whether or not to promulgate the requested ITR and issue the associated LOA to Park City Wind. NMFS' final decision of whether or not to promulgate the requested ITR and issue the LOA will be documented in a separate Decision Memorandum prepared in accordance with internal NMFS policy and procedures. The final ITR and a notice of issuance of the LOA, if issued, will be published in the **Federal Register**. The LOA would authorize Park City Wind to take a small number of marine mammals incidental to Project construction and would set forth permissible methods of incidental taking; means of effecting the least practicable adverse impact on the species and its habitat; and requirements for monitoring and reporting. Pursuant to section 7 of the Endangered Species Act, NMFS issued a final Biological Opinion to BOEM on February 16, 2024, evaluating the effects of the proposed action on ESA-listed species. The proposed action in the opinion includes the associated permits, approvals, and authorizations that may be issued.

USACE has decided to adopt BOEM's final EIS and issue permits to Park City Wind pursuant to section 10 of the RHA and section 404 of the CWA. The USACE permits may authorize Park City Wind to discharge fill below the high tide line of waters of the United States. They may also authorize Park City Wind to perform work and place structures below the mean high water mark of navigable waters of the United States and to affix structures to the seabed on the OCS.

Authority: National Environmental Policy Act of 1969, as amended, (42 U.S.C. 4321 *et seq.*); 40 CFR 1505.2.

Karen Baker,

Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management.

[FR Doc. 2024–07436 Filed 4–8–24; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–716–719 and 731–TA–1683–1687 (Preliminary)]

Epoxy Resins From China, India, South Korea, Taiwan, and Thailand; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–716–719 and 731–TA–1683–1687 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of epoxy resins from China, India, South Korea, Taiwan, and Thailand, provided for in subheading 3907.30.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Governments of China, India, South Korea, and Taiwan. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by May 20, 2024. The Commission's views must be transmitted to Commerce within five business days thereafter, or by May 28, 2024.

DATES: April 3, 2024.

FOR FURTHER INFORMATION CONTACT: Alejandro Orozco (202–205–3177), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to petitions filed on April 3, 2024, by the U.S. Epoxy Resin Producers Ad Hoc Coalition, which is comprised of Olin Corporation, Clayton, Missouri, and Westlake Corporation, Houston, Texas.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under

investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Office of Investigations will hold a staff conference in connection with the preliminary phase of these investigations beginning at 9:30 a.m. on Wednesday, April 24, 2024. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before Monday, April 22, 2024. Please provide an email address for each conference participant in the email. Information on conference procedures, format, and participation, including guidance for requests to appear as a witness via videoconference, will be available on the Commission's Public Calendar (Calendar (USITC) | United States International Trade Commission). A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Written submissions.—As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before 5:15 p.m. on April 29, 2024, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties shall file written testimony and supplementary material in connection with their presentation at the conference no later than noon on April 23, 2024. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 3, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–07458 Filed 4–8–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1353]

Importer of Controlled Substances Application: VHG Labs dba LGC Standards

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: VHG Labs dba LGC Standards 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 May 9, 2024. Such persons may also file a written request for a hearing on the application on or before May 9, 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 February 27, 2024, VHG labs dba LGC Standards, 3 Perimeter Road, Manchester, New Hampshire 03103–3341, applied to be registered as an importer of the

following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Amineptine (7-[(10,11-dihydro-5Hdibenzo[a,d]cycloheptен-5-yl)amino]heptanoic acid)	1219	I
Mesocarb (N-phenyl-N′-(3-(1-phenylpropan-2-yl)-1,2,3-oxadiazol-3-ium-5-yl)carbamimidate)	1227	I
3-Fluoro-N-methylcathinone (3-FMC)	1233	I
Cathinone	1235	I
Methcathinone	1237	I
4-Fluoro-N-methylcathinone (4-FMC) 1238 I N	1238	I
Para-Methoxymethamphetamine (PMMA), 1-(4-methoxyphenyl)-N-methylpropan-2-amine	1245	I
Pentedrone (α-methylaminovalerophenone)	1246	I
4-Methyl-N-ethylcathinone (4-MEC)	1249	I
Naphyrone	1258	I
N-Ethylamphetamine	1475	I
Methiopropamine (N-methyl-1-(thiophen-2-yl)propan-2-amine) 1478 I N	1478	I
N,N-Dimethylamphetamine	1480	I
Fenethylline	1503	I
Aminorex	1585	I
4-Methylaminorex (cis isomer)	1590	I
4,4′-Dimethylaminorex (4,4′-DMAR; 4,5-dihydro-4-1595 I N methyl-5-(4-methylphenyl)-2-oxazolamine; 4-methyl-5-(4-methylphenyl)-4,5-dihydro-1,3-oxazol-2-amine).	1595	I
Gamma Hydroxybutyric Acid	2010	I
Methaqualone	2565	I
Mecloqualone	2572	I
Etizolam (4-(2-chlorophenyl)-2-ethyl-9-methyl-6Hthieno[3,2-f][1,2,4]triazolo[4,3-a][1,4]diazepine	2780	I
Flualprazolam (8-chloro-6-(2-fluorophenyl)-1-methyl-4Hbenzo[f][1,2,4]triazolo[4,3-a][1,4]diazepine)	2785	I
Clonazolam (6-(2-chlorophenyl)-1-methyl-8-nitro-4Hbenzo[f][1,2,4]triazolo[4,3-a][1,4]diazepine	2786	I
Flubromazolam (8-bromo-6-(2-fluorophenyl)-1-methyl4H-benzo[f][1,2,4]triazolo[4,3-a][1,4]diazepine	2788	I
Diclazepam (7-chloro-5-(2-chloro-5-(2-chlorophenyl)-1-methyl-1,3-dihydro-2H-benzo[e][1,4]diazepin-2-one	2789	I
JWH-250 (1-Pentyl-3-(2-methoxyphenylacetyl) indole)	6250	I
SR-18 (Also known as RCS-8) (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl) indole)	7008	I
ADB-FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7010	I
5-Fluoro-UR-144 and XLR11 [1-(5-Fluoro-pentyl)1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	7011	I
AB-FUBINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	7012	I
JWH-019 (1-Hexyl-3-(1-naphthoyl)indole)	7019	I
FUB-AMB, MMB-FUBINACA, AMB-FUBINACA (2-(1-(4-fluorobenzyl)-1Hindazole-3-carboxamido)-3-methylbutanoate)	7021	I
AB-PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	7023	I
THJ-2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	7024	I
5F-AB-PINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluropentyl)-1H-indazole-3-carboximide)	7025	I
AB-CHMINACA (N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide)	7031	I
5F-ADB, 5F-MDMB-PINACA (Methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	7034	I
5F-MDMB-PICA (methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate)	7041	I
MDMB-CHMICA, MMB-CHMINACA (Methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate)	7042	I
APINACA and AKB48 (N-(1-Adamantyl)-1-pentyl-1H-indazole-3-carboxamide)	7048	I
5F-APINACA, 5F-AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide)	7049	I
JWH-081 (1-Pentyl-3-(1-(4-methoxynaphthoyl) indole)	7081	I
4-CN-CUML-BUTINACA, 4-cyano-CUMYL-BUTINACA, 4-CN-CUMYL BINACA, CUMYL-4CN-BINACA, SGT-78 (1-(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide).	7089	I
SR-19 (Also known as RCS-4) (1-Pentyl-3-[(4-methoxy)-benzoyl] indole)	7104	I
JWH-018 (also known as AM678) (1-Pentyl-3-(1-naphthoyl)indole)	7118	I
JWH-122 (1-Pentyl-3-(4-methyl-1-naphthoyl) indole)	7122	I
UR-144 (1-Pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	7144	I
JWH-073 (1-Butyl-3-(1-naphthoyl)indole)	7173	I
JWH-200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	7200	I
AM2201 (1-(5-Fluoropentyl)-3-(1-naphthoyl) indole)	7201	I
JWH-203 (1-Pentyl-3-(2-chlorophenylacetyl) indole)	7203	I
PB-22 (Quinolin-8-yl 1-pentyl-1H-indole-3-carboxylate)	7222	I
5F-PB-22 (Quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate)	7225	I
N-ethylhexedrone 7246 I N	7246	I
Alpha-ethyltryptamine	7249	I
Ibogaine	7260	I
2-(ethylamino)-2-(3-methoxyphenyl)cyclohexan-1-one (methoxetamine)	7286	I
CP-47,497 (5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl-phenol)	7297	I
CP-47,497 C8 Homologue (5-(1,1-Dimethyloctyl)-2-[(1R,3S)3-hydroxycyclohexyl-phenol)	7298	I
Lysergic acid diethylamide	7315	I
2C-T-7 (2,5-Dimethoxy-4-(n)-propylthiophenethylamine	7348	I
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Mescaline	7381	I
2C-T-2 (2-(4-Ethylthio-2,5-dimethoxyphenyl) ethanamine)	7385	I
3,4,5-Trimethoxyamphetamine	7390	I
4-Bromo-2,5-dimethoxyamphetamine	7391	I

Controlled substance	Drug code	Schedule
4-Bromo-2,5-dimethoxyphenethylamine	7392	I
4-Methyl-2,5-dimethoxyamphetamine	7395	I
2,5-Dimethoxyamphetamine	7396	I
JWH-398 (1-Pentyl-3-(4-chloro-1-naphthoyl) indole)	7398	I
2,5-Dimethoxy-4-ethylamphetamine	7399	I
3,4-Methylenedioxyamphetamine	7400	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
3,4-Methylenedioxymethamphetamine	7405	I
4-Methoxyamphetamine	7411	I
5-Methoxy-N-N-dimethyltryptamine	7431	I
Alpha-methyltryptamine	7432	I
Bufotenine	7433	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I
5-Methoxy-N,N-diisopropyltryptamine	7439	I
N-Ethyl-1-phenylcyclohexylamine	7455	I
1-(1-Phenylcyclohexyl)pyrrolidine	7458	I
1-[1-(2-Thienyl)cyclohexyl]piperidine	7470	I
N-Benzylpiperazine	7493	I
4-MePPP (4-Methyl-alphapyrrolidinopropiophenone)	7498	I
2C-D (2-(2,5-Dimethoxy-4-methylphenyl) ethanamine)	7508	I
2C-E (2-(2,5-Dimethoxy-4-ethylphenyl) ethanamine)	7509	I
2C-I 2-(4-iodo-2,5-dimethoxyphenyl) ethanamine)	7518	I
2C-C 2-(4-Chloro-2,5-dimethoxyphenyl) ethanamine)	7519	I
2C-N (2-(2,5-Dimethoxy-4-nitro-phenyl) ethanamine)	7521	I
2C-P (2-(2,5-Dimethoxy-4-(n)-propylphenyl) ethanamine)	7524	I
2C-T-4 (2-(4-Isopropylthio)-2,5-dimethoxyphenyl) ethanamine)	7532	I
MDPV (3,4-Methylenedioxypyrovalerone)	7535	I
25B-NBOMe (2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7536	I
25C-NBOMe (2-(4-chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7537	I
25I-NBOMe (2-(4-iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl) ethanamine)	7538	I
Methylone (3,4-Methylenedioxy-N-methylcathinone)	7540	I
Butylone	7541	I
Pentylone	7542	I
N-Ethypentylone, ephylone (1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-pentan-1-one)	7543	I
alpha-pyrrolidinopentiophenone (α-PVP)	7545	I
alpha-pyrrolidinobutiophenone (α-PBP)	7546	I
Ethylone	7547	I
AM-694 (1-(5-Fluoropentyl)-3-(2-iodobenzoyl) indole)	7694	I
Codeine-N-oxide	9053	I
Desomorphine	9055	I
Dihydromorphine	9145	I
Difenoxin	9168	I
Heroin	9200	I
Morphine-N-oxide	9307	I
Nicomorphine	9312	I
Normorphine	9313	I
Pholcodine	9314	I
Drotebanol	9335	I
U-47700 (3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-methylbenzamide)	9547	I
AH-7921 (3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide))	9551	I
MT-45 (1-cyclohexyl-4-(1,2-diphenylethyl)piperazine))	9560	I
Acetylmethadol	9601	I
Alphameprodine	9604	I
Alphamethadol	9605	I
Benzethidine	9606	I
Betameprodine	9608	I
Clonitazene	9612	I
Dextromoramide	9613	I
Isotonotazene (N,N-diethyl-2-(2-(4 isopropoxybenzyl)-5-nitro-1H-benzimidazol-1-yl)ethan-1-amine)	9614	I
Dimenoxadol	9617	I
Dimepheptanol	9618	I
Dimethylthiambutene	9619	I
Dioxaphetyl butyrate	9621	I
Dipipanone	9622	I
Etonitazene	9624	I
Ketobemidone	9628	I
Levomoramide	9629	I
Noracymethadol	9633	I
Norlevorphanol	9634	I
Normethadone	9635	I

Controlled substance	Drug code	Schedule
Piritramide	9642	I
Properidine	9644	I
Racemoramide	9645	I
1-Methyl-4-phenyl-4-propionoxypiperidine	9661	I
Tilidine	9750	I
Metonitazene (N,N-diethyl-2-(2-(4-methoxybenzyl)-5-nitro-1Hbenzimidazol-1-yl)ethan-1-amine	9757	I
Protonitazene (N,N-diethyl-2-(5-nitro-2-(4-propoxybenzyl)-1H-benzimidazol-1-yl)ethan-1-amine)	9759	I
+Para-Fluorofentanyl	9812	I
3-Methylfentanyl	9813	I
Alpha-methylfentanyl	9814	I
Acetyl Fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide)	9821	I
Butyryl Fentanyl	9822	I
4-Fluoroisobutyryl fentanyl (N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide)	9824	I
Beta-hydroxyfentanyl	9830	I
Beta-hydroxy-3-methylfentanyl	9831	I
3-Methylthiofentanyl	9833	I
Furanyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide)	9834	I
Thiofentanyl	9835	I
Beta-hydroxythiofentanyl	9836	I
Ocfentanil	9838	I
beta′-Phenyl fentanyl (N-(1-phenethylpiperidin-4-yl)-N,3-diphenylpropanamide; also known as β′-phenyl fentanyl; 3-phenylpropanoyl fentanyl).	9842	I
N-(1-phenethylpiperidin-4-yl)-N-phenyltetrahydrofuran-2-carboxamide	9843	I
Crotonyl fentanyl ((E-N-(1-phenethylpiperidin-4-yl)-N-phenylbut-2-enamide)	9844	I
Cyclopropyl Fentanyl	9845	I
ortho-Fluorobutyryl fentanyl (N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)butyramide; also known as 2-fluorobutyryl fentanyl).	9846	I
Fentanyl related-compounds as defined in 21 CFR 1308.11(h)	9850	I
Amphetamine	1100	II
Methamphetamine	1105	II
Lisdexamfetamine	1205	II
Phenmetrazine	1631	II
Amobarbital	2125	II
Pentobarbital	2270	II
Secobarbital	2315	II
Glutethimide	2550	II
Nabilone	7379	II
Phencyclidine	7471	II
ANPP (4-Anilino-N-phenethyl-4-piperidine)	8333	II
Norfentanyl (N-phenyl-N-(piperidin-4-yl) propionamide)	8366	II
Phenylacetone	8501	II
Alphaprodine	9010	II
Cocaine	9041	II
Codeine	9050	II
Dihydrocodeine	9120	II
Oxycodone	9143	II
Hydromorphone	9150	II
Diphenoxylate	9170	II
Ecgonine	9180	II
Ethylmorphine	9190	II
Hydrocodone	9193	II
Levomethorphan	9210	II
Levorphanol	9220	II
Isomethadone	9226	II
Meperidine	9230	II
Meperidine intermediate-A	9232	II
Meperidine intermediate-B	9233	II
Meperidine intermediate-C	9234	II
Oliceridine (N-[(3-methoxythiophen-2yl)methyl] ({2-[9r)-9-(pyridin-2-yl)-6-oxaspiro[4.5] decan-9-yl] ethyl {time})amine fumarate).	9245	II
Methadone	9250	II
Methadone intermediate	9254	II
Dextropropoxyphene, bulk (non-dosage forms)	9273	II
Morphine	9300	II
Oripavine	9330	II
Thebaine	9333	II
Levo-alphacetylmethadol	9648	II
Oxymorphone	9652	II
Noroxymorphone	9668	II
Phenazocine	9715	II
Racemethorphan	9732	II
Alfentanil	9737	II
Remifentanil	9739	II

Controlled substance	Drug code	Schedule
Sufentanil	9740	II
Carfentanil	9743	II
Tapentadol	9780	II
Fentanyl	9801	II

The company plans to import the listed controlled substances for distribution for analytical testing 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. 2024–07525 Filed 4–8–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1355]

Importer of Controlled Substances Application: Lyndra Therapeutics

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Lyndra Therapeutics 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 May 9, 2024. Such persons may also file a written request for a hearing on the application on or before May 9, 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 March 6, 2024, Lyndra Therapeutics, 60 Westview Street, Lexington, Massachusetts 02421–3108, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Methadone	9250	II

The company plans to import the above controlled substance for use in preclinical research and human clinical trials. No other activity for this drug code is 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. 2024–07529 Filed 4–8–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1123–1NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection; Application for Remission of Financial Penalties

AGENCY: Office of the Pardon Attorney, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Office of the Pardon Attorney, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until June 10, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Kira Gillespie, Deputy Pardon Attorney, Office of the Pardon Attorney, 950 Pennsylvania Avenue NW, Main Justice—RFK Building, Washington, DC 20530; *uspardon.attorney@usdoj.gov;* 202–616–6070.

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

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

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

Abstract: Applicants seeking remission of financial penalties by the President will be asked to respond to this collection. The principal purpose for collecting this information is to enable the Office of the Pardon Attorney to process applicants' requests for remission of financial penalties. The information is necessary to verify applicants' identities, conduct investigation of the applicants' backgrounds, criminal records, and conduct since their conviction, and to provide notice to the Federal Bureau of Investigation, U.S. Attorneys' Offices, U.S. Probation Offices, and federal courts in the event of grants of executive clemency.

Overview of This Information Collection

1. *Type of Information Collection:* New collection.

2. *The Title of the Form/Collection:* Application for Remission of Financial Penalties.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* There is no agency form number for this collection. The applicable component within the Department of Justice is the Office of the Pardon Attorney.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected Public: Individuals or households. The obligation to respond is voluntary.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Available information suggests that potentially 500 to 1,000 applicants will complete petitions annually. We estimate an average of 180 minutes for each applicant to respond to the collection.

6. *An estimate of the total annual burden (in hours) associated with the collection:* Considering the above projected figures, we estimate 1,500 to 3,000 hours of annual burden to the public.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response	Total annual burden (hours)
Application	1,000	1/annually	1,000	180 min	3,000
Unduplicated Totals	*1,000*		*1,000*		*3,000*

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

Dated: April 4, 2024.

Darwin Arceo,

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

[FR Doc. 2024–07519 Filed 4–8–24; 8:45 am]

BILLING CODE 4410–29–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0120]

Proposed Extension of Information Collection; Occupational Noise Exposure

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

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 collections of information, in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Occupational Noise Exposure.

DATES: All comments must be received on or before June 10, 2024.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below. Please note that late comments received after the deadline will not be considered.

- *Federal E-Rulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number MSHA–2024–0001.
- *Mail/Hand Delivery:* DOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, 4th Floor West, Arlington, VA 22202–5452. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.
- MSHA will post all comments as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811(a), authorizes the Secretary of Labor (Secretary) to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal, metal, and nonmetal mines.

Noise is a harmful physical agent and one of the most pervasive health

hazards in mining. Repeated exposure to high levels of sound over time causes occupational noise-induced hearing loss (NIHL). NIHL is a serious, often profound physical impairment for miners with far-reaching psychological and social effects. Occupational hearing loss is one of the most common work-related illnesses in the United States. NIHL can be distinguished from aging and other factors that can contribute to hearing loss and it can be prevented.

For many years, NIHL was regarded as an inevitable consequence of working in a mine. Mining, an intensely mechanized industry, relies on drills, crushers, compressors, conveyors, trucks, loaders, and other heavy-duty equipment for the excavation, haulage, and processing of materials. These machines create high sound levels, exposing machine operators and miners working nearby to occupational noise that can contribute to hearing loss. MSHA, the Occupational Safety and Health Administration (OSHA), the U.S. military, and other organizations around the world have established and enforced standards to reduce the loss of hearing. Quieter equipment, isolation of workers from noise sources, and limiting the time workers are exposed to noise are among the many well-accepted methods that will prevent costly incidences of NIHL.

Under 30 CFR 62, Occupational Noise Exposure, mandatory health standards are set for surface and underground coal and metal and nonmetal mines. This information collection addresses records of miners' exposures to noise, hearing conservation programs, hearing examinations, and training to prevent the occurrence and reduce the progression of NIHL among miners. Specifically, this information collection covers the following activities: notifying miners of noise exposure, developing and distributing administrative controls and procedures to reduce miners' exposure, recording audiometric tests, providing evaluators with audiometric tests, providing miners with audiometric test results and interpretation, certifying initial noise training and annual retraining, certifying corrective retraining, and providing miners with training records.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Occupational Noise Exposure. MSHA is particularly interested in comments that:

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

The information collection request will be available on *https://www.regulations.gov.* MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on *https://www.regulations.gov* and *https://www.reginfo.gov.*

The public may also examine publicly available documents at DOL–MSHA, Office of Standards, Regulations and Variances, 201 12th Street South, 4th Floor West, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the West elevator. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This information collection request concerns provisions for Occupational Noise Exposure. MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0120.

Affected Public: Business or other for-profit.

Number of Annual Respondents: 12,530.

Frequency: On occasion.

Number of Annual Responses: 186,262.

Annual Burden Hours: 14,273 hours.

Annual Burden Cost: $657,632.

Annual Other Burden Cost: $127,648.

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

Song-ae Aromie Noe,

Certifying Officer, Mine Safety and Health Administration.

[FR Doc. 2024–07435 Filed 4–8–24; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Workers' Compensation Programs

[OMB Control No. 1240–0010]

Proposed Extension of an Existing Collection; Request To Be Selected as Payee (CM–910)

AGENCY: Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Department of Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent purden, conducts a pre-clearance request for comment to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This request helps to ensure that: requested data can be provided in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the impact of collection requirements on respondents can be properly assessed. OWCP/DCMWC is soliciting comments on the information collection request (ICR) titled, ''Request to be Selected as Payee (CM–910)''.

DATES: Consideration will be given to all written comments received by June 10, 2024.

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

Written/Paper Submission: Submit written/paper submissions the following way:

- *Mail/Hand Delivery:* Mail or visit DOL–OWCP/DCMWC, Office of Workers' Compensation Program,

Division of Coal Mine Workers' Compensation, U.S. Department of Labor, 200 Constitution Ave. NW, Room C3520, Washington, DC 20210.

OWCP/DCMWC will post your comment as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Program administers the Coal Mine Workers' Compensation Act. The Act provides compensation to coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and to survivors of coal miners whose deaths are attributable to the disease. The Act also provides eligible miners with medical coverage for the treatment of lung diseases related to pneumoconiosis. This program helps ensure the requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

If a beneficiary is incapable of handling his/her affairs, the person or institution responsible for their care is required to apply to receive the benefit payments on the beneficiary's behalf. The CM 910 is the form completed by representative payee applicants. The payee applicant completes the form and submits it for evaluation to the district office that has jurisdiction over the beneficiary's claim file. The Black Lung Benefits Act, 30 U.S.C. 901 and its implementing regulations, 20 CFR 725.513(a), 725.533(e), authorizes this information collection. See 30 U.S.C. 936(a).

II. Desired Focus of Comments

The OWCP/DCMWC is soliciting comments concerning the proposed information collection request (ICR) titled, ''Request to be Selected as Payee (CM–910)''. OWCP/DCMWC is particularly interested in comments that:

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

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

III. Current Actions

This information collection request concerns the ''Request to be Selected as Payee (CM–910)''. OWCP/DCMWC has updated the date with respect to number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension.

Agency: DOL—Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, OWCP/DCMWC.

OMB Control Number: 1240–0010.

Affected Public: Individuals or households; Business or other for profit; Not-for-profit institutions.

Number of Respondents: 350.

Frequency: On Occasion.

Number of Responses: 350.

Estimated Total Annual Burden Hours: 88 hours.

Annual Respondent of Recordkeeper Cost: 230.00.

OWCP Form: Form CM–910, Request to be Selected as Payee.

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

Authority: 44 U.S.C. 3506(C)(2)(A).

Anjanette Suggs,

Agency Clearance Officer.

[FR Doc. 2024–07432 Filed 4–8–24; 8:45 am]

BILLING CODE 4510–CK–P

NATIONAL CREDIT UNION ADMINISTRATION

Renewal of Agency Information Collections for Comments Request: Proposed Collections

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice and request for comments.

SUMMARY: The National Credit Union Administration (NCUA) will submit the following information collection requests 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.

DATES: Written comments should be received on or before June 10, 2024 to be assured consideration.

ADDRESSES: Interested persons are invited to submit written comments on the information collection to Dacia Rogers, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314, Suite 5067; Fax No. (703) 519–8579; or email at *PRAComments@NCUA.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by contacting Dacia Rogers at (703) 718–1155.

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0092.

Title: Loans to Members and Lines of Credit to Members, 12 CFR 701.21 and Apx. B to 741.

Type of Review: Extension of a previously approved collection.

Abstract: Section 107(5) of the Federal Credit Union Act authorizes Federal Credit Unions (FCU) to make loans to members and issue lines of credit (including credit cards) to members. Section 701.21 governs the requirements related to loans to members and lines of credit to members for FCUs. Additionally, Part 741 established requirements for all federally insured credit unions (both Federal and state charters) related to loans to members and lines of credit union members. NCUA reviews the information collections to ensure compliance with applicable regulations and laws, and to assess the safety and soundness of the credit union's lending program.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 23,584.

OMB Number: 3133–0193.

Title: Joint Standards for Assessing the Diversity Policies and Practices.

Type of Review: Extension of a previously approved collection.

Abstract: Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Act) instructed each agency Office of Minority and Women Inclusion (OMWI) director to develop standards for assessing the diversity policies and practices of entities regulated by each agency. The Agencies worked together to develop joint standards and publish a policy statement in the **Federal Register**. The Policy Statement contains a collection of information. The NCUA 15004, ''Annual Voluntary Credit Union Diversity Self-Assessment,'' can be used by federally insured credit unions to perform their assessment and to submit information to NCUA.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 2,600.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit comments concerning: (a) whether the collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) 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 the information on the respondents, including the use of automated collection techniques or other forms of information technology.

By the National Credit Union Administration Board.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2024–07464 Filed 4–8–24; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL LABOR RELATIONS BOARD

Privacy Act of 1974; System of Records

AGENCY: National Labor Relations Board (NLRB).

ACTION: Notice of a modified system of records and rescindment of systems of records notices.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, the National Labor Relations Board (''NLRB'' or ''Agency'') publishes this notice of a modified system of records entitled Next Generation Case Management System (NxGen) (NLRB–33), which includes records from twelve systems of records that are no longer being maintained, and so those twelve systems of records notices are being rescinded. NxGen, an electronic case tracking system, permits the accurate and timely collection, retrieval, and retention of information maintained by offices of the Agency regarding those offices' handling of matters before them, including unfair labor practice and representation cases. This notice also includes the rescindment of two other systems of records that the Agency has stopped maintaining: Investigative Services Case Files (NLRB–16, **Federal Register**, May 16, 1988), and Telephone Call Detail Records (NLRB–19, **Federal Register**, August 17, 1994). All persons are advised that, in the absence of submitted comments considered by the Agency as warranting modification of the notice as proposed, it is the intention of the Agency that the notice shall be effective upon expiration of the comment period without further action.

DATES: Written comments on the system's routine uses must be submitted on or before May 9, 2024. The routine uses in this action will become effective on May 9, 2024 unless written comments are received that require a contrary determination.

ADDRESSES: All persons who desire to submit written comments for consideration by the Agency in connection with the proposed notice of system of records notice shall file them with the Senior Agency Official for Privacy (SAOP), National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570. Comments on this notice may also be submitted electronically to *privacy@nlrb.gov* or through *http://www.regulations.gov,* which contains a copy of this proposed notice and any submitted comments.

FOR FURTHER INFORMATION CONTACT: Ibrahim M. Ibrahim, Privacy and Information Security Specialist, Office of the Chief Information Officer, National Labor Relations Board, 1015 Half Street SE, Third Floor, Washington, DC 20570–0001, (202) 273–3733, or at *privacy@nlrb.gov.*

SUPPLEMENTARY INFORMATION: NxGen contains information from the twelve legacy systems, listed below, which are now consolidated into NxGen. The system of records notices for these twelve legacy systems are being rescinded.

The Agency previously published a **Federal Register** notice that it was consolidating six of its legacy electronic case tracking systems into a new electronic system, NxGen. 77 FR 5062 (Feb. 1, 2012). The system of records notices for those six systems had been published at 71 FR 74,941 (Dec. 13, 2006). Those six systems were:

1. Judicial Case Management System—Pending Case List (JCMS–PCL) and Associated Headquarters Files (NLRB–21);

2. Judicial Case Management System-eRoom (JCMS-eRoom) (NLRB–22);

3. Solicitors System (SOL) and Associated Headquarters Files (NLRB–23);

4. Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB–25);

5. Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB–28); and

6. Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB–30).

In addition to the six legacy systems cited in the 2012 notice, NxGen now includes records from the following five additional legacy systems, whose system of records notices were also published at 71 FR 74,941 (Dec. 13, 2006):

7. Trial Information Gathered on Electronic Record (TIGER) and Associated Agency Files (NLRB–24);

8. Litigation Information on the Network (LION) (NLRB–26);

9. Special Litigation Branch Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB–27);

10. Work in Progress (WIP) and Associated Headquarters Files (NLRB–29); and

11. Office of Appeals Extension of Time System (NLRB–31).

NxGen also contains records from a legacy system called:

12. Agency Disciplinary Case Files (Nonemployees) (NLRB–20), whose system of records notices were published at 58 FR 57633 (Oct. 26, 1993) and 61 FR 13884 (March 28, 1996), concerning disciplinary proceedings of non-Board attorneys pursuant to 29 CFR 102.177 (''102.177 cases'').

In addition to rescinding the twelve legacy systems listed above, the Agency is also rescinding two other systems of records that the Agency has stopped maintaining:

- Investigative Services Case Files (NLRB–16), 53 FR 17262 (May 16,

1988), concerning Agency investigations related to unfair labor practice cases (including compliance processing, as explained below) where, for charges that appear meritorious, there is concern about whether the correct party has been alleged or whether the charged party's financial condition raises questions about its ability to remedy unfair labor practices. For those records formerly contained in NLRB–16 that are not contained in NxGen, the Agency has treated those records pursuant the NLRB's Comprehensive Records Schedule (with National Archives and Records Administration (NARA) filename NC1–025–81–01) for ''transitory files'' (Standard Number 101–04), with a disposition of destruction after 90 days; and

• Telephone Call Detail Records (NLRB–19), 59 FR 42315 (August 17, 1994), concerning records relating to use of Agency telephones to place long-distance calls. The Agency has treated records from NLRB–19 pursuant to the disposition instructions in NARA General Records Schedule 5.6 for ''Records of credit card abuse and postal irregularities'' (Item 050).

NxGen contains case information regarding matters before the Board (including matters before the Office of the Solicitor, the Office of Representation Appeals, and the Office of the Executive Secretary), the Division of Judges, the Division of Operations-Management, Regional Offices, the Appellate and Supreme Court Litigation Branch, the Division of Advice's Regional Advice and Injunction Litigation Branches, the Office of Appeals, and the Contempt, Compliance, and Special Litigation Branch.

Records in NxGen include administrative unfair labor practice and representation proceeding documents, litigation files, transcripts, exhibits, briefs, motions, Board decisions, court opinions and orders made in the adjudication of cases, 102.177 case records, correspondence, legal research memoranda, and other related documents.

Pursuant to 5 U.S.C. 552a(k)(2), the Agency has exempted portions of NxGen from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f). *See* 29 CFR. 102.119, published at 82 FR 11754, Feb. 24, 2017, as amended at 84 FR 70425, Dec. 23, 2020, and 85 FR 75855, Nov. 27, 2020. Pursuant this *Notice of a modified system of records and rescindment of system of records notices,* the Agency, in a Direct Final Rule that appears elsewhere in this issue of the **Federal Register**, is setting forth consolidated exemptions for the NxGen system to make technical changes that would eliminate references to the legacy systems listed above. A report of the proposal to significantly revise this system of records has been filed pursuant to 5 U.S.C. 552a(r) with Congress and the Office of Management and Budget.

References to the Agency's ''unfair labor practice cases'' in this notice include the portion of such cases known as ''compliance,'' during which the Agency seeks effectuation of remedial provisions of a settlement agreement, Board order, or court judgment enforcing a Board order. *See* NLRB Casehandling Manual, Part 3, Compliance Proceedings (October 2020).

SYSTEM NAME AND NUMBER:

Next Generation Case Management System (NxGen) (NLRB–33).

SECURITY CLASSIFICATION:

Controlled Unclassified Information.

SYSTEM LOCATION:

Records are maintained at the National Labor Relations Board Headquarters in Washington, DC and in NLRB field locations, which are available on the NLRB's website (*https://www.nlrb.gov*), and in electronic databases.

SYSTEM MANAGER:

Chief Information Officer, National Labor Relations Board.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 153(d), 159, 160, 161; 44 U.S.C. 3101; the Government Performance and Results Act of 1993, Public Law 103–62, 107 Stat. 285 (codified in sections of Titles 5, 31, and 39 of the U.S. Code); the Government Performance and Results Modernization Act of 2010, Public Law 111–352 (codified as amended in scattered sections of 5 U.S.C. and 31 U.S.C.); 29 CFR 102.177; and E.O. 9397 (8 FR 16094, Nov. 30, 1943), as amended by E.O. 13478 (73 FR 70239, Nov. 20, 2008), relating to federal use of Social Security numbers.

PURPOSE(S) OF THE SYSTEM:

NxGen is an electronic case management system used by offices of the Agency to facilitate the accurate and timely collection, retrieval, and retention of information regarding the processing of unfair labor practice and representation cases, as well as other matters. The following offices of the Agency use NxGen for the purposes described:

• the Offices of the Board (Members and their staffs, the Office of Representation Appeals, the Office of the Solicitor, and the Office of the Executive Secretary) to facilitate collaborative drafting of decisions and disposition of cases and other matters before the Board;

• the Division of Judges for managing cases before the Division;

• the Division of Operations-Management and the Regional Offices for the processing of unfair labor practice charges, representation petitions, and matters arising under 29 CFR 102.177;

• the Appellate and Supreme Court Litigation Branch for cases referred to the Branch for enforcement or review in the federal courts of appeals, pursuant to Section 10(e) and (f) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(e) and (f), as well as for consideration of Supreme Court matters in consultation with the United States Solicitor General's office;

• the Division of Advice, for cases referred by the Regions to that Division;

• the Contempt, Compliance, and Special Litigation Branch (CCSLB) to facilitate case handling by the Branch; and

• the Office of Appeals for reviewing appeals of decisions by Regional Directors to dismiss or defer unfair labor practice charges and requests for extensions of time to file appeals.

The information and activities tracked by the system may be generated by parties' filings of briefs, motions, and other documents, or by deliberative, analytical processes undertaken by Agency employees assigned to cases. This system stores current and historical information and is used to: facilitate and document casehandling; generate data for managing the Agency's case processing and resources; create the Agency's budget; prepare monthly and annual reports of casehandling activities; provide responses to requests pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552; and provide information to the public, Congress, and other governmental entities. The information in this system may be used to assist in evaluating performance of Agency employees.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individual charged parties and individual charging parties in unfair labor practice cases; individual petitioners and individual employers in representation cases; individual representatives and named contacts of parties in unfair labor practice and representation cases, as well as related judicial or administrative proceedings; individual discriminatees in unfair

labor practice cases filed with the Agency; individuals who have filed petitions for rulemaking with the Board; non-Agency attorneys who are the subjects of disciplinary proceedings under Section 102.177 of the Board's Rules and Regulations; current Agency employees assigned to cases or other matters or judicial proceedings involving the Agency.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records contain such data elements as the names of parties, case status, Agency personnel assignments, due dates, hearing dates, court judgment dates, case-docketing information, parties' home addresses and home telephone numbers, personal email addresses, signatures, and health and/or medical information. For certain discriminatees in unfair labor practice cases, the records may also include the discriminatee's name, date of birth, date of death (if applicable), Social Security number, amounts of certain earnings, bank account information (where the discriminatee elects to receive funds through direct deposit), as well as the name, address, identification number of discriminatee's employer.

RECORD SOURCE CATEGORIES:

Record source categories include parties, representatives, witnesses, Agency employees, and the Social Security Administration in the following types of matters: unfair labor practice and representation cases; petitions for rulemaking; Section 102.177 cases; and other matters handled by Agency offices.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside the NLRB as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To a federal, state, or local agency (including a bar association or other legal licensing authority), charged with the responsibility for investigating, defending, or pursuing violations of law or rule (civil, criminal, or regulatory in nature), in any case in which there is an indication of a violation or potential violation of law or rule;

2. In a federal, state, or local proceeding or hearing, which is administrative, judicial, or regulatory, in accordance with the procedures governing such disclosure and proceeding or hearing, including, but not limited to, National Labor Relations Board Rule 29 CFR 102.118, and such records are determined by the Agency to be arguably relevant to the litigation;

3. To the Agency's legal representative, including the Department of Justice and other outside counsel, where the Agency is a party in litigation or has an interest in litigation, including when any of the following is a party to litigation or has an interest in such litigation: (a) the Agency, or any office thereof; (b) any employee of the Agency in his or her official capacity; (c) any employee of the Agency in her or her individual capacity, where the Department of Justice has agreed or is considering a request to represent the employee; or (d) the United States, where the Agency determines that litigation is likely to affect the Agency or any of its offices;

4. To a party or his or her representative in an Agency administrative unfair labor practice or representation proceeding or related judicial proceeding, for the purpose of: (a) negotiation or discussion on matters in furtherance of resolving the proceeding; (b) providing such persons with information concerning the progress or results of the Agency administrative or judicial proceeding; or (c) ensuring due process in the Agency's administrative proceedings by disclosing copies of all documents referenced by the Agency's Case-handling Manual, Part 1, Unfair Labor Practice Proceedings Section 11842, or releasing documents in accordance with the Board's Rules and Regulations;

5. To any person who, during the course of an Agency administrative unfair labor practice or representation proceeding or related judicial proceeding, is a source for information or assists in such proceeding, to the extent necessary to obtain relevant information or assistance or for a reason compatible with the purpose for which the record was collected;

6. To a federal, state, local, or foreign agency or agent, in order to: (a) aid in the Agency's collection, administration, and disbursement of remedial funds owed under the NLRA; or (b) assist in collecting an overdue debt owed to the United States by an unfair labor practice respondent;

7. To an arbitrator to resolve disputes under a negotiated Agency grievance arbitration procedure;

8. To officials of labor organizations recognized under 5 U.S.C. Chapter 71, when disclosure is not prohibited by law, and the data is normally maintained by the Agency in the regular course of business and is necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The foregoing shall have the identical meaning as 5 U.S.C. 7114(b)(4);

9. To a member of Congress or to a congressional staff member in response to an inquiry of the congressional office made at the request of the constituent about whom the records are maintained;

10. To the public, news media, and other individuals and organizations, where such information would be required to be disclosed if requested under the Freedom of Information Act (FOIA), 5 U.S.C. 522.

11. To FOIA requesters, when the Agency discloses requested documents under the circumstances of the Agency's discretionary release policy, set forth in the Agency's FOIA Manual;

12. To the news media and the public, with the approval of the Senior Agency Official for Privacy in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of the NLRB, or when disclosure is necessary to demonstrate the accountability of the Agency, except to the extent the Senior Agency Official for Privacy determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy;

13. To the following Federal agencies: (a) the Office of Management and Budget in order to obtain advice regarding the Agency's obligations under the Privacy Act, or to assist with the Agency's budget requests; (b) the Department of Justice in order to obtain advice regarding the Agency's obligations under the Freedom of Information Act; or (c) the National Archives and Records Administration, in records management inspections conducted under the authority of 44 U.S.C. 2904, 2906;

14. To appropriate agencies, entities, and persons when (1) the National Labor Relations Board suspects or has confirmed that there has been a breach of the system of records; (2) the National Labor Relations Board has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the National Labor Relations Board (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 the National Labor Relations Board's efforts to respond to the suspected or confirmed breach or to

prevent, minimize, or remedy such harm;

15. To another federal agency or federal entity, when the National Labor Relations Board 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;

16. To contractors, for the purpose of reproducing or processing any record within the system for use by the Agency;

17. To contractors and other federal agencies, for the purpose of assisting the Agency in further development and continuing maintenance of electronic case tracking systems; and

18. To NARA, pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906, as well as to NARA's Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures and compliance with the FOIA, and to facilitate OGIS's offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Currently, the data is maintained as electronic records in NxGen. Limited historical information is on electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Data may be retrieved by Agency employees through the application's query search by case number, case type, dispute state, case status, region, date filed, date created, issued date, document source, document type, and NxGen action, as well as by using the iSearch function, which is a free-form search of all text, including individual names.

Visibility protocols are in place to ensure that General Counsel–side employees and Board-side employees may only view their own side's internal documents.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

NxGen records will be retained and disposed of in accordance with the NLRB's Request for Records Disposition Authority, Records Schedule Number DAA–0025–2017–0001, approved by NARA on April 9, 2018. Any subsequent versions of the NxGen records schedule will be posted on NARA's website (*https://www.archives.gov*).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic system-based access controls are in place to prevent data misuse. Access to electronic information is controlled by administrators who determine users' authorized access based on each user's office and position within the office.

Access criteria, procedures, controls, and responsibilities are documented and consistent with the policies stated in applicable guidance from the NLRB Office of the Chief Information Officer. All network users are also warned at the time of each network login that the system is for use by authorized users only and that unauthorized or improper use is a violation of law.

RECORD ACCESS PROCEDURES:

For records not exempted under 5 U.S.C. 552a(k)(2), an individual seeking to gain access to records in this system pertaining to such individual should contact the System Manager in accordance with the procedures set forth in 29 CFR 102.119(b) and (c). Specific materials in this system have been exempted from Privacy Act provisions at 5 U.S.C. 552a(c)(3) and (d), regarding access to records. The section of this notice titled ''Exemptions Promulgated for the System'' indicates the kind of material exempted and the reasons for exempting them from access.

An individual requesting access in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such access, such as a government-issued photo ID. Individuals requesting access via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity. Requesters should also reasonably specify the record contents being sought.

CONTESTING RECORD PROCEDURES:

For records not exempted under 5 U.S.C. 552a(k)(2), an individual may request amendment of a record in this system pertaining to such individual by directing a request to the System Manager in accordance with the procedures set forth in 29 CFR 102.119(d). Specific materials in this system have been exempted from Privacy Act provisions at 5 U.S.C. 552a(d), regarding amendment of records. The section of this notice titled ''Exemptions Promulgated for the System'' indicates the kinds of material exempted and the reasons for exempting them from amendment.

An individual seeking to contest records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to contest such records, such as a government-issued photo ID. Individuals seeking to contest records via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity. Requesters should also reasonably identify the record, specify the information they are contesting, state the corrective action sought and the reasons for the correction along with supporting justification showing why the record is not accurate, timely, relevant, or complete.

NOTIFICATION PROCEDURES:

An individual may inquire as to whether this system contains a record pertaining to such individual by sending a request in writing, signed, to the System Manager at the address above, in accordance with the procedures set forth in 29 CFR 102.119(a).

An individual requesting notification of records in person must provide identity documents sufficient to satisfy the custodian of the records that the requester is entitled to such notification, such as a government-issued photo ID. Individuals requesting notification via mail must furnish, at minimum, name, date of birth, and home address in order to establish identity.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(k)(2), the Agency has exempted portions of this system, including, with respect to General Counsel–side information, investigatory records pertaining to unfair labor practice and representation cases, and with respect to Board-side information, investigatory records relating to requests to pursue proceedings under Section 10(j) of the NLRA (29 U.S.C. 160(j)), requests to pursue federal court contempt proceedings, and certain requests that the Board initiate litigation or intervene in non-Agency litigation, from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and(f). This system may contain the following types of information:

Investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2):

Provided, however, that if any individual is denied any right, privilege, or benefit to which he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

See 29 CFR 102.119.

HISTORY:

53 FR 17262 (May 16, 1988); 58 FR 57633 (Oct. 26, 1993); 9 FR 42315 (Aug. 17, 1994); 61 FR 13884 (Mar. 28, 1996); 71 FR 74941 (Dec. 13, 2006); and 77 FR 5062 (Feb. 1, 2012).

Dated: April 2, 2024.

By direction of the Board.

Roxanne L. Rothschild,

Executive Secretary.

[FR Doc. 2024–07324 Filed 4–8–24; 8:45 am]

BILLING CODE 7545–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Computer Science for All—Evaluation and Systematic Review of Grantee Documents

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register**, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice.

DATES: 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: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

Comments: Comments regarding (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information on respondents; and (d) 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 should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Copies of the submission may be obtained by calling 703–292–7556. NSF 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.

SUPPLEMENTARY INFORMATION:

Title of Collection: Generic Clearance for the Regional Innovation Engines Evaluation and Monitoring Plan.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of Request: New information collection.

Description

The instruments will collect data on (1) individuals in leadership or governance roles in funded NSF Regional Innovation Engine (NSF Engine), and individuals engaged or participating in the NSF Engine's activities; (2) organizations that are partnering with the NSF Engine or participating in NSF Engine activities; and (3) information on the programmatic activities, outputs, impact, and/or outcomes of the Engine (*i.e.,* use-inspired research, development and translation, impact on the economy, new jobs created, new industries launched, and others).

Background

The CHIPS and Science Act of 2022 codified the National Science Foundation's cross-cutting Directorate for Technology, Innovation and Partnerships (TIP), NSF's first new directorate in more than 30 years, and charged it with the critical mission of advancing U.S. competitiveness through investments that accelerate the development of key technologies and address pressing national, societal and geostrategic challenges. NSF's TIP directorate deepens the Agency's commitment to support use-inspired research and the translation of research results to the market and society. In doing so, TIP strengthens the intense interplay between foundational and use-inspired work, enhancing the full cycle of discovery and innovation.

TIP integrates with NSF's existing directorates and fosters partnerships—with government, industry, nonprofits, civil society, and communities of practice—to leverage, energize and rapidly bring to society use-inspired research and innovation. TIP spurs use-inspired research and innovation to meet the nation's priorities by accelerating the development of breakthrough technologies and advancing solutions.

The NSF Regional Innovation Engines (NSF Engines) program serves as a flagship funding program of the TIP directorate, with the goal of expanding and accelerating scientific and technological innovation within the U.S. by catalyzing regional innovation ecosystems throughout every region of our nation. The NSF Engines program was authorized in the CHIPS and Science Act of 2022 (Section 10388) to

(1) advance multidisciplinary, collaborative, use-inspired and translational research, technology development, in key technology focus areas;

(2) address regional, national, societal, or geostrategic challenges;

(3) leverage the expertise of multi-disciplinary and multi-sector partners, including partners from private industry, nonprofit organizations, and civil society organizations; and

(4) support the development of scientific, innovation, entrepreneurial, and STEM educational capacity within the region of the Regional Innovation Engine to grow and sustain regional innovation.

The NSF Engines program aims to fund regional coalitions of partnering organizations to establish NSF Engines that will catalyze technology and

science-based regional innovation ecosystems. Each NSF Engine is focused on addressing specific aspects of a major national, societal and/or geostrategic challenge that are of significant interest in the NSF Engine's defined ''region of service.'' The NSF Engines program envisions a future in which all sectors of the American population can participate in and benefit from advancements in scientific research and development equitably to advance U.S. global competitiveness and leadership. The program's mission is to establish sustainable regional innovation ecosystems that address pressing regional, national, societal, or geostrategic challenges by advancing use-inspired and translational research and development in key technology focus areas. The programmatic level goals of NSF Engines are to:

- *Goal 1:* Stimulate innovation in regions with low levels of innovation;
- *Goal 2:* Build and train an inclusive workforce;
- *Goal 3:* Advance key technologies;
- *Goal 4:* Create a culture that promotes inclusive and equitable prosperity;
- *Goal 5:* Cultivate new, sustainable, trusting cross-sector partnerships;
- *Goal 6:* Create a sustainable innovation ecosystem;
- *Goal 7:* Increase economic growth;
- *Goal 8:* Increase job creation.

To achieve these goals, each NSF Engine will carry out an integrated and comprehensive set of activities spanning use-inspired research, translation-to-practice, entrepreneurship, and workforce development to nurture and accelerate regional industries. In addition, each NSF Engine is expected to embody a culture of innovation and have a demonstrated, intense, and meaningful focus on improving diversity throughout its regional science and technology ecosystem. NSF Engines are awarded as cooperative agreements and are expected to undergo an annual comprehensive evaluation assessment of the NSF Engine's performance, which will inform subsequent year funding. The total funding for each NSF Engine is up to $160 million over 10 years with the first-ever group of NSF Engines expected to be announced in late 2023.

Effective monitoring, assessment, and evaluation of NSF Engines will be critical for making programmatic funding decisions and increasing the understanding of how regional innovation ecosystems are created. Systematic data and information collection will be qualitative, quantitative, and descriptive in nature and will provide a means for managing Program Directors to monitor progress throughout a given NSF Engine the award and ensure that the award is in good standing. These data will also allow NSF to assess the NSF Engines Program in terms of intellectual, technological, societal, commercial, and economic impacts that are core to the NSF merit review criteria. Finally, in compliance with the Evidence Act of 2019, information collected will be used for both internal and external program evaluation and assessment, satisfying Congressional requests, and supporting the Agency's policymaking and reporting needs.

Methodology

This information collection, which entails collecting information from NSF Engines grantees and participants through a series of surveys, interviews, focus groups, and case studies, is in accordance with the Agency's commitment to improving service delivery as well as the Agency's strategic goal to ''advance the capability of the Nation to meet current and future challenges.''

For this effort, four categories of survey instruments have been developed, each of which will include closed-ended and open-ended questions to generate quantitative and qualitative data. For ease of use for our respondent pool, survey questionnaires will be programmed into interactive web surveys and distributed to eligible respondents by email.

The surveys, which will serve as a census for all applicable NSF Engines grantees, partner organizations, and participants, will be used to collect baseline measures at the start of the program and vital information on how grantees, partner organizations, and participants progress through the program. All data collected through web surveys will be made available to the external evaluator(s) for each NSF Engine to be used for their own analyses, assessments, and evaluation. The four categories of data that will be collected for each NSF Engine through web-based surveys are outlined below:

- Input data for a given NSF Engine
  - The Chief Executive Officer, or designated personnel, will be asked to provide basic information on each NSF Engine participant (*e.g.,* name of individual, email address of individual, which NSF Engine activity the individual is involved in), each partner organization (*e.g.,* name and address of partner organization, point of contact for organization's involvement with NSF Engines, email address for organization's point of contact), and each programmatic activity (*e.g.,* title of activity, activity lead name and email address, short description of the activity). Automated web-based surveys will be sent to the email addresses collected from this input. Data will be collected on a rolling basis as NSF Engine activities may start at any time during the award.
- Individual level data
  - Demographic and personal data (*e.g.,* age, gender, race, educational attainment, socioeconomic status, job status) will be collected for all participants in a given NSF Engine, including the Chief Executive Officer; members of the leadership team, governance board, and advisory committees, as applicable; researchers; and workforce development participants. Data collected from individuals will be used to monitor and assess whether the NSF Engine's participants reflect the demographic diversity of the region of service defined by the NSF Engine. In addition, these data can be used by individual NSF Engines to assess whether they are meeting their diversity, equity, inclusion, and accessibility (DEIA) objectives and targets. Surveys for individuals will be conducted once a year.
- Partner organization level data
  - Partner organizations that are involved in any NSF Engines activities or provide any monetary, in-kind, or other contributions will be surveyed twice a year and asked to provide basic information about its organization (*e.g.,* employer identification number, legal name of organization, type of organization); in which NSF Engine activities the organization participated; the monetary or estimated value of in-kind and other resources they contributed to the NSF Engine; with which other partner organizations within the NSF Engine they collaborated; why they are a partner of the NSF Engine; and other information related to the roles and responsibilities an organization has within NSF Engine. Individual Engines may use the data for internal assessments and to help inform decision making. Data collected from this effort will be used to monitor and assess the level of cross-sector partnerships created within and across NSF Engines.
- Programmatic-level data
  - NSF Engines activities fall into one of four programmatic categories: (1) use-inspired and translational research, (2) workforce development, (3) diversity, equity, inclusion, and accessibility (DEIA), and (4) ecosystem building (*e.g.,* stakeholder engagement, strategic planning, building of infrastructure, partner outreach). The lead of each activity will be asked to provide

information about the activity twice a year. Different survey questionnaires will be used for each of the four programmatic categories. Basic information to be collected for all activities include activity status (*i.e.,* active, completed, on hold, or cancelled); identification of milestones; and milestone status (*i.e.,* on track, at risk, or off track). Information specific to each programmatic category will also be collected. For instance, the survey questionnaire on use-inspired and translational research activities will also collect information on intellectual property (*e.g.,* invention disclosures, patents granted, licensing agreements, royalties earned) as well as where along is the research spectrum of an activity (*e.g.,* technology and adoption readiness levels). For the workforce development survey questionnaire, information will also be collected on the targeted population(s) of the workforce development activity. Individual NSF Engines may use the data for internal assessments and to help inform decision making. Data collected from this effort will also be used to monitor and assess the progress made in use-inspired and translational research, workforce development, DEIA, and ecosystem building within and across NSF Engines.

In addition to the web-based surveys, follow-up interviews and focus groups will be conducted with project team leaders, such as Principal Investigators (PIs), Principal Directors (PDs), Chief Executive Officers (CEO), and members of the governance boards, as well as NSF Engines stakeholders, such NSF Engines participants, and partner and community-based organizations. Case studies and focus group interviews will be used to collect qualitatively rich discursive and observational information that cannot be collected within web surveys. Both interviews (focus groups and/or follow-up) and case studies will be conducted virtually with the possibility of in-person interviews and non-participant observation to be held in the future.

NSF's TIP directorate will only submit a collection for approval under this clearance if it meets the following conditions:

- The collection has a reasonably low burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for the Federal government;
- The collection is non-controversial and does not raise issues of concern for other Federal agencies; and
- Information gathered will be used for the dual and interrelated purposes of disseminating information about the NSF Engines program and using this information to conduct enhanced program monitoring for NSF Engines, identify and implement efficiencies, and make programmatic improvements.

Feedback collected under this clearance provides useful information for the continued evolution of the NSF Engines program, but it may not yield data that can be generalized to the overall population in all instances. Our qualitative data collection campaigns—follow-up interviews, focus groups, and case studies—are designed to provide contextual understanding of the progress made by each NSF Engine, and to identify NSF Engines or projects that demonstrate exceptional performance in efforts to build an inclusive, sustainable innovation ecosystem. All data collection campaigns (*e.g.,* web-based surveys, interviews, focus groups), collectively, will help TIP monitor the progress of individual NSF Engines, identify trends over time, and assess overall program performance.

Affected Public: Please refer to the detailed descriptions of each programmatic category for the targeted groups.

Average Expected Annual Number of Activities: For each Engine award, we anticipate the following lower and upper bounds for the numbers of responses and response burdens by collection method:

Collection component	Number of respondents	Number of hours	Total burden (hours)
6 surveys	40–70 respondents per Engine	10–15 hours per Engine per year	400–1,050 hours per Engine per year.
Focus group interviews.	10 participants/Engine (10 Engines)	2 hours per session	200 hours per Engine per year.
Total			600–1,250 hours per Engine per year.

As shown above, the annual response burden for the collections under this request is in the range of 600–1,250 hours.

Respondents: Lower bound estimate of 60 individuals and upper bound estimate of 400 individuals per NSF Engine award per year.

Annual Responses: Lower and upper bound estimates of 100 and 600 responses per NSF Engine per year, respectively. The total number of annual responses will be based on the total number of NSF Engines awarded, which is determined by annual funding availability.

Frequency of Response: Please refer to the description of programmatic categories for frequency of data collection.

Average Minutes per Response: 30.

Burden Hours: Lower and upper bound estimates of approximately 85 and 400 hours per NSF Engine award, respectively.

Dated: April 4, 2024.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–07517 Filed 4–8–24; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Biological Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub., L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Advisory Committee for Biological Sciences (#1110).

Date and Time: May 8—9, 2024; 9:00 a.m.—5:00 p.m. (Eastern).

Place: NSF, 2415 Eisenhower Avenue, Alexandria, VA 22314.

This is a hybrid meeting with advisory committee members participating in-person and virtually. Livestreaming is available for members of NSF and the external community via the following links:

May 8, 2024: *https://youtube.com/live/4ve0DsdeUmk?feature=share*

May 9, 2024: *https://youtube.com/live/4ve0DsdeUmk?feature=share*

Type of Meeting: Open.

Contact Persons: Dr. Karen C. Cone, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA

22314; Telephone: (703) 292–4967; Email: *kccone@nsf.gov.*

Purpose of Meeting: The Advisory Committee for the Directorate for Biological Sciences (BIO) provides advice and recommendations concerning major program emphases, directions, and goals for the research-related activities of the divisions that make up BIO.

Agenda: Agenda items will include: a Directorate business update; report on BIO's response to the Committee of Visitors Report for the Division of Environmental Biology; report from the Working Group for the Long Term Environmental Research Program on future program priorities; overview of the report, '*Vision, Needs, and Proposed Actions for the Data for the Bioeconomy Initiative',* overview of BIO support for data resources and synthesis centers, panel discussion on the intersection of artificial intelligence (AI) and biological research followed by AC discussion of opportunities and bottlenecks for advancing this intersection, a review of BIO funding metrics relevant to BIO's shift to no-deadlines for core programs, a review of BIO investments and outreach in EPSCoR states relevant to the CHIPs and Science Act mandates for increased NSF funding for institutions in EPSCoR jurisdictions, an overview from the Committee for Equal Opportunity in Science and Engineering on their 2023 Report on Rural STEM, and other directorate matters.

Dated: April 4, 2024.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2024–07524 Filed 4–8–24; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Grantee Reporting Requirements for the Graduate Research Fellowship Program

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to reinstate this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting Office of Management and Budget (OMB) clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by June 10, 2024 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18253, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NCSES, including whether the information will have practical utility; (b) the accuracy of the NCSES's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; and (d) 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.

Title of Collection: Grantee Reporting Requirements for the Graduate Research Fellowship Program.

OMB Number: 3145–0223.

Expiration Date of Approval: June 30, 2024.

Type of Request: Intent to seek approval to renew an information collection.

Abstract:

Proposed Project: The purpose of the NSF Graduate Research Fellowship Program is to help ensure the vitality and diversity of the scientific and engineering workforce of the United States. The program recognizes and supports outstanding graduate students who are pursuing research-based master's and doctoral degrees in science, technology, engineering, and mathematics (STEM) and in STEM education. The GRFP provides three years of support, to be used during a five-year fellowship period, for the graduate education of individuals who have demonstrated their potential for significant research achievements in STEM and STEM education.

The Graduate Research Fellowship Program uses several sources of information in assessing and documenting program performance and impact. These sources include reports from program evaluation, the GRFP Committee of Visitors, and data compiled from the applications. In addition, GRFP Fellows submit annual activity reports to NSF.

The GRFP Completion report is proposed as a continuing component of the annual reporting requirement for the program. This report, submitted by the GRFP Institution, certifies the completion status of Fellows at the institution (*e.g.,* in progress, completed, graduated, transferred, or withdrawn). The existing Completion Report, Grants Roster Report, and the Program Expense Report comprise the GRFP Annual Reporting requirements from the Grantee GRFP institution. Through submission of the Completion Report to NSF GRFP institutions certify the current status of all GRFP Fellows at the institution as either: In Progress, Graduated, Transferred, or Withdrawn. For Graduate Fellows with Graduated status, the graduation date is a required reporting element. Collection of this information allows the program to obtain information on the current status of Fellows, the number and/or percentage of Graduate Fellowship recipients who complete a science or engineering graduate degree, and an estimate of time to degree completion. The report must be certified and submitted by the institution's designated Coordinating Official (CO) annually.

Use of the Information: The completion report data provides NSF with accurate Fellow information regarding completion of the Fellows' graduate programs. The data is used by NSF in its assessment of the impact of its investments in the GRFP, and informs its program management.

Estimate of Burden: Overall average time will be 15 minutes per Fellow (8,250 Fellows) for a total of 2,063 hours for all institutions with Fellows. An estimate for institutions with 12 or fewer Fellows will be 1 hour, institutions with 12–48 Fellows will be 4 hours, and institutions over 48 Fellows will be 10 hours.

Respondents: Academic institutions with NSF Graduate Fellows (GRFP Institutions).

Estimated Number of Responses per Report: One from each of the 271 current GRFP institutions.

Dated: April 4, 2024.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2024–07491 Filed 4–8–24; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–29 and 72–31; NRC–2024–0067]

Yankee Atomic Electric Company; Yankee Atomic Power Station; 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 an exemption in response to the May 4, 2023, request from Yankee Atomic Electric Company (YAEC), for the Yankee Nuclear Power Station (YNPS or Yankee Rowe) located in Rowe, Massachusetts. The proposed exemption from NRC regulations, if granted, would permit YAEC to make withdrawals from a segregated account within Yankee Rowe's overall nuclear decommissioning trust (NDT), on an annual basis, for spent nuclear fuel (SNF) and Greater than Class C (GTCC) waste management and non-radiological site restoration without prior notification to the NRC. The NRC staff is issuing an environmental assessment (EA) and finding of no significant impact (FONSI) associated with the proposed exemption.

DATES: The EA and FONSI referenced in this document are available on April 9, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0067 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–2024–0067. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *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.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *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: Tilda Liu, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 404–997–4730, email: *Tilda.Liu@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated May 4, 2023, Yankee Atomic Electric Company (YAEC or the licensee) submitted a request to the NRC for an exemption from paragraphs 50.82(a)(8)(i)(A) and 50.75(h)(2) of title 10 of the *Code of Federal Regulations* (10 CFR) for the Yankee Rowe Independent Spent Fuel Storage Installation [1] (ISFSI).

YAEC has established a separate (segregated) account within its over-arching nuclear decommissioning trust (NDT), entitled ''ISFSI Radiological Decom,'' that identifies the funds for radiological decommissioning of the ISFSI apart from the larger balance of funds in the NDT allocated for ongoing management of SNF and GTCC waste and for non-radiological site restoration activities. Although 10 CFR 50.82 applies to the segregated account, it does not apply to the overall NDT.

If granted, the exemptions from 10 CFR 50.82(a)(8)(i)(A) and 50.75(h)(2) would permit YAEC to make withdrawals from the segregated account, on an annual basis, for SNF and GTCC waste management and non-radiological site restoration without prior notification to the NRC. More specifically, with this exemption, YAEC would be able to annually transfer funds exceeding 110 percent of the inflation-adjusted decommissioning cost estimate, described in 10 CFR 50.75, from the segregated account to its overarching NDT and use those funds for SNF and GTCC waste management and non-radiological site restoration.

YAEC received an operating license from the NRC in December 1963, and Yankee Rowe was permanently shut down in October 1991. In 1993, YAEC commenced decommissioning the power plant. The licensee constructed an onsite ISFSI under a general license and transferred the last canister containing GTCC material to the ISFSI in June 2003. The plant completed its final decommissioning of the reactor site, except for the ISFSI, which included dismantling and removing all reactor plant related facilities, in 2007. As a result, only the ISFSI remains at the old plant site of YNPS in Rowe, Massachusetts. By letter dated August 10, 2007, NRC approved the release of the majority of the YNPS site from the 10 CFR part 50 license (DPR–3) for unrestricted release, except for the ISFSI and immediately surrounding areas. Under its 10 CFR part 72 general license, YAEC is authorized to possess, and store spent nuclear fuel at the permanently shut down and decommissioned facility under the provision of 10 CFR part 72, subpart K, ''General License for Storage of Spent Fuel at Power Reactor Sites.''

The NRC staff is performing both a safety evaluation and an environmental review to determine whether to grant this exemption request. The NRC staff will prepare a separate safety evaluation report (SER) to document its safety review and analysis. The NRC's SER will evaluate the proposed exemption for reasonable assurance of adequate protection of public health and safety, and the common defense and security. This EA documents the environmental review which the NRC staff prepared in accordance with 10 CFR 51.21 and 51.30(a). The NRC's decision whether to grant the exemption will be based on the results of the NRC staff's review as documented in this EA, and the staff's safety review to be documented in the SER.

II. Environmental Assessment

By letter dated May 4, 2023, YAEC submitted a request to the NRC for an

[1] As discussed in this document, the Yankee Rowe ISFSI sits on the former site of Yankee Rowe, which YAEC finished decommissioning in 2007. Although only the Yankee Rowe ISFSI remains on the site, YAEC's 10 CFR part 50 license, Facility Operating License No. DPR–3 remains in effect. Because YAEC requested an exemption from the requirements of 10 CFR part 50, this would be an exemption for YAEC's 10 CFR part 50 license rather than for YAEC's 10 CFR part 72 general license. Therefore, although YAEC's submission requested an exemption for the Yankee Rowe ISFSI, the NRC staff will consider it a request for an exemption for YNPS.

exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2). If granted, the proposed exemption from 10 CFR 50.82(a)(8)(i)(A) and 50.75(h)(2) would permit YAEC to make withdrawals from the segregated account, on an annual basis, for SNF and GTCC waste management and non-radiological site restoration without prior notification to the NRC. More specifically, with this exemption, YAEC would be able to annually transfer funds exceeding 110 percent of the inflation-adjusted decommissioning cost estimate (DCE), described in 10 CFR 50.75, from the segregated account to its overarching NDT and use those funds for SNF and GTCC waste management and non-radiological site restoration activities.

Need for the Proposed Action

As required by 10 CFR 50.82(a)(8)(i)(A), decommissioning trust funds may be used by the licensee if the withdrawals are for legitimate decommissioning activity expenses, consistent with the definition of decommissioning in 10 CFR 50.2. This definition addresses radiological decommissioning and does not include activities associated with management of SNF and GTCC waste or non-radiological site restoration. Similarly, the requirements of 10 CFR 50.75(h)(2) restrict the use of decommissioning trust fund disbursements (other than for ordinary and incidental expenses) to decommissioning expenses until final decommissioning has been completed.

YAEC stated that it has established a segregated account, entitled ''ISFSI Radiological Decom,'' within its over-arching NDT, that identifies the funds for radiological decommissioning of the ISFSI. This segregated account is separate from the larger balance of funds in the NDT allocated for ongoing management of SNF and GTCC waste and for other non-radiological site restoration activities. Therefore, exemption from 10 CFR 50.82(a)(8)(i)(A) and 50.75(h)(2) is needed to allow YAEC to use funds from the segregated account for SNF and GTCC waste management and other non-radiological site restoration activities.

In its Decommissioning Funding Assurance Status Report dated March 6, 2023, YAEC stated that its inflation-adjusted DCE for the radiological decommissioning of the ISFSI, is approximately $6.1 million in 2022 dollars. It asserted this amount provides reasonable assurance of adequate funding to complete the NRC required decommissioning activities. In the same report, YAEC reported that, as of December 31, 2022, the segregated ''ISFSI Radiological Decom'' account had $22.5 million. More specifically, in its exemption request, YAEC provided a table showing $6,087,475, in 2022 dollars, as the inflation-adjusted DCE. YAEC's exemption request further stated that the segregated account has a balance of $22,496,631 as of December 31, 2022, meaning that the segregated account had a balance of $16,409,156, or 270 percent beyond the inflation-adjusted DCE.

YAEC stated that, if the exemption is granted, funds in its segregated account which exceed 110 percent of the inflation-adjusted DCE for the radiological decommissioning of the ISFSI would be transferred to the overarching NDT on an annual basis without prior NRC notification. YAEC would then use those funds for SNF and GTCC waste management and non-radiological site restoration, which in turn, would allow YAEC to return its additional excess funds in the overarching NDT to its customers as part of future rate cases with the Federal Energy Regulatory Commission.

The requirements of 10 CFR 50.75(h)(2) further provide that, except for withdrawals being made under 10 CFR 50.82(a)(8) or for payments of ordinary administrative costs and other incidental expenses of the NDT in connection with the operation of the NDT, no disbursement may be made from the NDT without written notice to the NRC at least 30 working days in advance. Therefore, an exemption from 10 CFR 50.75(h)(2) is also needed to allow YAEC to use funds from the segregated account for SNF and GTCC waste management and non-radiological site restoration activities without prior NRC notification.

Environmental Impacts of the Proposed Action

The proposed action involves an exemption from requirements that are of financial and/or administrative nature and that do not have an impact on the environment. Before the NRC could approve the proposed action, it would have to conclude that there is reasonable assurance that adequate funds are available in the segregated account to complete all activities associated with radiological decommissioning as well as SNF and GTCC waste management and non-radiological site restoration. Therefore, there would be no decrease in safety associated with the use of funds from the segregated account to also fund activities associated with SNF and GTCC waste management and non-radiological site-restoration.

The requested exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2), if approved, would allow transfers on an annual basis. YAEC stated that it will continue to provide its annual decommissioning funding assurance status report in accordance with 10 CFR 50.75(f)(1) and (2) and 10 CFR 50.82(a)(8)(v) and (vi) requirements. These reports provide the NRC staff with awareness of, and the ability to act on, any actual or potential funding deficiencies. As the proposed exemption would not affect these requirements, the NRC staff would have tools available for any potential funding deficiencies. Since the exemption would allow YAEC to use funds from the segregated account that are in excess of those required for radiological decommissioning, the adequacy of funds dedicated for radiological decommissioning would not be affected by the proposed exemption. Therefore, there is reasonable assurance that there would be no environmental impact due to lack of adequate funding for radiological decommissioning.

Further, there are no new accident precursors created by using the excess funds from the segregated account for SNF and GTCC waste management and non-radiological site-restoration. The exemption, if granted, would be financial and/or administrative in nature. Thus, the probability of postulated accidents is not increased. Also, the consequences of postulated accidents are not increased. No changes are being made in the types or amounts of effluents that may be released offsite. There is no significant increase in occupational or public radiation exposure. Therefore, the requested exemption will not present an undue risk to the public health and safety.

With regard to potential non-radiological impacts, the proposed action would have no direct impacts on land use or water resources, including terrestrial and aquatic biota, as it involves no new construction or modification of plant operational systems. There would be no changes to the quality or quantity of non-radiological effluents. In addition, there would be no noticeable effect on socioeconomic conditions in the region, no environmental justice impacts, no air quality impacts, and no impacts to historic and cultural resources from the proposed action. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

For these reasons, the NRC concludes there are no significant environmental impacts associated with the proposed exemption request.

Environmental Impacts of the Alternatives to the Proposed Action

In addition to the proposed action, the NRC staff also considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Denial of the exemption request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action would be similar.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies Consulted

By email dated February 16, 2024, the NRC provided a copy of the draft EA to the Massachusetts Department of Public Health, Radiation Control Program, Bureau of Environmental Health, for review. By email dated March 14, 2024, Massachusetts Department of Public Health, Radiation Control Program, Bureau of Environmental Health indicated that it had no comments.

Endangered Species Act Section 7 Consultation

Section 7 of the Endangered Species Act of 1973, as amended (ESA), requires Federal agencies to consult with the U.S. Fish and Wildlife Service or National Marine Fisheries Service regarding actions that may affect listed species or designated critical habitats. The ESA is intended to prevent further decline of endangered and threatened species and restore those species and their critical habitat.

The NRC staff determined that a consultation under section 7 of the ESA is not required because the proposed action will not affect listed species or critical habitat.

National Historic Preservation Act Section 106 Consultation

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to consider the effects of their undertakings on historic properties. As stated in the NHPA, historic properties are any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register of Historic Places.

The NRC determined that the scope of activities described in this exemption request do not have the potential to cause effects on historic properties because the NRC's approval of this exemption request will not authorize new construction or land disturbance activities. The NRC staff also determined that the proposed action is not a type of activity that has the potential to impact historic properties because the proposed action would occur within the established Yankee Rowe site boundary. Therefore, in accordance with 36 CFR 800.3(a)(1), no consultation is required under section 106 of NHPA.

III. Finding of No Significant Impact

The environmental impacts of the proposed action—an exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2) allowing YAEC to make withdrawals from the segregated account, on an annual basis, for SNF and GTCC waste management and non-radiological site restoration without prior notification to the NRC—have been reviewed under the requirements in 10 CFR part 51, which implement the National Environmental Policy Act of 1969, as amended.

The proposed exemption would not have a significant adverse effect on the probability of an accident occurring and would not have any significant radiological or non-radiological impacts. The proposed exemption involves an exemption from requirements that are of a financial and/or administrative nature and would not have an impact on the human environment. Consistent with 10 CFR 51.21, the NRC conducted the EA for the proposed exemption, and this FONSI incorporates by reference the EA included in this document. Therefore, the NRC concludes that the proposed action will not have significant effects on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

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.
Request for Exemption from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2) for the Yankee Nuclear Power Station Independent Spent Fuel Storage Installation, dated May 4, 2023.	ML23157A101
Email to State of Massachusetts providing draft environmental assessment related to Yankee Rowe exemption request, dated February 16, 2024.	ML24060A232
Email Response from State of Massachusetts on draft EA/FONSI, dated March 14, 2024	ML24075A201
Yankee Rowe Decommissioning Funding Assurance Status Report, dated March 6, 2023	ML23080A107
Yankee Nuclear Power Station—Release of Land from Part 50 License, dated August 10, 2007	ML071830515

Dated: April 4, 2024.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–07508 Filed 4–8–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–37, 50–237, and 50–249; NRC–2024–0054]

Constellation Energy Generation, LLC; Dresden Nuclear Power Station, Unit 2 and Unit 3; Independent Spent Fuel Storage Installation; Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued an exemption to Constellation Energy Generation, LLC permitting Dresden Nuclear Power Station (Dresden) to maintain loaded and to load 68M multi-purpose canisters with continuous basket shims in the HI–STORM 100 Cask System at its Dresden Unit 2 and Unit 3 independent spent fuel storage installation in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance No. 1014, Amendment No. 8, Revision No. 1 are not met.

DATES: The exemption was issued on April 1, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0054 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–2024–0054. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1018; email: *Yen-Ju.Chen@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: April 3, 2024.

For the Nuclear Regulatory Commission.

Yoira K. Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

Attachment—Exemption

NUCLEAR REGULATORY COMMISSION

Docket Nos. 72–37, 50–237, and 50–249

Constellation Energy Generation, LLC; Dresden Nuclear Power Station Unit 2 and Unit 3; Independent Spent Fuel Storage Installation

I. Background

Constellation Energy Generation, LLC (Constellation) is the holder of Renewed Facility Operating License Nos. DPR–19 and DPR–25, which authorize operation of the Dresden Nuclear Power Station, Unit 2 and Unit 3 (Dresden) in Morris, Illinois, pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities.'' The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC) now or hereafter in effect.

Consistent with 10 CFR part 72, subpart K, ''General License for Storage of Spent Fuel at Power Reactor Sites,'' a general license is issued for the storage of spent fuel in an Independent Spent Fuel Storage Installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. Constellation is authorized to operate nuclear power reactors under 10 CFR part 50 and holds a 10 CFR part 72 general license for storage of spent fuel at the Dresden ISFSI. Under the terms of the general license, Constellation stores spent fuel at its Dresden ISFSI using the HI–STORM 100 Cask System in accordance with Certificate of Compliance (CoC) No. 1014, Amendment No. 8, Revision No. 1.

II. Request/Action

By a letter dated February 23, 2024 (Agencywide Documents Access and Management System [ADAMS] Accession No. ML24054A031), and supplemented on February 28, 2024 (ML24065A292) and March 8, 2024 (ML24068A069), Constellation requested an exemption from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that require Dresden to comply with the terms, conditions, and specifications of the CoC No. 1014, Amendment No. 8, Revision No. 1 (ML16041A233). If approved, Constellation's exemption request would accordingly allow Dresden to maintain loaded and to load Multi-Purpose Canisters (MPC) with an unapproved, variant basket design (*i.e.,* MPC–68M–CBS) in the HI–STORM 100 Cask System, and thus, to load the systems in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1 are not met.

Constellation currently uses the HI–STORM 100 Cask System under CoC No. 1014, Amendment No. 8, Revision No. 1, for dry storage of spent nuclear fuel in MPC–68M at the Dresden ISFSI. Holtec International (Holtec), the designer and manufacturer of the HI–STORM 100 Cask System, developed a variant of the design with continuous basket shims (CBS) for the MPC–68M, known as MPC–68M–CBS. Holtec performed a non-mechanistic tip-over analysis with favorable results and implemented the CBS variant design under the provisions of 10 CFR 72.48, ''Changes, tests, and experiments,'' which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this is not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec (ML24016A190).

Prior to the issuance of the violations, Constellation had loaded four MPC–68M–CBS in the HI–STORM 100 Cask System, which are safely in storage at the Dresden ISFSI. Constellation's near-term loading campaigns for the Dresden ISFSI include plans to load one MPC–68M–CBS in the HI–STORM 100 Cask System in May 2024 and four MPC–68M–CBS in March 2025. While Holtec was required to submit a CoC amendment to the NRC to seek approval of the CBS variant design, such a process will not be completed in time to inform decisions for these near-term loading campaigns. Therefore, Constellation submitted this exemption request in order to allow for the continued storage of the four already loaded MPC–68M–CBS, and future loadings of one MPC–68M–CBS in May 2024 and four in March 2025, at the Dresden ISFSI. This exemption is limited to the use of MPC–68M–CBS in the HI–STORM 100 Cask System only for the four already loaded systems and specific near-term planned loadings of five systems using the MPC–68M–CBS variant basket design.

III. Discussion

Pursuant to 10 CFR 72.7, ''Specific exemptions,'' the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations of 10 CFR part 72 as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

A. The Exemption Is Authorized by Law

This exemption would allow Constellation to maintain loaded and to load MPC–68M–CBS in the HI–STORM 100 Cask System at its Dresden ISFSI in a storage condition where the terms,

conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1, are not met. Constellation is requesting an exemption from the provisions in 10 CFR part 72 that require the licensee to comply with the terms, conditions, and specifications of the CoC for the approved cask model it uses. Section 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. This authority to grant exemptions is consistent with the Atomic Energy Act of 1954, as amended, and is not otherwise inconsistent with NRC's regulations or other applicable laws. Additionally, no other law prohibits the activities that would be authorized by the exemption. Therefore, the NRC concludes that there is no statutory prohibition on the issuance of the requested exemption, and the NRC is authorized to grant the exemption by law.

B. The Exemption Will Not Endanger Life or Property or the Common Defense and Security

This exemption would allow Constellation to maintain loaded and to load MPC–68M–CBS in the HI–STORM 100 Cask System at the Dresden ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1, are not met. In support of its exemption request, Constellation asserts that issuance of the exemption would not endanger life or property because the administrative controls the applicant has in place prevent a tip-over or handling event, and that the containment boundary would be maintained in such an event. Constellation relies, in part, on the approach in the NRC's Safety Determination Memorandum (ML24018A085). The NRC issued this Safety Determination Memorandum to address whether, with respect to the enforcement action against Holtec regarding this violation, there was any need to take an immediate action for the cask systems that were already loaded with non-compliant basket designs. The Safety Determination Memorandum documents a risk-informed approach concluding that, during the design basis event of a non-mechanistic tip-over, the fuel in the basket in the MPC–68M–CBS remains in a subcritical condition.

Constellation also provided site-specific technical information, as supplemented, including information explaining why the use of the approach in the NRC's Safety Determination Memorandum is appropriate for determining the safe use of the CBS variant baskets at the Dresden ISFSI. Specifically, Constellation described that the analysis of the tip-over design basis event that is relied upon in the NRC's Safety Determination Memorandum, which demonstrates that the MPC confinement barrier is maintained, is documented in the updated final safety analysis report (UFSAR) for the HI–STORM 100 Cask System CoC No. 1014, Amendment 8, Revision No. 1 that is used at the Dresden site. Constellation also described its administrative controls for handling of the HI–STORM 100 Cask System at the Dresden ISFSI to prevent a tip-over or handling event. Those controls include operational procedures that demonstrate that the system is handled with a single failure proof device, complying with ANSI N14.6, ''for Radioactive Materials—Special Lifting Devices for Shipping Containers Weighing 10 000 Pounds (4500 kg) or More,'' and consistent with NUREG–612, ''Control of Heavy Loads at Nuclear Power Plants,'' (ML070250180) for heavy load lifting component, inside of the Reactor Buildings and during transport to the ISFSI. In addition, the transporter includes redundant drop protection.

Additionally, Constellation provided specific information from Dresden's 72.212 Evaluation Report, Revision 15, indicating that during the design basis event of a non-mechanistic tip-over, Dresden's ISFSI would meet the requirements in 10 CFR 72.104, ''Criteria for radioactive materials in effluents and direct radiation from an ISFSI or MRS,'' and 72.106, ''Controlled area of an ISFSI or MRS.'' Specifically, Constellation described that, in the highly unlikely event of a tip-over, any potential fuel damage from a non-mechanistic tip-over event would be localized, the confinement barrier would be maintained, and the shielding material would remain intact. Coupled with the distance of the Dresden ISFSI to the site area boundary, Constellation concluded that compliance with 72.104 and 72.106 is not impacted by approving this exemption request.

The NRC staff reviewed the information provided by Constellation and concludes that issuance of the exemption would not endanger life or property because the administrative controls Constellation has in place at the Dresden ISFSI sufficiently minimize the possibility of a tip-over or handling event, and that the containment boundary would be maintained in such an event. The staff confirmed that these administrative controls comply with the technical specifications and UFSAR for the HI–STORM 100 Cask System CoC No. 1014, Amendment 8, Revision No. 1 that is used at the Dresden site. In addition, the staff confirmed that the information provided by Constellation regarding Dresden's 72.212 Evaluation Report, Revision 15, demonstrates that the consequences of normal and accident conditions would be within the regulatory limits of the 10 CFR 72.104 and 10 CFR 72.106. The staff also determined that the requested exemption is not related to any aspect of the physical security or defense of the Dresden ISFSI; therefore, granting the exemption would not result in any potential impacts to common defense and security.

For these reasons, the NRC staff has determined that under the requested exemption, the storage system will continue to meet the safety requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20 and, therefore, will not endanger life or property or the common defense and security.

C. The Exemption Is Otherwise in the Public Interest

The proposed exemption would allow the four already loaded MPC–68M–CBS in the HI–STORM 100 Cask System to remain in storage at the Dresden ISFSI, and allow Constellation to load one MPC–68M–CBS in the HI–STORM 100 Cask System in May 2024 and four MPC–68M–CBS in March 2025,at the Dresden ISFSI, even though the CBS variant basket design is not part of the approved CoC No. 1014, Amendment No. 8, Revision No. 1. According to Constellation, the exemption is in the public interest because unloading fuel from already loaded canisters and not being able to load fuel into dry storage in future loading campaigns would impact Constellation's ability to offload fuel from the Dresden reactor units, consequently impacting continued safe reactor operation. The reflooding of the MPCs, removal of fuel assemblies, and replacement into a different MPC would result in additional doses and handling operations with no added safety benefit. In addition, future loading campaigns would need to be delayed until older design canisters can be fabricated and delivered to the site.

Constellation stated that to unload already loaded MPC–68M–CBS or delay the future loading campaigns would impact the ability to effectively manage the margin to full core discharge capacity in the Dresden Unit 2 and Unit 3 spent fuel pools. The low spent fuel pool capacity would make it difficult to refuel and present potential risks to fuel handling operations during pre- and post-outage. In addition, a crowded spent fuel pool would challenge the

decay heat removal demand of the pool and increase the likelihood of a loss of fuel pool cooling event and a fuel handling accident. Furthermore, Dresden planned the cask loading campaigns years in advance based on availability of the specialized workforce and equipment that is shared throughout the Constellation fleet. These specialty resources support competing priorities including refueling outages, loading campaigns, fuel pool cleanouts, fuel inspections, fuel handing equipment upgrade and maintenance, fuel sipping, new fuel receipt, and crane maintenance and upgrades. Any delays would have a cascading impact on other scheduled specialized activities.

For the reasons described by Constellation in the exemption request, the NRC agrees that it is in the public interest to grant the exemption. If the exemption is not granted, in order to comply with the CoC, Constellation would have to unload MPC–68M–CBS from the HI–STORM 100 Cask System at the Dresden ISFSI and reload into the older design MPC–68M to restore compliance with terms, conditions, and specifications of the CoC. This would subject onsite personnel to additional radiation exposure, increase the risk of a possible fuel handling accident, and increase the risk of a possible heavy load handling accident. Furthermore, the removed spent fuel would need to be placed in the spent fuel pool until it can be loaded into another storage cask or remain in the spent fuel pool if it is not permitted to be loaded into casks for future loading campaigns. As described by Constellation, this scenario would affect Constellation's ability to effectively manage the spent pool capacity and reactor fuel offloading at Dresden. In addition, the rescheduling of the specialized resources for the future loading campaigns would impact the operations of Dresden and other Constellation sites.

Therefore, the staff concludes that approving the exemption is in the public interest.

Environmental Consideration

The NRC staff also considered whether there would be any significant environmental impacts associated with the exemption. For this proposed action, the NRC staff performed an environmental assessment pursuant to 10 CFR 51.30. The environmental assessment concluded that the proposed action would not significantly impact the quality of the human environment. The NRC staff concluded that the proposed action would not result in any changes in the types or amounts of any radiological or non-radiological effluents that may be released offsite, and there would be no significant increase in occupational or public radiation exposure because of the proposed action. The environmental assessment and the finding of no significant impact was published on April 1, 2024 (89 FR 22463).

IV. Conclusion

Based on these considerations, the NRC has determined that, pursuant to 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC grants Constellation an exemption from the requirements of §§ 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 with respect to the ongoing storage of four MPC–68M–CBS in the HI–STORM 100 Cask System and future loading in the HI–STORM 100 Cask System of one MPC–68M–CBS in May 2024 and four MPC–68M–CBS in March 2025.

This exemption is effective upon issuance.

Dated: April 1, 2024.

For the Nuclear Regulatory Commission.

/RA/

Yoira K. Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2024–07455 Filed 4–8–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–338–SLR–2 and 50–339–SLR–2; ASLBP No. 24–984–02–SLR–BD01]

Virginia Electric and Power Company; Establishment of Atomic Safety and Licensing Board

Pursuant to the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Virginia Electric and Power Company

(North Anna Power Station, Units 1 and 2)

This proceeding involves the twenty-year subsequent license renewal of Renewed Facility Operating Licenses NPF–4 and NPF–7, which currently authorize Virginia Electric and Power Company to operate North Anna Power Station, Units 1 and 2, located in Louisa County, Virginia, until, respectively, April 1, 2038 and August 21, 2040. In response to a notice published in the **Federal Register** announcing the opportunity to request a hearing, *see* 89 FR 960 (Jan. 8, 2024), a hearing request was filed on March 28, 2024 on behalf of Beyond Nuclear and the Sierra Club.

The Board is comprised of the following Administrative Judges:

Michael M. Gibson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Rockville, Maryland.

Dated: April 3, 2024.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2024–07447 Filed 4–8–24; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collections for OMB Review; Comment Request; Reportable Events; Notice of Failure To Make Required Contributions

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of collections of information under PBGC's regulation on Reportable Events and Certain Other Notification Requirements (OMB control numbers 1212–0013 and 1212–0041, expiring July 31, 2024) without modifications. This notice informs the public of PBGC's request and solicits public comment on the collections.

DATES: Comments must be submitted by May 9, 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. All comments received will be posted without change to PBGC's website, *www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

A copy of the request will be posted on PBGC's website at *https://www.pbgc.gov/prac/laws-and-regulation/federal-register-notices-open-for-comment.* Copies of the collections of information may also be obtained without charge by writing to the Disclosure Division (*disclosure@pbgc.gov),* Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; or, calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Monica O'Donnell (*odonnell.monica@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–8706. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4043 of the Employee Retirement Income Security Act of 1974 (ERISA) requires plan administrators and plan sponsors to report certain plan and employer events to PBGC. The reporting requirements give PBGC notice of events that indicate plan or employer financial problems. PBGC uses the information provided to determine what, if any, action it needs to take. For example, PBGC might need to institute proceedings to terminate a plan (placing it in a trusteeship) under section 4042 of ERISA to ensure the continued payment of benefits to plan participants and their beneficiaries or to prevent unreasonable increases in PBGC's losses.

The provisions of section 4043 of ERISA have been implemented in PBGC's regulation on Reportable Events and Certain Other Notification Requirements (29 CFR part 4043).

Forms 10 and 10-Advance

PBGC has issued Forms 10 and 10-Advance and related instructions under subparts B and C of the regulation. The existing collection of information was approved under OMB control number 1212–0013 (expires July 31, 2024).

PBGC estimates that it will receive 438 reportable event notices per year under subparts B and C of the reportable events regulation using Forms 10 and 10-Advance. PBGC further estimates that the average annual burden of this collection of information is 1,377 hours and $326,310.

Form 200

Section 303(k) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 430(k) of the Internal Revenue Code of 1986 (Code) impose a lien in favor of an underfunded single-employer plan that is covered by PBGC's termination insurance program is (1) any person fails to make a required payment when due, and (2) the unpaid balance of that payment (including interest), when added to the aggregated unpaid balance of all proceedings for which payment was not made when due (including interest), exceeds $1 million. (For this purpose, a plan is underfunded if its funding target attainment percentage is less than 100 percent.) The lien is upon all property and rights to property belonging to the person or persons that are liable for required contributions (*i.e.,* a contributing sponsor and each member of the controlled group of which that contributing sponsor is a member).

Only PBGC (or, at its direction, the plan's contributing sponsor or a member of the same controlled group) may perfect and enforce this lien. ERISA and the Code require persons that fail to make payments to notify PBGC within 10 days of the due date whenever there is a failure to make a required payment and the total of the unpaid balances (including interest) exceeds $1 million.

PBGC Form 200, Notice of Failure to Make Required Contributions, and related instructions implement the statutory notification requirement. Submission of Form 200 is required by 29 CFR 4043.81 (Subpart D of PBGC's regulation on Reportable Events and Other Notification Requirements, 29 CFR part 4043). The existing collection of information was approved under OMB control number 1212–0041 (expires July 31, 2024).

PBGC estimates that it will receive 60 Form 200 filings per year. PBGC further estimates that the average annual burden of this collection of information is 60 hours and $43,500.

On February 1, 2024, PBGC published in the **Federal Register** (at 89 FR 6557) a notice informing the public of its intent to request an extension of these collections of information. No comments were received. PBGC is requesting that OMB extend approval of the collections of information for 3 years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2024–07444 Filed 4–8–24; 8:45 am]

BILLING CODE 7709–02–P

POSTAL SERVICE

Sunshine Act Meetings

TIME AND DATE: April 17, 2024, at 4:00 p.m. EST.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Meeting of the Board of Governors

April 17, 2024, at 4:00 p.m. EST

1. Strategic Matters
2. Administrative Matters

General Counsel Certification: The General Counsel of the United States Postal Service has certified that the meeting may be closed under the Government in the Sunshine Act.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Secretary.

[FR Doc. 2024–07554 Filed 4–5–24; 11:15 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99902; File No. SR–MIAX–2024–17]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 3, 2024.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4

[1] 15 U.S.C. 78s(b)(1).

thereunder,[2] notice is hereby given that on March 22, 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'') to extend the SPIKES Options Market Maker Incentive Program (the ''Incentive Program'') until June 30, 2024.

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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to extend the Incentive Program until June 30, 2024.

On September 30, 2021, the Exchange filed its initial proposal to implement a SPIKES Options Market Maker Incentive Program for SPIKES options to incentivize Market Makers [3] to improve liquidity, available volume, and the quote spread width of SPIKES options beginning October 1, 2021, and ending December 31, 2021.[4] Technical details regarding the Incentive Program were published in a Regulatory Circular on September 30, 2021.[5] On October 12, 2021, the Exchange withdrew SR–MIAX–2021–45 and refiled its proposal to implement the Incentive Program to provide additional details.[6] In that filing, the Exchange specifically noted that the Incentive Program would expire at the end of the period (December 31, 2021) unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[7]

Between December 23, 2021, and November 29, 2023, the Exchange filed several proposals to extend the Incentive Program, with the last extension period ending March 31, 2024.[8] In each of those filings, the Exchange specifically noted that the Incentive Program would expire at the end of the then-current period unless the Exchange filed another 19b–4 Filing to amend the fees (or extend the Incentive Program).[9]

The Exchange now proposes to extend the Incentive Program until June 30, 2024.[10]

The Exchange proposes to extend the Incentive Program for SPIKES options to continue to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options. Currently, to be eligible to participate in the Incentive Program, a Market Maker must meet certain minimum requirements related to quote spread width in certain in-the-money (ITM) and out-of-the-money (OTM) options as determined by the Exchange and communicated to Members via Regulatory Circular.[11] Market Makers must also satisfy a minimum time in the market in the front 2 expiry months of 70%, and have an average quote size of 25 contracts. The Exchange established two separate incentive compensation pools that are used to compensate Market Makers that satisfy the criteria pursuant to the Incentive Program.

The first pool (Incentive 1) has a total amount of $40,000 per month, which is allocated to Market Makers that meet the minimum requirements of the Incentive Program. Market Makers are required to meet minimum spread width requirements in a select number of ITM and OTM SPIKES option contracts as determined by the Exchange and communicated to Members via Regulatory Circular.[12] A complete description of how the Exchange calculates the minimum spread width requirements in ITM and OTM SPIKES options can be found in the published Regulatory Circular.[13] Market Makers are also required to maintain the minimum spread width, described above, for at least 70% of the time in the front two (2) SPIKES options contract expiry months and maintain an average quote size of at least 25 SPIKES options contracts. The amount available to each individual Market Maker is capped at $10,000 per month for satisfying the minimum requirements of the Incentive Program. In the event that more than four Market Makers meet the requirements of the Incentive Program, each qualifying Market Maker is entitled to receive a pro-rated share of the $40,000 monthly compensation pool dependent upon the number of qualifying Market Makers in that particular month.

The second pool (Incentive 2 Pool) is capped at a total amount of $100,000 per month which is used during the Incentive Program to further incentivize Market Makers who meet or exceed the requirements of Incentive 1 (''qualifying Market Makers'') to provide tighter quote width spreads. The Exchange ranks each qualifying Market Maker's quote width spread relative to each other qualifying Market Maker's quote width spread. Market Makers with tighter spreads in certain strikes, as determined by the Exchange and communicated to Members via Regulatory Circular,[14] are eligible to receive a pro-rated share of the compensation pool as calculated by the Exchange and communicated to Members via Regulatory Circular,[15] not to exceed $25,000 per Member per month. Qualifying Market Makers are ranked relative to each other based on

[2] 17 CFR 240.19b–4.

[3] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[4] *See* SR–MIAX–2021–45.

[5] *See* MIAX Options Regulatory Circular 2021–56, SPIKES Options Market Maker Incentive Program (September 30, 2021) *available at https://www.miaxglobal.com/sites/default/files/circular-files/MIAX_Options_RC_2021_56.pdf.*

[6] *See* Securities Exchange Act Release No. 93424 (October 26, 2021), 86 FR 60322 (November 1, 2021) (SR–MIAX–2021–49).

[7] *See id.*

[8] *See* Securities Exchange Act Release Nos. 93881 (December 30, 2021), 87 FR 517 (January 5, 2022) (SR–MIAX–2021–63); 94574 (April 1, 2022), 87 FR 20492 (April 7, 2022) (SR–MIAX–2022–12); 95259 (July 12, 2022), 87 FR 42754 (July 17, 2022) (SR–MIAX–2022–24); 96007 (October 7, 2022), 87 FR 62151 (October 13, 2022) (SR–MIAX–2022–32); 96588 (December 28, 2022), 88 FR 381 (January 4, 2023) (SR–MIAX–2022–47); 97239 (April 3, 2023), 88 FR 20930 (April 7, 2023) (SR–MIAX–2023–13); 97883 (July 12, 2023), 88 FR 45941 (July 18, 2023) (SR–MIAX–2023–26); *and* 99040 (November 29, 2023), 88 FR 84374 (December 5, 2023) (SR–MIAX–2023–47).

[9] *See id.*

[10] The Exchange notes that at the end of the extension period, the Incentive Program will expire unless the Exchange files another 19b–4 Filing to amend the terms or extend the Incentive Program.

[11] *See supra* note 5.

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

the quality of their spread width (*i.e.,* tighter spreads are ranked higher than wider spreads) and the Market Maker with the best quality spread width receives the highest rebate, while other eligible qualifying Market Makers receive a rebate relative to their quality spread width.

The Exchange proposes to extend the Incentive Program until June 30, 2024. The Exchange does not propose to make any amendments to how it calculates any of the incentives provided for in Incentive Pools 1 or 2. The details of the Incentive Program can continue to be found in the Regulatory Circular that was published on September 30, 2021, to all Exchange Members.[16] The purpose of this extension is to continue to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options. The Exchange will announce the extension of the Incentive Program to all Members via a Regulatory Circular.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[17] in general, and furthers the objectives of Section 6(b)(4) of the Act[18] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to extend the Incentive Program for Market Makers in SPIKES options until June 30, 2024. The Incentive Program is reasonably designed because it will continue to incentivize Market Makers to provide quotes and increased liquidity in select SPIKES options contracts. The Incentive Program is reasonable, equitably allocated and not unfairly discriminatory because all Market Makers in SPIKES options may continue to qualify for Incentive 1 and Incentive 2, dependent upon each Market Maker's quoting in SPIKES options in a particular month. Additionally, if a SPIKES Market Maker does not satisfy the requirements of Incentive Pool 1 or 2, then it simply will not receive the rebate offered by the Incentive Program for that month.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to offer this financial incentive to SPIKES Market Makers because it will continue to benefit all market participants trading in SPIKES options. SPIKES options is a Proprietary Product on the Exchange and the continuation of the Incentive Program encourages SPIKES Market Makers to satisfy a heightened quoting standard, average quote size, and time in market. A continued increase in quoting activity and tighter quotes may yield a corresponding increase in order flow from other market participants, which benefits all investors by deepening the Exchange's liquidity pool, potentially providing greater execution incentives and opportunities, while promoting market transparency and improving investor protection.

The Exchange believes that the Incentive Program is equitable and not unfairly discriminatory because it will continue to promote an increase in SPIKES options liquidity, which may facilitate tighter spreads and an increase in trading opportunities to the benefit of all market participants. The Exchange believes it is reasonable to operate the Incentive Program for a continued limited period of time to strengthen market quality for all market participants. The resulting increased volume and liquidity will benefit those Members who are eligible to participate in the Incentive Program and will also continue to benefit those Members who are not eligible to participate in the Incentive Program by providing more trading opportunities and tighter spreads.

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.

Intra-Market Competition

The Exchange believes that the proposed extension of the Incentive Program to March 31, 2024, would continue to increase intra-market competition by incentivizing Market Makers to quote SPIKES options, which will continue to enhance the quality of quoting and increase the volume of contracts available to trade in SPIKES options. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity for SPIKES options. Enhanced market quality and increased transaction volume in SPIKES options that results from the anticipated increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

Inter-Market Competition

The Exchange does not believe that the proposed rule changes will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed extension of the Incentive Program applies only to the Market Makers in SPIKES Options, which are traded exclusively on the Exchange.

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–2024–17 on the subject line.

[16] *See id.*

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4) and (5).

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

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–2024–17. 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–2024–17 and should be submitted on or before April 30, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–07443 Filed 4–8–24; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2024–0010]

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes renewals and revisions of OMB-approved information collections, and one new collection for OMB-approval.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, Mail Stop 3253 Altmeyer, 6401 Security Blvd., Baltimore, MD 21235, Fax: 833–410–1631, Email address: *OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAmain* by clicking on Currently under Review—Open for Public Comments and choosing to click on one of SSA's published items. Please reference Docket ID Number [SSA–2024–0010] in your submitted response.

The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than June 10, 2024. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Supportive Housing & Individual Placement and Support (SHIPS) Study—0960–NEW.

Background:

Homelessness and unemployment are linked issues, with rising housing costs often leaving people unable to afford homes when combined with unemployment. The instability of housing makes finding employment even more challenging, creating a difficult cycle to break. While studies have shown that supportive housing programs improve housing stability, there is no significant evidence that such programs reliably increase employment among residents. Conversely, Individual Placement and Support (IPS), a proven method for supporting employment, has not demonstrated effectiveness in stabilizing housing. For the purposes of this study, we define supportive housing as housing services coupled with additional services that include case management support. These include: place-based permanent supportive housing, scattered site permanent supportive housing, and rapid rehousing.

SSA is requesting clearance to collect data for the Supportive Housing and Individual Placement and Support (SHIPS) study, under the Interventional Cooperative Agreement Program (ICAP), to determine whether participation in Individual Placement and Support (IPS) improves the employment, income, health, and self-sufficiency of people who are recently homeless and living in supportive housing. ICAP allows SSA to partner with various non-federal groups and organizations to advance interventional research connected to the Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) programs. SSA awarded Westat a cooperative agreement to conduct SHIPS. In addition to SSA, Westat is partnering with three subrecipients for this project: (1) People Assisting the Homeless (PATH), (2) the University of Southern California (U.S.C.), and (3) the Research Foundation for Mental Hygiene (RFMH) to implement the SHIPS study.

ICAP SHIPS Study Project Description

The SHIPS study is a randomized controlled trial (RCT) designed to determine whether participation in Individual Placement and Support (IPS) improves the employment, income, health, and self-sufficiency of people who are recently homeless and living in supportive housing. The SHIPS study will mark the first study testing the effectiveness of implementing IPS in a supportive housing program. SSA hypothesizes that combining the two most successful evidence-based practices that separately address homelessness and supported employment will yield a single intervention that effectively addresses both. The intent of the SHIPS study is to measure the effectiveness of evidence based IPS compared to the services provided by local WorkSource Centers broadly available to job seekers in the Los Angeles area, The housing case managers will refer PATH clients interested in finding employment and will randomly assign participants to one of two groups:

(a) *IPS:* The Individual Placement and Support (IPS) service team will offer a range of structured services customized to participants' personal needs, preferences, and challenges related to

[21] 17 CFR 200.30–3(a)(12).

disabilities and/or mental health conditions. The New Hampshire-Dartmouth Psychiatric Research Center specifically designed the IPS as a supported employment model for individuals with serious mental illness and includes standardized training and fidelity requirements. Components of IPS that differ from those offered by WorkSource Services include integrated treatment that incorporates vocational and mental health services; benefits planning; and focus on rapid job search without extensive training.

(b) *WorkSource Centers:* Under PATH's current housing model, housing case managers refer PATH clients who express interest in finding employment to local American Job Centers, known as WorkSource Centers in Los Angeles. The City of Los Angeles Economic and Workforce Development Department, operates the WorkSource Center, and follow an employment services model that varies by WorkSource Center; is not evidence-based or subject to fidelity monitoring; and is not necessarily responsive to the individual needs of jobseekers with disabilities.

The primary goals of the SHIPS study are:

- To measure the effects of IPS participation on employment, income, health, and long-term self-sufficiency measured as a combination of housing stability, income, and receipt of DI and SSI benefits.
- To describe the study population in order to understand both the general applicability of the study's findings and the potential reasons for the observed effects.
- To explore the IPS implementation process in supportive housing and identify the factors that make it successful or challenging to maintain high-quality implementation in the supportive housing context.

Grantee researchers and SSA will use the information collected during this study to: (1) assess the short-term and long-term effectiveness of the proposed intervention to improve employment, income, and self-sufficiency; (2) understand the implementation process and (3) provide detailed subgroup-specific data related to the effect of IPS.

The respondents are unemployed residents living in PATH-operated supportive housing units who are looking for employment.

Type of Request: Request for a new information collection.

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in office or for teleservice centers (minutes) **	Total annual opportunity cost (dollars) ***
Study enrollees: baseline interview	200	1	200	60	200	*$13.30	**24	***$3,724
Study enrollees: quarterly interviews	200	7	1,400	10	233	*13.30	**21	***4,030
Study enrollees: final interview	200	1	200	60	200	*13.30	**21	***3,724
PATH Interviews: Staff	5	1	5	60	5	*32.05	**24	***224
SHIPS Interviews: enrollees	5	1	5	60	5	*13.30	**24	***93
Totals	610			250	643			***11,795

*We based this figure on the average DI payments based on SSA's current FY 2024 data (2024FactSheet.pdf (*ssa.gov*)), and survey researchers (*https://www.bls.gov/oes/current/oes193022.htm*).

**We based this figure on averaging both the average FY 2024 wait times for field offices and teleservice centers, based on SSA's current management information data.

***This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Certification by Religious Group—20 CFR 404.1075—0960–0093. SSA is responsible for determining whether religious groups meet the qualifications exempting certain members and sects from payment of Self-Employment Contribution Act taxes under the Internal Revenue Code, Section 1402(g). SSA sends Form SSA–1458, Certification by Religious Group, to a group's authorized spokesperson to complete and verify organizational members meet or continue to meet the criteria for exemption. The respondents are spokespersons for religious groups or sects.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–1458	142	1	15	35	*$31.48	**$1,102

*We based this figure on average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm).*

**This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. Development of Participation in a Vocational Rehabilitation or Similar Program—20 CFR 404.316(c), 404.337(c), 404.352(d), 404.1586(g), 404.1596, 404.1597(a), 404.327, 404.328, 416.1321(d), 416.1331(a)–(b), and 416.1338, 416.1402—0960–0282. State Disability Determination Services (DDS) determine if Social Security disability payment recipients whose disability ceased and who participate in vocational rehabilitation programs may continue to receive disability payments. To do this, DDSs needs information about the recipients, the types of program participation, and the services they receive under the rehabilitation program. SSA uses Form SSA–4290 to collect this information. The respondents are State employment networks, vocational rehabilitation agencies, or other providers of educational or job training services.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office phone call (minutes) **	Total annual opportunity cost (dollars) ***
SSA–4290–F5 (By mail)	2,400	1	40	1,600	* $21.27		*** $34,032
SSA–4290–F5 (Telephone)	600	1	30	300	* 21.27	** 19	*** 10,422
Totals	3,000			1,900			*** 44,454

* We based this figure on average Social and Human Service Assistant's hourly salary, as reported by Social and Human Service Assistants (*bls.gov*).
** We based this figure on the average FY 2024 wait times for field offices phone calls, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

4. Filing Claims Under the Federal Tort Claims Act—20 CFR 429.101–429.110—0960–0667. The Federal Tort Claims Act (FTCA) is the mechanism for compensating people who Federal employees injured through negligent or wrongful acts that occurred during the performance of those employees' official duties. SSA accepts claims filed under the FTCA for damages against the United States; loss of property; personal injury; or death resulting from an SSA employee's wrongful act or omission. The various types of claims included under this information collection request require claimants to provide information SSA can use to determine whether to make an award, compromise, or settlement under the FTCA. The respondents are individuals or entities making a claim under the FTCA.

Type of Request: Renewal of an OMB-approved information collection.

Regulation citations	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) **	Total annual opportunity cost (dollars) ***
429.102; 429.103 *	1	1	1	0	** $31.48	*** $0
429.104(a)	8	1	60	8	** 31.48	*** 252
429.104(b)	30	1	60	30	** 31.48	*** 944
429.104(c)	1	1	60	1	** 31.48	*** 32
429.106(b)	1	1	60	1	** 31.48	*** 32
Totals	41			40		*** 1,260

* We are including a one-hour placeholder burden for 20 CFR 429.102 and 429.103, as respondents complete OMB-approved Form SF–95, OMB No. 1105–0008. Since the burden for these citations is covered under a separate OMB number, we are not double-counting the burden here.
** We based this figure on the average U.S. citizen's hourly salary, as reported by the U.S. Bureau of Labor Statistics (*https://www.bls.gov/oes/current/oes_nat.htm*).
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

5. Internet and Telephone Appointment Applications—20 CFR 404.620–404.630, 416.330–416.340—0960–0822. SSA offers both internet and Telephone appointment options for applicants or recipients who wish to request an appointment when they are unable to complete one of SSA's online or automated telephone applications because they failed the initial verification checks, or who state their reading language preference is other than English.

- *iAppointment:* iAppointment is an online process that allows members of the public an easy-to-use method to schedule an appointment with the servicing office of their choice. Since the application date can affect when a claimant's benefit begins, iAppointment establishes a protective filing date and provides respondents information related to the date by which they must file their actual application. The iAppointment application propagates information the applicant already entered onto any of SSA's internet applications for SSN, name, date of birth, and gender. However, applicants must provide minimal additional information: mailing address; telephone number; language preference; type of appointment (Disability, Retirement, Medicare); and whether they prefer a telephone interview or in-office appointment. iAppointment is a customer-centric application. If the available appointment times do not meet the customer's needs, iAppointment allows them to enter a different zip code to identify another field office, which may offer different appointment times. At this time, SSA only allows domestic first party applicants to use iAppointment. If users indicate they are filing as third parties, iAppointment provides a message directing them to call the National 800 Number for assistance. If a foreign first party user is unable to complete iClaim, iAppointment directs them to contact a Social Security representative, and provides a link to SSA's Service Around the World website.
- Enhanced Leads and Appointment System (eLAS)—eLAS is an Intranet-based version of the iAppointment screens for use by SSA technicians both in the field offices and call centers. eLAS interacts with iAppointment directly to ensure we always record the same information whether an individual requests an appointment through our internet screens, or via telephone. eLAS is a non-public facing system that allows SSA employees in the field offices, workload support units, and teleservice centers to use a telephone interview process to schedule appointments and document an individual's intent to file using a specific script and asking the same questions to each individual. We use eLAS with individuals who use our automated telephone system, or who prefer not to use iAppointment to set up their appointment.

The respondents are individuals who are unable to use our internet or automated telephone systems because they failed the initial verification checks, or because they state their reading language preference is other than English.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average combined wait time in field office or for teleservice center (minutes) **	Total annual opportunity cost (dollars) ***
iAppointment	20,965	1	10	3,494	* $31.48		*** $109,991
eLAS	7,270,161	1	10	1,211,694	* 31.48	** 21	**** 118,246,750
Totals	7,291,126			1,215,188			*** 118,356,741

* We based these figures on average U.S. worker's hourly wages (based on *BLS.gov* data, (*https://www.bls.gov/oes/current/oes_nat.htm*).
** We based this figure on the combined average FY 2024 wait times for field offices (approximately 24 minutes per respondent) and teleservice centers (approximately 17 minutes per respondent), based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: April 3, 2024.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2024–07449 Filed 4–8–24; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 12370]

Determination Pursuant to Section 451 of the Foreign Assistance Act of 1961 Regarding FY 2021 Peacekeeping Operations

ACTION: Determination.

SUMMARY: The State Department is publishing a Determination signed by the former Deputy Secretary of State for Management and Resources on September 8, 2022.

SUPPLEMENTARY INFORMATION: Brian P. McKeon, former Deputy Secretary of State for Management and Resources, signed the following ''Determination Pursuant to Section 451 of the Foreign Assistance Act of 1961 Regarding FY 2021 Peacekeeping Operations'' on September 8, 2022. The State Department maintains the original document.

(Begin summary.)

Determination Pursuant to Section 451 of the Foreign Assistance Act of 1961 Regarding FY 2021 Peacekeeping Operations

Pursuant to section 451 of the Foreign Assistance Act of 1961 (the ''Act'') (22 U.S.C. 2261), section 1–100(a)(1) of Executive Order 12163, and Delegation of Authority No. 513, I hereby authorize, notwithstanding any other provision of law, the use of up to $21,420,323 made available to carry out provisions of the Act (other than the provisions of chapter 1 of part I of the Act) to provide assistance for the Philippines and Nepal.

This Determination and the accompanying Memorandum of Justification shall be promptly reported to the Congress. This Determination shall be published in the **Federal Register**.

(End summary.)

Gregory A. Hermsmeyer,

Director, Office of Security Assistance, Bureau of Political Military-Affairs, U.S. Department of State.

[FR Doc. 2024–07461 Filed 4–8–24; 8:45 am]

BILLING CODE 4710–25–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing on May 2, 2024. The Commission will hold this hearing in person and telephonically. At this public hearing, the Commission will hear testimony on the projects listed in the Supplementary Information section of this notice and testimony on the proposed rulemaking for agency procurement and bid protest procedures, as well as a draft policy entitled ''SRBC Procurement Procedures.'' Such projects and actions are intended to be scheduled for Commission action at its next business meeting, tentatively scheduled for June 13, 2024, which will be noticed separately. The public should note that this public hearing will be the only opportunity to offer oral comments to the Commission for the listed projects and actions. The deadline for the submission of written comments is May 13, 2024.

DATES: The public hearing will convene on May 2, 2024, at 6:30 p.m. The public hearing will end at 9:00 p.m. or at the conclusion of public testimony, whichever is earlier. The deadline for submitting written comments is Monday, May 13, 2024.

ADDRESSES: This public hearing will be conducted in person and virtually. You may attend in person at Susquehanna River Basin Commission, 4423 N. Front St., Harrisburg, Pennsylvania, or join by telephone at Toll-Free Number 1–877–304–9269 and then enter the guest passcode 2619070 followed by #.

FOR FURTHER INFORMATION CONTACT: Jason Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423 or *joyler@srbc.gov.* The draft rulemaking and policy can be viewed on the Commission's website at *https://www.srbc.gov/meeting-comment/default.aspx?type=19&cat=43*. Information concerning the project applications is available at the Commission's Water Application and Approval Viewer at *https://www.srbc.net/waav*. Additional supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy at *www.srbc.gov/regulatory/policies-guidance/docs/access-to-records-policy-2009–02.pdf.*

SUPPLEMENTARY INFORMATION: The public hearing will cover the following projects:

Projects Scheduled for Action

1. Project Sponsor: Berwick Enterprises, Inc. Project Facility: The Bridges Golf Club, Berwick Township, Adams County, Pa. Application for renewal of consumptive use of up to 0.249 mgd (30-day average) (Docket No. 19950102).

2. Project Sponsor and Facility: BKV Operating, LLC (Meshoppen Creek), Washington Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 2.160 mgd (peak day) (Docket No. 20190602).

3. Project Sponsor and Facility: BKV Operating, LLC (Susquehanna River), Washington Township, Wyoming County, Pa. Application for renewal of

surface water withdrawal of up to 2.914 mgd (peak day) (Docket No. 20190603).

4. Project Sponsor and Facility: BKV Operating, LLC (unnamed tributary to Middle Branch Wyalusing Creek), Forest Lake Township, Susquehanna County, Pa. Application for renewal of surface water withdrawal of up to 0.648 mgd (peak day) (Docket No. 20190604).

5. Project Sponsor: Byler Golf Management, Inc. Project Facility: Iron Valley Golf Club, Cornwall Borough, Lebanon County, Pa. Applications for renewal of consumptive use of up to 0.300 mgd (30-day average) and groundwater withdrawals (30-day averages) of up to 0.300 mgd from Well Lb-814 and 0.140 mgd from Well B (Docket No. 20200902).

6. Project Sponsor: Cowanesque Valley Recreation Association. Project Facility: River Valley Country Club, Westfield Township, Tioga County, Pa. Application for renewal of consumptive use of up to 0.099 mgd (30-day average) (Docket No. 20020602).

7. Project Sponsor and Facility: Dillsburg Area Authority, Carroll Township, York County, Pa. Application for renewal of groundwater withdrawal of up to 0.280 mgd (30-day average) from Well 5A (Docket No. 19980703).

8. Project Sponsor and Facility: EQT ARO LLC (Pine Creek), McHenry Township, Lycoming County, Pa. Application for renewal of surface water withdrawal of up to 1.500 mgd (peak day) (Docket No. 20190601).

9. Project Sponsor and Facility: Keystone Clearwater Solutions, LLC (Lycoming Creek), Lewis Township, Lycoming County, Pa. Application for renewal of surface water withdrawal of up to 1.250 mgd (peak day) (Docket No. 20190608).

10. Project Sponsor and Facility: Lear Corporation Pine Grove, Pine Grove Borough, Schuylkill County, Pa. Application for renewal of consumptive use of up to 0.160 mgd (30-day average) (Docket No. 19940501).

11. Project Sponsor: Londonderry Township. Project Facility: Sunset Golf Course, Londonderry Township, Dauphin County, Pa. Application for renewal of consumptive use of up to 0.181 mgd (30-day average) (Docket No. 20190613). *Located in an Environmental Justice area.*

12. Project Sponsor and Facility: Lycoming County Water and Sewer Authority, Fairfield Township, Lycoming County, Pa. Application for groundwater withdrawal of up to 0.216 mgd from Well PW–2 (30-day average).

13. Project Sponsor and Facility: Mount Joy Borough Authority, Mount Joy Borough, Lancaster County, Pa. Application for renewal of groundwater withdrawal of up to 1.020 mgd (30-day average) from Well 3 (Docket No. 20070607), and modification of Docket Nos. 20110617, 20110617–1, and 20110617–2 for Wells 1 and 2 by adding conditions related to Well 3 and proposed operations.

14. Project Sponsor: Pennsylvania—American Water Company. Project Facility: Philipsburg/Moshannon District, Rush Township, Centre County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.600 mgd from Cold Stream Well 1, 0.432 mgd from Cold Stream Well 2, and 0.374 mgd from Cold Stream Well 3 (Docket No. 19890302).

15. Project Sponsor and Facility: Seneca Resources Company, LLC (Tioga River), Richmond Township, Tioga County, Pa. Application for surface water withdrawal of up to 3.000 mgd (peak day).

16. Project Sponsor and Facility: Shippensburg Borough Authority, Southampton Township, Franklin County, Pa. Application for renewal of groundwater withdrawal of up to 1.900 mgd from Well 2 (Docket No. 19940504).

17. Project Sponsor and Facility: SWN Production Company, LLC (North Branch Mehoopany Creek), Forkston Township, Wyoming County, Pa. Application for surface water withdrawal of up to 2.500 mgd (peak day).

18. Project Sponsor and Facility: Tower City Borough Authority, Porter Township, Schuylkill County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.086 mgd from Well 5 and 0.070 mgd from Well 6 (Docket No. 19920301). *Located in an Environmental Justice area.*

19. Project Sponsor and Facility: Town of Erwin, Steuben County, N.Y. Applications for renewal of groundwater withdrawals (30-day averages) of up to 1.700 mgd from Well 4 and 0.634 mgd from Well 6 (Docket Nos. 19990503 and 20070602, respectively). *Located in an Environmental Justice area.*

Opportunity To Appear and Comment

Interested parties may call into the hearing to offer comments to the Commission on any business listed above required to be the subject of a public hearing. Given the nature of the meeting, the Commission strongly encourages those members of the public wishing to provide oral comments to pre-register with the Commission by emailing Jason Oyler at *joyler@srbc.gov* before the hearing date. The presiding officer reserves the right to limit oral statements in the interest of time and to control the course of the hearing otherwise. Access to the hearing via telephone will begin at 6:15 p.m. Guidelines for the public hearing are posted on the Commission's website, *www.srbc.gov,* before the hearing for review. The presiding officer reserves the right to modify or supplement such guidelines at the hearing. Written comments on any business listed above required to be the subject of a public hearing may also be mailed to Mr. Jason Oyler, Secretary to the Commission, Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pa. 17110–1788, or submitted electronically through *https://www.srbc.gov/meeting-comment/default.aspx?type=2&cat=7.* Comments mailed or electronically submitted must be received by the Commission on or before Monday, May 13, 2024, to be considered.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: April 4, 2024.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2024–07490 Filed 4–8–24; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–2211]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Identification of Foreign-Registered Civil Unmanned Aircraft Operating in the United States

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 November 6, 2023. The collection involves identifying information regarding foreign-registered civil unmanned aircraft operated in the airspace of the United States. The

information to be collected will be used to associate a foreign-registered unmanned aircraft operating in the United States with Remote Identification to the unmanned aircraft operator.

DATES: Written comments should be submitted by May 9, 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: Benjamin Walsh by email at: *ben.walsh@faa.gov;* phone: 202–267–8233

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: 2120–0782.

Title: Identification of Foreign-Registered Civil Unmanned Aircraft Operating in the United States.

Form Numbers: N/A.

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 November 6, 2023 (88 FR 76268). The unmanned aircraft remote identification operating requirements in Title 14 Code of Federal Regulations, Part 89 apply to persons operating foreign civil unmanned aircraft in the United States. The FAA must be able to correlate the remote identification message elements broadcast by foreign civil unmanned aircraft operated in the United States against information that helps FAA and law enforcement identify a person responsible for the operation of the foreign civil unmanned aircraft. Where unmanned aircraft are registered in a foreign jurisdiction, the FAA may not have access to information regarding the unmanned aircraft or its registered owner. Thus, the FAA is allowing a person to operate foreign-registered civil unmanned aircraft with remote identification in the United States only if the person submits a notice of identification to the Administrator in accordance with title 14 Code of Federal Regulations section 89.130. The notice can be submitted online using the notice of identification form in FAA Drone Zone (*https://faadronezone.faa.gov/*). The notice includes the following information to allow FAA to associate an unmanned aircraft to a responsible person:

(1) An indication whether the person operating the foreign registered civil unmanned aircraft in the United States is an organization or an individual.

(2) The name of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative.

(3) The physical address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the physical address for the person's authorized representative. If the operator or authorized representative does not receive mail at the physical address, a mailing address must also be provided.

(4) The telephone number(s) where the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the person's authorized representative can be reached while in the United States.

(5) The email address of the person operating the foreign registered civil unmanned aircraft in the United States, and, if applicable, the email address of the person's authorized representative.

(6) An indication whether the unmanned aircraft is a standard remote identification unmanned aircraft or has a remote identification broadcast module.

(7) The unmanned aircraft manufacturer and model name.

(8) The serial number of the unmanned aircraft or remote identification broadcast module.

(8) The country of registration of the unmanned aircraft.

(10) The registration number.

Once a person submits an online notice of identification, the FAA will issue a confirmation of identification. A person operating a foreign-registered unmanned aircraft in the United States must maintain the confirmation of identification at the unmanned aircraft's control station and must produce it when requested by the FAA or a law enforcement officer. An electronic copy is acceptable.

The holder of a confirmation of identification must ensure the information provided under § 89.130(a) remains accurate and is updated prior to operating a foreign registered civil unmanned aircraft with remote identification in the United States. The confirmation of identification expires after one year and can be cancelled or renewed online at FAA Drone Zone.

Respondents: Operators of foreign-registered civil unmanned aircraft with remote identification, as needed (prior to operating in the airspace of the United States) are mandated to report information to this collection. The FAA uses information provided by operators of foreign-registered civil unmanned aircraft operating in the airspace of the United States to identify those aircraft.

Frequency: As needed prior to operation of a foreign-registered civil unmanned aircraft in the United States.

Estimated Average Burden per Response: 36 minutes per response.

Estimated Total Annual Burden: 36 minutes per respondent, 762 hours per year total for all respondents.

Issued in Washington, DC, on April 4, 2024.

Marcus Cunningham,

Acting Manager, Emerging Technologies Division, AFS–700.

[FR Doc. 2024–07475 Filed 4–8–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8823

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

DATES: Written comments should be received on or before June 10, 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.* Please include the OMB Control Number 1545–1204 or Form 8823 in the Subject line. Requests for additional

information or copies of the form and instructions should be directed to, Sara Covington, (202) 317–5744 or through the internet at *sara.l.covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

OMB Number: 1545–1204.

Form Number: 8823.

Abstract: Under Internal Revenue Code section 42(m)(1)(B)(iii), state housing credit agencies are required to notify the IRS of any building disposition or noncompliance with the low-income housing tax credit provisions. A separate form must be filed for each building that is not in compliance. The IRS uses this information to determine whether the low-income housing credit is being correctly claimed and whether there is any credit recapture.

Current Actions: There are no changes being made to the form at this time, changes to the burden estimates are due to IRS most current filing data.

Type of Review: Extension of a currently approved collection.

Affected Public: State or local government housing credit agencies.

Estimated Number of Respondents: 14,474.

Estimated Time per Respondent: 15.16 hours.

Estimated Total Annual Burden Hours: 219,426.

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. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 3, 2024.

Sara L. Covington,

IRS Tax Analyst.

[FR Doc. 2024–07456 Filed 4–8–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Special Rules and Certificate of Partner-Level Items To Reduce Withholding

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning special rules and certificate of partner-level items to reduce withholding.

DATES: Written comments should be received on or before June 10, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB control number 1545–1934 or Special Rules and Certificate of Partner-Level Items to Reduce Section 1446 Withholding.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation or form should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Special Rules and Certificate of Partner-Level Items to Reduce Section 1446 Withholding.

OMB Number: 1545–1934.

Regulation and Form Number: T.D. 9394 and Form 8404–C.

Abstract: T.D. 9394 contains final regulations regarding when a partnership may consider certain deductions and losses of a foreign partner to reduce or eliminate the partnership's obligation to pay withholding tax under section 1446 on effectively connected taxable income allocable under section 704 to such partner. Form 8804–C is used by a foreign partner that voluntary submit to the partnership if it chooses to provide a certification that could reduce or eliminate the partnership's withholding tax obligation under section 1446 (1446 tax) on the partner's allocable share of effectively connected income (ECTI) from the partnership.

Current Actions: There is no change to the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Individuals or Households, and Not-for-Profit Organizations.

Form 8804–C

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 18.7 hours.

Estimated Total Annual Burden Hours: 18,700 hours.

TD 9394

Estimated Number of Respondents: 1.

Estimated Time per Response: 1 hours.

Estimated Total Annual Burden Hours: 1 hour.

Total Number of Respondents: 1,001.

Total Estimated Annual Burden Hours: 18,701.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information

is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 3, 2024.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2024–07452 Filed 4–8–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Information Reporting by Passport Applicants

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning information reporting by passport applicants.

DATES: Written comments should be received on or before June 10, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Include OMB control number 1545–1359 or Information Reporting by Passport Applicants.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Information Reporting by Passport Applicants.

OMB Number: 1545–1359.

Regulation Number: T.D. 9679.

Abstract: These final regulations provide information reporting rules for certain passport applicants. These final regulations apply to certain individuals applying for passports (including renewals) and provide guidance to such individuals about the information that must be included with their passport application.

Current Actions: There is no change to the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 12,133,537.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 1,213,354 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 3, 2024.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2024–07425 Filed 4–8–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning information collection requirements related to continuation coverage requirements application to group health plans.

DATES: Written comments should be received on or before June 10, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB control number 1545–1581 or Continuation Coverage Requirements Application to Group Health Plans.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Continuation Coverage Requirements Application to Group Health Plans.

OMB Number: 1545–1581.

Regulation Number: REG–209485–86 (TD 8812).

Abstract: The regulations require group health plans to provide notices to individuals who are entitled to elect COBRA (The Consolidated Omnibus Budget Reconciliation Act of 1985) continuation coverage of their election rights. Individuals who wish to obtain the benefits provided under the statute are required to provide plans notices in the cases of divorce from the covered

employee, a dependent child's ceasing to be dependent under the terms of the plan, and disability. Most plans will require that elections of COBRA continuation coverage be made in writing. In cases where qualified beneficiaries are short by an insignificant amount in a payment made to the plan, the regulations require the plan to notify the qualified beneficiary if the plan does not wish to treat the tendered payment as full payment. If a health care provider contacts a plan to confirm coverage of a qualified beneficiary, the regulations require that the plan disclose the qualified beneficiary's complete rights to coverage.

Current Actions: There is no change to the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, and not-for-profit institutions.

Estimated Number of Respondents: 12,079,600.

Estimated Time per Response: Varies from 30 seconds to 330 hours, depending on individual circumstances, with an estimated average of 14 minutes.

Estimated Total Annual Burden Hours: 404,640 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: April 3, 2024.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2024–07451 Filed 4–8–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Departmental Offices

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The 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 comment on the proposed information collection listed below, in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments should be received on or before June 10, 2024 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW, Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Departmental Offices (DO)

Title: Improving Customer Experience (OMB Circular A–11, Section 280 Implementation).

OMB Control Number: 1505–0272.

Type of Review: Extension of a currently approved information collection request.

Description: A modern, streamlined and responsive customer experience means: Raising government-wide customer experience to the average of the private sector service industry; developing indicators for high-impact Federal programs to monitor progress towards excellent customer experience and mature digital services; and providing the structure (including increasing transparency) and resources to ensure customer experience is a focal point for agency leadership.

This proposed information collection activity provides a means to garner customer and stakeholder feedback in an efficient, timely manner in accordance with the Administration's commitment to improving customer service delivery as discussed in section 280 of OMB Circular A–11 at *https://www.performance.gov/cx/a11-280.pdf.*

As discussed in OMB guidance, agencies should identify their highest-impact customer journeys (using customer volume, annual program cost, and/or knowledge of customer priority as weighting factors) and select touchpoints/transactions within those journeys to collect feedback. These results will be used to improve the delivery of Federal services and programs. It will also provide government-wide data on customer experience that can be displayed on *www.performance.gov* to help build transparency and accountability of Federal programs to the customers they serve.

As a general matter, these information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. The Department of the Treasury will only submit collections if they meet the following criteria.

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered is intended to be used for general service improvement and program management purposes;
- Upon agreement between OMB and the agency all or a subset of information may be released as part of A–11, section 280 requirements only on *performance.gov.* Summaries of customer research and user testing

activities may be included in public-facing customer journey maps or summaries.

• Additional release of data must be done coordinated with OMB.

These collections will allow for ongoing, collaborative and actionable communications between the Agency, its customers and stakeholders, and OMB as it monitors Agency compliance on Section 280. These responses will inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on services will be unavailable.

Affected Public: Individuals and households, businesses and organizations, State, local or Tribal government.

Average Expected Annual Number of Activities: Approximately five types of customer experience activities such as feedback surveys, focus groups, user testing, and interviews.

Estimated Number of Respondents: 2,001,550.

Average Number of Responses per Activity: 1 response per respondent per activity.

Estimated Number of Responses: 2,001,550.

Estimated Time per Response: 2 minutes–60 minutes, dependent upon activity.

Estimated Total Annual Burden Hours: 101,125 hours.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2024–07446 Filed 4–8–24; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0665]

Agency Information Collection Activity: Direct Deposit Enrollment/ Change

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before June 10, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0665'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0665'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Direct Deposit Enrollment/ Change, VA Form 29–0309.

OMB Control Number: 2900–0665.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants complete VA Form 29–0309 authorizing VA to initiate direct deposit of insurance benefit at their financial institution.

Affected Public: Individuals and households.

Estimated Annual Burden: 10,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 30,000.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt), Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–07485 Filed 4–8–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0024]

Agency Information Collection Activity: Insurance Deduction Authorization (for Deduction From Benefit Payments)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed

collection of information should be received on or before June 10, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0024'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0024'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Insurance Deduction Authorization, VA Form 29–888.

OMB Control Number: 2900–0024.

Type of Review: Extension of a currently approved collection.

Abstract: These forms are used by veterans to authorize the Department of Veterans Affairs (VA) to make deductions from benefit payments to pay premiums, loans and/or liens on his/her insurance contract. The information requested is authorized by law, 38 CFR 8.8.

Affected Public: Individuals and households.

Estimated Annual Burden: 622 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,732.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt) Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–07463 Filed 4–8–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of Transportation

49 CFR Parts 23 and 26
Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket No. DOT–OST–2022–0051]

RIN 2105–AE98

Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT or the Department).

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (DOT or Department) is amending its Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise (ACDBE) program regulations. The DBE and ACDBE programs are designed to allow small businesses owned and controlled by socially and economically disadvantaged individuals to compete fairly for DOT funded contracts let by State and local transportation agencies and in airport concession opportunities. The final rule improves program implementation in major areas, including by updating the personal net worth and program size thresholds for inflation; modernizing rules for counting of material suppliers; incorporating procedural flexibilities enacted during the coronavirus (COVID–19) pandemic; adding elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; updating certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; revising the interstate certification process to provide for reciprocity among certifiers; and making technical corrections to commonly misinterpreted rules.

DATES: This rule is effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: For questions related to the final rule or general information about the DBE and ACDBE Program regulations, please contact Marc D. Pentino, Associate Director, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–302, Washington, DC 20590, at 202–366–6968/*marc.pentino@dot.gov* or Lakwame Anyane-Yeboa, ACDBE and DBE Compliance Lead, Disadvantaged Business Enterprise Programs Division, Departmental Office of Civil Rights, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W78–103, Washington, DC 20590, at 202–366–9361/*Lakwame.Anyane-Yeboa@dot.gov.* Questions concerning part 23 amendments should be directed to Marcus England, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0487/*marcus.england@faa.gov* or Nicholas Giles, Office of Civil Rights, National Airport Civil Rights Policy and Compliance (ACR–4C), Federal Aviation Administration, 600 Independence Ave. SW, Washington, DC 20591, at 202–267–0201/*nicholas.giles@faa.gov.* Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

Electronic Access and Filing

This document, the Notice of Proposed Rulemaking (NPRM), all comments received, and all background material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.federalregister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

Regulatory Analyses and Notices

Executive Summary

This final rule modernizes the DBE and ACDBE program rules to provide greater clarity and flexibility to DOT recipients and enhance the ability of DBEs to compete on a level playing field for DOT-assisted [1] contract opportunities. Spanning over 40 years, the DBE and ACDBE programs are small business initiatives intended to prevent discrimination, and to remedy the effects of past discrimination, in DOT-assisted contracting markets and airport concession opportunities. Since 1983, Congress has authorized the DBE program for highway and transit projects, most recently in Section 11101(e) of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58) (November 15, 2021). Congress codified the ACDBE program in 1987. (See 49 U.S.C. 47107(e)). In reauthorizing the DBE program in the BIL, Congress received and reviewed testimony and documentation from numerous sources which show that discrimination, its effects, and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States. *See* BIL, section 11101(e)(1).

The current rules and the revisions contained herein leave intact the goal setting rules that have been in place over many decades. These rules, then and now, prohibit DBE contract quotas; and they do not impose any penalties for failing to meet DBE goals, unless a recipient fails to administer its program in good faith. Every court to have considered the constitutionality of the program, as implemented by these regulations, has held that these limitations and other flexibilities embedded in the DBE program—such as the ability of recipients to seek waivers of or exemptions from certain provisions, the requirement for recipients to reexamine their programs and program goals every three years, and the authority to decertify firms that do not continue to meet certification standards—ensure that DOT's DBE regulations, on their face, are narrowly tailored to achieve the compelling interest that has been identified by Congress, thus satisfying strict scrutiny.

[1] DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

On July 21, 2022, the Department issued a notice of proposed rulemaking (NPRM) in the **Federal Register** (87 FR 43620) setting forth the major categories of revisions, the Department's rationale, and proposed rule text. In July and August 2022, the Department held seven virtual listening sessions to brief the public and stakeholders on the proposals and to solicit further input. Recordings of the sessions are posted on the Department's DBE web page *https://www.transportation.gov/dbe-rulemaking,* and a transcript of all comments received are available at *Regulations.gov* (DOT–OST–2022–0051). DOT extended the comment period deadline from September 19 until October 31, 2022, through a notice published in the **Federal Register** on September 1, 2022 (87 FR 53708).

The Department received approximately 400 written comments from State departments of transportation, transit authorities, airports, DBEs, non-DBEs, representatives of various stakeholder organizations, and individuals. Many of the comments were extensive and covered numerous proposed changes. Some commenters suggested changes beyond the scope of what the Department proposed in the NPRM. We fully considered all written comments we received.

Congress created the DBE and ACDBE programs by statute and has continued to reauthorize the program in successive transportation reauthorization laws. The purpose of this rulemaking is to make technical improvements to the Department's DBE and ACDBE programs, including modifications to the forms used by program and certification-related changes. While this rule has implications for program eligibility, it does not change the underlying programs and projects being carried out with DOT funds. However, the Department recognizes that certain provisions focus on discrete aspects of the DBE and ACDBE programs. Therefore, the Department finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing this congressionally mandated program to continue to operate.

Part 26

Subpart A—General

1. Bipartisan Infrastructure Law (BIL) and Fixing America's Surface Transportation Act (FAST Act) (§ 26.3)

The Department proposed adding citations to applicable surface authorization legislation. We received no comments, and the final rule adopts our proposal with minor technical corrections to the text.

2. Definitions (§ 26.5)

NPRM

In addition to minor technical and spelling changes, the NPRM proposed new or altered definitions of disadvantaged business enterprise, principal place of business, transit vehicle, transit vehicle dealer, transit vehicle manufacturer, and unsworn declaration. In addition, because ''home state'' is no longer being used as a term of art in the regulation, we are removing that definition from the current rule.

Comments

Disadvantaged Business Enterprise

The majority of the comments addressed the proposed addition of ''be engaged in transportation-related industries'' to the definition of ''disadvantaged business enterprise.'' We proposed the addition because applicants that have no capability or interest in working on DOT-assisted contracts seek DBE certification for other, unrelated reasons, resulting in an unnecessary burden on certifiers' workloads.

Ten of the 40 commenters (mostly recipients and DBEs) supported the proposed definition, though most requested clarification because they found it confusing. They stated that an absence of clarification would cause difficulty in determining which firms were in transportation-related industries and which were not, and the results could easily be inconsistent and arbitrary. Some commenters noted that many DBEs do not have specific mentions of transportation in their North American Industry Classification System (NAICS) codes. A few recipients asked how they should handle DBEs that might not be performing work in transportation-related industries.

The majority of commenters who sought clarification, as well as several others who opposed the proposal altogether, opined that the limitation would constrain opportunities for small businesses, especially those in the goods and services sector or new or non-traditional types of work. One commenter cited the example of firms

supporting electric vehicles or related infrastructure.

Very few of the commenters who sought clarification proposed an approach that would better clarify the definition. One State DOT suggested there could be a ''stop here'' entry on the Uniform Certification Application, analogous to the current check entry box on which an applicant would check whether it was a for-profit firm, on which a company could affirm that it intended to work on transportation projects.

Principal Place of Business

All three commenters supported the proposal, though one asked for more guidance.

Transit Vehicles, Manufacturers, and Dealerships

For comments and the Department's response related to the definitions of transit vehicle, transit vehicle manufacturer, and transit vehicle dealership, please see the portion of the preamble below concerning TVMs.

Unsworn Declaration

With the exception of one State DOT, which thought DOT's proposal could enable fraud, all of the more than 20 commenters on the concept and definition of unsworn declaration, both recipients and DBEs, supported the proposal. The main reason was that it reduced the burden on both firms and certifiers. One State DOT suggested the idea be extended to information provided in on-site interviews as well as applications. One transit agency suggested having a witness sign the declaration, the use of which it thought should be limited to declarations of eligibility (DOEs) or interstate certification applications.

Miscellaneous Comments Received

Some commenters asked for the addition of such groups as LGBTQ individuals, disabled veterans, individuals with disabilities, and persons from North Africa and the Middle East to the definition of ''socially and economically disadvantaged individual.'' One commenter found the definition of ''affiliation'' confusing but did not suggest a clarification.

As has been the case during past rulemakings, a few commenters disliked the use of the term ''disadvantaged business enterprise,'' finding its connotation too negative. Those commenters suggested alternatives like ''historically underutilized business,'' ''business inclusion program,'' or making the ''D'' in DBE stand for diverse, dynamic, or distinguished. A commenter wished to exclude ''micro purchases,'' as defined in Federal procurement rules, from the definition of ''contract.'' One commenter asked to expand the definition of ''DOT-assisted contract'' to include all contracts relating to any phase of a DOT-assisted project (*e.g.,* State or locally funded pre-construction engineering or design of a project that would ultimately gain DOT funding).

DOT Response

Disadvantaged Business Enterprise

With respect to comments on the proviso in the definition of ''disadvantaged business enterprise'' that a DBE be one ''engaged in transportation-related industries,'' we considered two program concerns. On one hand, some Unified Certification Programs (UCPs) may have been burdened by significant numbers of applications from firms that appear not to have interest in, or the ability to work on, the DOT-assisted contracts of recipients. For example, some firms may seek certification from a UCP in order to become eligible for State and local programs in areas unrelated to transportation. We believe it is useful to limit such burdens on certifiers, which themselves have limited resources.

On the other hand, it would be counterproductive to use language that could be interpreted as limiting DBE program participation given the diversity of the types of work that DOT-assisted projects entail. Thus, we exclude ''engaged in transportation-related industries'' from the definition of DBE.

Instead, the final rule requires applicants to describe in detail in the Uniform Certification Application (UCA)—with examples wherever possible—the type(s) of work they envision performing on DOT-assisted contracts. The UCA will not be considered complete if the applicant omits this information. During the onsite visit, for example, certifiers should ask applicants to describe the nature of their work and what they seek to achieve with certification. If the applicant's response reasonably suggests to the certifier that the firm would likely not have opportunities to participate in, or has no intention of pursuing participation in, DOT-assisted contracts, the certifier should encourage the applicant to withdraw its UCA in order to avoid unnecessary expenditures of time and effort by all parties. This mechanism fulfills the intended purpose of the now-deleted ''transportation-related industries'' language.

Unsworn Declaration

Given commenters' general support of our proposal, and the likelihood that permitting unsworn declarations will reduce burdens and maintain program integrity, the final rule adopts the proposal without substantive change.

Principal Place of Business

We believe that the NPRM's proposed definition of ''principal place of business'' is clear as written, and the final rule incorporates it without change.

Other Comments

The Department does not have legal authority to add groups (*e.g.,* LGBTQ persons or disabled veterans) to the current list of groups whose members are rebuttably presumed socially and economically disadvantaged. However, persons who are not members of a presumptive group may qualify as socially and economically disadvantaged through individual determination procedures as detailed in § 26.67(d).

We recognize that some commenters were uncomfortable with possibly negative connotations of the term ''disadvantaged business enterprise.'' We leave the program name unchanged. It is well-recognized and cited as such in the statutes authorizing the program, and changing the name of the program may lead to confusion.

3. Reporting Requirements (§ 26.11 and Appendix B)

NPRM

The NPRM proposed adding and changing three reporting requirements. First, the NPRM proposed adding ten new data fields to the Uniform Report of Awards, Commitments and Payments (Uniform Report) that recipients submit annually, such as work category/trade a firm performed in a contract, federally assisted contract number, and terminations (for the complete list, see 87 FR 43624 (July 21, 2022)). We believed this additional information would help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report in a manner acceptable to the relevant OA, but the form itself, while on the DOT website, would no longer be printed in the regulation.

The NPRM also proposed to require recipients to obtain and enter bidders list data into a centralized, searchable database that the Department would

specify. The data points for this bidders list would be expanded to include race and gender information for a firm's socially and economically disadvantaged owner (SEDO) and the NAICS code applicable to each scope of work the firm proposed to perform in its bid. The NPRM asked for comment on the estimated costs for developing and maintaining such a database. The Department said that since recipients already collect most of the information that would be reported on the bidders list, reporting this data would be beneficial to the Department in evaluating program success with anticipated minimal impact on stakeholders.

Third, the NPRM asked for comments on expanding the information collected through what is referred to as the MAP–21 data report. That report includes information taken from each State's UCP directory and reporting on the percentage and location of DBEs owned and controlled by women, by disadvantaged individuals who are not women, and individuals who are women and are also otherwise disadvantaged. The NPRM proposed collecting data on the following six additional items: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; the number of in-state and out-of-state firms certified based on such a determination; and the number of DBEs prequalified in their work type by the Department. The Department proposed creating a similar data requirement for ACDBEs.

Comments

This section was one of the most frequently commented upon of any subject in the NPRM, with some commenters expressing general support for the proposals, some expressing general opposition, and others delving into the details of one or more of the reports.

General Comments on Proposed Reports

Of the nearly 60 commenters who expressed a view (pro or con) about the Uniform Report and MAP–21 report proposals, a significant majority, predominantly recipients, opposed the proposals. Often, these comments did not distinguish closely between the MAP–21 report and the Uniform Report but talked about the NPRM's reporting requirements generally.

Opponents primarily expressed that the proposals were too detailed and created unnecessary burdens and costs, particularly for local agencies and subrecipients. The required information would be difficult to collect, and create a cumbersome, time-consuming process, sometimes involving manual reporting (*e.g.,* concerning listing replaced firms), keeping staff from doing more substantive work. One recipient said it would have to double its staff to handle the requirements, for example. Another said that handling the proposed Uniform Report requirements would double its staff time on that work by 16 hours per year. Programs are short-staffed as it is, others said, especially for small recipients and some saw the expanded Uniform Report items as a substantial change. Certification could be slowed down.

While some commenters in this category said the requested information could be helpful, they did not think that its potential use outweighed the burdens involved. One commenter questioned the use the Department would make of the additional data; something more specific than ''program evaluation'' in general was needed to justify new collections. Instead of making reporting requirements more complex, commenters said they should be reduced and simplified (*e.g.,* one contractor suggested limiting fields to firm name, disadvantaged group membership, contracts, and DBE commitment amount).

Some commenters also thought that certain fields in the report were duplicative or redundant. For example, one commenter said that information about decertifications had to be reported in three different places. A few commenters thought some fields, such as those addressing decertifications and terminations, did not fit well in the Uniform Report. Another said the proposed reports generally were not relevant to ACDBEs. Rather than sending one report to the OA and another to DOCR, there should be a single, streamlined form sent to only one office at DOT.

Some commenters recommended that DOT convene a recipients' group to do a feasibility study and figure out how to make the reports work efficiently prior to adopting the proposals. Commenters suggested time frames from one to five years to phase in the requirements. Other commenters suggested that the Department should also develop, test, and make available a uniform, centralized database before imposing requirements that all recipients, vendors, and subcontractors could use and delay implementation 3 to 5 years.

Commenters said that such a database would allow data from different sources to merge and that the database should be made available to users through an online portal. Other commenters said DOT should provide funding for recipients to comply with the expanded requirements and provide more guidance on the reporting forms and process.

Supporters of the proposals included some recipients but were predominantly DBEs. Generally, they favored obtaining the additional detailed data for program evaluation purposes. Some cited particular items they thought were useful, such as race/ethnic/gender data, explaining that those items could keep better track of the use of Black-owned firms. Some commenters suggested collection of additional data points such as dollar amount of contracts by NAICS codes, and some commenters recommended that recipients be required to maintain copies of all prime contracts and subcontracts.

Bidders Lists

A large majority of the over 40 comments concerning the NPRM's bidders list proposal opposed it. A few comments, all but one of which were from DBEs, supported the proposal for the reasons stated in the preamble. Some of these comments favored the idea of a centralized database for bidders list information. One asked for more data on the actual use of successful DBE bidders, to address the issue of prime contractors listing DBEs in their bid and then not using them.

Most of the comments opposing the proposal were from recipients. Some of these commenters said that the existing bidders list requirements were sufficient, and that there was no need to make any changes. They asserted that the proposed changes to the Uniform and MAP–21 reports would be unduly burdensome and create an unfunded mandate. One airport trade organization member noted it would take 25 hours to complete the MAP–21 report of ACDBEs in various categories rather than the 3.2 hours estimated.

Commenters said that the NPRM underestimated the costs and burdens of the proposal, particularly with recipients for small staffs. One commenter estimated that its staff would have to take an extra 20 minutes per project under the proposed system, adding up to 13 hours per month, in contrast to the eight hours forecast in the NPRM. Another said it could take weeks of staff time per year to comply.

Another estimated that it would take two hours of staff time to enter information into the system for each bidder.

A few commenters expressed concern that prime contractors would be disincentivized from hiring DBE subcontractors, especially if they had to input information at the time of submitting a bid or offer. They also stated that it would reduce the data available to recipients. One commenter explained that it would be better if a bidder on a prime contract could submit information within a short time after the time the bid or offer was submitted, such as five days. One recipient said it typically allows prime contractors until the end of the month in which a letting takes place to submit bidders list data. On the other hand, a comment said that bidders list items should be submitted at the time of bid or offer. Another commenter suggested that to reduce burdens on prime contractors, recipients should collect information directly from subcontractors. One commenter recommended that firms submit to the recipient the NAICS codes they have worked on in the past year.

In addition to the general concern about burdens, a number of commenters focused on the centralized database that the NPRM said the Department would specify. Some thought having to communicate with such a database would be a source of administrative burdens for their staff. Others, while sympathetic to the concept of a centralized database, pointed to the fact that the Department had not yet specified the database to be used. Without such a system being in place, including a standard format, they said, the proposed changes would not work. Two commenters said that rather than creating a centralized database, DOT should make software available to allow interface with UCP directories and create reports. Another was concerned that, in the absence of an actual centralized system, recipients would develop their own electronic formats, which were likely to be incompatible with each other.

Some commenters questioned the utility of bidders lists. One said that such a list is an imperfect tool to gauge DBE interest in the program, since some DBEs do not submit bids because, in their experience, prime contractors typically use the same DBE firms that they always use. Because of this, another commenter said, firms effectively drop out of the program because they are not getting any work, even if they maintain their certified status. Others said that bidders lists have proved not to be an accurate or reliable indicator of DBEs' availability or interest in seeking contracts.

One commenter suggested that DBEs should not have to submit confidential or proprietary business information, another suggested that race/ethnic/gender information should be part of bidders list entries; while another indicated that some firms may decline to submit this information. Another asked if there should be an exemption to some requirements for publicly traded firms. One commenter suggested working with American Association of State Highway and Transportation Official's Civil Rights and Labor Committee on how best to handle bidders list issues.

Detailed Comments on Reporting and Bidders List Contents

Commenters had a wide variety of comments on details of the documents discussed in this portion of the NPRM. A commenter wanted to clarify the meaning of ''awards,'' ''commitments, and ''payments.'' It said the age of a firm should be entered only for DBEs. Another suggested that termination data should be submitted as ''known DBE terminations during the reporting period'' to capture a lag in information reaching the recipient from contractors.

One commenter suggested not using ''dollar value of contract,'' preferring the use of ranges (*e.g.,* less than $100,000 or $100,000–500,000). On the other hand, another commenter thought that the dollar value of contracts and NAICS codes involved were very important information to capture. That same commenter also thought that information on firms that have exceeded size standards was important, to see if the program was creating sustainable growth.

Another commenter wanted to make sure that the reporting would include professional services, even in States that do not include professional services in their DBE goals. One commenter said it does not do prequalifications, and so did not know how to respond to that field. One commenter expressed uncertainty about how reporting could be uniform since different States have different prequalification requirements. The commenter was also unsure what ''work type'' meant, and how firms prequalified in some, but not all, of the areas in which they were certified could be counted.

With respect to terminations and replacements of DBEs, one commenter thought reports should include the date of contract award, the date of the prime's termination notice, the reasons for the action, and the DBE's response. Another commenter agreed that the reason should be reported, adding that any resulting revisions of the recipient's overall goal should be noted. One commenter said that termination data should be reported in the semi-annual reporting timeframe, using a Google or Excel spreadsheet, and that the reporting should include the number of terminations and NAICS codes of terminated firms. Another commenter also supported using Excel spreadsheets or XML files for reporting this and other information into the reports, rather than relying on manual inputs of information.

Two commenters addressed the ''running tally'' requirement, one saying it did not currently have a running tally provision and was unsure how to develop one. Another asked how the running tally provision differed from the ''open'' and ''completed'' reporting fields, suggesting that the information requested was duplicative. Another commenter suggested that information about DBE's that have been decertified or graduated only be included in the ''open'' and ''completed'' fields, while a different commenter suggested that, for re-entering firms, the reports include the date and basis of graduation, the date of reapplication, and the basis for re-entry.

Some commenters expressed concern about what data should be submitted and by whom. One commenter said that the DBE owner's contact information and the ZIP code of the firm's principal place of business need not be reported. Another suggested that if multiple contracts were awarded to a firm during a reporting period, there should not have to be multiple entries of the firm's information. Two others said that if recipients submitted basic information (*e.g.,* a firm's certification number and NAICS code), the Operating Administration (OA), rather than the recipient, should enter other information about the firm.

One commenter asked whether race and gender were intended to be entered for all firms or only DBEs, and how the recipient would handle situations in which a firm is certified in more than one NAICS code. Another commenter advocated expanding the information reported, adding such items as the number and percentage of in-state and out-of-state firms by race and ethnicity, looking at applications, decertifications, and prequalifications information.

With respect to the bidders list, one commenter raised several questions. Would the centralized database be available at all times to recipients, as opposed to only during certain reporting periods? Would the December 1 date for submitting information apply to the bid date or the contract award date, when

one was before and the other was after December 1? How would micro purchases and single bidder or sole source procurements be handled? How should a recipient handle incomplete forms submitted by bidders? Since the commenter had a race-neutral program, how would ''subcontract approval'' be reported? This commenter, as well as another, said that reporting a high volume of bids would be very burdensome and expensive.

A few commenters said that prime contractors should have to submit most or all of the data required for the bidders list, while another said that recipients should collect bidders list information directly from bidders for subcontracts or certification process records, rather than indirectly through prime contractors.

One commenter said that, with respect to engineering firms, the bidders list should include the number of such firms bidding on prime contracts or subcontracts, the number of such firms that were shortlisted or awarded, and the total number of engineering contracts with and without DBE goals.

DOT Response

As described in this preamble (see discussion of § 26.11 and Appendix B), the final rule adopts revisions to all three reporting requirements, including the creation of a centralized bidders list system.

A recipient must provide its bidders list collection information in a standardized and centralized form. Although recipients are already obligated to gather most of this data, the rule imposes the additional step of reporting this information. However, the burden of this reporting process is expected to be minimal since recipients are already required to collect most of the information. One commenter stated that it does not collect bidder information on a per project basis. That recipient maintained that the compliance burden would be more than minimal. We respond that the current rule requires collection for all projects. The bidders list data that needs to be reported to DOT includes specific details such as the race and gender information for the owners of all firms and the NAICS code that is applicable to each scope of work proposed by the firm in its bid.

To ensure usability and standardization of the bidders list data, the Department will build a comprehensive and searchable database to house this information, a feature recommended by a commenter. The final rule allows for a delay in the requirement to allow ample time for the Department to complete the development of the database and ensure its readiness before recipients are obligated to submit the necessary data. Once the database is fully operational, recipients will be able to seamlessly enter the required information with minimal additional burden. Recipients may use the information to set their overall goals.

With this data, the Department will analyze the representation of DBEs within the bidding process. This assessment will enable a closer examination of the specific types of work that DBEs actively pursue and competitively bid for. Ultimately, this analysis will serve as a vital tool in monitoring the effectiveness of the rule and guiding future policy decisions. It enables the Department to make informed assessments regarding the impact of the regulations and take appropriate actions to address any identified shortcomings, thereby ensuring that DBEs can compete fairly for DOT-assisted contracts.

For the Uniform Report, the Department is requiring recipients to submit names of DBEs, NAICS codes performed in a contract, federally assisted contract number(s), and the dollar value of the contract. We disagree with a commenter who stated entering this information constitutes a substantial expansion of what is collected, because these data points should already be tabulated by the recipient in order for them to properly upload the current report. We inadvertently listed prequalification in the uniform report draft rule and deleted it from the final rule. We agree with commenters' concerns regarding ''work categories'' and exclude the ambiguous category from the final rule. Also, after careful consideration, the Department believes that the proposed data collection on terminations would pose significant challenges for recipients. Given the complexities and challenges inherent in collecting and reporting termination data, the Department believes that it would be unreasonable to mandate recipients to undertake this task. We must strike a balance between gathering valuable information for analysis and avoiding excessive administrative burden for recipients. The Department will continue to explore alternative approaches and strategies that can provide meaningful insights into terminations without imposing disproportionate burdens on recipients.

The additional uniform report information will help the Department evaluate whether the DBE program is making progress toward the objectives stated in § 26.1 of the regulation. Recipients would submit the Uniform Report Form online in a manner acceptable to the relevant OA. The Department will post a copy of the form, which is no longer posted in the regulation, to the DOT website.

Finally, the Department expands the MAP–21 data report collection to cover six items mentioned in the NPRM: the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity; the number of applications received from in-state and out-of-state firms and the number of each found eligible or ineligible; the number of in-state and out-of-state firms decertified or summarily suspended; the number of in-state and out-of-state applications involving a request for an individual determination of social and economic disadvantage; and the number of in-state and out-of-state firms certified based on such a determination. Decertified DBEs that exceed gross receipts and PNW caps must be reported using MAP–21 data instead of the uniform report proposed in the NPRM.

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

4. Tiered Program Requirements for FTA Recipients (§ 26.21)

NPRM

Under the current rule, FTA recipients who will award prime contracts exceeding $250,000 (cumulatively) in a fiscal year must have a DBE program meeting all requirements of part 26. Based on changes in the consumer price index (CPI) since 1983 (the year the $250,000 value was established), the NPRM proposed to increase this value to $670,000. FTA recipients receiving planning, capital, or operating assistance who will award prime contracts (other than transit vehicle purchases) that cumulatively exceed $670,000 in a fiscal year would be required to comply with every requirement of part 26 and have a full DBE program. Recipients awarding prime contracts totaling $670,000 or less would also have to maintain a program, but compliance with only certain provisions of part 26 would be required. Specifically, these recipients would be subject to the requirements for reporting and recordkeeping, contract assurances, a policy statement, fostering small business participation, and transit vehicle procurements.

The Department's records show that in most years there were about 80 FTA recipients awarding between $250,000 and $670,000 per year. The Department estimated that the change would provide cost savings for such recipients

from the reduction in administrative burdens. Based on attainment data from previous years, the Department found that if there were any reductions in total program-level DBE participation, the reduction would be minimal.

Comments

Commenters on this issue, predominately transit operators and DBEs, were almost evenly divided. Supporters were attracted to the reduction in administrative burdens for some small transit providers. One commenter suggested raising the value further, to $750,000, while another suggested that a similar threshold should be established for airports. One supporter of the proposal asked the Department to define ''significant changes'' to a DBE program that would require OA approval (this provision, in proposed § 26.21(b)(2), applies to all OAs).

Opponents pointed to the estimated 80 transit operators that would not have to maintain full DBE programs, saying that this would reduce opportunities for DBEs. All recipients should have DBE programs, some comments said. One commenter said a problem could arise for a recipient who had been below the threshold but then received a large grant that put it above the threshold. The recipient would have to quickly create a full program, the commenter said.

Most of the commenters not in favor of the proposals or who expressed negative opinions were concerned that DBEs seeking to work with smaller recipients would not be afforded a level playing field because the DBE programs of such recipients would not be subject to as stringent oversight by FTA. These commenters were concerned that less oversight would result in these recipients taking the program less seriously.

DOT Response

The final rule is adopting this proposal substantively unchanged from the NPRM. The Department recognizes that the proposed regulatory text used a structure and phrasing that may not have been clear to some readers. Though commenters did not address the clarity of the drafting specifically, the comments suggested there may be some confusion as to what requirements apply to which recipients. In response to these comments, the final rule includes definitions for FTA Tier I and FTA Tier II recipients. Further, the final rule adds paragraphs to § 26.21(a)(2) to list the applicable requirements for Tier II recipients more clearly. The Department notes that under the new requirement, all FTA recipients that receive planning, capital, or operating assistance and award FTA funded contracts must have a DBE program.

The Department takes seriously commenters' concerns that some affected recipients might operate their DBE programs less robustly under the new rules. The Department expects that the positive impacts of expanding DBE program requirements to almost all FTA recipients mitigates that risk. The intent of reducing administrative burdens on smaller recipients is to allow them to direct a greater share of their resources towards implementing the DBE program elements that expand opportunities for DBEs, and the Department expects that they will do so. Under the final rule, all FTA recipients with DBE programs will be subject to enhanced reporting requirements, which will allow FTA to conduct more effective oversight.

As explained in the Regulatory Impact Analysis of the NPRM, if every single contract awarded annually to DBEs by the approximately 80 recipients that award between $250,001 and $670,000 annually (in prime contracts) went instead to non-DBEs, 99.7 percent of Federal funds awarded to DBEs on FTA assisted contracts would still be awarded to DBEs. In response to the comments received, FTA reviewed Uniform Report data for fiscal year 2021 to better understand the potential impact of the proposed Tier II DBE program on contract awards to DBEs. The data shows that 195 recipients reported awarding between $0 and $250,000 in that fiscal year. Of those, 159 operated completely race-neutral DBE programs. Of the remaining 36 recipients with race conscious goals, five awarded race conscious contracts to DBEs, resulting in $170,913 of cumulative awards to DBEs through the use of race-conscious means (or 0.02 percent of total dollars to DBEs that year).

The Department expects that many Tier II recipients will operate entirely race-neutral programs, though they are not prohibited from employing race-conscious means as necessary. The Department does not anticipate any reduction in awards to DBEs by Tier II recipients under the new rules, especially in light of increased funds being awarded by FTA to transit agencies. Further, FTA will be conducting *more* oversight of recipients currently awarding $250,000 or less. FTA will remain responsible for ensuring that *all* FTA recipients subject to the DBE program are awarding and administering their contracts in a nondiscriminatory manner, and the reporting requirements under the new rules will provide FTA the information needed to ensure compliance.

Regarding the comment that discusses the impact of receiving a large grant, as compared to the current rule the final rule would reduce the risk and mitigate the negative impact of exceeding the threshold due to a single grant. First, and as a matter of clarification, whether a recipient is tier I or II is determined by the value of contracts it awards, not the value of funds it receives from FTA. Under the current rule, since the contract value threshold is low ($250,000), there is a greater risk than under the final rule that a recipient will be required to implement all DBE program requirements after receiving a large grant. Further, since FTA Tier II recipients will be operating DBE programs, the additional administrative burden of becoming an FTA Tier I recipient is comparatively less than under the current rule, since recipients below the current threshold do not have the experience and administrative infrastructure to operate an effective DBE program. Finally, the Department expects recipients to budget and plan accordingly, and if a large grant is awarded then appropriate and commensurate resources should be devoted to compliance.

Regarding the comment that suggested raising the contract value to $750,000, the Department notes that $670,000 represents an inflationary adjustment, and there is no evidence to support that $750,000 would be more effective. Regarding the comment asking the Department to define ''significant changes'' to program plans, the Department notes that the final rule does not change what qualifies as a significant change.

5. Unified Certification Program (UCP) DBE/ACDBE Directories (§§ 26.31 and 26.81(g))

NPRM

The NPRM proposed to expand existing DBE and ACDBE directories to allow certified firms to display information about the firms' ability, availability, and capacity to perform work. The Department thought that this would provide a one-stop tool that would enable DBEs to market their services and help prime contractors seek out potential DBE subcontractors. Directories would include a standard set of options for information that firms could choose to make public, such as a capability statement, State licenses held, prequalifications, personnel and firm qualifications, bonding coverage, recently completed projects, equipment capability, and a link to the firm's

website. UCPs would not have to vouch for the accuracy of the information provided.

The NPRM would also eliminate the option for a hard copy directory since online availability of the information is sufficient. The NPRM said that the Department anticipated that UCPs could implement the proposed requirements by January 1, 2024, or 180 days after the final rule. However, the Department sought comment on having a phase-in period to allow necessary changes to be made.

Comments

This subject was among the most heavily commented upon in the NPRM, attracting over 70 comments. Of the almost 50 comments that expressed an opinion about the overall wisdom of the proposal, a majority fully or partially supported it. Many other comments addressed details of the directory process or had other ideas of how the directory process could best work.

Comments from supporters said that an expanded directory would help DBEs market themselves to primes, especially if DBEs could update information in an efficient way. Such a directory would be useful to primes searching for DBEs for a contract and could help to avoid the ''can't find qualified DBEs'' excuse for failing to meet goals, one comment said. More detail in the directory would also save DBEs from being inundated with solicitations from primes for work in areas in which the DBEs are not interested. DBEs, several comments said, should be allowed to add data about their operations, since NAICS codes, by themselves, provide only limited information about what a firm does.

Some supporters of the proposal nevertheless noted concerns about it. For example, commenters believed that the information in the expanded directories would be helpful to DBEs but acknowledged that costs and administrative burdens could be a problem, throwing the cost-effectiveness of the expanded directories into question. One asked whether there would be any DOT funds to support the expansion. Another supported the proposed expansion only if DBEs were not allowed to be certified in all 50 States under the interstate certification proposal in the NPRM. Others were concerned that, despite disclaimers to the contrary, the public would think that information about firms in the directory had been vetted for accuracy by certifiers. If certifiers were expected to verify information submitted by DBEs, another asked, how would certifiers determine the accuracy and timeliness of the information?

One commenter wanted to make sure that capability information about a firm be specific; another, however, thought that information about bonding and equipment should not be included because some of this information could be proprietary and could change from project to project. Other commenters suggested that owners' race and gender information should be included or that additional information categories should be included.

One commenter expressed concern that there would be large burdens on certifiers if they, rather than DBEs themselves, had to input data about the firms. It estimated that it would take 30 minutes to two hours of staff time per procurement for this process. Another commenter wanted the rule to prohibit recipients from using data from the expanded directory to judge which firms are ready, able, and willing to work.

A small number of commenters suggested that the Department go beyond the proposed changes and create a centralized, nationwide database, to which DBEs could upload information and which would be user-friendly and readily searchable by such terms as State and type of work. A variation on this idea was that States' UCP directories should be merged together to avoid duplication and inconsistency. A comment said that such a directory should specify which states a firm is certified in and should be in an Excel format and include the DBE's email and the SEDO's presumptive group membership. It could also include information on a firm's ability to perform a commercially useful function (CUF).

The principal objection of commenters who opposed the proposal is that it would add costs, take additional staff time, and create unnecessary administrative burdens. New software and additional staff would be needed, and staff would be unable to keep up with the workload they claimed.

Two commenters said that adding too much detail about firms would be counterproductive, and making sure information was updated would be a slow and difficult process. Another said that most of the proposed fields were available in commercial software, but seldom used. Similarly, another commenter questioned the usefulness of the added fields.

Commenters were concerned that there could be confusion about what a prime contractor could get credit for, based on representations in material DBEs added, since self-reported capability statements could be misleading. For this reason, one commenter said, DBEs should not be able to upload information themselves. Another said that capacity, availability, and other detailed information should not be entered, as that could lead to inaccuracy, discrimination, and lost opportunities. Two commenters suggested that it would be simpler and less burdensome to limit additional information to a link to the DBEs' websites, making additional directory fields unnecessary.

There was a wide variety of other comments concerning directories and the NPRM's proposal. A commenter expressed concern that, with many firms potentially being added to a UCP's directory as the result of the interstate certification proposal, the availability numbers used for goal setting could be distorted, even though many of the newly added firms might not be available to work in projects in the State. On the other hand, another commenter was concerned that directories might undercount firms that were potentially ready, willing, and able to work in a State, affecting goals in the other direction.

Some commenters were concerned about computer security and privacy. Two mentioned a concern about the privacy implications of including home addresses for businesses operated out of the SEDO's home, particularly in the context of more widespread certification under the interstate certification proposal. Some commenters thought the proposed implementation time frame for the new requirements was too short, and should be extended a year, or until software development and vendors were in place.

A commenter asked that more detail about the specifics of directory format, including using a spreadsheet and having search functions based on such factors as NAICS and ZIP codes. Another commenter wanted more to ensure that the dates when details concerning such items as prequalification, licensing, or bonding would be displayed. A commenter asked that all UCP directories use a standard format. Another commenter said the Department should give a unique identifier for each DBE that would be consistent across all UCP directories. A commenter recommended that directory entries have a notation about whether a DBE firm was eligible for FAA projects but not FTA or FHWA projects, because of differences in applicable size standards.

DOT Response

The main purpose of the DBE directory is to show DBEs, prime contractors, and the public which firms are certified as a DBE to do the various kinds of work that take place in DOT-assisted contracts. The directory is not primarily about the resources, equipment, bonding, experience, or other qualifications of a firm to do particular sorts of work. In performing their due diligence in selecting DBE contractors, considering those factors is a task for prime contractors.

We understand that it is useful for prime contractors to have such information readily at hand. One important means of making this information available to prime contractors would be for DBEs to include such information on their websites, which would then be linked to their entries in UCP directories.

In the NPRM, we proposed including fields for many of these types of information in UCP directories. However, we recognize, as commenters pointed out, that mandating a large expansion of the content of directories could create additional administrative burdens for certifiers. We are also concerned about some pitfalls that we recognize about open data fields for firms to enter their own information (*e.g.,* accuracy, information that has not been updated, unintended exclusion of eligible firms, available information being inconsistent from one firm to another).

In light of these concerns, DOT has limited the elements that must be included. They are firm name, location, NAICS code(s), and websites. The directory, which we now clarify must be an online platform, must permit the public to search and/or filter for these items in addition to the types of work a firm is seeking to perform. We will also mandate that the directory must include a prominently displayed disclaimer (*e.g.,* large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.

Certifiers may, at their discretion, include optional additional fields in their directories, including those proposed for inclusion in the NPRM. UCPs with sufficient resources may include such fields in their electronic directories, while others may find it more feasible to simply tell firms to provide a link to their own company websites, which would include the information they wanted prime contractors to access. UCPs have the responsibility, under the final rule, to ensure that mandatory items about firms are and remain accurate. UCPs permitting permissive entry of other information about firms' capabilities should also take steps to ensure that what the firms enter is accurate and up to date, including removal of inaccurate or untimely information they learn of. But the disclaimer mentioned above must state, UCPs do not warrant the accuracy of information provided by firms, and users' reliance upon it is at their own risk. Prime contractors always need to fact-check the claims made by firms they are considering doing business with.

6. Monitoring Requirements (§ 26.37)

NPRM

The NPRM would make a number of changes concerning a recipient's monitoring responsibilities. Recipients must monitor race-neutral participation by DBEs as well as participation on contracts that have DBE goals. The recipient would have to verify that a DBE was performing work on a contract, the recipient would also have to verify that it was performing a commercially useful function (CUF). This dual verification would have to occur on every contract involving a DBE. The NPRM emphasized the need for recipients to keep a ''running tally'' of its overall DBE attainment as well as each prime contractor's payments to DBEs it is using to meet its goal, rather than waiting until the end of the contract.

Comments

Monitoring Proposal

Most of the over 30 commenters on the NPRM supported the idea of more intensive and consistent monitoring of work in the DBE program, some saying they were already effectively doing what the NPRM proposed. Design/build contracts were one place where more monitoring was needed, a commenter said. The focus should be on actual dollars that DBEs receive, and payments should be confirmed on a regular and frequent basis, particularly to ensure compliance with prompt payment requirements.

Monitoring should continue throughout the procurement process and involve all elements of the recipient's organization, not just the civil rights office. More resources for monitoring are necessary, another comment said, because often times monitoring is not happening as it should. A comment said that DOT should verify commitment and performance numbers as well as CUF matters. One comment suggested that recipients use independent, third-party monitors.

Some of the comments supported the ''running tally'' requirement, especially the point that this applies to progress throughout the contract, and not just at the end of the project. One comment said that there should be written verification or a signed checklist concerning progress. Similarly, another said that there should be payment reconciliation on all invoices issued by DBEs.

Two comments questioned how and whether the running tally provision would apply to race-neutral contracts. Two others said that for funding or software reasons, implementation of the running tally provision should be phased in as funding, or software, becomes available (which one of these comments said would take 3–5 years). Another commenter, a recipient, said that more monitoring procedures are not needed beyond what it was already doing and that the OAs should provide uniform forms for monitoring purposes. One comment asked how often monitoring would have to be done and what the effect would be on staff workload. Another asked whether ''local public agencies'' that are part of FHWA's local public agency program would have to follow the proposed requirements applying to principal recipients themselves.

Other Enforcement Comments

Several comments talked about enforcement matters generally in the DBE program, rather than the specifics of the NPRM's monitoring proposal. One detailed a complaint about the commenter's perceived failure of a major recipient to enforce the program effectively. Another asked for stricter enforcement by the Department, since the commenter did not believe recipients could be trusted. There should be stiffer sanctions for noncompliance, including debarment of contractors, and DBEs who violate the rules should be decertified, other comments said. Another suggested that the Department should set up a public list of prime contractors' performance in meeting goals and getting DBE ''waivers.'' A commenter said that the Department should crack down on misuse of waivers and exemptions that evaded DBE requirements. A commenter asked for greater involvement by the Office of Inspector General (OIG) and the imposition of penalties for noncompliance. On the other hand, a commenter said that audits should focus more on customer service, rather than on negative matters.

DOT Response

Bidders on contracts with DBE contract goals can meet their obligations in one of two ways, which are equally acceptable under the regulation. First, they can enlist sufficient DBE participation to meet the goal. Second, they can document sufficient good faith efforts to meet the goal. Either route results in compliance with the requirements of the rule. The second route is not a ''waiver'' of the requirements of the regulation. This is simply an alternative method of compliance, one necessary to avoid the DBE program becoming a quota-based program that would not be narrowly tailored, as is legally required.

We believe that the running tally requirement is an important element of the compliance monitoring that all recipients are responsible for completing. It ensures that, throughout the course of a contract, the recipient will know whether a DBE is doing the work to which the prime contractor has committed, whether payments to DBEs are timely, and whether DBEs are performing a commercially useful function. If problems are found, then they can be corrected at a time before it becomes too late to do anything about them as a practical matter. We believe it is crucial to avoid situations where issues are revealed only when a contract is completed, and there are no available measures to achieve the meaningful DBE participation that was promised at contract award.

The optimal frequency of running tally inspections of a contract is likely to vary with the length and complexity of the contract. In a relatively simple, 60-day contract involving one DBE, for example, a running tally check 30 days after the beginning of the contract might suffice. In a more complex, multi-year contract, involving several DBEs, more frequent checks focusing on the times when the DBEs would be performing their tasks would be appropriate. While there is not a one-size-fits-all interval for running tally checks, it is essential that a recipient know at all times what is going on with DBE participation on its projects. ''There was a problem we didn't know about until after the fact'' is not an acceptable way for a recipient to oversee a project.

The Department chose to clarify that the ''running tally'' not only applies to monitoring contract goal attainment but also to monitoring the recipient's progress toward attaining its overall goal each year. Recipients must meet the maximum feasible portion of their overall goal by using race-neutral means (§ 26.51(a)), establishing contract goals to meet any portion of the overall goal that the recipient does not project being able to meet using race-neutral means (§ 26.51 (d)). Accordingly, recipients need a mechanism to keep a running tally of progress toward annual goal achievement that provides for a frequent comparison of current DBE awards/commitments to DOT-assisted prime contract awards to determine whether the use of contract goals is appropriate.

It is also important to emphasize who provides information that goes into the running tally. The DBE program is not the exclusive province of a recipient's civil rights or business diversity office, the staff of which are often small. The DBE program is the responsibility of all parts of the recipient's program and of all personnel who work with it.

On a highway construction project, for example, it is inconceivable that resident engineers, inspectors, procurement officials, and others would not be keeping track of the progress of the work, whether the work met schedules and specifications, whether the work was meeting budget projections, etc. The DBE program is an element of the contract no less than these routine matters that are regularly overseen, and needs to be given the same attention and, importantly, by the same people. The same individuals who inspect a project to see if, for example, materials meet specifications and that a project is on time and on budget can and should be trained, and required, to give the same attention to providing the information informing the recipient's running tally. It is part of their job. This is a point that the Department has emphasized over many years, and we wish to re-emphasize it here. When the Department reviews a recipient's compliance, we will be paying special attention to whether the recipient is doing what needs to be done in this respect.

Subpart C—Goals, Good Faith Efforts, and Counting

7. Prompt Payment and Retainage (§ 26.29)

NPRM

Responding to Congressional mandates and OIG recommendations, the Department in 2016 issued guidance concerning prompt payment and retainage. The guidance emphasized that recipients had responsibility for affirmatively monitoring contractors' compliance with prompt payment and retainage requirements, rather than relying on complaints from subcontractors. However, a 2020 FHWA review of recipients' practices showed that many were not fulfilling this responsibility adequately. Therefore, the NPRM proposed a specific provision concerning mandating affirmative monitoring and an enforcement mechanism, including appropriate penalties for noncompliance. Requirements would flow down to lower-tier subcontractors as well as prime contractors.

Comments

DBE and recipient commenters generally supported the NPRM proposal, emphasizing the need for affirmative monitoring and stressing the need for prompt payment to avoid cash flow problems for subcontractors. Commenters who mentioned the flow-down of requirements to lower-tier contractors also supported the proposal. Several commenters asked for a clarification of the rule that would specifically authorize enforcement of State laws mandating payment to subcontractors with a shorter period of the time than the 30 days provided for in § 26.29(b).

Many of these commenters and others emphasized the need for closer oversight and stricter enforcement; a few made suggestions about what this would look like. Monitoring should be conducted on a regular and frequent basis (*e.g.,* monthly). Other commenters suggested mandating a 10- or 15-day rather than 30-day payment period. Some commenters advocated those penalties (*e.g.,* 3 percent of the subcontractor's invoice, interest on late payments) be assessed against tardy contractors.

Several comments proposed alternative ideas to achieve the objective of prompt payment. One was to provide an incentive to prime contractors who paid subcontractors on time or early, such as a bonus or gaining points that could be used in future procurements. Another was to follow a model the commenter said was used in the Department of Defense and some SBA programs, involving an automated payment system and online certifications that payments have been made on time.

A comment suggested that recipients could set up an escrow-like account to pay subcontractors in the event prime contractors were late. Some commenters emphasized that primes should send invoices to recipients on time or that recipients could avoid problems by making partial payments to primes when a subcontractor's portion of the work was completed, as opposed to waiting until the entire project had been completed. A commenter suggested that DOT should develop software for

grantees to track payments by all parties at all stages of the process.

Comments from some recipients, especially in the transit industry, expressed concern about affirmative monitoring being burdensome, especially for smaller recipients that have limited staff. Other commenters thought that applying prompt payment requirements to all subcontractors, rather than just DBEs, exceeded the scope of the DBE program.

DOT Response

We believe as a basic, upper limit, standard for a national program, the proposed 30-day period for payment and for the return of retainage following the satisfactory completion of a DBE's work on its portion of the overall contract is appropriate. We agree with commenters that when State law or a recipient's program calls for a quicker turnaround time, that shorter requirement prevails. For example, if State M's law calls for payment to be made in 15 days, all recipients in that State would have to observe the 15-day rule. On the other hand, if State P's law allowed 45 days for payment or the return of retainage, the regulation would require the action to be taken in 30 days on a DOT-assisted contract.

We strongly encourage recipients to establish shorter time frames for lower tier subcontractors, because these smaller businesses have more acute cash flow needs than their larger counterparts. While we are not adopting, as generally applicable national requirements, the various ideas that commenters suggested to make prompt payment and retainage more effective, we encourage recipients to adopt measures that will work in their circumstances, and we will work with recipients to incorporate such measures in their DBE programs. The idea of providing special incentives for contractors, merely for doing what they are supposed to do, is not one that the Department supports, however.

In any case, adopting strong enforcement mechanisms is critical to making prompt payment and retainage return requirements work. For example, making failure to meet these requirements a material breach of contract, or an explicit cause for liquidated damages in the prime contract, are among many possible measures for this purpose. Letting failure to comply go unnoticed, or to be without consequences, is not an acceptable option. As part of their normal oversight of recipient operations, as well as in compliance reviews, the OAs will make prompt payment and return of retainage a point of emphasis.

8. Transit Vehicle Manufacturers (TVMs) (§§ 26.5 & 26.49)

NPRM

The Department proposed several changes to provisions in 49 CFR part 26 related to requirements for FTA assisted transit vehicle procurements. The NPRM included revisions in § 26.5 to the definition of TVM and proposed two new definitions, transit vehicle and transit vehicle dealership. Additionally, the Department proposed several revisions to § 26.49 to clarify reporting requirements for FTA recipients and TVMs.

The NPRM proposed terminology changes to make § 26.49 more reader-friendly and clear, such as using ''TVM'' consistently to refer to transit vehicle manufacturers and using the term ''eligible'' rather than ''certified'' when referring to a TVM's eligibility to bid. The Department also sought to clarify that a contract to procure vehicles from a transit vehicle dealership (TVD) does not qualify as a contract with a TVM, even if the vehicle was originally manufactured by a TVM.

Comments

Definitions

The proposed definitions of transit vehicles, manufacturers, and dealers drew only a small number of comments, most of which supported the changes, though a transit authority and a consultant sought more clarity. As noted above, a commenter said that a transit vehicle dealer (TVD) should be more simply defined as a firm that sells transit vehicles (including modified vehicles) made by a transit vehicle manufacturer (TVM), whether or not the dealer is ''primarily engaged'' in selling such vehicles.

Terminology

The few comments addressing the proposed change from ''certified'' to ''eligible'' in § 26.49(a)(1) and (2) supported it.

Procuring Transit Vehicles

Two commenters agreed that a vehicle purchased from a non-TVM should not be treated in the TVM category for goal and reporting purposes. Another suggested that paratransit vehicles like SUVs and vans be allowed to be purchased from dealers rather than manufacturers.

Two commenters expressed concerns about the proposal that vehicles purchased from TVDs are not treated under the TVM provisions of the rule. Both said they procure ADA paratransit vehicles from TVDs. One concern was that because a TVD is not a TVM under the proposal, FTA funding would not be available for the paratransit vehicle purchases. A related concern was that since most TVDs are non-DBE firms, there are no meaningful contacting opportunities for DBEs in that field and hence no point in setting contract goals for TVDs. Moreover, a commenter noted that the proposal could limit DBE opportunities related to paratransit vehicles that might exist through the TVM program.

A commenter recommended that neither modified nor unmodified transit vehicles purchased through TVDs should be included in a recipient's goals or uniform reports.

A State DOT said that it procured its paratransit vehicles from TVDs, which then would not count as TVMs under the proposed language. It was concerned that FTA therefore would not treat such purchases as eligible for Federal funds because, as TVDs rather than TVMs, they could not participate in the TVM program. The commenter was unsure how a recipient would comply with the rule under these definitions. Moreover, it said, most TVDs are owned by socially and economically disadvantaged individuals (SEDs) and have few if any DBE subcontracting opportunities. It suggested that recipients be able to report purchases of such vehicles from TVDs in the same manner as for TVMs.

TVM Goal Submissions

Four commenters recommended that TVMs only have to submit goals every three years, rather than annually. This would reduce burdens, they said.

Ferries

The NPRM did not address ferries specifically, but several commenters noted the difficulty in applying the TVM rules to ferry procurements. For example, commenters suggested that the proposed definition of transit vehicle would likely result in additional confusion as to how to treat procurements of ferries because they are vehicles that clearly should be regarded as transit vehicles yet are manufactured by entities that should not be considered TVMs.

TVM Other Details

A commenter said that since TVMs report directly to FTA, a TVM should not have to report the same data to recipients. Another commenter said that TVMs should not have to provide confidential bidders list information in their DBE goal submission; FTA can

audit their records for this information if needed.

A commenter suggested amending § 26.49(a)(4) to say, ''becoming contractually required [as opposed to the proposed ''obligated''] to procure a transit vehicle.'' Another commenter said that it thought that NAICS codes do not cover vehicle component manufacturers adequately.

Another commenter supported the proposed revision of § 26.49(c) that clarified that TVMs would have to submit reports only for years in which they were eligible. It also suggested that the ''awards/commitments'' line item in section A of the Uniform Report form be clarified to apply only to work performed in the U.S., to be consistent with the language in § 26.49(b) that limits TVM goals to work performed in the U.S. A transit advocacy organization added that since many TVMs may be small businesses with limited staff, TVMs should be required to submit their goal information in the same three-year interval as recipients, thus further reducing the paperwork burden. Overall, this organization commented that any additional administrative burdens could result in fewer DBE businesses participating, fewer bids, less competition, and longer lead time for new capital projects.

DOT Response

§ 26.5 Definitions

The final rule will adopt the proposed definition of TVM. In response to the comments expressing concern over applying the definition to ferry manufacturers, the final rule further clarifies how recipients may establish project goals to procure transit vehicles from entities that are not eligible TVMs. See the discussion of § 26.49(f) below.

After considering the comments received, the Department decided not to adopt the proposed definition of transit vehicle. As noted in the preamble to the 2022 NPRM, the Department recognizes that there is some ambiguity as to what qualifies as a ''transit vehicle procurement'' and is therefore subject to special rules. However, since these situations are relatively rare and the most appropriate course of action depends on the unique facts and circumstances, the Department expects that providing training, guidance, and technical assistance will be more effective than issuing a one-size-fits-all regulatory definition.

The final rule will not include a definition for transit vehicle dealer. Commenters explained that small transit agencies routinely use dealers to procure transit vehicles, and that paratransit vehicles are often procured through dealers. As discussed elsewhere in this notice, these comments persuaded the Department to maintain the status quo with respect to dealership transactions in § 26.49. Since the definition would only be relevant if the Department retained the proposal in § 26.49, there is no need for a definition.

§ 26.49 Procuring Transit Vehicles

As noted above, the proposed revisions to § 26.49 received mixed comments. Generally, commenters agreed that the proposals would clarify the requirements. The Department appreciates the comments in support of the proposed change from ''certified'' to ''eligible'' in § 26.49(a)(1) and (2). Accordingly, the final rule adopts this change as proposed. The Department agrees with the commenter who suggested that the word ''required,'' instead of ''obligated,'' better conveys the necessary action that triggers the 30-day reporting requirement in § 26.49 (a)(4). The final rule therefore uses the term ''required.'' Several commenters opined that the proposed addition of paragraph (a)(5) addressing awards to dealerships could severely disrupt vehicle acquisition practices by small transit agencies and paratransit providers. In response to these comments, the final rule does not adopt proposed paragraph (a)(5) or otherwise address awards to dealerships. The final rule substantively adopts all other proposed changes in § 26.49 with only minor additional revisions to paragraph (a)(2) for clarity. Additionally, the final rule incorporates changes to paragraph (f) to address situations in which recipients establish project goals.

§ 26.49 TVM Goal Submissions

The Department recognizes that TVMs are required to set and submit goals more frequently than recipients. The timelines are different because TVMs and direct recipients (often transit agencies in the case of FTA funds) fundamentally differ in their ability to predict contracting opportunities. Generally, transit agencies are able to predict the projects they will undertake over the next three years with a relatively high degree of accuracy, which allows transit agencies to accurately predict the scale and scope of contracts they will award. TVMs, though, are often limited to the information their potential clients (often transit agencies) make available. Since most transit agencies do not provide extensive details on the vehicles that they intend to procure prior to issuing a public solicitation, which in many cases is within months (at most) of the deadline to submit bids, TVMs cannot accurately predict the federally funded subcontracting opportunities they will have available in several years. Thus, the Department will retain the requirement for TVMs to set DBE goals on an annual basis and submit goal methodologies annually. Without more information from commenters, we are unaware of how this administrative burden can result in fewer DBEs participating, fewer bids, etc.

Ferries

The Department understands that large ships are manufactured by shipyards, and that the shipyard industry is different from bus and rail manufacturing industries. Shipyards are contracted by entities from various other industries to build vessels specified to the customer's needs. Smaller vessels, though, are typically manufactured by well-known brands, and may be specialized by the manufacturer or third parties. Thus, there are aspects of ferry manufacturing that are unique to the shipbuilding industry. However, other aspects are similar to the rest of the transit vehicle manufacturing industry. Such factors mean that ferry procurements are often best addressed through project goals pursuant to § 26.49(f). As discussed below, the final rule clarifies how to apply project goals to transit vehicle procurements from specialized manufacturers when a TVM cannot be identified.

Use of Project Goals

The final rule revises § 26.49(f) to clarify how to use project goals to procure transit vehicles. The revisions codify and clarify current practices and are in response to comments expressing confusion over how to apply the TVM rules to ferry procurements (project goals may be used to acquire vehicles other than ferries).

The final rule adds new paragraphs (f)(1), (f)(2) and (f)(3) and simplifies paragraph (f) to clarify that project goals are used in cases when transit vehicles are procured from specialized manufacturers when a TVM cannot be identified. Pursuant to paragraph (f)(1), if a recipient establishes a project goal, it must use the process prescribed in § 26.45 to do so. This effectively requires recipients to use the same methodology for project goals as overall goals. Pursuant to paragraph (f)(2), FTA must approve the recipient's decision to use a project goal before the recipient issues a public solicitation for vehicles. Paragraph (f)(3) requires recipients to demonstrate that no TVMs are available to manufacture the transit vehicle it intends to procure.

The Department established the project goal option in paragraph (f) in 2014. This option has always been intended to maintain the spirit of the DBE program when compliance with the general rule would be impracticable or create more barriers for DBEs in the transit vehicle manufacturing industry. Often, this scenario occurs when a transit agency intends to procure a vehicle for transit purposes but the entities that manufacture the vehicle do not meet the TVM definition (and are not excluded from the definition).

It has been FTA's longstanding practice that if a recipient can show that it is procuring transit vehicles with FTA funds and there are no entities that qualify as TVMs that manufacture such vehicles, the recipient may use a project goal to procure the vehicles. If a recipient intends to use a project goal, the recipient must request FTA's approval of that decision, and must not issue a public solicitation until FTA has approved the decision. The request for approval must demonstrate that the recipient looked for and could not identify a TVM that manufactures the vehicles sought. To be clear, the project goal does not have to be approved by FTA prior to the recipient's issuance of a request for proposals. Generally, recipients will be required to submit the project goal methodology prior to issuing a public solicitation, though FTA may make case-by-case decisions depending on the facts and circumstances; only under extraordinary circumstances will FTA permit recipients to submit the goal methodology after contract award. This is similar to how FTA reviews and approves all project and overall goals.

TVM Other Details

Regarding the comments on duplicative reporting requirements imposed by part 26 and locally by recipients, the Department recognizes that recipients have legitimate reasons for collecting information from TVMs, some of which may also be reported to FTA. Thus, the Department does not believe it would be prudent at this time to limit recipients' ability to collect such information.

Regarding the comments on confidential bidders lists submitted with goal methodologies, part 26 only requires submission of such information if the TVM chooses to use a bidders list when calculating its overall goal. Otherwise, TVMs are merely required to retain their bidders lists on file. Since it would be impossible to verify the validity of a goal based on a bidders list without reviewing the bidders list, the Department intends to continue to require TVMs to submit their bidders lists when they choose to use a bidders list in their goal methodology.

The final rule adopts the proposed changes to § 26.49(c). Regarding the comment about changing the Uniform Report to clarify that only domestically performed work is to be included in the report, the Department does not believe that this specific change is necessary. We acknowledge that the final rule will result in several changes to the Uniform Report; FTA will issue guidance to TVMs on how to fulfill their reporting requirements under the new rules.

The Department appreciates the comment that discussed the inadequacy of NAICS codes to describe the sort of work available in the vehicle manufacturing industry. The Department intends to use the data it collects under the final rule to learn more about the opportunities available to small businesses and DBEs in the vehicle manufacturing industry.

Finally, the Department intends to use this notice to clarify longstanding policy on how to count DBEs performing on transit vehicle procurements. In recognition of the complex supply chain necessary to manufacture a transit vehicle, the Department has always permitted TVMs to count awards to any certified DBE if the DBE is certified in the State in which it performs the work, regardless of whether the TVM is present in the State. More recently, particularly in the context of ferry procurements, the Department has been asked to allow recipients to count awards to DBEs certified in States other than the recipient's home State if the recipient is using a project goal. The Department has found that such practices can be an effective means of ensuring DBEs are afforded opportunities to compete on transit vehicle procurements. Thus, the Department may approve such practices when sufficiently justified (here, the Department reminds recipients and TVMs that work performed outside of the United States or its territories must not be counted).

9. Procedures for Good Faith Efforts on Design-Build Contracts With DBE Goals (§ 26.53)

NPRM

The NPRM proposed that, in a negotiated procurement (*e.g.,* for professional services), the bidder or offeror may make a binding commitment to meet the goal at the time of bid submission or presentation of initial proposals but provide the detailed information about its DBE participation later, before selection. This provision would not apply to design/build contracts, however.

The NPRM proposed that for a design-build contract, the bidder or offeror would submit a DBE Performance Plan (DPP) with its proposal. The DPP would have to include a commitment to meet the goals and provide details—including dollar amounts and time frames—for the type of subcontracting work or services the proposer will solicit DBEs to perform. The recipient would monitor the design-builder's good faith efforts (GFE) to comply with the DPP and its schedule. The recipient and design-builder could agree to revisions of the DPP over the course of the project.

Comments

DBE Performance Plans

Nearly 50 commenters, from all the major interests, addressed the NPRM's DPP proposal. Of these, about 40 supported the proposed concept, though many had suggestions for modifying the proposal.

In addition to agreeing with the NPRM's rationale for DPPs, supporters said that the DPP would help small businesses seeking work on large projects and would update the regulation to be consistent with existing best practices. Several comments said that they already used something like a DPP in their procurements. Other advantages include, commenters said, giving greater flexibility to prime contractors while allowing for detailed planning and monitoring to provide better experiences for DBEs.

One suggestion made by numerous commenters for modifying the proposal was to have a ''hybrid'' or two-step process in design/build procurements. That is, for the design and pre-construction phases of a project, recipients could use this flexibility to set goals that the design-builder would have to meet up front, as traditionally done in the DBE program. For the longer construction phase, recipients would have a process like that described in the NPRM.

A few commenters suggested that if, as might happen in smaller design/build projects, a contractor meets the goal with sufficient DBE commitments before the project started, the DPP might not be required for the project. A comment requested that prime contractors be required to commit to DBEs as soon as possible in the process.

Other suggestions included setting specific time frames in which actual DBE contracts would have to be executed and making the DPP process available to a broader scope of projects than design/build projects *per se* (*e.g.,*

public-private partnerships). To make this point clearer, some comments said, the regulation should use a term like ''alternative delivery'' rather than ''design/build'' for projects involving a DPP.

Several commenters wanted to make sure that there was active and frequent monitoring of contractors' performance under the DPP. Commenters suggested that DOT could assist this process by providing monitoring software and additional funding to deal with the costs of additional resources for evaluating and monitoring DPPs, and that DOT should also provide more details about what an adequate DPP looks like. Other commenters suggested that DOT should also provide guidance on how to deal with issues that may arise in the course of a project (*e.g.,* change orders), several commenters said, as well as on proper use of DPPs to avoid bids nonresponsive bids.

A few commenters asked how, if at all, the DPP concept would apply to contracts that have race-neutral goals (*e.g.,* as is commonly the case in Florida). One comment suggested that since many design/build projects are large, DBE size standards should be increased for firms participating in them. Another commenter asked that the regulation prohibit prime contractors from making small, incremental additions to their contracts to avoid making firm commitments to subcontractors for DBE work. Another pointed to what it thought could be an inconsistency between the DPP proposal and present Appendix A, section VI, which says that a promise to use DBEs after contract award is not considered responsive to the contract solicitation or to constitute GFE.

If what a prime contractor promises in a DPP does not happen, then what is a recipient to do, some commenters asked. In addition to monitoring, these commenters said, the rule should take enforcement action and impose consequences on prime contractors who are in noncompliance with their DPP obligations. One commenter said, however, that enforcement can be difficult because contractors often do not understand what is involved in a DPP.

The smaller number of comments opposed to the DPP proposal said that moving away from the requirement to have prime contractors commit to specific DBEs in advance would diminish opportunities for DBEs. A comment suggested that a bidder on a prime contract should have to always meet a goal or show GFE before being awarded a contract, no matter what the structure of the contract may be. DBEs need time to get working capital, employees, and equipment in order; and advance notice at the start of a project is important to enabling them to do so, a commenter noted. Another commenter asserted that the premise of the proposal is mistaken, it is not that difficult to identify subcontractors at the start of a project, it said. In the absence of requiring compliance before contract award, DBE participation could become an afterthought for the prime contractor and recipient.

Others opposing the proposal said that implementing the DPP proposal could increase burdens and costs for recipients, delay projects, or lead to additional restrictions or conditions on RFPs, potentially deterring some bidders.

DOT Response

Commenters generally approved of the concept of a DBE performance plan in design/build contracts, and we continue to believe that this will be a useful tool in managing DBE participation in a type of contract in which award of the contract occurs before the design is complete and the details of the work, quantities, and scheduling are not yet known. We agree with commenters that there may well be circumstances in which DBE subcontractors can be selected for the design phase of a project at the outset, in which case the DBE Performance Plan would include commitments to those firms while listing the work types it plans to solicit DBEs to perform in the remainder of the plan. While we appreciate that many projects span over the course of several years, at this time, it is only those contract procurement and delivery methods that lack the details needed to make subcontracting commitments prior to contract award to which the Department approves of the use of a DBE Performance Plan.

Since the beginning of the DBE program in the 1980s, the Department has heard complaints from prime contractors that they cannot find sufficiently qualified, capable DBEs to meet goals on a project. This belief itself appears to be one of the effects of discrimination that the program is designed to combat, and it can act as a self-fulfilling prophecy preventing prime contractors from exerting optimal efforts to find DBEs to meet a goal, whether on a traditional contract or a design-build project. Making good faith efforts to find DBEs is essential to compliance with the regulation. Open communication among the recipients and prime contractors is essential to ensure that the work commitments in the performance plan result in actual subcontracts. With agreement of the parties, work types identified up front could be altered to account for actual work needed in real time; however as long as there are subcontracting opportunities, the recipient must enforce the prime contractor's requirement to make ongoing good faith efforts to meet the goal. We do appreciate the comment that Appendix A needs to be revised to provide an exception for design-build contracts. We are making that alteration. In addition, we are re-naming the DBE Performance Plan to DBE Open Ended Performance Plan (OEPP) to align with the FHWA's EDC–7 initiative.[2] Other than these changes, we are adopting the proposal as proposed in the NPRM without substantive change.

10. Terminations (§ 26.53(f))

NPRM

The NPRM restated the prohibition on terminating DBE subcontractors' work without the recipient's written consent (*e.g.,* because the prime contractor wanted to self-perform the work or use a different firm for the work that had been committed to the DBE). The NPRM further clarified that ''terminations'' need not be terminations in full, but that ''partial terminations,'' *e.g.,* removing a work item or decreasing the amount of work committed to a DBE would still require prime contractors to follow the process by providing a ''good cause'' reason it proposes to terminate, provide the DBE with time to respond, and not terminating before receiving prior written consent from the recipient. The NPRM also proposed to clarify that termination, on the one hand, and replacement or substitution, on the other, are two separate and distinct processes.

Comments

The majority of the nearly 20 commenters supported the proposal. They agreed that a prime contractor may not terminate a DBE's contract without the recipient's written consent. Some of these comments said that it made sense

[2] In 2009, FHWA launched the Every Day Counts (EDC) initiative in cooperation with state, local, and industry partners to speed up the delivery of highway projects and create a broad culture of innovation within the highway community. Proven innovations and enhanced business processes promoted through EDC facilitate greater efficiency at the state and local levels, saving time, money, and resources that can be used to deliver more projects. The EDC initiative is a state-based model to identify and rapidly deploy proven, yet underutilized innovations to shorten the project delivery process, enhance roadway safety, reduce traffic congestion, and improve environmental sustainability. Rethinking DBE for design-build projects is one of the innovations being promoted in the seventh round of the EDC initiative.

to fold the notion ''substitution'' into the overall ''termination'' framework, since a substitution had the effect of terminating the original contractor. One commenter wanted to make sure that the five-day period for a recipient's consent had elapsed before the prime contractor actually terminated the DBE. Another said that, if there was additional work to be done in the scope of a DBE's work, and the goal had been met, the DBE should complete the additional work, rather than the prime contractor self-performing it.

Some commenters sought clarifications of the proposal. Three commenters said that a recipient's removal of work intended for a DBE to perform should not be treated as a termination by the prime contractor. There could be circumstances, another commenter said, in which a recipient would need to make a determination in less than five days; for example, there may be an urgent need to ensure that hauling supplies to the job site happens on time. In such a case, the commenter said, the recipient would have to respond to the contractor's written notice in 24 hours, and a formal termination process could follow.

The small number of opponents preferred retaining the former regulation's provisions. Some thought that the list of ''good cause'' reasons for termination is too restrictive.

DOT Response

In the NPRM, the Department underscored that any time a prime contractor seeks to terminate a DBE to which it had made a commitment in response to a contract goal or approved substitution, it must follow the process set out in § 26.53(f). The Department sought to clarify that this requirement applies not only to a complete termination but also to a ''partial termination,'' *i.e.,* eliminating a *portion* of work committed to a DBE. For example, a ''partial termination'' in which a prime contractor wishes the DBE to do $100,000 worth of work as opposed to the originally committed $200,000, is just as much subject to the approval as an action to terminate the DBE firm entirely. This would not apply to change orders initiated by the recipient that had the effect of eliminating some or all of the work to which a DBE was committed to perform.

The Department continues to believe that it is important to separate the termination requirements from the substitution process. We have found that some recipients will not allow the prime contractor to terminate a DBE until it has submitted a substitution. Other recipients forgo the termination process and merely require the prime contractor to submit a request for substitution. The due process requirements in § 26.53(f) are essential to protect DBEs committed toward a contract goal, or approved replacement, from arbitrary elimination. This is true whether or not a substitution of another firm for the terminated DBE's work is intended. Again, after considering the comments, we are adopting the termination and substitution provisions as proposed in the NPRM.

11. DBE Supplier Credit (§ 26.55(e))

NPRM

As noted in the 2022 NPRM preamble (87 FR 43631–43632), the issue of how to count DBE credit for suppliers has long been a subject of debate and extensive stakeholder input. Changes over the years in the way that materials are delivered for projects and the importance of concepts like the ''regular dealer'' to DBE suppliers and prime contractors seeking to meet goals have been among the frequent topics of discussion.

Based on the Department's consideration of stakeholder input, the NPRM proposed several changes to the counting provisions of § 26.55(e). First, a prime contractor could meet no more than 50 percent of a goal on a given contract through use of DBE suppliers (including manufacturers, regular dealers, distributors, or transaction facilitators). A recipient could, with prior OA approval, make exceptions to this limit (*e.g.,* for material-intensive contracts). The purpose of this proposal was to prevent the use of DBE suppliers from crowding out opportunities for other types of DBE contractors on a project.

To avoid ad hoc, post-contract award determinations of whether the contributions of a supplier were those of a ''regular dealer'' eligible for 60 percent credit, the NPRM proposed that recipients establish a system to determine, before contract award, whether a DBE supplier meets the basic requirements for being a regular dealer. That is, does the firm generally engage in the sale or purchase of the items in question or items having the general character of those to be supplied under the contract? As part of this pre-award process, the recipient would look at such questions as whether the items would be provided from the supplier's inventory, whether the supplier would have physical possession of the items, or, in the case of bulk items, whether the supplier would deliver the items using its own distribution equipment. Goal credit would ultimately be decided on a contract-by-contract basis based on the recipient's final evaluation of whether the firm would provide a commercially useful function (CUF) deserving of 60 percent regular dealer credit.

The recipient's system for carrying out this proposal would also evaluate situations in which all or most of a regular dealer's supplies come from its inventory, but other sources, such as a manufacturer, would provide additional minor quantities of items related to those in the contract.

In addition, the recipient's system would consider situations in which a DBE supplies items/goods that are not typically stocked (*e.g.,* specialty items). A DBE that provides such items would be eligible for 60 percent regular dealer credit if, like a supplier of bulk items, it used its own distribution equipment.

One of the issues that stakeholders have discussed is the handling of ''drop shipping,'' in which a DBE supplier arranges to have a product sent from its manufacturer to the job site, without passing physically through the hands of the DBE. On the one hand, this arrangement appears similar to that of a transaction facilitator, whose credit is limited to its fees or commissions. On the other, some stakeholders said that dealers in bulk items with distributorship agreements had a good deal of control of a transaction, take significant risks, and often use their own delivery equipment, meaning that their involvement went beyond being simply a transaction facilitator.

To address these concerns, the NPRM proposed that a ''distributor'' having a valid distributorship agreement receive 40 percent credit for the items it provides. Recipients would have to review distributorship agreements, prior to contract award, to determine their validity with respect to each purchase order/subcontract and the risk the DBE assumes. Where a distributor ''drop ships'' materials without assuming risk, or does not operate according to its distributorship agreement, its credit would be limited to fees or commissions.

The NPRM proposed to retain the existing requirement that to receive credit for supplying materials, a DBE must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself.

The NPRM would clarify the definition of ''manufacturer'' by proposing that manufacturing includes blending or modifying raw materials or assembling components to create the finished product to meet contract specifications. Minor modifications do

not count as manufacturing eligible for 100 percent credit.

Comments

The 50 Percent Limit on Credit Toward Goals for Use of Suppliers

This provision of the NPRM attracted over 60 comments, which, by roughly a 5–1 ratio, opposed the Department's proposal. DBEs, non-DBEs, and recipients found reasons for objecting to the proposed limit on the use of suppliers to meet goals. Commenters opposing the proposal did so on a variety of grounds.

Several comments challenged the factual basis for the proposal. A DBE supplier said that there were no statistics or other evidence supporting the proposal, making the limit arbitrary, a point other commenters made as well.

A non-DBE contractor said that there were no studies showing that DBE suppliers were favored over other kinds of DBEs, or showing what percentage of goals were being met by different categories of DBE firms. Nor was there evidence that suppliers or manufactures were being used at a greater rate in the DBE program than in the construction industry generally, or that the participation of non-supplier DBEs were unduly limited under the present rule. The comment added that the only evidence in the NPRM preamble for the proposal was a reference to a 2018 stakeholder meeting in which some DBE participants had said that, on some contracts, prime contractors were able to meet all or most of DBE goals through use of suppliers, especially of bulk items, making use of other types of DBEs unnecessary. It depends, one commenter said: in some contracts in which his company had been involved, goals had been met mostly or entirely with DBEs other than suppliers.

A State-level contractors' association said that it had been told by its State DOT that it does not keep numbers on the participation of DBE suppliers vs. other DBEs, resulting in a lack of evidence that could provide a basis for a supplier limit. A national-level contractors' association said, referencing the stakeholder meeting mentioned above, that use of comments constituted rulemaking by anecdote. Moreover, it said, it had not been given the opportunity to participate in the meeting, the results of which had never been published. Another commenter noted it did not appear that the views of prime contractors or recipients had been solicited in the stakeholder meeting cited in the NPRM preamble.

Commenters who are or who represented recipients expressed concern that the proposal did not take into account the realities of their contracting activities, such as the unique characteristics of contracts, the needs associated with each contract, and the availability of DBEs relevant to the work of each contract. Two such commenters said that in their jurisdictions, there was not an excess of suppliers, one of them noting that only 20 percent of the DBEs in its directory were suppliers. Others said that the provision would not work with respect to contracts heavily involving bulk and other materials (*e.g.,* asphalt), therefore harming businesses who focus on those materials. One recipient said that there were often few DBEs to work on contracts in rural areas, making reliance on suppliers more important there.

Recipients and contractors both said that the proposal would adversely affect the ability of prime contractors to meet contract goals and of recipients to meet overall goals. Recipients' goals might have to be lowered as a result, especially when a contract did not provide significant opportunities for non-supplier DBEs. For example, one State contractors' association said that materials made up 60–80 percent of typical highway contracts in its State. On a paving contract for example, a commenter said, there might be only two or three, usually small, scopes of work that a DBE subcontractor could perform. If a contractor could count only suppliers to meet half of its goal, it would make it impossible to meet goals in many cases, commenters asserted, given what they characterize as the frequent unavailability of other types of ready, willing and able non-supplier firms. The effects of the pandemic on small business could make this problem worse, a prime contractor suggested. All this would make more good faith efforts ''waivers'' necessary, commenters said.

A few recipients expressed the concern that the proposal could increase their workload and create confusion or delays in their administration of their contracting activities.

A frequent comment opposing the proposal is that it would unfairly create financial harm to DBE suppliers. These firms have configured their businesses to meet the requirements of the existing rule, commenters said, making considerable investments in facilities, inventory, and employees. They would have fewer opportunities to work under the proposal, as the rule favors one category of DBEs over another, with the result that suppliers would lose income and could even be forced out of business. One DBE stated that it would cut their business in half.

A few comments also asked how the exception process was supposed to work. When would recipients have to go to an OA to have an exception approved, and what would be the OAs' criteria for approving the request? A commenter suggested there should be a deadline for an OA's response to a request for an exception (*e.g.,* five days). One comment suggested that the matter of exceptions should be delegated to recipients, without needing approval from an OA.

Some commenters also had suggestions for modifying the proposal. One would allow suppliers to count 50 percent of their gross sales for credit. Another suggested giving recipients flexibility to decide what level of credit (*e.g.,* 50, 60, or some other percentage) applied to a particular contract. Another suggestion was to calibrate credit according to the percentage of supplies on a contract. If supplies account for 80 percent of a contract, then the recipient would allow DBE suppliers' contribution to count for 80 percent of the goal. Another variation would be to apply the 50 percent limit with respect to commitments in the pre-award process, but then count the entire amount of actual supplier participation toward actual attainment at the end of the project.

The smaller number of commenters who supported the proposal, or at least did not object to it, said they thought the proposal fair and useful to keep open opportunities for non-supplier DBEs. Some supporters said there should be exceptions for materials-heavy contracts (*e.g.,* guardrails). Another said it could support a 50 percent limit for large contracts but not smaller contracts. A few recipients said the issue did not much impact their operations. One comment asked how the provision would apply to situations where there was no contract goal. A few comments wanted stricter limits on supplier participation (*e.g.,* 25 percent).

Regular Dealer Issues

The largest number of comments on regular dealer issues focused on the proposal that recipients have a system to make contract-by-contract pre-award decisions about whether a supplier deserved 60 percent credit as a regular dealer.

More than 20 comments, mostly from recipients, opposed the idea. Their primary objection was that implementing the proposal would be confusing, difficult, and burdensome. For example, there would be additional work for contract administrators, which could delay contact awards. Prime contract bidders would face an undue

burden, as they would have to do additional due diligence to make sure that the credit they were claiming for DBE participation was consistent with the recipient's determination in each case. These determinations could be subjective and subject to challenge.

Most of the comments opposed to the proposal stated that if there was to be a determination about whether a supply firm was a regular dealer, it should be made by the UCP at the time of certification, not on a pre-award basis on each contract by the recipient. On the other hand, a commenter objected to UCPs performing this function, since it would result in a *de facto* certification of regular dealers.

A few comments supported the proposal. One comment suggested that the approval of a DBE as a regular dealer could be done as part of a recipient's good faith efforts review. Another suggested that firms could submit an affidavit attesting to its meeting regular requirements as part of the pre-award process. Another recommended that a CUF review for regular dealers consider such factors as the firm's ability to secure the items, do their own takeoffs and quantity planning, get quotes, and have distribution agreements.

On other regular dealer matters, a few commenters said that the credit awarded to regular dealers should remain at 60 percent. Some would increase the percentage (*e.g.,* to 75, 80, or 100 percent). One commenter said that regular dealers in specialized fields for items such as bridges should be able to count 100 percent. Another commenter favored 100 percent credit if the firm's workforce was predominately minority or female. One commenter said the entire regular dealer concept was outdated and should be taken out of the regulation. The commenter urged that the regulation talk about suppliers in general in a simpler way.

Other commenters requested clarification with respect to terms like keeping a ''sufficient quantity'' of materials in stock (which the commenter said could vary among different kinds of items), ''drop shipper,'' or ''specialty items.'' Another asked how a recipient could make regular decisions with respect to out-of-state firms that were certified via interstate certification. Another provided a detailed typology of regular dealers, bulk suppliers, and brokers/transaction expediters.

Commercially Useful Function

In addition to its role in determining whether a firm was a regular dealer, some comments addressed CUF decisions more generally. Two supported doing CUF reviews on all federally assisted contracts, while another thought doing so would too burdensome if applied to contracts without a DBE goal. One of these asked for more specific CUF criteria. One wanted to streamline the process by allowing a CUF review that would apply to all jobs within a year, while another commenter thought certifiers could verify CUF at the time of certification.

Recipients, not prime contractors, should make CUF determinations, one commenter said. Another added that recipients should not be able to request CUF data from prime contractors; the prime contractor should get DBE credit unless there is documented evidence of noncompliance. Another was concerned that CUF reviews and the ''running tally'' monitoring requirements could become confused with one another.

A commenter thought that prime contractors should be able to do several things to assist DBEs without running afoul of CUF requirements. These included providing specialized training through a shared superintendent or foreman, access to contract management software and back- office assistance, sharing of equipment and workers, and guarantees consistent with industry practice.

Bulk Suppliers and Supplies of Specialty Items

The 60 percent credit given to suppliers of bulk materials and specialty items is a subcategory of the treatment of regular dealers under the rule. There was a division of opinion among commenters about whether, as the NPRM proposed, these suppliers would need to have their own distribution equipment to count for 60 percent credit towards a DBE goal.

Several comments said that leasing equipment was a common industry practice among suppliers, and that suppliers should not be penalized for doing so. Being unable to lease distribution equipment would be burdensome and could make DBE suppliers uncompetitive, one comment said. A distinction based on physical delivery of products is unrealistic, a DBE supplier said, as suppliers have to do a lot of work that adds value no matter how products are delivered.

One recipient suggested that an equipment lease should be long term (*e.g.,* at least a year). Others would make allowance for a situation in which a supplier that had its own distribution equipment used a short- or long-term lease arrangement for items that are infrequently needed (*e.g.,* highway signs) or to supplement their own equipment, as needed (*e.g.,* through engaging owner-operators).

Among other comments on the subject, a few supported the proposal as written. Another raised a problem concerning what it said was a common practice of manufacturers (*e.g.,* of structural steel) shipping their products to the job site using their own trucking company. The commenter wondered whether there would be a CUF for a DBE in such a situation.

Drop Shipping and Distributors

All but a few of over 40 comments that addressed this issue opposed the NPRM's proposal, though not all for the same reasons. A mix of recipients, DBEs, and non-DBEs said that the proposal was unclear, confusing, overly complex, burdensome, and difficult to administer. Recipients do not have expertise in evaluating the validity of a distributorship agreement, some said, adding that the NPRM did not provide guidance or criteria to aid this task. It could be difficult for recipients to distinguish between those transactions counted at 40 and 60 percent, another comment asserted. One comment suggested that other factors aside, all drop-shipped goods should be counted at a fixed percentage (*e.g.,* 30 or 50 percent) to simplify matters.

Two commenters thought that, as comments had suggested about regular dealer evaluations, decisions about the validity of distributorship agreements should be made in advance, through the certification process. Monitoring would be very hard to accomplish, requiring intensive work. Recipients should have the flexibility to determine how much credit to permit for drop-shipped goods, depending on the circumstances of individual contracts, a comment said. Some commenters were concerned that the 40 percent number was arbitrary, lacking a basis in evidence.

Another theme expressed by some commenters was that drop shipping was a normal industry practice for building and construction materials, particularly in this day of just-in-time logistics. Firms that do business this way, assuming that they insure the goods and bear the risk of loss, should not be penalized by the lower 40 percent level for credit. If a firm delivers or insures the material, commenters of this view said, it should count at the 60 percent level, even if drop shipped. The proposal could make it difficult for small firms to make a profit, another said. This is particularly true, one commenter said, for made-to-order items that are not typically kept in warehouses (*e.g.,* rail ties and switches). The proposal could place DBE shippers

at a competitive disadvantage compared to non-DBEs.

On the other hand, a few comments opposed any credit for drop shipping distributors, beyond fees and commissions, saying that regular dealers add more value and have more overhead costs. Moreover, a comment said, the proposal opens opportunities for fraud. Others said that distributorship was not a valid business model. In a similar vein, a few commenters suggested that a lower percentage (*e.g.,* 20 or 30 percent) should count. Another said that drop shipping credit should be permitted only for large quantities or oversized items that are difficult to store in a warehouse.

A few comments did support the proposal, though with the caveats that more guidance from DOT would be needed about what a valid distributorship agreement should look like, and that close scrutiny of such agreements by recipients would be necessary to make the concept work.

Negotiating Price of Supplies

Relatively few comments addressed the proposal to continue in effect the current requirement that, to get credit, a DBE supplier must negotiate the price of supplies, determine quality and quantity, order the materials, and pay for the materials itself. Some said that there are situations (*e.g.,* airport lighting) when the price of items cannot be negotiated. An equal number of comments supported the proposal. One of them added that a DBE should have to perform, and not outsource, all of the four required functions; otherwise, there would be opportunities for fraud and abuse. In any case, another said, recipients had to enforce these requirements strictly.

Definition of Manufacturer

A majority of the 13 comments that addressed this proposal supported it, though some asked for clarification of what constituted a ''minor'' modification of materials. Commenters asked whether activities like adding logos to uniforms, cement mixing trucks, coating rebar, or cutting materials to a specific size would count as manufacturing or minor modifications. Some comments also suggested using SBA regulations in 13 CFR 121.406 to define what constitutes a manufacturer. One comment asked that manufacturers not be subject to the proposed 50 percent limit on DBE credit for supplies provided to a project.

Other Comments

One comment said that there should be a special rule for counting disposal of hazardous materials, such as a percentage of the disposal costs. Two others said that DBE credit should be allowed for at least some of the work that a DBE subcontracts to a non-DBE, at least as long as the non-DBE is not an affiliate. Another said that brokers had a legitimate role, asking that the rule define their proper role.

DOT Response

50 Percent Limit on Credit Toward Goals for Use of Suppliers

In proposing the 50 percent limit on the counting of DBE participation by suppliers toward goals, the Department was responding to the perception of many DBEs, as well the experience of DOT staff, that prime contractors find it easier to meet DBE contract goals through obtaining supplies and materials from DBE suppliers than through using DBE subcontractors who work on projects on the ground. For example, on a highway project it can be simpler for a prime contractor to buy paving materials through a DBE supplier than to engage a DBE to install the materials. This has given rise to the concern that DBE subcontractors can be frozen out of opportunities, since goals may be able to be met without them. By limiting the portion of the goal that could be met by using suppliers, the Department hoped to keep open a significant percentage of work that would then be available for DBE subcontractors.

Nevertheless, the Department has been persuaded by the comments that this provision should not be included in the final rule. Comment periods on proposed rules are not simply votes, and in making this decision the Department is not simply responding to the numbers of comments opposing the proposal. Rather, we believe that commenters made reasonable points about the basis and potential effects of the proposal.

We find plausible the concern that if suppliers could not comprise more than 50 percent of a goal, many contract goals might not be met, resulting in higher numbers of goal attainment through documented good faith efforts instead of sufficient DBE subcontracting; this may have possible implications for overall goal attainment. This concern appears particularly credible with respect to contracts that emphasize bulk supplies like asphalt or petroleum products, or projects that may be located in parts of States or work scopes in which few DBE subcontractors may be available.

The proposed exception mechanism, as well as some of the commenters' suggestions for modifications that could be added to a supplier limit regime to provide greater flexibility, are well intended, but could easily lead to greater complexity and inconsistency in program administration. In any event, because we are not adopting the 50 percent limit provision, they are unnecessary.

Our underlying concern about ensuring that the program does not have inadvertent adverse effects on DBE subcontractors is addressed through other changes to the present rule that are adopted in this final rule. The definition of regular dealer is being strengthened to emphasize the necessity of regular dealers having facilities, inventories, and/or distribution/delivery equipment in order for 60 percent of the value of their supplies to be counted toward goals.

The new distributor definition limits to 40 percent the credit that can be obtained for many drop-shipped goods, provided the DBE bears risk for loss or damage of such items. The credit for broker and expediter participation continues to be limited to fees or commissions. These provisions should reduce the incentives and opportunities for prime contractors to over-rely on suppliers to meet goals to the detriment of other DBEs. We expect recipients to enforce these provisions rigorously and to take care, at the pre-award stage, to ensure that bidders on prime contractors do not obtain credit beyond what the provisions permit.

The Department also understands commenters' point that creating a provision that would directly benefit one category of DBEs at the expense of another category does risk being arbitrary. It is likewise the case that DBE suppliers, particularly those that are regular dealers, have a reliance interest in retaining full access to the program, and may often have made considerable investments to establish their position in the program. To limit their business opportunities could well cause them economic harm, as comments asserted, based solely on the type of work they do.

The risk of arbitrariness increases absent quantitative information to support an impression—even one based on considerable anecdotal experience—that there is a problem that such a regulatory provision is needed to solve. The Department recognizes that it does not collect information from recipients about the type of work DBEs perform on contracts. The Department proposed in the NPRM the ability to collect that information as part of recipient's required submission of the Uniform Report of DBE Awards, Commitments, and Payments. It may be that reliable data showing that DBE subcontractors

are effectively shut out of opportunities to work on projects by prime contractors' over-reliance on suppliers to meet goals could make a ''market failure'' case for imposing a provision like that of the NPRM; however, without that information at the present time, the Department is declining to change the rule at this time.

Going forward, the Department will have recipient data from the updated Uniform Report of DBE Awards, Commitments and Payments regarding not only the number and dollar amount of DBEs that participated on federally assisted contracts that we currently collect, but information on the type of work performed by those DBEs as well. Depending on what such data shows, the Department may reconsider whether a limit on goal credit for DBE suppliers is appropriate.

Commercially Useful Function and Regular Dealer Issues

Finding a means of limiting potential over-crediting of suppliers, while not unreasonably limiting their participation, is an important step toward creating a well-balanced DBE program.

We believe that we can achieve this objective by having recipients pay close attention, at the pre-award stage, to how suppliers proposed to be used by a prime contract bidder can go far to avoiding over-crediting in a way well-suited to the circumstances of a particular contract.

Recipients are already required to carefully examine, before contract award, whether the bidder has committed to a sufficient number of DBEs in sufficient amounts to meet the contract goal or has submitted adequate documentation of good faith efforts. Often, however, recipients assume that DBEs committed as suppliers are entitled to 60 percent of the cost of supplies when evaluating pre-award goal attainment. The final rule requires recipients to look in detail at how a DBE supplier would provide supplies and materials to the contract to provide more certainty whether the contractor would be entitled to count 60 percent of the cost of supplies toward goal attainment during contract performance. The recipient would do so through asking a series of questions with respect to the role of a proposed DBE supplier. In so doing, it would not determine whether a DBE was, in some intrinsic sense, a ''regular dealer.'' The inquiry would not focus on the nature of the firm, but on what the firm proposed to do on a particular contract and how it proposed to carry out its responsibilities.

The Department determined that the proposed change to § 26.55 with respect to requiring bidders submitting commitments to DBE suppliers to include is better placed in § 26.53(c)(1). Thus, § 26.53(c)(1) of the final rule describes the nature of the questions and affirmations a proposed DBE supplier will provide, and the prime bidder will include in the pre-award process for each contract. This information helps the recipient to determine if the firm should be awarded 60 or 40 percent credit for supplies. For example, the recipient would ask, whether on a particular contract, the DBE supplier will be using its own distribution equipment, whether it maintain a warehouse or other facility, whether it engages in the sale of the sort of goods involved in the contract to the public on a regular basis, etc. We will also make available a form tool on the Departmental Office of Civil Rights' website.

Drop Shipping and Distributorship Issues

In an effort to address the fact that drop-shipping is a common way of doing business, we proposed that drop-shipping by a DBE that has a distributorship agreement with a manufacturer would be able to count 40 percent of the value of materials toward goals. The distributorship agreement concept troubled many commenters, both from the viewpoint of how recipients would decide if an agreement was legitimate and the fact that many, especially smaller, DBE suppliers might not have the resources to enter such an agreement. Commenters said that if a DBE supplier took enough risk, it should be entitled to credit regardless of whether it was part of a formal relationship of this kind with a manufacturer.

The Department will respond to these comments by eliminating the distributorship agreement proposal. Instead, as part of the pre-award review for firms proposing to drop-ship items, the recipient would determine whether the proposed supplier demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. Again, the Department's form tool will have questions to help recipients make this determination. If the proposed drop-shipper met these criteria, it would receive 40 percent credit for the cost of the items. We anticipate that many bulk material items may well fall into this category, if all the requirements are met.

The current rule's provisions for 100 percent credit for materials provided by a DBE manufacturer, and for credit limited to the fees or commissions for firms who did not meet the criteria for 60 or 40 percent credit, would remain the same. The Department believes that detailed enforcement of all the supplier provisions discussed above would be sufficient to prevent or limit over-crediting of suppliers, to the detriment of other kinds of DBEs, to make the proposed 50 percent cap on supplier credit toward goals unnecessary, while respecting the arrangements that may be appropriate to the wide variety of contracts in DOT-assisted programs. To make this approach work, recipients would have to ensure that bidders and proposed DBE suppliers specify and certify the details of the work that would be performed and how it will be performed, so that post-award monitoring could ensure that commitments were being met.

Other Matters

The Department adopts the NPRM provisions concerning the definition of manufacturers and the responsibility of DBEs for negotiations concerning price without change. In regard to a commenter's view that credit be allowed for work performed by a non-DBE subcontractor, such an approach is not aligned with the intent of the program. The comments regarding the disposal of hazardous materials and brokers were not proposed in the NPRM and are therefore outside the scope of this final rule. DOCR appreciates the commenters' input and will consider any information or recommendations the commenters may have on these issues.

Subpart D—Certification Standards

12. General Certification Rules (§ 26.63)

NPRM

Proposed § 26.63 of the NPRM was largely a redesignation of the material previously found in § 26.73. The one substantive change of note would be that, in place of current § 26.73(e), concerning DBEs owned by holding or parent companies, the NPRM would substitute a simpler provision saying that there could be one level of ownership above the company seeking certification. That is, there could be a subsidiary and its parent company, but there could not be a ''grandparent'' company above both of them. Eligibility in such a situation assumes cumulative 51 percent ownership of the subsidiary company and that other eligibility

requirements were met. The proposal includes several examples of arrangements that would or would not be eligible under the revised rule.

Comments

There were 10 comments on this proposal; all but one favored it. The unfavorable comment expressed concern that the proposal could compromise the independence of the subsidiary firm.

Several commenters addressed the regulation's approach to certification in general. For example, some commenters asked the Department to simplify the certification process, which they characterized as a lengthy, costly, and paperwork intensive process that was an obstacle and deterrent to firms seeking to enter the program.

Other comments said that the annual submissions of a DOE and financial data were unnecessarily burdensome on both DBEs and certifiers. It would be better to require this submission only every two or three years. Moreover, in the context of the interstate certification proposal, the burden on firms would be multiplied if they had to submit a DOE to every State in which they had become certified.

Two comments suggested having independent third-party administrators do certification reviews instead of recipient personnel. Another commenter suggested better education and training about Federal and State program rules (*e.g.,* requirements for continuing education). Another commenter recommended and that the Department develop a code of conduct for certifiers.

DOT Response

The final rule adopts NPRM's proposal to limit DBEs to having one level of ownership above an operating DBE company. That is, there could be a ''parent'' company but not a ''grandparent'' company. The rule does not specify the type of business entity involved in the level above the operating company, as long as it permitted the operating company's ownership to meet certification requirements.

The final rule also retains the requirement for the annual DOE for all companies. A firm that is certified in multiple States must submit DOEs to all States in which it was certified on the anniversary date of its certification by the jurisdiction of original certification (JOC).

Given the frequent turnover of certifier personnel, and the errors in the certification process that too often come to light in the certification appeal process, it is clear that training is key to smooth operation of the certification function. This is especially true when, following the issuance of this final rule, new and changed certification standards go into effect. While we are not mandating a specific number of ''continuing certification hours'' for staff, or setting forth a standard curriculum at this time, the Department intends to make comprehensive training opportunities available to certifiers, which we expect all certifiers to take advantage of.

13. Business Size (§§ 26.65, 23.33)

NPRM

Only small businesses may participate in the DBE program. The business size limit for applicant and certified DBEs seeking to participate in FHWA and FTA assisted contracts is adjusted for inflation per the BIL. As of this final rule, this statutory gross receipts cap is $30.40 million. A DBE firm must still meet the size standard(s) appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. These standards vary by industry according to the NAICS code(s) defined by the Small Business Administration (SBA).

The adjusted gross receipts cap does not apply to determining a firm's eligibility for participation in FAA assisted projects. This is due to a recent statutory change that eliminated this requirement for FAA assisted contracts. This means that the Department does not have the discretion to change these size standards through administrative action. DBE firms working on FAA assisted projects must meet the size standard(s) appropriate to the type(s) of work based solely on the applicable NAICS code(s) size standard(s). UCP directories must clearly indicate which firms are only eligible for counting on FAA assisted work. (There are separate size standards for the part 23 ACDBE program that are not affected by recent changes in SBA regulations pursuant to the Small Business Runway Extension Act of 2018 (Pub. L. 115–324).)

The NPRM proposed to conform the Department's rule so that a firm's compliance with NAICS code size standards would be based on its average annual gross receipts over the firm's previous five fiscal years. However, under § 1101(e)(2)(A)(i) and (ii) of the Bipartisan Infrastructure Law (BIL), only the firm's gross receipts for the most recent three fiscal years may be submitted to determine whether it meets the small business statutory size cap.

The NPRM also addressed size provisions in the ACDBE program. There would be minor changes to part 23 and a reference to pay telephone operators would be removed. The NPRM would also remove a requirement for adjusting the ACDBE size standards every two years; the preamble asked whether any change was needed at this time and, if so, what measure of inflation the Department should use. The preamble expressed concern that raising the standards could harm the chances of smaller firms trying to enter the program. It also asked whether industry-specific standards, like that for car rentals, are still needed. Finally, the NPRM added a clarification that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture.

Comments

Part 26 Standards

A significant number of commenters, from both DBEs and recipients, supported the proposal to go to a five-year calculation for NAICS code size standard compliance, though a couple of commenters would have preferred a shorter (3-year) or longer (7-year) calculation. A number of commenters, however, said that the NAICS codes limits and/or statutory size cap were themselves too low, given inflation that has particularly affected commodity prices. Several commenters advocated raising the part 26 limits to the level of the part 23 standards, or to the $39.5 million level applicable to many types of business under SBA regulations.

A few commenters recommended regional variations in the size standards. For example, in high-cost construction areas, like New York or San Francisco, size standards could be adjusted along a scale tuned to the prevailing wage rates in those areas. One commenter suggested that proceeds from COVID–19 pandemic relief legislation, like the Paycheck Protection Program, should not be counted toward a firm's gross receipts calculation. A few comments also suggested using net, rather than gross, receipts to calculate whether a firm meets size standards. One commenter said pass-through payments to subcontractors in particular should not be part of the calculation.

A smaller number of commenters stated that the regulation should eliminate size standards because they unfairly limit DBEs' growth. Several commenters recommended a mechanism that would allow mid-size DBEs to remain certified for a limited time after exceeding the size standards so that they should be able to continue their growth and success. For example,

DBE credit for using a firm could be progressively reduced over a period of three years (*i.e.,* 75 percent in year 1, 50 percent in year 2, 25 percent in year 3) after it first exceeded the size limits for full DBE participation.

With respect to adjustments, commenters generally agreed with the proposal, though some pointed out that adjustment dates had been missed in the past, that stakeholders should be consulted on the subject, that industry-specific data should be used, that White-owned businesses should be omitted from the calculation, or that inflation should be used as the measure for adjustments.

Part 23 Standards

Two commenters, both from the same urban area, asked to retain a standard for pay telephone operators, lest existing contracts with such operators be adversely affected. Those commenters, who addressed the proposal that an ACDBE that is a party to a joint venture must include in its gross receipts its proportional share of receipts generated by the joint venture, approved it.

DOT Response

The Department adopts the NPRM's proposals on these issues. While we understand the objectives that supporters of regional or local standards seek to achieve, we believe that in a national program—especially one in which interstate certification reciprocity will become a reality—a single national standard is appropriate. We also do not believe that a variety of different standards would be consistent with the program's governing statutes. For example, the Department is now working under a statutory requirement for five-year averaging for NAICS code gross receipts size standard purposes, such that a different period—three or seven years—is not something we have the statutory authority to authorize.

With respect to size calculations, the final rule clarifies that certifiers should count on a cash basis, regardless of a firm's choice of accounting method. This is intended to level the accounting playing field among firms.

For part 23, because there are still some airports that have pay telephones, the final rule retains the size standard for existing pay telephone concessionaires. Similarly, the final rule retains the proposed provision that joint venture receipts be included in the ACDBE size calculation in proportion to the ACDBE's demonstrated ownership interests in the joint venture, lest the size of such firms be either overstated or understated.

14. Personal Net Worth (§ 26.68)

NPRM

The NPRM's discussion of proposed changes to the personal net worth (PNW) standard was the most complex portion of its preamble. The discussion noted the reason for having a PNW standard, namely that in its absence persons who are members of presumptively eligible groups but who in fact are not economically disadvantaged could benefit from the DBE program, undermining both the program's ability to assist persons who are truly disadvantaged and the narrow tailoring that is vital to the program's continued legal validity.

The preamble also noted the balancing act that the Department faces in setting a PNW cap. If set too high, persons who are not truly disadvantaged can participate. If set too low, socially and economically disadvantaged owners (SEDOs) whose firms have grown successful can be prematurely excluded.

PNW Cap

Since 2011, the PNW cap has been set at $1.32 million, which had been adjusted upward for inflation from the $750,000 level in its 1989 base year. As explained in the NPRM preamble, 87 FR 43636–38 (July 21, 2022), rather than make a direct inflationary adjustment, based on a measure like the Consumer Price Index (CPI), the Department employed a complex analysis based on the Federal Reserve Board's 2019 Survey of Consumer Finances (SCF), a triennial cross-sectional survey of U.S. families' balance sheets, pensions, income and demographic characteristics. The methodology accounts for differences among racial and ethnic groups (*e.g.,* White, non-Hispanic households have net worth of six to seven times that of Hispanic or Black households).

Specifically, using SCF data on household assets and liabilities allowed the Department to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program but also allows consideration of the impact of removing retirement accounts from the definition of PNW accounts for the relative wealth of potential DBEs by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, the Department constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble. There is an apparent breakpoint between the 80th and 90th percentiles. As described in the discussion of Table 2 of the NPRM preamble, ''[t]he 90th percentile of PNW for male, White, Non-Hispanic self-employed business owners is roughly $1.60 million, which is $1.04 million higher than the 80th percentile of $0.56 million, which is in turn just $0.29 million greater than the 70th percentile.'' 87 FR at 43638. Therefore, there is a substantial jump in PNW between the 80th and 90th percentiles, making it an intuitive breakpoint between wealth groups. A 90th percentile cutoff is commonly used to describe the most wealthy group and to compare the economic position of the most wealthy group to the rest of the population.[3]

Looking to the percentile distribution of personal net worth for male, White, non-Hispanic business owners, the Department calculated that the 90th percentile PNW for persons in this category was approximately $1.60 million (in 2019 dollars). Based on this calculation, the NPRM proposed that $1.60 million be the new PNW cap for SEDOs, meaning that they could continue in the DBE program if their PNW was at the same level as a 90th percentile White, non-Hispanic, male business owner. This would mean, the preamble explained, that 92.6 percent of self-employed business owners who are women, Hispanic, or non-White would fit under the revised cap.

The NPRM proposed using changes in aggregate household net worth data published by the Federal Reserve to adjust the PNW amount in future years. Details of this approach are found at 87 FR 43639. We would make the first adjustment 180 days after the effective date of the final rule and make further adjustments at five-year intervals. The NPRM proposed that we make only upward adjustments.

[3] See Smith, Zidar, and Zwick, ''Top Wealth in America: New Estimates under Heterogeneous Returns,'' 138 Quarterly Journal of Economics 515 (2023) available at *https://economics.princeton.edu/working-papers/top-wealth-in-america-new-estimates-under-heterogenous-returns/*; Kuhn, Schularick, and Steins, ''Income and Wealth Inequality in America,'' Center for Economic and Policy Research (Aug. 9, 2017) available at *https://www.wiwi.hu-berlin.de/de/professuren/vwl/wtm2/seminar-schumpeter/hscf_cepr.pdf*; Bricker, Goodman, Moore and Volz, ''Wealth and Income Concentration in the SCF: 1989–2019'' in FEDS Notes (Sept. 28, 2020) available at *https://www.federalreserve.gov/econres/notes/feds-notes/wealth-and-income-concentration-in-the-scf-20200928.htm*; Kochar and Cilluffo, ''Income Inequality in the U.S. Is Rising Most Rapidly Among Asians,'' Pew Research Center (July 12, 2018) available at *https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/.*

Reporting

The NPRM proposed several changes affecting asset inclusion and valuation in reporting PNW. Under the proposal:

- The SEDO reports asset values without regard to community property, equitable distribution, or similar State laws. In general, title determines ownership.
- The SEDO reports assets held in qualified retirement accounts at full value but excludes them in full from the calculation of PNW.
- The SEDO may not report loans taken against retirement assets as liabilities, regardless of title.
- The SEDO continues to exclude her share of the equity in the primary residence although in some cases that share may change.
- The SEDO reports 100 percent of the value of household contents unless she and a spouse or domestic partner cohabit, in which case the SEDO reports 50 percent of total value. Total value is deemed to be a least the amount for which contents, including fixtures and appurtenances, are insured,
- The SEDO reports motor vehicle values in the proportion to which she holds title. The Department requested comments concerning how the SEDO should report, if at all, the value of leased vehicles.
- The SEDO reports at full value assets she transferred to certain related parties during the two years preceding an application for certification and in any single year following a declaration of eligibility. The NPRM clarifies which related-party transfers trigger the inclusion and adds a de minimis exception. It further clarifies which ''personal expenditures'' the SEDO may exclude.
- A natural person's signatory (not guarantor) status on a debt instrument generally determines ownership of the liability. In cases in which another party consistently makes payments on the debt, however, the certifier may determine, as it may under the current rule, that for eligibility purposes the debt does not belong to the formal obligor.

Comments

PNW Cap

Over 50 comments, not only from DBEs but recipients and other non-DBE commenters as well, supported the proposed $1.60 million PNW limit. The basic reason for their support was that the adjustment would increase opportunities for DBEs and avoid penalizing SEDOs for success. One comment suggested that, following SBA's practice, there should be separate entry and retention PNW limits for firms.

Nearly as many comments (including some of the above) said that $1.60 million was still too low a number. One common reason for this view was that the $1.60 million adjustment, based as it was on 2019 dollars, failed to keep pace with recent higher rates of inflation. Even if the proposed methodology were used, the final rule should update the number to be consistent with more recent data, they said. A commenter argued that a higher PNW number was needed to allow DBEs to compete in markets dominated by large corporations. Another noted that data from the Federal Reserve Bank of New York supported the proposition that Black and Hispanic Americans took a bigger hit from impacts on the economy of the COVID–19 pandemic and recent inflation than other persons, suggesting that this be considered in setting PNW numbers.

Other commenters' suggestions included $1.84 million (based on CPI inflation since 1989), $2 million, $2.5 or 2.6 million, $3 million, $5 million, or even $20 million. A few commenters referred to New York State's $15 million cap for its State minority and women business (M/WBE) programs. Several DBE commenters went further, advocating for the elimination of a PNW cap altogether, saying that it was ''anti-entrepreneurial'' and too limiting on firms' growth.

Using the SCF as the basis for the adjustment was problematic, a few comments said (*e.g.,* because it uses data from the male in an opposite-sex couple, the older person in a same-sex couple, or an individual, making it difficult to use the SCF to determine PNW for DBEs).

A significant number of comments advocated taking regional, or even local, differences in the cost of living and the cost of doing business into account in setting PNW limits, rather than establishing a one-size-fits-all national number. For example, one comment said, the cost of living in the New York metropolitan area was 69 percent higher than the national average. One of these made an analogy to the ''locality adjustments'' made in the salaries of Federal employees. Differences in the type of business involved (*e.g.,* have higher PNWs for types of firms, like heavy construction companies or ACDBEs) should also be taken into account.

A small number of commenters dissented from the concept of increasing the PNW number. Some said that even someone whose PNW was $1.32 million, let alone $1.60 million, should not truly be regarded as economically disadvantaged. The main reason commenters opposed the increase is that it allowed established DBEs who already get significant amounts of work to remain in the program, limiting opportunities for smaller, newer firms, especially those operated by Black or Hispanic SEDOs.

Two recipients said that they knew of few DBEs that became ineligible for their SEDOs' excess PNW, while a DBE association said that increasing the limit could risk narrow-tailoring challenges to the program. A few comments questioned the economic rationale for the NPRM's calculation or found it confusing.

Commenters generally agreed with our proposal to make future adjustments without formal rule making. While some commenters endorsed the proposed five-year adjustment intervals, others advocated more-frequent adjustments.

Several commenters questioned or opposed the 90th percentile benchmark for the adjustment. Some commenters thought that this choice was arbitrary or confusing, with no compelling rationale. Other commenters said the 90 percent level is unfair because DBEs must compete with extremely wealthy and powerful non-DBEs, and that using 95 percent might be better.

Taking the opposite point of view, some commenters thought using the 90th percentile standard could be over-inclusive, letting too-wealthy individuals into the program, undermining the concept of economic disadvantage, and risking challenges to the program based on a lack of narrow tailoring. One commenter questioned the point of having a PNW cap at all, considering the commenter's assertion that more than 90 percent of small business owners have a PNW below the current cap, and the NPRM would increase the cap and exclude retirement assets.

Reporting

Retirement assets drew well over 50 comments, with a considerably wider divergence of opinion than on the PNW number itself. Supporters of the proposal outnumbered opponents by about two to one. Supporters were primarily DBEs but included some recipients and non-DBE groups as well. Opponents were primarily recipients.

Comments supporting the proposal generally did so for the reasons stated in the NPRM. It would make SEDOs' lives fairer and the program easier to deal with, one of them said.

The most significant reason for opposition to the proposal was a concern that it would be subject to

manipulation and allow wealthier SEDOs to shelter significant assets, perhaps in the millions of dollars in some cases, from the PNW calculation. This would exacerbate inequality among DBEs, disfavoring SEDOs of smaller, newer DBEs and implicitly favoring White females over minority SEDOs. The proposal would likely benefit only a few existing firms, mostly those who already get a large portion of DBE participation and open the door to firms that are not truly disadvantaged, resulting in an uneven playing field among DBEs, one recipient said.

The proposal could have unintended consequences, according to some comments, such as incentivizing transfers of assets to retirement accounts, resulting in unrealistically low PNW asset totals. In addition, comments said, the proposal could disfavor individuals who invested in real property, as distinct from financial instruments, as a means of retirement planning. Retirement savings are a part of someone's wealth, after all, another commenter noted, and should be treated as such. Excluding them dilutes the notion of economic disadvantage and could facilitate the participation in the program of people who are not genuinely economically disadvantaged. Being able to put significant sums into retirement accounts itself suggests a level of affluence that may indicate that someone is not economically disadvantaged.

Some of the opponents of the proposal, and other commenters, suggested modifications of the proposal to deal with what they saw as its problematic aspects. One suggested a $500,000 reduction in excluded retirement assets, with a 10 percent reduction of the remainder. Other comments recommended that only a portion of retirement assets be excluded, such as 10, 20, 50, or 75 percent. Another comment wanted more guidance on what constituted a retirement asset for purposes of the provision.

Commenters addressed several of the NPRM's proposed provisions regarding the SEDO's reporting of assets and liabilities for PNW purposes.

The most contentious issue in this PNW component was the proposal that SEDOs report assets without regard to State community property, equitable distribution, or similar laws or principles. The opinion among commenters was evenly divided on the subject. Supporters generally agreed with the NPRM's rationale for the proposal, some specifically citing the desirability of avoiding inconsistency among States.

A number of the opponents of the proposal were concerned that removing consideration of marital and community property laws could disproportionately favor wealthier SEDOs over less affluent SEDOs, and White female SEDOs over minority SEDOs. Opponents maintained that the proposed rule would allow a SEDO access to a spouse's wealth while artificially reducing her own reportable assets. Excluding these laws from consideration could cause problems for some States in administering the program, others said, and it would be better to retain the current rule.

If household goods are divided equally between spouses or domestic partners, a number of others asked, why should their house itself not be treated the same way? One commenter asked how the Department would treat a house that was titled in a revocable trust (which the commenter said was a common estate planning technique). The commenter suggested that it be counted in the owner's PNW calculation if the SEDO was a beneficiary of the trust for purposes of the house.

The commenters who addressed the ownership of household goods expressed a variety of concerns. Two opposed counting goods at all because doing so, or keeping the information up to date, was too complex and burdensome for applicants (*e.g.,* figuring in depreciation). Another idea was to exclude personal property up to a certain dollar limit (*e.g.,* $250,000). One said that insurance values tend to be understated, and another stated that insurance companies tend to value household goods at a certain percentage of the value of the home itself, a figure which the homeowner should be able to contest in the PNW process. Requiring a copy of the insurance policy for verification would be a good idea, two comments suggested.

Several comments suggested that leased vehicles should be treated neither as a liability or an asset, though a few other commenters thought they should be one or the other. Other comments expressed concern that vehicles, including valuable ones, could be hidden from the PNW calculation by being placed in the name of an applicant's non-disadvantaged spouse. One such comment suggested that a vehicle in a spouse's name should always be counted as part of the SEDO's assets. Two others questioned why a vehicle would be placed solely in the name of its title holder, while other personal property, like household goods, would be divided 50/50 between an applicant and a non-disadvantaged spouse.

One commenter expressed concern that attributing a debt to the signatory on a debt instrument could serve as a way for a wealthy applicant to inflate his liabilities for PNW purposes. Another asked whether a business going into default should be counted as a liability if the owner had guaranteed the loan personally, while a third asked for clarification that a firm's debt, as opposed to a personal debt, should not count as a liability for PNW purposes. Another question concerned how the rule would treat a debt entered into by a SEDO in his or her personal capacity but was being paid off by the firm. One commenter suggested that in connection with the proposal not to consider State marital property laws, having the signatory on the debt instrument determine the ownership of the liability would be a loophole that would favor applicants with non-SED spouses.

Other Comments

A number of comments propose alternative approaches. One commenter advocated not counting any of a spouse's assets for PNW purposes; another took the opposite view, suggesting that all of a spouse's assets be counted. Another said that in addition to excluding contingent liabilities, contingent assets should not be counted. Exclusions should include non-revenue producing property (*e.g.,* timeshares, vacant land) and the cash surrender value life of insurance policies should not be counted as an asset, a commenter asserted. Another comment suggested excluding encumbered assets from consideration.

One commenter suggested that the rule define the time period in which direct payments for health care, education, or celebration of significant family life events should be counted. A DBE association said, with respect to the proposed rule limiting transfers to family members or related entities, there should be an exception for transfers that were irrevocable or were pursuant to a bona fide tax planning, estate planning, family support, or similar strategy, perhaps involving a third-party professional's certification that the transfer was part of such a plan.

DOT Response

The PNW cap is an important feature, among the other eligibility criteria and standards set for the program, that helps ensure that the DBE program remains narrowly tailored. The cap prevents people who are too wealthy to be reasonably considered economically disadvantaged from participating in the program.

The PNW Cap

As explained in the NPRM, and in this final rule, the Department undertook a fresh, comprehensive approach to tailor an original analysis of wealth based on quantitative analysis. The approach in this rulemaking uses SCF data on household assets and liabilities to allow us to construct a proxy measure of PNW that is close to the how PNW is currently defined by the program and also allows us to consider the impact of removing retirement accounts from the definition of PNW. Further, it allows us to allow for the *relative* wealth of potential DBEs—by comparing their financial position to other self-employed business owners, rather than the general public. After constructing the proxy measure of the revised PNW definition that removes retirement accounts using the 2019 SCF, we then constructed a distribution of PNW across white, male, non-Hispanic self-employed business owners. See Table 2 of NPRM preamble.

In arriving at the $1.60 million proposal in the NPRM, the Department used data from the Survey of Consumer Finances (SCF), a survey conducted every three years by the Federal Reserve and U.S. Department of the Treasury. This data was specifically analyzed for business owners by race and gender to reach the proposed $1.60 million PNW threshold. The NPRM proposed to adjust that figure subsequently based on the growth in the Federal Reserve measure of total household net worth from ''Financial Accounts of the United States: Balance Sheet of Households and Nonprofit Organizations Table Z.1'' using 2019 as the base year.

Determining a threshold beyond which an individual is considered to have accumulated wealth too substantial to need the program's assistance is an exercise in judgment. Nonetheless, as explained in the NPRM and in this final rule, using the 90th percentile to identify a high level of wealth or income is a common convention used to describe economic inequality. Choosing a substantially lower threshold, such as the 80th percentile, would result in a cap that is lower than the current cap and would act to remove businesses that are currently participating in the DBE and ACDBE programs which would be an undesirable outcome for the DBE and ACDBE programs. Choosing a substantially higher threshold would risk the possibility of that the program would no longer be narrowly tailored. However, we deem the 90th percentile appropriate because based on a review of the 2019 SCF data, the mean net worth of White, Non-Hispanic households is roughly 6 to 7 times higher than for Black, Non-Hispanic and Hispanic households. Even at the highest wealth levels, the disparity exists: the wealth of the top 10 percent of White households exceeds the wealth of the top 10 percent of Black, Non-Hispanic and Hispanic households by a factor of 5.

Data from the 2019 SCF suggests that between 88.7 and 90.8 percent of self-employed business owners who are presumed to be socially and economically disadvantaged (*i.e.,* individuals who are women, Hispanic, or non-White) have PNW lower than the current PNW cap as PNW is currently defined.[4] Under the proposed cap of $1.60 million, 92.6 percent of that group would fall under the cap, an increase of 1.8 to 3.9 percentage points.

The final rule adopts a higher number than that of the proposal, not only in response to comments suggesting an increase in the cap, but also because we have modified the methodology used to establish and later adjust the PNW cap. These modifications take into account the inflation that has affected the financial situation of all Americans not only since the publication of the NPRM, but more importantly since the 2019 data on which the NPRM's calculations were based. These modifications also rely on data more recent than the data on which we based the NPRM proposal. The data, as cited in the NPRM, are a combination of households and nonprofit organizations when really only households should be considered. Additionally, by using solely the growth in net worth we are not accounting for the normal population growth. Accounting for population growth is necessary to obtain a figure that represents the average wealth per household rather than an aggregate. Consequently, for purposes of the final rule, the Department has made two adjustments. The first adjustment is a change in the dataset to the ''Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h),'' effectively removing nonprofit organizations from the net worth calculation. The second adjustment is to normalize household net worth by the number of households as calculated by the Census (Families and Households, Total Households [TTLHH].[5])

With these adjustments and using 2022 data rounded to the nearest thousand, we have set the current PNW limit at $2,047,000. This takes inflation into account and, as in the past, includes in the calculation the most common forms of wealth (*e.g.,* an owner's personal and shared assets, real estate and trust assets, cash and cash on hand, the value of outside businesses, life insurance policies). We have determined that rounding to the nearest thousand is more appropriate than rounding to the nearest ten-thousand (as we do for the statutory gross receipts cap in § 26.65(b)) because of the relative difference between these two caps (the current gross receipts cap is $30.40 million, effective March 1, 2023). It also takes into account the fact that the population of business owners has greater net worth than the overall population. PNW is now, and always has been, a relative concept: how does the wealth of business owners in presumptively economically disadvantaged groups relate to that of business owners generally? With this in mind, we believe that this number effectively meets the objectives of allowing businesses to grow; establishing a PNW limit based on current and relevant data; and ensuring that the program remains narrowly tailored by not creating eligibility criteria that are overbroad.

The Department will use the data discussed above in connection with establishing the current PNW to make future adjustments to the PNW cap, which will be made every three years. We do not believe this will result in a substantially higher amount based on our assessment of the likelihood that the datasets described above will produce large jumps in net worth. An adjustment on a more frequent basis, though favored by some commenters, will not be made because of the issues it may cause in the certification and decertification processes. The Department will post the adjustments on the Departmental Office of Civil Rights' web page. Each such adjustment will become the currently applicable PNW cap for purposes of this regulation.

Reporting

The Department adopts as final the general rule that community property,

[4] The range on this estimate is the result of lack of information in the SCF on how to appropriately adjust the current balances of retirement accounts for early withdrawal penalties and taxes. The lower end of the estimated range (88.7 percent) assumes that the entire balance of retirement accounts is counted toward the PNW cap while the upper end (90.8 percent) assumes that no portion of retirement account balances are counted toward the PNW cap. The Department believes that the true value is likely closer to 88.7 percent than 90.8 percent because the deduction for early withdrawal penalties and taxes is likely to be less than 50 percent, but a more precise estimate is not possible with the available information.

[5] *https://www.census.gov/topics/families/families-and-households.html.*

equitable distribution, and similar laws or principles have no effect on the SEDO's PNW reporting. In most cases, the new provisions either produce the same result or work in the firm's favor. The Program and its stakeholders will benefit from burden reduction and more-consistent, predictable, equitable results.

The final rule adopts the NPRM's proposal to exclude retirement assets in full. We believe that saving for retirement is crucial to wealth creation. We do not think it is appropriate to make it harder for eligible firms to become and remain certified, simply because their SEDOs are planning for their retirement.

We note this rationale mirrors SBA's 8(a) program, which eliminated the counting of these assets for PNW purposes in 2020. (91 FR 27650 (May 11, 2020)). As SBA opined, this accords with the valuable public policy of incentivizing, rather than punishing, saving for retirement; and expands the pool of potential eligible participants ''because retirement-age small business owners will no longer be ineligible solely due to their retirement savings.'' (*Id.* at 27651).

We understand the concern some commenters expressed that wealthier SEDOs could stay in the program longer by sequestering assets in retirement accounts, to the detriment of smaller, newer DBE firms. A certifier's continued ability to rebut an owner's claim of economic disadvantage will help prevent this. That backstop, reworked in revised provisions in § 26.67(c)(2), is an important mechanism to prevent wealthy individuals from gaming the PNW calculation rules and ensures that the program remains narrowly tailored. As explained below, the rebuttal provisions are meant for situations in which a reasonable person would not consider the individual to be economically disadvantaged.

Under § 26.67(c)(2), certifiers may consider assets and income, free use of them or ready access to their benefits, and any other indicators of non-disadvantage that the certifier considers relevant. The provision states that there are no asset (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. Several commenters seem to have understood that the current and/or proposed rules permit the SEDO to exclude the entire value of the primary residence. They do not. Under either rule, the SEDO excludes only his share of the equity in the home. Under the proposed rule, transferring title to a spouse reduces the SEDO's PNW exclusion to zero, and that result is consistent across all States, regardless of the potential application of community property rules in some States, under the old rule. The Department adopts the rule as proposed, with modifications to clarify that the marital/community property change applies to all PNW reporting, not simply to the exclusion of equity in the primary residence. The new rule clarifies and refines but does not change the general rule that actual ownership, normally denoted by title, determines PNW reporting. We disagree with the commenters who opine that the old rule, the effect of which varied by jurisdiction, is preferable to the proposed rule. Under either regime, the SEDO may transfer title to avoid reporting all or part of an asset's value. The final rule makes the result more predictable, and it levels the playing field nationwide. Anti-abuse rules address transfers that have an evasive effect.

Other, targeted NPRM provisions attempt to resolve smaller, thornier issues with bright-line solutions that should ease administration and compliance. We finalize the rule that attributes 100 percent of personal property in a SEDO's primary residence to the SEDO unless the SEDO shares the residence with a spouse or domestic partner. Determining aggregate value is difficult enough; we do not believe it is an effective use of certifiers' or owners' time to pick through property item by item to determine individual ownership and value. In most cases, the value of personal property is not of sufficient magnitude to pierce the PNW ceiling. We adopt the 50 percent/100 percent rule for ease of administration and to curb some of the abuses that concerned commenters.

PNW reporting for leased vehicles is another case in point. We agree with the plurality of commenters that opined that a leased vehicle is neither an asset nor a liability. Thus, the final rule states that leased vehicles should not be reported at all.

We retain the ''two-year transfer'' rule and adopt as final the changes proposed, again with clarifying edits in response to comments. The broader proposition, that substance trumps form when the asserted transaction, fact, or circumstance is unreal or abusive, remains in effect. The final rule so provides in, for example, sections 26.68(c), 26.69(c)(3)(ii), and 26.69(g)(1) and (g)(2). All of these iterations are anti-abuse rules that apply across the entirety of subparts D and E. We encourage certifiers to make use of them when circumstances warrant.

15. Social and Economic Disadvantage (§ 26.67)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subtopics, with discussions about the NPRM provision, comments, and DOT response pertaining to each individual subtopic.

As a general matter, the final rule notes that Congress continues to recognize present-day discrimination and the ongoing effects of past discrimination against members of certain groups who seek to participate in DOT-assisted contracting opportunities. Under the DBE regulation, members of those groups are rebuttably presumed socially and economically disadvantaged. A certifier's ability to rebut the presumption is a key ''narrow tailoring'' feature because it prevents the DBE program from being overinclusive. We make clear that questioning the owner's claim of membership in one or more of the groups whose members are presumed disadvantaged is a separate process from rebutting a presumption of social and economic disadvantage. The former requires the applicant to bear the burden of proof to demonstrate that they are a member of a presumed group. The latter requires the certifier to bear the burden of proof to demonstrate that even though the owner is a member of one or more of the presumed disadvantaged groups, they are not, in fact socially disadvantaged.

Group Membership (§§ 26.5, 26.63, 26.67)

NPRM

The general rule in the regulation is that all an applicant needs to claim membership in a group whose members are presumed socially and economically disadvantaged is to check the appropriate box or boxes on the Uniform Certification Application (UCA) and submit a signed Declaration of Eligibility (DOE). We reminded certifiers that this is the *only* evidence of membership owners must provide at the time of submitting the UCA. An exception is that owners claiming Native American status must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. We explicitly stated that certifiers must not question an owner's claim of group membership as a matter of course, as doing so unduly burdens applicants and contravenes the rule itself. The NPRM retained the requirement that when questioning an individual's group

membership, a certifier ''must consider whether the person has held himself out to be a member of the group *over a long period of time* prior to application for certification . . . .'' (italics added). Without that requirement, a White male (for example) could suddenly discover he has Black genetic ancestry and apply for DBE certification based on that recent discovery—even though he has never held himself out as Black, and he would likely have no evidence that the Black community regards him as a member of the Black community. Because of confusion expressed by certifiers and applicants alike, the Department proposed defining ''a long period of time'' as a period of at least five years, marking the first time the Department ever proposed a specific number.

The NPRM placed timelines/deadlines in § 26.67 to ensure that neither certifiers nor applicants unduly delay the process of questioning group membership. We also proposed allowing a firm whose owner's claim of group membership has been rebutted to submit a claim of the owner's individual social disadvantage at any time under § 26.67(d) (§ 26.67(e) in the final rule), without regard to the waiting period in § 26.86(c). A certifier would not be able to require the individual to file a new application; the individual would be permitted to simply amend the original application.

Comments

The majority of comments addressed evidence of Native American group membership and the proposed minimum 5-year time frame for ''holding oneself out.''

Given that the DOE is the only evidence of group membership an individual must submit with the UCA, some commenters asked whether, and how, certifiers could obtain proof of enrollment in a federally or State-recognized Tribe from an individual claiming Native American group membership. One commenter asked about State-recognized Tribes in the context of interstate certification, as not all States recognize the same Tribes. One commenter suggested that Native American-owned and tribally owned firms be afforded the same exceptions from some certification requirements provided to Alaska Native Corporations.

Of the 15 comments addressing the ''holding out for a long period of time'' proposal, 10 supported implementing a minimum five-year requirement. One commenter asked when the five-year period started to run (*e.g.,* from someone's first application, a current application?). Some commenters asked for clarity on how to apply the ''holding out'' provision and examples of evidence. Opponents said that five years is too short a period to meaningfully demonstrate that an individual had held themselves out to be a group member. One commenter suggested 10 years. Another suggested that ''since adulthood'' would be a better criterion.

A few commenters sought clarification about the definition of a ''well-founded reason'' for questioning an individual's claim of group membership. Two commenters asked for guidance on how to handle situations involving a transgender person or one whose gender identification is inconsistent with that on her/his/their birth certificate. One commenter noted that looking into someone's claim of disadvantage could run up against the shortened time frame for issuance of a certifier's decision on an application.

DOT Response

The regulation's general rule is that all an applicant needs to do to claim membership in a group whose members are presumed SED is to check the appropriate box(es) on the UCA and submit a signed DOE. However, an individual claiming membership in the Native American group must also provide proof of enrollment in a federally or State-recognized Indian Tribe, or proof that the individual is an Alaska Native or Native Hawaiian. Examples of proof of Tribal enrollment include, but are not limited to, a Tribal identification card, or a letter from a Tribal leader. We recognize that Alaska Natives and Native Hawaiians do not necessarily possess Tribal enrollment documents. Certifiers must verify government-recognized documentation submitted by Alaska Natives or Native Hawaiians, such as enrollment documents from the U.S. Department of the Interior or a State agency. The final rule amends § 26.67(a)(2) to reflect that requirement.

The Department continues to give certifiers latitude in determining whether there is a well-founded reason to question someone's claim of presumptive group membership. We also continue to emphasize our view that a well-founded reason must not be a mere suspicion or a bare expression of a certifier's opinion. Certifiers must continue to fully explain the basis for the well-founded reason and reference specific evidence in the record. Without that, an individual cannot meaningfully respond.

People who are members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone whose situation is intended to be remedied by participation in the program.

The final rule does not include a definition of ''long period of time'' in order for certifiers to consider the full context of an individual's claim of group membership. Specifying a rigid time period could be subject to manipulation by an applicant who continues to assert a clearly invalid claim of group membership for many years. Members of the regulation's designated groups are presumed to be disadvantaged because members of those groups have, historically and currently, suffered from discrimination and its effects. If someone has not identified as, or been regarded as, a group member for long enough to have suffered these effects, they are not someone who is intended to have the presumption of disadvantage.[6] By not including a definition of ''long period of time,'' we preserve the ability of certifiers to consider a persons' claim of group membership and to demonstrate such by a preponderance of the evidence.

Lastly, the procedures for questioning the membership of a transgender individual, or one whose gender identification is inconsistent with that on the individual's birth certificate, are the same as questioning the group membership of any other individual. If, after a proper inquiry, a certifier rebuts a transgender individual's membership in the ''female'' group, the certifier must deny the application and inform the individual of the right to apply under § 26.67(e) (individualized showing of disadvantage) at any time and of the right to appeal to the Department. This scenario differs from an instance in which a person does not check the box for ''female'' and instead writes ''transgender'' after checking the ''other'' box. In that instance, a certifier must inform the person that ''transgender'' is not a group whose members are presumed SED and explain the option of applying under § 26.67(e)

[6] The Department has acknowledged, even as far back as the 1999 final rule preamble, that commenters have wanted further definition of what ''a long period of time'' means. As we stated then, we believe ''it would be counterproductive to designate a number of years that would apply in all cases, since circumstances are likely to differ. The point is to avoid ''certification conversions'' in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.'' 84 FR 5116 (Feb. 2, 1999).

to demonstrate SED status on an individualized basis.

Evidence and Rebuttal of Economic Disadvantage

NPRM

The NPRM proposed eliminating the six ''ability to accumulate substantial wealth'' (AASW) factors by which a certifier could rebut an owner's presumed economic disadvantage, because the Department witnessed the significant extent to which certifiers and firms inappropriately treat the six factors as a checklist of required criteria and treat the examples' numbers as floors or ceilings.

We proposed bringing the ''reasonable person'' standard from the preamble to the 2014 regulation into the regulation itself, just as we moved AASW from guidance into the regulation in 2014. Via a § 26.87 proceeding, a certifier would bear the burden of proving, by a preponderance of the evidence, that a reasonable person would not consider the individual to be economically disadvantaged even though the individual's PNW did not exceed the regulation's limit. Among the evidence that could be considered are ready access to wealth, income or assets of a type or magnitude inconsistent with economic disadvantage, a lavish lifestyle, or other circumstances that economically disadvantaged people typically do not enjoy. Liabilities and the kind of asset exclusions used in PNW calculations would not be taken into account as part of this determination.

Comments

Most commenters opposed our proposal to replace the AASW factors with a ''reasonable person'' evaluation. About 30 comments, primarily from recipients but also including some DBE and non-DBE firms, said that it was too vague and subjective. It could lead to inconsistent and arbitrary results and could let in people who should not be in the program. It left too much discretion to the personal opinions of certifiers, leading to conscious or unconscious bias, or a certifier's dislike of a particular firm, being able to affect decisions.

More than 20 commenters (there was some overlap with the first group) advocated retaining either the existing six guidance factors or some other factors more concrete than a reasonable person standard. Many of these comments suggested modifications to make something like the existing provisions work better, such as more guidance. One subject suggested for guidance is how certifiers should look at situations involving S-corporations or LLCs, where business income is passed on to an individual's personal return, enlarging the SEDO's AGI. Some said, given inflation, the AGI criterion should be increased to $400,000–$500,000. Others recommended stronger language to prevent single-factor evaluations using the criteria, or that more than one factor should always be used.

A smaller number of commenters supported the proposal, favoring the ''big picture'' approach of the NPRM. One recipient said it already used a holistic approach successfully. One of the supporters commented favorably on what it regarded as the NPRM's simpler approach to the issue. Another wanted the certifier to have to prove its case under the proposed approach by the clear and convincing evidence standard. One comment was concerned about the proposal's subjectivity but said the current six factors were worse. It asked that the Department not provide guidance that made decisions on rebutting disadvantage harder for certifiers.

Two comments said that evaluations under the section exclude spouses' assets, while another thought those assets should be included.

DOT Response

The Department's final rule about rebutting economic disadvantage helps ensure that the DBE program remains narrowly tailored and strengthens current safeguards that prevent firms owned by individuals who cannot fairly be viewed as economically disadvantaged from participating in the program. Rebutting an owner's presumed economic disadvantage inevitably requires certifiers to make a judgment call about whether an owner can be reasonably considered economically disadvantaged. We make final our proposal to eliminate the AASW framework and shift the analysis from a list of specific criteria to a ''reasonable person'' evaluation.

By giving certifiers the ability to make judgment calls, we believe that we place them in the best position to achieve this objective, without needing to engage with factors that, while intended as suggestions, were too often taken as strict regulatory criteria. Retaining and/or revising some or all of the existing factors, as some commenters suggested, will not solve the problem and might inadvertently create additional complexity. We understand commenters' concern about decisions on this matter becoming too subjective. That is why, and consistent with prior final rules, certifiers must articulate, in writing, a detailed explanation and not simply make a conclusory statement.

Individual Determinations of Social and Economic Disadvantage (§ 26.67(d))

NPRM

The Department proposed eliminating its guidance in Appendix E and adding flexible, less prescriptive requirements into the regulation itself. An individual seeking to demonstrate SED status on an individual basis would still have to prove, by a preponderance of the evidence, that he experienced social and economic disadvantage within American society and without regard to the individual's personal characteristics.

Comments

Of the more than 20 comments that addressed this issue, a majority opposed the NPRM's proposal, saying that it was too subjective. It gave certifiers too much discretion, left open the possibility of inconsistency and bias, and might help ineligible firms to obtain certification. Most of these commenters favored retaining the guidance or something like it. A smaller number of commenters favored the proposal for the reasons stated in the NPRM preamble, with two asking for more examples to help certifiers.

DOT Response

We adopt proposed § 26.67(d) with modifications in response to the comments. We believe that the changes provide clearer guidance to certifiers and business owners. The final rule removes the lopsided and, in some cases, insurmountable burdens that the previous rule and guidance imposed and curbs the excesses they enabled. The rule simplifies, specifies, and streamlines. It substantially levels a skewed playing field for owners, which should result in more accurate determinations and the more efficient administration of the certification process.

The final rule reunites the social and economic aspects of ''disadvantage,'' which are intrinsically linked, and explicitly identifies the three elements that the owner must demonstrate. Although the substance deviates very little from that of the superseded guidance, the final rule concisely identifies the ''what'' and the ''how'' and does it in plain language. The rule clearly specifies the criteria that an owner must satisfy, and the kind of evidence that he must present, to show that the negative effects of discrimination (social disadvantage) caused economic hardship.

The final rule, as did the previous provision, requires a degree of

subjectivity because each owner presents unique facts and personalized experiences. The checklist approach of the superseded appendix was ill-suited to the evaluation. Although the final rule is less rigid, it continues to require robust proof of individual disadvantage. We are confident that certifiers will evaluate the evidence fully and objectively, in accordance with the restated, simplified criteria, and thereby ensure that only eligible firms become certified.

The reauthorization of the DBE program in successive Congressional reauthorizations, including the Bipartisan Infrastructure Law, demonstrates Congress' intent to facilitate the participation of social groups that have experienced past, and continuing, discrimination in federally assisted contracting. The final rule safeguards against certifiers imposing undue requirements on individuals that are not presumptive group members. The rule focuses solely on essential requirements, ensuring fairness and clarity in the certification process. This matches Congress' and DOT's objective to remove barriers and facilitate certification of eligible firms.

The Department's final rule adopts in full our NPRM proposal for the reasons given there. As with evaluating the SED status of an individual claiming membership in one of the groups whose members are presumed SED, evaluation of an application under § 26.67(e) inherently requires certifiers to make a judgment call. In doing so, certifiers must not simply rely on the quantity of examples of disadvantage an owner provides; rather, certifiers must focus on the *quality* of the evidence presented. Applicants have to submit a personal narrative detailing the experiences that demonstrate the social and economic disadvantages they have had to contend with. While applicants bear the burden of both production and persuasion with respect to all elements of certification, certifiers must holistically evaluate all presented evidence before making a determination.

We reiterate that an owner need not have filed a complaint of discrimination as a prerequisite of claiming social disadvantage. Nor must an owner produce corroborating evidence, as such evidence may not exist. The final rule merely levels the field by removing what amounts to a higher burden than ''preponderance of the evidence.'' [7] The owner still must make his case, and the certifier may disregard a claim of social disadvantage where the individual presents evidence of discriminatory conduct but does not connect that conduct to negatively impact on his own entry into or advancement in the business world. On this point, the Department is following SBA's guidance that individuals need to provide ''a complete picture, or additional facts that would make an individual's claim of bias or discriminatory conduct more likely than not.'' [8] Like SBA, certifiers should not intend as a matter of course, to disbelieve an applicant but should continue to rely on the affidavits and sworn statements, as long as those statements clearly establish an instance of social disadvantage.

Appendix E is modeled after several, but not all, SBA requirements. When it was first introduced by the Department, we modified our guidance to make it fit our needs because of the differences between the two programs. Appendix E was intended by the Department to be guidance only, yet recipients used it to impose rigid, prescriptive requirements that too often excluded meritorious applicants who, by any reasonable standard, proved their SED status. Nonetheless, certifiers found them ineligible because they did not produce a specific type of evidence, in sufficient volume, of each of the several ''required'' varieties. In some cases, the evidence (*e.g.,* corroboration of malign intent) does not exist; in others, it cannot be obtained. For example, researching and compiling data about other firms in the same or a similar line of business with which to compare the individual's circumstances is well beyond the means of an owner of a small business seeking DBE certification. Competitors tend not to publish information concerning capital, net worth, access to credit, etc. As stated in the NPRM preamble, we believe that this is inequitable. The rule at § 26.67(a) aligns with the Department's surface authorization requirement to follow SBA's definition of members of groups deemed socially disadvantaged; and § 26.67(d) retains SBA's regulatory requirements that a person who is not socially disadvantaged must make an individual showing of disadvantage. To do so, § 26.67(d) requires an owner to identify at least one objective distinguishing feature (ODF) that resulted in racial, ethnic, cultural, or other prejudice against him personally and describe with particularity how the ODF caused personal social disadvantage. The owner may provide evidence related to the owner's education, employment, or any other evidence the owner considers relevant.

16. Ownership (§ 26.69)

The NPRM proposed changes that would streamline the ownership rules and make them easier to understand and administer. The proposal retained the essential substantive elements of the 2014 rule but recast them in simpler language. It distilled from the multitude of prescriptive ''real, substantial, and continuing'' (RS&C) rules a few general principles and set those out as the main components of ownership. Sub-rules fleshed out the framework. The Department's overall goal was to make certification easier to obtain, maintain, and monitor.

The proposed rule employed a new term, *Reasonable Economic Sense* (RES) as its rationalizing principle. RES, like RS&C in the 2014 rule, was to be a touchstone, shorthand, and umbrella for the underlying concepts and operating rules. We intended for the term to signal flexibility, a common-sense focus, and tighter alignment with small business realities.

Reasonable Economic Sense (RES)

NPRM

The NPRM replaced the term RS&C with RES in describing the rule's unifying principle or overarching requirement. The proposal restated the 2014 rule's essential requirements and organized them more logically. At the top analytical tier, the proposed language simplified and clarified the rule's main components; it changed nomenclature and emphasized more than substance. For example, ''proportionality'' (broader, less rigid, more clearly defined) replaced the 2014 rule's ''real,'' ''substantial,'' and ''commensurate with'' language. The changes gave certifiers more latitude than they believed they had before, to encourage them to consider firm-specific facts without undue regard for technical disqualifications. Similarly, the proposal gave owners more control over how to structure their businesses' ownership. Proportionality does not require exactitude. Owners have latitude up the point at which the benefits and burdens of ownership are ''clearly disproportionate'' or ''undue.'' While the proposed rule described the

[7] SBA uses the preponderance of the evidence standard as well in its eligibility standards. In its final rule, SBA addressed the Supreme Court's decision regarding the DBE program (Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), which requires programs to provide a race-based remedy to be ''narrowly tailored.'' SBA noted that the Department of Justice recommended the ''preponderance of the evidence'' standard for government-wide disadvantaged business programs; and therefore, based its ''preponderance of the evidence'' standard accordingly. See 63 FR 35728 (June 30, 1998). The Department follows this standard.

[8] 81 FR 48569 (Jul. 25, 2016).

ownership requirements in plainer, more accessible language, the animating theory remained: substance prevails over form.

Comments

Commenters supported the NPRM's overall approach, including the rule's substantive provisions, by a wide margin. Supporters often cited increased flexibility and the likelihood of better outcomes. However, a sizable majority of all commenters specifically opposed RES. They faulted the term for vagueness, subjectivity, the potential for inconsistent results (*e.g.,* disfavoring WBEs), and the possibility that front companies could become certified more easily. While some of the commenters opposing RES wanted to retain the existing rule, most requested more definitions, guidance, and examples.

DOT Response

Our objectives in promulgating the proposed and final rules are to simplify, clarify, and modernize certification standards; give firms and certifiers more flexibility; and promote consistent, fair results. We intended for RES to capture in a single, overarching term the essence of the DBE ownership standards, as simplified and clarified. The comments, however, persuade us that RES is unhelpful, and on further reflection, we see no need for an overarching term. We therefore delete all references to RES.

The comments also prompt us to explain key concepts and rules more thoroughly and to add substantially more situational guidance and examples. We adopt proposed § 26.69, with these additions and edited for clarity.

We believe that the final rule reduces burdens, increases understanding, and promotes equity.

Investments

The regulation frames ownership in terms of ''investments'' and provides detailed guidance on which investments in ownership make a firm eligible for certification. Investments are the mechanism through which the rule applies. If the SED owner (SEDO) makes no investment, an insignificant one, or one that is disproportionately low, the firm is ineligible.

Purchases, capital contributions, and gifts are investments if they meet specified standards, including proportionality consistent with the owners' relationships and the business's circumstances. Investments must have real economic effect. The SEDO must have parted irrevocably with (her own) cash or with a combination of cash and tangible or real property. She must stand to lose the entire investment if the business folds. In colloquial terms, the SEDO must have real ''skin in the game.''

Rules for Acquisition, Proportionality, and Maintenance

Section 26.69(b) retains the proposed rules for acquiring and maintaining ownership interests. In all cases, the principle of proportionality applies. The SEDO's investment to acquire ownership must be substantial, and it must include a significant cash component.

Example 1. SEDO contributes $51 to acquire 51 percent of Newco. The cash outlay is insubstantial, and the capital contribution is therefore not an investment. Newco is ineligible for certification.

Example 2. SEDO contributes $5,100 in exchange for 51 percent of Newco, which does not yet operate any business. Regardless of whether $5,100 is a substantial outlay, Newco is ineligible under § 26.71(a), which requires that an applicant have business operations.

Example 3. SEDO purchases 60 percent of Opco for $30,000 cash. Assuming that the outlay is not clearly disproportionate to value, and the SEDO does not reap benefits or shoulder burdens clearly disproportionate to those of other owners, Opco is eligible on ownership grounds.

Example 4. SEDO contributes a truck worth $60,000 to Haulco in exchange for 100 percent ownership. Without a significant cash contribution, Haulco is ineligible.

Example 5. SEDO buys 80 percent of Opco from Founder, who is retiring, for $8,000. Opco has run at a small net loss for the last 2 years but was profitable in several preceding years. Opco has generated over $3 million of revenue in each of the last four years. Opco is probably ineligible because $8,000 is unlikely to be proportional to the value of 80 percent of Opco.

Example 6. SEDO pays $55,000 to buy 60 percent of the stock of Oldco from Founder, who was Oldco's sole owner. Oldco's book (net asset) value is $100,000. Since there are no other, recent stock sales or other persuasive evidence of fair value, Oldco is probably eligible because $55,000 is not ''clearly disproportionate'' to the value of the shares purchased.

''Proportionality'' requires that the SEDO not derive disproportionate benefits or bear disproportionate burdens of ownership. The SEDO may not make a conditional or revocable investment, and once made, the SEDO must maintain the investment. ''Maintain'' means both that the SEDO not withdraw her investment and that she keep her investment proportional to those of other owners.

Purchases and Capital Contribution

A purchase is an investment when the consideration is exclusively monetary and not a trade of property or services. A capital contribution is an investment when the owner contributes cash, tangible property, realty or a combination of these assets. Contributions of time, labor, and services (*i.e.,* called ''sweat equity'') are never investments.

We exclude as unhelpful our proposal concerning contributions of expertise, even though we received no comments about it.

Gifts

NPRM

The NPRM provides that a gift is an investment only if the transferor becomes uninvolved with the applicant or DBE in any capacity and in any other business that performs similar work or contracts with the firm other than as a lessor or supplier of standard support services. This language is a condensation and simplification of current regulation §§ 26.69 (h) and (j). The NPRM removes the prohibition on the transferor's involvement with a non-DBE firm in a similar business; adds the contracting restriction and a documentation requirement; and removes as unwieldy, unnecessary, and unfair the paragraph (h) presumption of non-ownership, two-pronged rebuttal (one wholly unrelated to ownership), and heightened burden of proof.

Comments

One commenter supported the proposal, while another opposed allowing gifts to be considered toward ownership at all. A third opposed the proposal that a non-SEDO providing a gift to a SEDO would have to become uninvolved with the company. It could be a good thing for the business if the non-SEDO could stay involved, the comment asserted. Another expressed the concern that, under the proposal, someone could acquire ownership solely on the basis of a gift.

DOT Response

Paragraph (e) of the final rule replaces paragraph (h) of the 2014 rule. The new rule eliminates the more complex two-prong test and heightened burden of proof of the former paragraph (h), which has proved confusing in practice. Under the final rule, when a non-disadvantaged person gives an ownership interest to a disadvantaged

person, the gift is the donee's ''investment'' for certification purposes only if the donor becomes completely uninvolved in the business or any that contracts with it. Unless or until that happens, the firm will not be eligible for certification and will remain ineligible until the donor severs all ties. Of course, if other SEDOs own 51 percent of the firm without the donee's contribution, the firm could be certified.

We acknowledge that there are often good reasons for a former, non-disadvantaged owner and a new, disadvantaged owner to work together during a transition period, but we remain concerned that permitting such arrangements across the board presents risks to program integrity. However, we believe that the prohibition on the donor's involvement in similar businesses is unwarranted. Although removing that prohibition marginally increases risk of program abuse, other provisions of the regulation curb those risks. As this restriction may discourage transfers that benefit SEDOs and their businesses, we adopt the proposed rule but strike the ''similar business'' proviso.

Loans and Debt-Financed Investments

NPRM

Under the NPRM, a SEDO may finance all or part of an investment in the company, including a purchase from a third-party owner. In that case, the company is eligible only when the SEDO has paid at least 15 percent of her total investment from her own funds. The firm may not be a party to the loan, and its property may not serve as collateral. The firm is eligible only if the SEDO meets this requirement before the firm applies for certification.

Comments

One commenter proposed raising the 15 percent requirement to 35 percent, since the higher floor would demonstrate a greater stake in the business. Another commenter opposed the 15 percent requirement as unwarranted because it could impair the ability of younger owners to become certified. Others suggested that, instead of naming a percentage, the rule should require a ''commercially reasonable portion of total investment'' to come from a SEDO's own resources or that repayment be consistent with the terms of the loan agreement, if consistent with industry standards. Another commenter opposed prohibiting the use of a firm's property as collateral for a loan to the SEDO claiming the investment.

DOT Response

We adopt the debt financing rules as proposed, move them into a new § 26.70, and respond to comments by breaking the definitions into smaller components, reordering the rules for clarity, and adding multiple examples. We do not raise the 15 percent self-funding requirement because we believe that a higher percentage would be too exclusionary.

We move these rules to emphasize a crucial distinction that the 2014 rule did not articulate effectively. While a SEDO may make an investment using funds from a debt, meeting the requirements of this section, the *loans themselves are not investments.* This rule applies regardless of who the creditor and debtor may be. The rule is that, subject to the conditions specified in §§ 26.69 and 26.70, the owner ''invests'' only when she *contributes the loan proceeds* to the firm or uses them to purchase an ownership interest.

To further explain the distinction and the rationale for it, the SEDO's ''contribution'' of her debt to the company relieves her of the obligation to repay. Such a transaction is the opposite of an investment: the owner has parted with nothing but a liability, the firm receives no capital, and the firm must *pay out* its own capital to repay the owner's debt. A loan *from* the company is not an investment because the firm cannot contribute capital to itself or buy shares from itself for itself. (Treasury stock is already treasury stock; the asserted transaction is as fictional as it is unnecessary.) Nor may the SEDO use the company's property to secure her loan: a different rule would effectively nullify the general rule that a loan from the company is not an investment. Given this treatment of the owner's debt, a mere guarantee is not an investment.

Section 26.70 also requires regular, level payments of principal and interest over the term of the loan at least until sufficient principal has been repaid to make the owner's out-of-pocket expenditure at least 15 percent of the total investment. Related rules ensure the integrity of the rule's limitations.

Curative Measures

NPRM

Proposed revisions to § 26.69 would adopt by regulation the memorandum that the Department issued on August 7, 2019. Applicants can take curative measures to correct impediments to eligibility, as long as they are legitimate, accurately reflect relevant facts, are made in good faith, and are not prohibited in the regulation.

Comments

A strong majority of comments supported the NPRM proposal. Several commenters said this was a practice they already followed. Some of these comments suggested that the use of curative measures should be limited to minor administrative matters rather than serious issues concerning the organization or structure of a business. Opponents were concerned that the provision would allow firms to circumvent the rules or put certifiers in the position of ''coaching'' applicants on how to get certified.

DOT Response

The final rule adopts the proposal, essentially for the reasons explained in the NPRM preamble. It will encourage recipients to catch problems that often unwittingly lead particularly new, inexperienced, but otherwise potentially eligible firms into mistakes that result in denials and the application of a waiting period before the firm can try again. We believe that certifiers can exercise sound judgment concerning the kinds of matters on which they can usefully assist such firms. We do so with the safeguard that, like all actions by participants in the program, abusive or sham actions are prohibited. When part or all of a transaction or series of transactions involved with the certification or participation involving a firm have no apparent purpose other than camouflaging facts or circumstances which more likely than not render the firm ineligible, the final rule's § 26.69(g) calls for sanctions against the offending parties.

Other Ownership Issues

There were a variety of comments regarding aspects of ownership that the NPRM did not address. One suggested there should be more guidance on firms that had more complex ownership arrangements, like ''simple agreements for future equity.'' Another would delete the requirement that a SEDO own 51 percent of each class of ownership, which it found too restrictive. This commenter would instead say that a SEDO should have enough shares of any or all classes of ownership to control the firm and receive 51 percent of its profits.

Other comments requested clarification on what information an applicant is required to provide to show ownership and on the status of trusts under the proposal. Another comment expressed concern that deleting provisions concerning marital property would make it easier for applicants to circumvent the intent of the rules.

Another opined that non-SEDOs should not be able to be part owners of a DBE firm if they were involved in non-DBE firms in the same type of work, a relationship that could enable pass-throughs. A final commenter believed that certifiers should take workforce diversity as well as ownership into account in certifying firms.

DOT Response

The final rule retains the joint ownership provision as proposed, for the reasons stated in the NPRM: consistent results across jurisdictions, federalism, and expertise. Fairness, prudence, and practicability underlie the final rule.

Any issues arising from the other concerns noted by commenters can, if needed, be addressed through future guidance or on a case-by-case basis as a matter of program administration.

17. Control (§ 26.71)

In this section, because the overall topic contains several important subtopics, we have organized the material around the subsections, with discussions about the NPRM proposals, comments received, and DOT responses pertaining to each subtopic.

The thrust of the Department's final rule is to shift the focus from the actions and experience of non-disadvantaged participants in the firm to those of the SEDO, to reflect the original intent of the regulation's control requirements. A SEDO must pass the three-part test of managerial oversight, revocable delegation of authority, and critical and independent decision-making.

''Operations'' Requirement

NPRM

The NPRM proposed several changes to the current § 26.71. One proposal stated that firms (except ACDBEs) would have to have ''operations'' in the type of business in which they seek certification. The NPRM said that this would allow certifiers to make decisions based on actions the SEDO takes and avoid wasting certifier resources on firms that are not conducting business and have no ability to perform DBE contracts.

Comments

Of the nearly 40 comments that addressed this issue, a majority opposed the NPRM proposal. The principal argument of opponents was that requiring a business to have operations before being certified would be a barrier to new firms or those seeking to expand into new areas of work. The program should encourage, not discourage, firms seeking their first contract. It would create a disincentive to entrepreneurship in non-traditional types of work. It should be enough, commenters said, for the SEDO to have experience in the type of work involved with a new firm. For example, it should suffice if an engineer had work experience relevant to the field a new engineering firm wanted to work in as a DBE, even if a newly formed firm had not yet obtained a contract.

Among commenters who either supported or did not object to the proposal, some said that it made sense to prevent situations in which a certifier would be asked, in effect, to certify a business plan. The provision would save staff time, in that staff would not have to do certification workups on firms that would not be able to perform contracts. A commenter thought that an applicant should have at least a year of experience in its type of work.

Several commenters asked for clarification of what constituted ''operations'' for purposes of the proposed section, and what applicants would have to show in order to meet the requirement. Would they need to have already performed work on a contract? Others suggested that certifiers should have discretion to decide the question, given that more operational experience may be needed in some fields than others (*e.g.,* heavy highway construction vs. landscaping). A number of commenters questioned or objected to the exception to the proposed requirement for ACDBEs, asking why the same standards should not apply to an ACDBE.

DOT Response

A DBE must have business operations. Certifiers should not be involved in what amounts to certifying a business plan. It does not make sense for a certifier to engage in the certification process for a firm, which, if certified, is not in a position to work on a DOT-assisted contract. This is no less true for new businesses than for long-existing businesses. For this reason, the final rule retains the proposed requirement.

This is not to say that an applicant must have had previous contracts in order to be certified. We expect certifiers to make the necessary judgment calls to determine when an applicant firm is sufficiently ready to participate in the program if certified.

The Department explains how to apply these concepts in the context of the ACDBE program in the preamble discussion on § 26.71 regarding the operations requirement for DBEs, including ACDBEs.

Control (SEDO as the Ultimate Decision Maker) (§ 26.71)

NPRM

The NPRM would require a firm to demonstrate that, beyond formalities of business structure and governance documents, the SEDO ''runs the show,'' having the final say on all matters, regardless of the size or complexity of the business. Governance continues to matter, however, and provisions that require non-SEDO concurrence or consent for the SEDO to act, including provisions related to board of directors, quorums, and votes, would prevent the SEDO from being determined to control the firm (there would be an exception allowing non-SEDO members to block an extraordinary action, like sale or merger of the company, that would affect their ownership rights). The SEDO must hold the highest officer position and have voting authority over all other participants.

As under the former rule, a SEDO would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding the owner should have can vary with the type and complexity of the business. A SEDO would have to *actually* make major decisions, not just have the ability to do so as under the former rule. Control determinations would be based on a three-part test: (1) the firm would have to show that a SEDO gets pertinent information from subordinates, (2) a SEDO analyzes the information, and (3) a SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with a SEDO at the top.

Comments

By about a three-to-one majority, commenters endorsed the new control framework, saying that less prescriptive requirements would simplify the certification process. There were supportive comments on a number of the specific points in the proposal, such as the SEDO being the ultimate decision maker and having the top position in the company and the three-part test with respect to how and by whom decisions are made. Commenters asked for more guidance on what an applicant would have to show in order to carry its burden of proof on these matters.

Comments opposed to the proposal said that the proposal would lower standards and compromise program integrity. Others thought the approach too subjective. One said the three-part test was not realistic for certifiers to

apply; it boiled down to whether a certifier thought what an applicant said was credible.

One commenter supported the NPRM's proposal about boards of directors, saying it would clarify matters. Another opined that firms should be able to set up their boards as they wish because boards of directors are generally not decision-making bodies. Another said that non-SEDOs should not be able to block extraordinary actions of the company and still have the SEDO regarded as controlling the firm, while another commenter supported the proposed provision concerning extraordinary actions.

One comment asked for a clarification continuing the present rule's allowance of control by any SEDO, not only the one having the largest stake in the company. Another suggested that § 26.71 be made broader and more ''big picture'' in nature. Another said that if the certifier determined that the owner does not control the firm, it should be required to state who does control it.

A few commenters expressed concern about certifiers' ability to verify the reality of decision-making power within a company. One commenter noted that anyone can be placed at the top of an organizational chart. Another commenter asked how a certifier would know whether other participants faithfully follow the SEDO's directives. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could cause certifiers to overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process. Commenters opposed to the proposal said that the proposal would lower standards and increase the possibility of opening the program to increased fraud. Others thought the approach was too subjective. One said the three-part test was not realistic for certifiers to apply; it boiled down to whether a certifier thought what an applicant said was credible.

DOT Response

The Department believes that the overall approach taken to control matters in the NPRM is sound and will meet the dual objective of removing unnecessary obstacles from applicant firms while ensuring that only those firms that are genuinely controlled by SEDOs are certified. It comes down to whether the SEDO in fact—not just in theory or on paper—runs the show. The SEDO must show that they possess not only the authority to make decisions, but in fact make those decisions.

With respect to control, certifiers must necessarily make a judgment call: does the SEDO, based on the complete record, including the application and the on-site interview, really ''run the show?'' The NPRM clearly stated this responsibility on the certifier's part. One of the best ways a certifier can do this is to make in-depth inquiries, during the on-site interview, to determine if SEDOs critically analyze information provided by others and make reasonable business decisions based on independent analysis. Do other key employees bring issues or problems to the SEDO, who asks good questions, and then makes the decisions, which others carry out? Or do others make decisions autonomously, without involving the SEDO, or disregarding direction from the SEDO? Interviewing not only the SEDO, but also other key employees where relevant, to get a full picture of how decisions are made is crucial to good control decisions by the certifier. To the extent possible, the certifier should ask for examples about how real-life decisions were made within the firm in the past. The Department believes this approach, as stated in the NPRM, makes sense and is consistent with the intent of the program and maintaining program integrity, and we are adopting it as final.

The NPRM discussed, in § 26.71(c), the point that governance provisions of a company must ensure that the SEDO, in addition to having the highest officer position in the company (*e.g.,* CEO), must not be constrained from fully controlling actions of the company by quorum, by-law, or other provisions. Non-SEDO consent for certain extraordinary actions (*e.g.,* sale or dissolution of the company) would be permitted. However, similar provisions in the former rule often proved to be problematic for small or inexperienced companies, who in our certification appeal practice we have found used templates for governance documents that limit SEDO actions without non-SEDO concurrence. This is a classic example of where a certifier can vindicate the intent of the program by pointing out such problems to an applicant and allowing the applicant to take curative measures.

Expertise and Delegation

NPRM

As under the current rule, the NPRM proposed that SEDOs would have to understand and be competent in the substance of the firm's business. The NPRM noted that the degree of understanding that the owner should have can vary with the type and complexity of the business. The SEDO would have to actually make major decisions, not just have the ability to do so as under the present rule. Control determinations would be based on a three-part test: the firm would have to show that the SEDO receives pertinent information from subordinates, that the SEDO analyzes the information, and that the SEDO makes independent decisions. Tasks can be delegated, as long as the SEDO can revoke the delegation. Everyone in the company must recognize and abide by the chain of command, with the SEDO at the top.

Comments

A few commenters were concerned about how certifiers would verify the reality of decision-making power within a company. Anyone can be placed at the top of an organization chart, after all, one comment noted; and another asked how a certifier would know whether other participants faithfully follow directives from the SEDO. Would the certifier have to interview all key participants as part of an on-site review? This commenter also was concerned that what it saw as the proposal's emphasis on formal authority could overlook situations in which someone other than the SEDO had the bulk of expertise and clout within the firm. Other commenters thought the proposal's bright-line approach to a company's chain of command, and the importance of the SEDO's ability to revoke delegations, would add clarity to the certification process.

Three commenters supported the proposal as written. Another said that there should be language telling certifiers not to reject a firm because a SEDO, even if clearly the decision maker, has employees who have greater experience or expertise than the SEDO. On the other hand, one commenter said that an unlicensed or non-expert person should not be viewed as controlling a firm (*e.g.,* a non-electrician in charge of an electrical services firm). One commenter said the SEDO should be qualified in the NAICS code(s) the firm is seeking, while others asked for more clarification and examples, especially in professional services firms and for ACDBEs, where the commenter expressed concern that inexperienced

people were getting certified as a part of joint ventures.

DOT Response

The Department adopts the NPRM proposal without change. It emphasizes that the SEDO, while permitted to delegate authority and functions, must be able to revoke that authority. There must be a recognized chain of command within the company in reality, and not just on an organizational chart, for example. Making probing inquiries on this point, and on the recognition and acting upon this authority structure, is something certifiers should, as described above, ensure is part of the on-site interview process.

The Department emphasizes, in the final rule, that the proper focus for certifiers is the role the SEDO plays and the SEDO's being the ultimate decision maker. We have often seen that certifiers go astray by determining that a SEDO does not control a company simply because other participants have experience or expertise in a given aspect of the firm's operations. The contribution of non-SEDOs to the operation of a company is not a ground for denying eligibility to a company, so long as the SEDO runs the show in all aspects of the business, including with respect to areas of work that may be delegated to others.

While we do not believe it is necessary to include rule text language on these points, we agree with commenters that, as under the present rule, in a situation where there is more than one SEDO, control by any SEDO is sufficient to meet § 26.71 requirements. This is consistent with the definition of a DBE under § 26.5. For example, if one SEDO owns 45 percent of a company, and the other owns 10 percent, the firm can meet control requirements if the 10 percent owner runs the show.

Independence

NPRM

With respect to independence, the proposed rule (redesignated as § 26.71(g)) clarifies that a firm must prove that it is independently viable, notwithstanding a relationship with another firm from which it receives or shares essential resources. A pattern of regular dealings with a single or small number of firms would not necessarily render a firm ineligible as long as it was not operating as a front or pass-through for another firm or individual. The proposed rule clarifies that relationships and transactions between firms of which the SEDO has 51 percent ownership and control does not violate the rule, although the relationship may raise a business size issue.

Comments

While a few commenters supported this proposal as written, others asked for more clarification of what a certifier needs to know in order to determine if an applicant is independent. One request for clarification asked whether independence concerns relationships with any firms, or only relationships with non-DBEs. Another thought that the reference to ''commercially reasonable terms'' in the proposed § 26.71(g) was too vague, while another comment asked how a certifier should evaluate whether firms ''shared essential resources.'' Another asked for clarification in the context of leasing trucks, suggesting that a DBE should lease trucks from leasing companies that lease trucks to the general public.

With respect to the proviso that dealings with only one or a small number of firms does not necessarily compromise independence, one commenter agreed while another asked how a certifier would determine when such a situation was problematic. Two commenters expressed concern about a situation in which, after a firm is certified, it enters into an exclusive or nearly exclusive relationship with a prime contractor. One commenter suggested that this should be prohibited.

Among other suggestions by commenters were to retain the present language because independence determinations would be harder to make under the proposed language; to substitute language from the identity of interest provision of the SBA regulation (13 CFR 121.103(f)(2) and (i)). If the Department modeled its provision after § 121.103(f)(2) the commenter argued, certifiers could presume an identity of interest based upon economic dependence if the concern in question derived 70 percent or more of its receipts from another concern over the previous three fiscal years. Likewise, adopting a similar provision as SBA had done, this presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

Another commenter suggested allowing prime contractors to provide specialized training to DBEs through a shared foreman or superintendent.

DOT Response

As in the NPRM, the final rule provides that a key element of meeting the control requirements of the rule is that a firm must be independent. Independence in this context refers to the relationship between the firm in question and other firms, whether those other firms be DBEs or non-DBEs. A firm cannot be independent if, absent such relationships, it would not be viable. If a firm cuts the ties that bind applicant Firm X to Firm Y—whether those ties, be sharing of facilities, resources, or personnel, common ownership or management, exclusive or nearly exclusive contracting or business relationships—would Firm X continue to be able to do business? If not, then Firm X is not independent.

The regulation does not prohibit relationships with other firms, including relationships that may create affiliation. Nor does the regulation prohibit a firm from providing services only to one business, or only a few businesses. That scenario might arise in a locale that has a limited number of potential customers. However, the DBE must not be used as a conduit or pass-through to obtain DBE credit. In any case where an applicant has relationships with other firms, the applicant must demonstrate that it is independently viable, notwithstanding relationships with another DBE or non-DBE firm.

We disagree with the commenters who suggested that the Department should adopt the Small Business Administration's 8(a) or 8(d) program rules about independence. The Department's final rule sufficiently equips certifiers to make the necessary judgment calls, without unnecessarily leaning on another agency's regulations.

It is likely that allowing a prime contractor to share experienced personnel with a DBE, especially if they have a contractual relationship, has a high probability of compromising the DBE's independence. Certifiers should carefully investigate any such relationships.

Licensing and Other Specific Sections Proposed for Deletion

NPRM

The NPRM proposed removing several control provisions from the former rule, including § 26.71(h) (licensing); § 26.71(i) (differences in remuneration); § 26.71(j) (outside employment); § 26.71(k) (family relationships); § 26.71(l) (transfer of a

firm to a SEDO when the non-SEDO transferor remains involved); § 26.71(m) (ownership and leasing of equipment); § 26.71(p) (ability of non-SEDOs to bind the firm without SEDO's consent); and § 26.71(q) (use of employee leasing companies).

Comments

Supporters of the licensing proposal thought that deleting § 26.71(h) would make the certification process less onerous for applicants and less likely to lead to decisions based on a misunderstanding of the regulations. Slightly more opponents recommended retaining § 26.71(h) to prevent licensed non-SEDO participants from having *de facto* control of the firm. Others said that, especially in specialized fields, the SEDO should be the license holder. Two commenters noted that in their States, the majority owner must have a license to operate certain kinds of professional services firms. One commenter advocated that the SEDO of a trucking company should have a CDL.

Commenters also raised the question of how, in the context of reciprocal interstate certification, differing licensing requirements of different States would be handled. One recipient suggested that an additional State could deny certification to an out-of-state firm in a NAICS code for which that State required a license, but the jurisdiction of original certification (JOC) did not, while still certifying the firm in other NAICS codes.

Several commenters asked that the Department retain all or most of the other specific existing provisions in § 26.71 that the NPRM proposed to delete. Considering issues covered by these provisions was an important element of doing a good job of certification, these commenters suggested. The proposed rule would shift the burden of proof from applicants to certifiers, one commenter said. Among specific provisions mentioned by commenters were those concerning family businesses, outside employment, differences in remuneration, and leasing of equipment. In the absence of these provisions, another commenter said, DOT would need to provide more guidance on how to make control determinations when these issues arose.

DOT Response

Consistent with the NPRM, the final rule deletes §§ 26.71(h), (i), (j), (k), (l), (m), (p), and (q) as duplicative and outdated. The overhaul of the control provisions described in this final rule are more than adequate for certifiers to properly evaluate whether a SEDO controls a firm.

The proposed deletion receiving the most comment concerned licensing (§ 26.71(h) of the former rule). We wish to remind certifiers that, in many cases, it is the business as an entity, not the SEDO as an individual, who is required to have a license. For example, an engineering firm must have someone with an engineering license. The firm may still be certified if the license holder is someone other than the SEDO, as long as the SEDO meets all the ''running the show'' requirements of § 26.71. We also note—this is an issue that has frequently arisen in certification appeal cases—that it is not essential for the SEDO in a trucking or transportation company to personally hold a CDL (commercial driver's license); as long as the SEDO establishes control of the company as this section requires.

In the context of interstate certification, if a firm is certified in its JOC, it can obtain certification in any other State. But suppose that the firm lacks a professional license in an additional State that is not needed in the JOC or that the firm's licenses the JOC are not valid in another State? In such a case, the firm would be certified in the additional State—because it met basic size, disadvantage, ownership requirements via its certification in the JOC—but would not yet be able to do business in the additional State.

While § 26.71(l) of the existing regulation, concerning firms where a non-disadvantaged individual who formerly owned and controlled a company remains involved with the company, we note that the ownership requirements of the final rule require the former owner to immediately become uninvolved with the company or other business that performs similar work or contracts with the applicant firm other than as a lessor or provider of standard support services. We take this action in the final rule because parties have not understood how to handle the rebuttal procedurally or apply the stricter burden of proof. The crux of the rule states that the new owner needs to still show that he/she is in control, notwithstanding the presence of the old owner. The final rule preserves and emphasizes this.

While the specific outside employment provision of the existing rule is being removed, certifiers may still consider the effect on outside employment as they determine whether a SEDO is in a position to really run the show for an applicant firm. For example, when a SEDO has a full-time job for another employer, how does the SEDO find the time to analyze information and make independent decisions for the applicant firm? How does the SEDO communicate with employers and customers if the SEDO has duties for another employer that conflict, in terms of time and place, with the applicant firm's work? The applicant has the burden of proving to the certifier that the SEDO can do everything needed to control the firm, notwithstanding the SEDO's duties for another employer. Delegations by a SEDO with outside employment must meet the same requirement as other delegations; the SEDO must remain in active control of those to whom the SEDO has delegated duties.

North American Industry Classification System (NAICS) Codes

NPRM

The NPRM proposed removing material concerning NAICS codes from the control requirements to a new § 26.73, making minor technical corrections in the process.

Comments

While there were no comments on the proposal to put NAICS code provisions into a new section of the rule, as such, there were comments on the general subject of NAICS codes. A few commenters said that the ability of firms to expand into additional codes should be expanded, for example by relaxing the requirement that the narrowest applicable code be used for a firm, allowing expansion based on staff capabilities, or allowing a SEDO to be considered qualified to control a firm in a related NAICS code to that one a firm already has been assigned. One commenter suggested that a firm should be able to remain certified in a narrower NAICS code even if it exceeded the size standard for that code as long as it continued to meet the size standard for a broader NAICS code that encompassed the subject matter of the narrower code.

A few comments also asked that NAICS code assignments be made more consistent among certifiers, though they did not suggest how this would be done. Another suggested updating NAICS codes and making them more specific. Another wanted firms to be certified in State work codes, where applicable, as well as NAICS codes. Two comments said that existing NAICS codes do not work well for TVMs, and that the Department should find another way of classifying especially subcomponent manufacturers for transit vehicles.

DOT Response

The Department is adopting the NAICS code provisions of the NPRM—which are substantively identical to the those of the existing rule—without change. We continue to believe that the narrowest appropriate code should control for purposes of certification; doing otherwise would allow circumvention of the intent of small business size standards for firms. It is important for certifiers to avoid overly broad NAICS codes. For example, NAICS code 237310, concerning highway and bridge construction, has sometimes been applied to specialty contractors who perform only one or two of the functions under that code's broad umbrella. We intend that certifiers, in such a case, assign only the narrower code applicable to the specialty functions that the firm performs.

As under the present rule, states may employ State work codes or categories, but they cannot supersede NAICS codes for purposes of DBE eligibility or credit toward goals. Certifiers cannot certify firms as DBEs using State work codes, or limit opportunities for DBE credit to firms certified in a given NAICS code to types of work named under a State code that is in effect a subset of the work encompassed by the NAICS code in which the firm is certified.

Subpart E—Certification Procedures

18. Technical Corrections UCP Requirements (§ 26.81)

We did not receive any comments on our proposal to remove outdated references in § 26.81 (a)—the original due date for recipients to sign a UCP agreement (March 4, 1999) and § 26.81 (g)—the requirement that UCP directories be made available in print. The rule is revised to reflect these changes.

19. Virtual On-Site Visits and Other On-Site Comments (§§ 26.83(c)(1) and (h)(1))

NPRM

The Department proposed making an option for virtual on-site visits a regular part of the certification process based on positive experiences with permitting on-site certification visits to be conducted virtually as an accommodation to conditions during the COVID–19 pandemic. This change would reduce administrative burdens and costs for certifiers and applicants. As stated in the NPRM, the Department believed that virtual on-site visits were equally as effective as in-person visits and were a more efficient means of achieving the purpose of the visits. The software used for virtual visits would also permit recording of the conversations between applicants and certifiers, which would permit certifiers to prepare more accurate on-site visit reports and create a fuller record for cases that resulted in a certification appeal. The NPRM still gave certifiers the discretion to conduct on-site visits in person.

Comments

Almost all commenters, particularly recipients, but DBE and non-DBE contractors as well, supported the Department's proposal, citing the reasons stated in the NPRM preamble. Commenters also supported certifiers' discretion to choose whether to conduct on-site visits in person or virtually. Only one commenter, a DBE association, said that in-person on-site visits should continue to be conducted for both initial applications and subsequent certification reviews. Another commenter asked why the NPRM used the term ''on-site'' at all, given that it proposed having interviews conducted remotely rather than actually on site.

Around 10 commenters suggested that the use of virtual on-sites be somewhat limited, for example, by using in-person on-site visits for initial certification applications, with virtual on-site visits being reserved for post-certification reviews. These same commenters suggested that on-site visits for heavy construction firms or other businesses requiring specialized expertise or equipment (*e.g.,* a medical laboratory) be conducted in person.

Other Comments About On-Site Visits

Comments also addressed other subjects related to on-site visits. Several commenters urged the Department to develop a uniform on-site questionnaire for all certifiers to use. One commenter asked whether establishing a practice of periodic on-site reviews (*e.g.,* at 3, 5, or 7-year intervals) was allowed. Another commenter suggested that follow-up on-site visits be required at three-year intervals.

DOT Response

Under the current rule, recipients must take several steps in determining whether a firm meets all eligibility criteria for DBE certification. An on-site visit to a firm's principal place of business and job sites are a crucial component of this review.

The Department's experience after authorizing virtual on-site interviews during the early years of the COVID–19 pandemic has been overwhelmingly positive. Virtual on-sites are more efficient for certifiers, avoiding sometimes lengthy time periods needed to travel to an applicant's office. That said, there may be situations where an in-person visit to an applicant's office or job site will be beneficial. Particularly in the case of construction firms or others that have field operations, a job site visit can be very useful, and in such cases (as distinct, for example from the case of a professional services firm, all of the work of which is done in an office) the final rule will direct certifiers to go to the job site, if feasible. The decision belongs to the certifier. Certifiers can also set their own schedules for virtual or in-person interviews to certified DBEs in the context of periodic reviews.

There will continue to be no standard form for on-site interviews, and we strongly urge certifiers to avoid using routine questionnaires or checklists because they are not probative and ask for information that duplicates what is found in a UCA. They also miss the point of an on-site interview, which is to comprehensively investigate how the SEDO acquired ownership, how the firm actually operates, and whether the SEDO has enough knowledge to independently make daily and long-term decisions. Interviews should be a conversation tailored specifically to the circumstances of each firm. The conversation must be with the SEDO, as well as with other principals and key employees.

For example, one of the common situations we see is a firm where there is a SEDO and co-owners or key employees who work together to accomplish the firm's goals. In the interview, it would be beneficial to ask specifically how decisions are made. When an issue comes up, does a participant other than the SEDO bring the matter to the SEDO's attention, as opposed to handling the matter autonomously? Is the SEDO able to ask knowledgeable questions about the matter? Does the SEDO then decide based on information or options presented by the other participant, and does the other participant then carry out the SEDO's decision? The certifier should seek real-world examples of how this decision-making process has worked in practice.

The final rule will require certifiers to make audio recordings of interviews. In cases where certifiers have done so, the Department has found them highly useful in deciding certification appeals. They tend to provide much more thorough and nuanced information than certifier staff summaries or paraphrases of what has been said during an interview. Making these recordings will provide fuller context for the information on which certification decisions are based and will help to

prevent misunderstandings or decisions based on paraphrases of what an interviewee says. Whether in a virtual or in-person interview, current technology readily permits recordings to be made with negligible additional burden.

20 and 23. Timely Processing of In-State Certification (§ 26.83(k)) Applications and Denials of Initial Certification Applications

NPRM

Currently, when a certifier receives all required information from an applicant, it has 90 days to complete review and issue a written decision. However, a certifier may, upon written notice to the applicant, extend this period for another 60 days. The NPRM proposed to reduce the extension period to 30 days, though a certifier could get approval for a further extension from an OA. One reason stated in the preamble was to give a firm the chance to cure a defect in its application. Failure by a certifier to meet the deadline would be treated as a constructive denial of the application, and the certifier could become subject for noncompliance under §§ 26.103 and 26.105.

Under the present rule, when a certifier denies an application, the certifier must establish a waiting period of no more than 12 months before the firm can reapply. The NPRM would remove a current requirement for OA approval before a certifier could establish a shorter waiting period. The date on which the waiting period would start to run would be the date of the denial letter.

Comments

Supporters of the proposed change to shorten the extension time frame from 60 to 30 days, among them both recipients and DBEs, outnumbered opponents by a 3–1 ratio. The proposal would encourage quicker and more timely decisions, supporters said. Opponents said that the shorter time frame would impose an undue burden on certifiers' staff, particularly given that staff are often small. Rushed decisions could be poor decisions, one said, suggesting that the 90-day deadline should be a target to be met, if practicable, rather than a mandate.

Some commenters suggested modifications of the proposal. One said that extensions should be for 45 days, rather than for 30 or 60. Two comments said that the process should accommodate delays in the transmission of information from the applicant to the certifier. Another idea was that, if applicant did not get complete materials to the certifier within 90 days, the certifier could return the application without deciding on the merits. Another suggestion was that, during the time that a firm was making curative changes in its application, the clock for the certifier's deadline should pause. Two commenters suggested adding specific consequences for tardy certification actions, such as being able to appeal constructive denials to the Department.

One commenter supported the ability of certifiers to have reapplication waiting periods shorter than 12 months without seeking permission from an OA.

DOT Response

Existing provisions are designed to ensure that recipients afford adequate procedural due process to DBE applicants, standardize certification practices, and develop an adequate record of certification actions. The 2014 final rule explained the Department's rationale for setting 90 days as a reasonable time for recipients to render a certification decision. We believe 90 days remains sufficient and that notifications to firms about a 60-day extension beyond that point are rare. The Department is keeping the proposal to shorten this extension period to 30 days, because this is in the best interests of firms that may be seeking contracting opportunities as a DBE and the recipient, who can assign sufficient staff to perform the certification function in an efficient manner. In our view, the ability of all certifiers to email questions and requests for information to firms and their ability to conduct virtual on-site visits will mitigate the concerns of the handful of commenters on this issue. We believe that 90 days is more than enough time.

The Department proposed adding verbatim language that recipients must include in all denial and decertification letters, essentially directing firms what to include in their appeal letter, how to appeal to DOCR, and their right to request information. This language was communicated to recipients by DOCR, and we have noticed its inclusion in most of the adverse decision letters processed since that time. This final rule references that language, which will be posted on the Departmental Office of Civil Rights website.

The Department is also finalizing the proposal to remove the current requirement for OA approval before a certifier could establish a shorter waiting period for the firm to reapply for certification to less than 12 months from the date of denial. This change to the new § 26.86(c) gives UCPs the leeway to improve wait time to certify firms without OA approval. The final change clarifies that the date on which the waiting period would start to run would be the date of the denial letter. This information, per § 26.86(a), must be included in all denial letters.

We want to call to participants attention the provisions of § 26.83(h)(2), which prohibit certifiers from requiring a DBE to reapply for certification, ''renew'' a certification, or a similar requirement. We are aware that recipients sometimes use commercial software that calls on recipients to submit information associated with an initial certification in order to complete the annual DOE process. This is contrary to the regulations, which limit the material that must be submitted with a DOE to documentation of a firm's size and gross receipts. For a recipient to, in effect, require more because a software program calls for it amounts to noncompliance with the regulation. We expect a recipient, in such a situation, to work with the vendor to conform the software to the requirements of the rule.

21. Curative Measures (§ 26.83(m))

NPRM

The NPRM proposed a new § 26.83(m) that would permit, though not require, certifiers to notify an applicant of ineligibility concerns and allow the applicant an opportunity to rectify the deficiencies in a timely manner. The NPRM cited two examples of matters that might be subject to curative measures: proof of a financial contribution meeting § 26.69 requirements and revising an operating agreement or bylaw provision to meet control requirements of § 26.71.

Proposed § 26.69(f) would create a parallel curative measures provision concerning ownership. There was not a parallel provision in § 26.71 concerning curative measures for control, though the second example in the discussion of proposed § 26.83(m) applies that provision to a control issue.

Comments

The comments below apply to the proposed curative measures sections in proposed §§ 26.83(m) and 26.69(f).

Of the over 20 comments on this subject, about two thirds, from both recipients and DBEs, supported the concept. Many of the supporters, however, asked for additional guidance or examples concerning what kinds of defects would be subject to curative measures. How much help should certifiers provide to applicants, and what should that help concern (*e.g.,* minor administrative matters, governance issues like organization of boards of directors, larger matters affecting the structure of a company)?

Opponents, most of which were recipients, expressed the concern that the proposal would allow firms to circumvent the rules and enable fraud. Certifiers should not be cast in a ''coaching'' role in which they tell applicants how to structure their firms. Applicants should be responsible for getting things right as they present companies for certification.

DOT Response

The Department contemplated curative measures as far back as 1992. We do not agree with commenters who felt that allowing a firm to take curative measures increases the possibility of fraud. Our view is that to be considered non-fraudulent, curative measures must be a legitimate effort to correct impediments to certification made in good faith. A firm bears the burden of showing that it undertook curative measures in good faith and not in an attempt to circumvent the requirements and intention of the DBE program.

The DBE program exists to facilitate participation of small, disadvantaged businesses in DOT-sponsored contracting projects and airport concession opportunities. The program is not intended for certifiers to create hurdles for firms that would be eligible but for minor deficiencies that the firm could easily rectify. As described in the Department's August 7, 2019, memorandum and in the NPRM preamble, startup firms created by inexperienced SEDOs have been particularly vulnerable to this, causing them to endure a 12-month waiting period for reapplying. Such situations can be avoided if a certifier notifies the firm of potential denial grounds and offers the firm an opportunity to address them before the certifier renders a final decision. The August 7, 2019, memorandum explicitly encourages certifiers to do so and provide a reasonable time for the issues to be resolved before the certifier renders a decision. This would result in lifting the burden on a certifier to begin the eligibility evaluation anew should the firm reapply.

The Department codifies in § 26.83(m) of today's final rule the language of the August 7, 2019, memorandum. We agree with commenters that this provision is not intended to make certifiers ''coaches'' for all aspects of the certification process or require certifiers to pause the evaluation process to allow firms to make time-consuming changes, such as major organizational restructurings. We agree with commenters who pointed out that firms bear the burden of proving that they fully meet the regulation's certification requirements, while emphasizing that we view the task of certifiers as reasonably balancing the interest in ensuring that only eligible firms participate with the interest of the program in providing opportunities for small, disadvantaged businesses, including those that may not be sophisticated in the details of the certification process.

Section § 26.83(m) amounts to ''if you see something, say something.'' While it is not a mandate, the Department believes strongly that certifiers should call situations potentially solvable through curative measures to applicants' attention, in order to better serve the program's objectives of improving opportunities for DBEs.

Doing so does not impose an unnecessary time crunch on certifiers with respect to the final rule's deadlines for action on applications. If a certifier notices a problem, notifies the applicant about it in writing, and the applicant takes, for example, 14 days to fix it, that period would be added to the certifier's timeline for completing the decision. The certifier could also set a realistic deadline for the applicant to fix a problem the certifier mentioned; if the applicant did not respond in a timely fashion, the certifier could then decide on the basis of the original documentation. In all cases, it will be important for the certifier to memorialize corrective measures, notifications, dates, and responses in its records.

The NPRM preamble mentioned two types of problems that the Department has seen frequently in certification appeals. One involves proof of a financial contribution. For example, sometimes a SEDO who is married to a non-disadvantaged individual will make an initial capital contribution from a joint bank account, not realizing that, absent a renunciation of interest in the funds by the spouse, only 50 percent of the contribution will be counted toward ownership, insufficient to support an assertion of 51 percent or greater ownership.

Similarly, a bylaw provision–often one seemingly copied from an online template–will say that a majority of the members of the board of directors is needed to form a quorum or act on behalf of the board. In a two-person company, this inadvertently can result in the possibility of a deadlock on the board, even though the SEDO clearly owns 51 percent or more of the stock and thus is able to control stockholder votes. Mere paper changes, without substantive changes, would not ''cure'' a defect.

These are not the only problems to which this provision could apply, but they exemplify the scope of the sorts of issues the Department has in mind in adopting this provision.

22. Interstate Certification (§ 26.85)

NPRM

The NPRM proposed major changes to the interstate certification provisions of § 26.85, which became effective on January 1, 2012. For the first time in the program's history, there would be nationwide reciprocity among UCPs. The NPRM would also reform the way that UCPs share information about firms certified in more than one State.

The NPRM proposed to eliminate the ''home State first'' requirement of the present rule, and instead allow a firm to apply for its initial certification to any UCP. Then, any other State would be required to accept the original UCP's certification. All the firm would have to submit to an additional State would be a short cover letter, an image of its Original State of Certification (OSC) directory entry, and a Declaration of Eligibility (DOE). Unlike under the present rule, the firm would not have to send an additional State its entire certification package.

Following the interstate certification by an additional State, that State and others that have certified the firm, could ask State A or other UCPs for information on the firm, which would need to be provided within 10 business days, as part of all program participants' obligation to cooperate. The Department said that this should not be unduly burdensome, given electronic file sharing technology.

A firm would have to submit an annual DOE to each State in which it is certified. The NPRM asked whether it would be helpful to create a centralized database to reduce the burden on firms certified in multiple States. The NPRM also would allow States to participate in oversight and enforcement activities with other States about a firm, including joint removal procedures that would be voluntary among the UCPs involved.

A proposed provision would state that if a firm certified in more than one State were decertified (for any reason except failure to cooperate with one State), the firm then appealed the decision to DOT, and DOT affirmed the decertification, the firm would then automatically be decertified in all States, without further right of appeal. That is, if one State decertifies a firm and DOCR upholds the action, then the firm would be automatically decertified in all States in which the firm was certified without the need for further process in those States.

Comments

Interstate certification proposals have long inspired input from a significant number of commenters, and the response to this NPRM was no exception. About twice as many commenters expressed general support for the NPRM's nationwide reciprocity proposal as expressed opposition, but there were also a wide variety of nuances and suggestions among commenters on the topic.

The largest number of supporters were DBEs or their associations, who cited the reduced burden on firms who have often had to submit extensive documentation to become certified in more than one State. One DBE, for example, mentioned having to submit about 3,000 pages of paperwork to become certified in another State, but was unsuccessful because it did not have its original application. Another spoke of inconsistencies in acceptance of NAICS codes from one State to another, long delays by certifiers outside of its home State, and differing paperwork requirements and regulatory interpretations among States. One DBE owner related their difficulty with tracking different deadlines for renewal each year, citing a burden in preparing and submitting materials for each State in which it was certified in. The same owner expressed that it takes some UCPs a long time to process renewals or notice of change, which results in their view of an expiration date passing without renewing paperwork. On these points, we reiterate that there is no DBE renewal process, nor does certification expire.

A significant number of recipients also supported the proposal, one citing reduced staff time demands that would allow its staff to focus on other program tasks (*e.g.,* compliance). It said that it now takes them 38 staff days to process an out-of-state certification and believed the proposal would reduce this to 10 staff days. Other recipients also cited reduced processing time or greater flexibility as potential benefits. One recipient noted that it had already been doing a good deal of reciprocity and found that it reduced their burdens.

Some of the supporters of the reciprocity proposal and other commenters, among them both DBEs and recipients, suggested going to what might be called national certification. This would involve a single national directory, with a Federal certification database. A DBE firm, for example, mentioned that it has to send annual updates to 15 different States. Sending one update to a centralized database would be far less burdensome, it said.

This group of commenters supported the concept that once a firm was certified in its original State of certification usually its home State, the firm's status would be reflected in the database, and it would automatically be certified in all States, without having to submit additional documentation elsewhere. Annual update issues or decertification actions could be handled through the centralized database or by the firm's home State. If universal certification of this kind were put into place, there would be a greatly reduced need for individual State systems and the resources needed to run them.

Generally, commenters with a variety of views on the overall question of interstate certification supported the idea of a centralized database and/or national portal, though three recipients warned that questions about control of such a database and a variety of implementation problems that could beset it might create serious risks to the program.

Recipients made up a large majority of commenters opposing reciprocity. One reason was the long-standing concern that given what they saw as the varying quality of other recipients' certification programs, unqualified firms could become certified in its OSC and then become certified in other States without further review. The proposal puts too much trust in other certifiers, one recipient said, preventing recipients from exercising due diligence for their own programs. One large recipient complained, for example, that another large recipient never looked at the personal net worth of firms following initial certification and was concerned about having to deal with other certifiers' out-of-date records.

Some certifiers wanted to vet each firm that sought certification in their jurisdictions, and doing the job right would require seeing the firm's documentation before granting eligibility. Absent that ability, questionable firms could get contracts in other States before they had adequate time to review their bona fides, and after-the-fact decertification was too little and too late as a remedy for such problems. Accordingly, some certifiers claimed that reciprocity would consequently undermine program integrity. To mitigate this problem, one recipient suggested that reciprocity be limited to five UCPs in its region.

Moreover, the proposed system would encourage DBEs to join the directories of multiple States (a ''land rush,'' one commenter called it), multiplying the workloads of certifier staffs to oversee the continued eligibility of firms (*e.g.,* with respect to annual DOEs), some of whom might never work in their jurisdictions. A DBE was concerned that if there were different DOE due dates for different States in which a firm was certified, it would be all too easy for small businesses to miss submission deadlines, resulting in decertification. DOEs should go only to the home State, not other States, some commenters said. A non-DBE contractors' association said that, in general, a home State should bear the burden of oversight to prevent increased burdens for other States. For example, it said, its State already has over 400 out-of-state firms in its directory, and reciprocity could require it to oversee many more.

One concern expressed by several commenters pertained to State licenses. For example, if the OSC does not require the person running an engineering company to personally have a professional license, but another State does, how is that other State to enforce its licensing requirement in the proposed reciprocity regime? Commenters also expressed concern about data security issues, as entries in online directories multiplied without regard to the cybersecurity protections that would guard sensitive business data and personal protected information.

A recipient association said that interstate certification should not be implemented until a robust oversight system could be established everywhere. Commenters doubting the wisdom of the proposal also said that 10 days was too short a time to exchange information among UCPs, especially because all certification records are not yet electronic. Sixty days would be more realistic, one recipient said. A DBE expressed concern that large out-of-state prime contractors would travel with their favorite DBE firms, crowding out local DBEs in other States.

A recipient and a non-DBE contractors association raised the issue of how an influx of out-of-state contractors would affect goal setting and disparity studies. Would out-of-state entries in a UCP's directory be used as a measure of the availability of ready, willing and able contractors? If so, it could distort the goal-setting process, these commenters feared.

Commenters who either favored or opposed the reciprocity proposal in general, and other commenters as well, suggested a variety of ideas that they believed would improve the certification system. One DBE suggested that States should recognize other States' business and professional licenses as well as certifications. A UCP asked DOT to create a uniform interstate application form. A non-DBE association wanted to make sure that the

rule did not allow other States to second-guess State A without a ''well-founded'' reason.

Three recipients favored creating a ''challenge procedure'' to allow an additional State to prevent an out-of-state firm from immediately becoming certified immediately, if the additional State had a good reason to believe that OSC certification was based on faulty or missing data. A non-DBE firm suggested that if an OSC's certification is more than 10 years old, another State in which the firm is certified should be able to do a review of its eligibility.

A group of recipients suggested that an additional State could choose to require an out-of-state firm to provide a statement that it intended to work in that State before the firm would be certified there. They and other commenters also supported retaining the ''home State first'' provision of the existing rule, rather than the NPRM's idea that any State could become a firm's OSC. Another recipient suggested that an interstate application firm should include details about its licenses to work in that State. Two recipients suggested that, to minimize recipients' burdens, requests from one UCP to another about a firm be limited to the original application, its supporting documentation, and the most recent four years of DOEs. A similar suggestion was that it should be enough for the OSC to submit its most recent on-site report to another State.

The proposal to give nationwide effect to DOCR certification appeals decisions upholding a decertification action in one State was discussed in several comments. Two comments supported it, and three opposed it. Opponents said the proposal would deter firms from appealing and raise due process and federalism concerns for both firms and certifiers. Another commenter said that other States should be able to conduct their own decertification process. A third said that a firm should be decertified only in those States that had joined the decertification proceeding. One commenter wanted the Department to look at the other side of the coin, by imposing retraining requirements or other consequences on UCPs that had had a decertification decision overturned on appeal.

Two comments raised questions about this proposal. One asked how and when firms decertified in this manner could reapply in the States in which they were automatically decertified. A second asked what would happen if a firm decertified in one State declined to appeal.

DOT Response

In the original version of the DBE program in the 1980s, each recipient certified applicant firms independently. If there were a State highway agency, three airports, and four transit agencies in a State, then a firm wanting to work throughout the State might need to get certified by eight different agencies, each with its own certification process. This proved inefficient and burdensome. First proposed in 1992 and added to the rule in the major 1999 revision, the creation of unified certification programs (UCPs) ensured that a firm would have to be certified only once to work in any recipient's DBE program in the State.

The DBE program is a national program, and the same kinds of inefficiencies and burdens that adversely affected DBEs within States in the pre-UCP era continued to affect firms that wanted to work in more than one State. A firm certified in one State would have to go through a new certification process in another, complete with the submission of extensive documentation and having to wait for the completion of the second State's administrative process. Because certifiers' views of a given firm's *bona fides* could differ among States, a firm could be approved for participation in one State while denied in another, all based on the same facts.

The idea of nationwide reciprocity among UCPs was raised, but rejected, in the 1999 rulemaking, though the Department at that time encouraged cooperative arrangements among States to reduce certification burdens. Unfortunately, few certifiers chose to enter into such agreements. Consequently, in a 2010 NPRM, the Department proposed an interstate certification system that sought to occupy a middle ground between full-fledged nationwide reciprocity and an approach that allowed UCPs to challenge and reject DBEs certified in other States. This became the basis, in 2011, for what became § 26.85 of the current regulation.

Under this current provision, a firm certified in its home State (''State A'') would submit its certification credentials to ''State B,'' which could either accept the firm or require the firm to submit a much more extensive document package. Within 60 days, State B would either accept the firm's certification or determine that there was ''good cause'' of a kind specified in the regulation for rejecting the firm. In the latter case, the firm would then bear the burden of proof of showing State B that it was nonetheless eligible.

As documented in the preamble of the 2022 NPRM, § 26.85 has not worked well (see 87 FR 43647). Few UCPs have accepted out-of-state firms without requiring lengthy and burdensome additional certification processes. Some UCPs have effectively ignored interstate certification procedures, treating all or nearly all out-of-state applicants as if they were applying for certification for the first time. The ''good cause'' reasons for questioning an out-of-state firm's eligibility have been widely misunderstood or misapplied (*e.g.,* ''factually erroneous or inconsistent with the requirement of this part'' being used to mean a simple disagreement about a judgment call). The result is that a large majority of interstate certification cases appealed to the Department have been reversed.

As long ago as the 2010 NPRM, the Department stated that true nationwide reciprocity is a worthwhile objective, and in the 2022 NPRM we proposed to make it a reality, so that a firm in a nationwide program under a single national set of eligibility criteria could expect to be eligible throughout the country. As noted above, the comments on the proposal followed the lines of the long-term debate on the subject. Generally speaking, most DBEs favored this approach, for its value in reducing burdens, while many certifiers opposed it, out of concern about having to accept firms whose qualifications they questioned. Having found, over many years, that approaches short of nationwide reciprocity have been unsatisfactory, the Department is convinced that it is time to treat certification on a meaningfully national basis. For this reason, we are, with some modifications in detail, adopting the NPRM proposal, intending to reduce burdens on all participants while building trust, encouraging teamwork, and improving the quality of certifications. As with the adoption of UCPs in 1999 within States, we believe that the adoption of nationwide reciprocity among States, while necessitating some adjustments in current practice, will result in a system that works better for everyone concerned.

Under the final rule, a firm would initially be certified in the State in which it maintains its principal place of business. We no longer use the ''home State'' or ''State A'' terminology, instead speaking in terms of a firm's ''jurisdiction of original certification'' (JOC). The JOC would normally be the State in which the firm maintains its principal place of business, though there could be unusual cases that could lead to the JOC being a different State

(*e.g.,* a situation in which a firm's principal place of business has moved to another State after it has been certified). However, the additional State may not deny a DBE's application based on questions regarding the location of the firm's JOC.

Once a firm is certified in its JOC, all it needs to submit to become certified in any other State is a short cover letter and a signed Declaration of Eligibility (DOE). The cover letter must state that the firm is applying for certification in the additional State and all other States in which the firm is certified. The cover letter may also list any licenses (*e.g.,* business or professional licenses) that the firm has in the additional State. The additional State could request the JOC's documentation concerning the firm, which the JOC would be required to provide within 30 days (modified from the NPRM's 10 business days to reduce burdens on the JOC). Ten days, in the view of a commenter that still retains paper copies of certification materials, is too short a period to scan and send these materials manually. We agree and modified the rule accordingly.

We acknowledge that implementing the revised interstate rule will require additional monitoring of businesses, and we would like to remind recipients that the current rule allows UCPs to charge reasonable application fees. These fees can help alleviate some of the burden associated with managing the increased number of businesses under reciprocity. Application fees may also deter firms that seek certification in multiple jurisdictions without any intentions of conducting significant work within each jurisdiction. As noted in the discussion of control provisions above, an out-of-state firm and owner that lack a necessary business or professional license in an additional State, while it would be certified and listed in the directory, would not be able to conduct business there until it obtained the required license(s).

When a firm is certified in its JOC, it becomes responsible for submitting a DOE to that State each year on the anniversary date of its certification. When the firm then becomes certified in other States, it also becomes responsible for submitting annual DOEs to them. We believe the most convenient way of handling this requirement is to use the JOC anniversary date as the date for submission of DOEs to all States in which the firm is certified. This will likely result in firms initially submitting a second DOE to an additional State before a year has elapsed, but after that will avoid the potential confusion of multiple submission dates. This alleviates the burden on firms certified in multiple jurisdictions.

For example, suppose a firm is certified in its JOC on September 1, one additional State on October 7, and a second additional State on the following January 8. The firm would submit its first DOEs to all three States on the next September 1, and then on every September 1 thereafter. Doing so will inform all the States involved that the firm has a continuing interest in working there. Having a single DOE date, reduces the burden on firms, some of which noted in their comments that it can be burdensome to submit paperwork to each State on different timelines. With this change, the Department also believes the annual submission requirement is not onerous. Some commenters asked that there be a national, centralized database for DBE certifications. While we understand the attractiveness of the concept, we do not believe that it is feasible at this time. In addition to budgetary limitations, concerns about ensuring that data are updated and secure would need to be addressed. Until it is possible to deal successfully with the issues involved, the program must continue to rely on UCP directories, which are responsible for treating out-of-state firms in the same way as in-state firms for directory and other program administration purposes.

Some commenters expressed a concern that having larger numbers of out-of-state firms in their directories could skew goal setting. Recipients commonly use bidders lists as a primary source of data for setting overall goals; thus, only those out-of-state firms that bid or quote on projects should be included in the methodology's base figure. Recipients using other primary data sources should review their UCP database, including the NAICS codes associated with each firm, and consider whether out-of-state firms will likely submit bids or quotes prior to including them in their base figure.

A few commenters asked to have a ''challenge procedure'' available, through which they could delay certifying an out-of-state firm for a given period (*e.g.,* 30 days), giving them an opportunity to raise issues concerning the firm's eligibility with the OSC. We believe implementing such a procedure would not facilitate the certification process but would rather introduce an additional bureaucratic step. Our goal is to streamline the interstate certification process. We view the ''challenge procedure'' as a slight modification of the old interstate rule, which was a complex and burdensome certification framework. Instead, we aim to adopt a more streamlined and transparent process that eliminates unnecessary barriers to certification. Given the procedure described below, for collective action to decertify a firm that appeared not to be eligible, we do not believe such a preemptive procedure is needed.

One of the issues considered in the NPRM was how, in the context of a firm that is certified in multiple States, a decertification process would work. Proposed § 26.85(g)(4) said that any UCP could join a decertification proceeding initiated by another State, on the same grounds and facts alleged by the initiating State. The joining UCP could present evidence at the hearing. The result of the ensuing decision would apply to all States that are parties to the action. Under paragraph (g)(6) of the proposed section, if a decertification by any UCP in which the firm had been certified is upheld on appeal by the Department (except with respect to actions concerning a failure to cooperate or send a timely DOE to the decertifying State), then the firm would lose its eligibility in all States in which it was certified.

As noted above, some commenters said that UCPs should be able to conduct their own certification proceedings, that the effect of a decertification should apply only to States that have joined a decertification proceeding in another State, and that the nationwide effect of a DOT decision upholding a decertification by one State was unfair to the firm as well as the other certifiers involved.

In considering these comments, the Department believes that a modification of the proposal would serve not only the interest of fairness to certifiers and firms but also further the Department's policy goal of encouraging cooperation and interaction among certifiers. Therefore, the final rule will establish procedures that would apply to a scenario in which a firm is certified in more than one State and one of the States believes it has a ground under proposed § 26.87(e) to decertify.

The procedures are best illustrated by an example. DBE X is certified in its JOC and in five additional States via reciprocity. One of the additional States believes that it has reason to decertify the firm. It notifies not only the firm, but also the other States in which the firm is certified, that it is considering beginning a decertification proceeding, as well as the grounds for doing so and the evidence supporting such an action. The other States have 30 days to respond. They may comment on proposed basis for its proposed actions, concur or non-concur. A certifier would

be deemed to concur in the proposed action if it did not respond. If it had grounds under § 26.88, the certifier proposing decertification may impose a summary suspension without affecting the status of the firm in other States, though we encourage the certifier to notify the other States of its action so that they could take similar action if warranted.

If after considering the input from other States, the State proposing decertification decided to pursue the matter, it would then issue its formal NOI and proceed to a decision. Any of the other States could decide to file a brief or other arguments and evidence. In its final decision, the State that proposed decertification may address arguments and evidence from other States involved, as well as those made by the respondent firm. This is in effect a ''speak now or forever hold your peace'' provision. We note that the resolution of the matter is an independent decision of the UCP proposing the decertification, not dependent on the ''votes'' or views of other certifiers.

Because a decision by a UCP to decertify the firm would only be issued after soliciting views from the other States involved, the decision would represent the collective view of the UCPs involved and would take effect in all the States involved. If the firm appealed, any certifier that did not agree could submit its views to the Department. The Department's decision to affirm or reverse the decision would apply to all the States in question, since all would have had the opportunity to participate and make their views known.

23. Denials of In-State Certification Applications (§ 26.86)

See discussion above, item 20.

24. Decertification Procedures (§ 26.87)

NPRM

The NPRM emphasized that certifiers must strictly follow the regulation's procedural requirements concerning decertification proceedings, putting the certifier's burden of proof up front in the revised § 26.87 and clarifying what must be included in certifiers notices of intent (NOI) to remove the firm's certification.

If a DBE fails to submit the required annual Declaration of Eligibility (DOE) required under § 26.83(j) in a timely manner, the NPRM proposed that a certifier could initiate decertification proceedings on that basis without offering the opportunity for a hearing. If within 15 days of the issuance of a certifier's NOI to remove the firm's certification, the certifier could issue a final notice of decertification.

The NPRM would say that, if a ground for decertification is a change in DOT's certification standards or requirements, the certifier would have to offer the firm, in writing, the opportunity to cure resulting eligibility defects within 30 days.

The Department proposed authorizing, on a permanent basis, virtual hearings (*i.e.,* via video conferencing) in decertification cases. Virtual hearings are more efficient, can be more easily scheduled and better protect the health of participants. Other requirements, like those for verbatim transcripts, would remain intact. To avoid dilatory tactics, the NPRM would impose a 45-day deadline for submission of written responses to an NOI or a hearing. Once the hearing had happened, or written responses received, the certifier would have 30 days to issue a final decision.

When there is a hearing, the NPRM would require that only the SEDO be permitted to answer questions concerning the firm's control. While an attorney or other representative could be present and participate, and answer questions concerning other aspects of a firm's eligibility, only the SEDO could testify about control matters. An attorney or other representative could ask follow-up questions to the SEDO concerning control, however.

Comments

Decertifications for Lack of a Timely DOE

Almost all comments on the issue of decertifications for lack of timely submission of a DOE supported the idea that there need not be a hearing in such cases. However, several of these commenters thought that the 15-day window for response to a NOI concerning a late DOE was too short. A 21-, 30-, 45-, or 60-day time period for response before a final decertification was issued would be fairer, some commenters said, pointing to the difficulty that especially small firms may have keeping up with paperwork or potential increases in certifier workload. One comment cautioned that, because of the uncertainties of email, the time period prior to a decertification action start to run only on confirmation that the DBE received the certifier's NOI.

To avoid confusion and potential decertification actions, firms should have to submit only one DOE per year, the commenter said. Another commenter said that it did not want lack of a timely DOE to be the sole ground for removal of eligibility.

Deadlines

There were few comments about the proposed deadline in the NPRM for issuance of a final decertification decision, all of which were from recipients. One would prefer no deadline at all, but if there is one, believed 60 days for the issuance of a final decision would be appropriate. Another supported 60 days, saying that 30 days was too short a time to handle complex cases, especially for high volume certifiers. A third found the proposed 30-day deadline acceptable but wanted to allow a 15-day extension on a case-by-case basis.

With respect to the proposed deadline for conducting a hearing, a recipient suggested that the hearing should be scheduled 45 days from the firm's request for a hearing, rather than from the issuance of the NOI by the recipient.

Hearing Procedures

Concerning representation at hearings, a large majority of the comments addressing the issue supported the NPRM's proposal that only the SEDO should testify about control issues. Attorneys and other representatives should be able to speak about other matters (*e.g.,* PNW), several added. The commenters who disagreed thought that the requirement would impinge on the due process owed to DBEs in a proceeding that could remove certification, a property right, from a firm. A recipient thought that panel members at a hearing should be able to use their discretion with respect to who is allowed to testify on issues being discussed. One comment said that only owners should be able to testify about ownership and other issues, as well as control.

All the comments that addressed the proposal for allowing virtual decertification hearings supported it. One said that, however, a firm should be able to have an in-person hearing if it wanted one.

Among other comments, one thought that an ''informal hearing'' should be better defined, and that there should be additional safeguards against abusive or dilatory tactics by attorneys. This comment also said that it was important that hearing officers and decision makers in decertification actions really understood the rules well, suggesting that additional training from DOT for such persons would be useful. Another commenter thought that hearings should not be heard by staff from recipients in the same State as the certifier proposing certification, as this could lead to

rubber-stamping of the proposed removal. A comment said that firms needed stronger protections in decertification actions, as they can be subject to burdensome information requirements and harassment, especially in cases involving rebuttal of the SEDO's presumption of economic disadvantage.

Other Comments

Once a firm has been decertified, a few recipients said, the certifier should notify all other States in which the firm is certified. DOT should notify States if a decertification is upheld on appeal, another said.

DOT Response

Filing a timely DOE is an affirmative obligation of certified firms. Given that all DOEs to all States would now be due on the same date—the anniversary date of certification in the JOC—firms should not be confused about the time they are supposed to send DOEs to all the States in which they are certified. We believe that summary suspension is the most efficient provision for enforcing failures in filing § 26.83(j) material. Nevertheless, the final rule allows the certifier the discretion to choose either § 26.87 or § 26.88 as the most appropriate course of action.

With respect to the date for a hearing on other decertification actions, we believe that it is prudent to require certifiers to set a hearing date that is no less than 30, but no more than 45, days from the date of the NOI. This prevents both undue delays in the process and schedules that do not allow a firm to prepare adequately. The firm must let the certifier know within 10 days whether it wants a hearing, and the parties can negotiate an agreed-upon date for the hearing. If the firm does not want a hearing or does not notify the certifier in a timely manner that it wants one, the firm can still submit written information and arguments.

In cases in which the firm elects not to go to a hearing, and rather only submits written materials, we believe that the firm should have the same amount of time to prepare as in the case where it chose to appear at a hearing. Therefore, the material would be due by what would have been the hearing date. If a firm does not show up for a hearing, or does not submit written materials, the certifier makes its decision on the basis of the information it already has.

In the interest of simplifying the procedure, we are not specifying by rule who can speak to issues at the hearing. We emphasize that, during a hearing, a SEDO or other witnesses should have a reasonable opportunity to consult with counsel, other witnesses, or experts. It is appropriate neither for a certifier to deny the firm such an opportunity, nor for the firm to unduly delay or interfere with the conduct of the proceeding. Dilatory tactics are prohibited and may be sanctioned by a certifier. It is up to the hearing officer to make sure that information presented is relevant and is provided by the most knowledgeable sources. For example, if an attorney or other witness attempts to speak to a matter affecting control, it could be appropriate for the hearing officer to say, in effect, ''I want to hear directly from the SEDO on this matter.''

It is incumbent on certifiers to conduct thorough on-site interviews—including a review of a certified firm prior to considering decertification—so that information about the roles of other key participants and the firm's decision-making process can already be part of the record before the hearing.

We agree with commenters that the decisionmaker in a decertification hearing must, in addition to complying with separation of functions requirements, have extensive familiarity with the program regulation. We urge certifiers to make sure that any officials who may be tasked with this responsibility have received thorough training concerning the regulation, such as the Department has made available. We also note that, as under the previous versions of the regulation, the deciding official must also be an individual who was not involved in the earlier stages of the proceeding or who is not supervised by anyone who was. This could be someone in another part of the certifier's agency or someone who works for another agency.

In administrative law, a ''formal'' hearing is one that involves a trial-type hearing with administrative law judge and detailed rules of evidence. At the Federal Government level, sections 554–557 of the Administrative Procedure Act (5 U.S.C. 554–557) provide a model for what such a proceeding looks like. One example of such a proceeding within the Department of Transportation is the process for aviation enforcement proceedings under 14 CFR part 300. Anything other than that is an ''informal hearing.'' The structure of informal hearing in the DBE program can vary among certifiers, but in all cases must provide reasonable administrative due process to the respondent and other participants.

Commenters agreed with the proposal to authorize virtual hearings in decertifications proceedings. While in-person hearings are also permitted, we note that in an interstate decertification case in which staff from other States are participating, a virtual component would be essential. The requirement to provide a transcript of any hearing, virtual or in-person, to the Department in the event the firm appeals remain in place.

The NPRM proposed that once a hearing had been held, or written arguments received, a certifier would have 30 days to issue a final decision. Some commenters thought that time period was too short, given certifiers' workloads. A firm remains certified until the NOD is issued, so the effect of a certifier's delay beyond that period has the effect of keeping in effect a certification that the certifier believes should be removed. A certifier that often fails to meet this deadline may be the subject of DOT compliance and enforcement action.

In the interest of simplifying the rule and avoiding disputes over the basis for a decertification, the proposed § 26.87(g), specifying the grounds on which a decertification can take place, is not included in the final rule. In our experience, these provisions have often led to confusion (*e.g.,* concerning whether a certifier's previous decision was ''clearly erroneous'' or simply change of mind). The key question in any decertification action is whether a firm meets eligibility criteria at the time of the action. If a certifier certifies a firm in September, and the following April comes to believe, on the same facts, that the firm is not eligible, it is likely to have a difficult time meeting its burden of proof in a decertification proceeding.

25. Counting DBE Participation After Decertification (§ 26.87(j))

NPRM

In addition to clarifying the effect of the removal of a firm's certification prior to a DBE obtaining a prime contract or subcontract, the NPRM proposed changes to § 26.87(j) concerning how DBE participation is counted with respect to firms that lose their certification partway through a contract. The Department proposed that a prime contractor would only be permitted to add work or extend a completed contract with a previously certified firm with the prior written consent of the recipient.

This proposal was responsive to the concern that, especially in a long-term project of the sort that is often done via a design-build contract, prime contractors had an incentive to give work to decertified firms that were already working for them, rather than find new eligible DBEs to do the work going forward. At the same time, the proposal would give recipients

flexibility to permit a brief amendment to or continuation of a contract with a decertified former DBE.

Under the current rule, when a DBE is decertified in the midst of a contract, after the subcontract is executed, the prime contractor gets to count credit for its use through the end of the contract. The NPRM proposed to make an exception to that rule, saying that if the reason for the DBE's ineligibility is that it was acquired by, or merged with, a non-DBE firm, the prime contractor could no longer count the former DBE's participation for the remainder of its contract. This means that, under these circumstances, continuing to count the former DBE's work for credit would deprive other DBEs of opportunities.

Comments

A narrow majority of commenters opposed the NPRM's proposals concerning § 26.87(j). Opponents, including non-DBE contractors and recipients, but some DBEs as well, said the proposal concerning merged or purchased DBE firms would impose burdens on prime contractors who, after engaging a DBE in good faith, found that the DBE had later merged with or been purchased by a non-DBE. This would unfairly penalize the prime since the DBE's relationship with the acquiring firm was not the prime's responsibility. One of these comments suggested that the proposed exception should apply only if the non-DBE that bought or merged with the DBE was the prime contractor itself. One opponent of the proposal said that it could place DBEs in an unequal position compared to non-DBEs, who can use mergers and acquisitions for business growth purposes.

Some comments opposed to the proposals said that requiring recipients' consent to count credit for added or extended work for a decertified DBE would be an extra burden on both recipients and prime contractors. A comment said that added tasks for the DBE within its scope of work, including via change orders, should be counted. Denying DBE credit for added or extended use of decertified DBEs could disrupt projects, another comment said. Recipients should make case-by-case judgments on such matters, it added.

Proponents of the proposals, also from a variety of stakeholder types, supported them for the reasons stated in the NPRM preamble. Some of these comments specifically mentioned favoring prior recipient consent for any extension of or addition to the former DBE's work, wanting prime contractors to seek new DBE participation in the absence of such consent.

One comment that supported the proposal asked for clarification about its application in situations where a DBE had exceeded the size standard or had withdrawn from the program. Another did not want firms who had exceeded the size standard during the contract to lose credit. In the context of the ACDBE program, a DBE commenter that supported the proposal nevertheless thought it should be waived if a decertified ACDBE showed that it had made good faith efforts to sell to another ACDBE.

DOT Response

We continue to believe that in most instances, if a DBE loses its eligibility during contract performance but after execution of the subcontract and continues to perform a commercially useful function, its participation should continue to count toward contract goal credit; prime contractors should not bear the burden of finding a DBE replacement if the firm was certified at the time the subcontract was executed. However, many have raised concerns about a prime contractor's ability to continue to count toward goal credit the performance of a DBE that was certified at the time the subcontract was executed but loses its eligibility during contract performance *because it merges with, or is acquired by, a non-DBE* (at times by the prime itself). This may occur early in the performance of a multi-year contract and result in a non-DBE receiving goal credit at the expense of other ready, willing, and able, certified DBEs.

We agree that the standard rule should have an exception if a DBE loses its certification eligibility after execution of the subcontract because it merges with or is acquired by a non-DBE. In that instance only, we believe that the benefit to the DBE program of directing the prime contractor to seek DBE participation to make up the now-ineligible firm's contribution to the goal outweighs the costs to the prime contractor of doing so. Similarly, seeking the recipient's consent for a prime contractor's practice of adding work or change orders, typically in the context of a design-build project, to extend the performance of a DBE that has lost certification during project performance, is a good check on actions that could go counter to the interests of the program. Recipients should reach out to a prime contractor when it becomes apparent that the prime is repeatedly extending the work of a firm after the firm becomes ineligible to determine if the extensions are made for the purpose of avoiding soliciting other DBEs. If so, the program benefits when the recipient withholds consent to add further work to an ineligible DBE to allow room for certified DBEs to participate.

26. Summary Suspension (§ 26.88)

NPRM

The existing summary suspension rule permits or requires certifiers to immediately suspend a DBE's certification in extraordinary situations that could jeopardize program integrity or when time is otherwise of the essence. It is an extraordinary remedy that certifiers should not use lightly and to which a firm should have an adequate opportunity to respond.

The changes proposed to § 26.88 in the NPRM remedy problems in the current language that in effect converts what was intended as swift summary suspension action into a slower § 26.87 process. Notice of the suspension would be by email, rather than certified mail to ensure that the firm received immediate notice of the action and a time certain when the parties would know requisite timelines begin. Credible evidence of the firm's involvement in criminal or fraudulent activity would be added as mandatory grounds for suspension. The death or incarceration of the SEDO, on the other hand, would trigger a discretionary elective summary suspension only if there is ''clear and credible evidence'' that the DBE's continued certification poses a substantial threat to program integrity. This bar allows for more certifier discretion to determine if either event demanded immediate action. Failure to file a timely DOE, which is essential to a firm's continued eligibility, would also be elective grounds for a suspension. This change expands the ability to remove ineligible firms without invoking a § 26.87 proceeding.

Elective summary suspensions could be based on only a single ground, while mandatory suspensions could cite multiple grounds. The NRPM also provided procedural details for § 26.88 proceedings, designed to bring the proceedings to conclusion within 30 days. A new elective suspension occurring within 12 months of a previous elective suspension would be null and void, and subject to ''injunctive relief'' from the Department.

Baked into the proposed rule are balanced due process parameters framing both certifier and firm actions. This includes a certifier explaining with specificity the reasons for the actions, their consequences, and the evidence replied upon. The firm may elect to present information and arguments or explanations but is required to

affirmatively respond to the certifier's scheduled hearing—opting in or responding in the timeline specified. If the firm fails to cancel or appear at the hearing, it forfeits its certification. Boundaries on what evidence the certifier may present are delineated in the proposed rule as is the applicable burdens of production and proof by both parties. Lastly, the proposed changes make suspensions immediately appealable to DOT.

Comments

The nearly 20 comments addressing this section of the NPRM had a variety of things to say about it. Several supported the proposal as written. One comment asked whether the ''clear and credible evidence'' standard for an elective suspension is the same as ''clear and convincing evidence,'' while another thought that the ''clear and credible evidence'' standard placed an undue burden on certifiers.

One commenter thought that the proposed scheduling requirements would be difficult for certifiers to meet. Two commenters asked for more detail on the timing and procedures for the process, such as who could attend and who the decision maker would be. Others believed that a certifier should be able to suspend a firm more than once in a 12-month period, if circumstances supported doing so (*e.g.,* there are two separate events in such a period that would justify a suspension).

One comment suggested adding bankruptcy, especially under Chapter 7, as a trigger for a suspension. Another suggested that, after a bankruptcy, death of a SEDO, or another basis for an elective suspension, there should be a 90-day grace period to allow a firm to deal with the issue before it could be suspended. On the other hand, another commenter thought there should be a mandatory suspension whenever ownership of a firm changes in a way that could affect its eligibility. One commenter said that certifiers should be able to cite multiple grounds for a discretionary suspension if such grounds existed.

A number of commenters said that in addition to or instead of sending an email, a certified letter should be used to provide notice of a suspension. Emails were too uncertain, these commenters thought, and a certified letter would provide evidence of receipt. Given the difficulties that small firms often have keeping track of paperwork, another commenter said, imposing a suspension for a late DOE seemed unduly harsh.

DOT Response

Summary suspension is an important tool for protecting the DBE program in situations involving serious, often rapidly developing situations that could adversely affect its integrity. It is intended to be used rarely, in situations that present an obvious threat to program integrity. It is not intended to be used in situations where a certifier merely has a suspicion or a hunch that a firm may be ineligible, or where there is uncertainty about whether the suspension is justified. It is intended to be used when the cause is certain, and when the need for action to protect the integrity of the program is time-sensitive because delay in action could lead to real harm to the program or participants in it. It is not intended to be a shortcut for removing the eligibility of firms whose status is properly addressed under the normal decertification provisions of the regulation.

The NPRM used the term ''clear and credible evidence'' to describe the proper basis for a summary suspension which, perhaps because of its seemingly similarity to the ''clear and convincing evidence'' term used in sections of the current rule and in other proceedings, raised questions for some commenters. The Department is not creating a new legal standard or a variation on an existing standard. We are simply saying that to serve as the basis for a summary suspension, the certifier's evidence must be clear. It must be credible. If not, then summary suspension is not an appropriate remedy.

The credible, clear evidence must pertain to specific types of facts. The death of a SEDO, leaving the ownership and/or control of a DBE in question, is one situation that could lead to a summary suspension. Likewise, incarceration, a medical condition (*e.g.,* a seriously disabling stroke), or a legal disability (*e.g.,* having one's affairs placed in a conservatorship) that prevents a SEDO from controlling a firm could be a basis for a summary suspension. As a commenter suggested, an event putting the viability of the firm into serious question, like a Chapter 7 bankruptcy or a merger or acquisition involving a non-DBE firm could also be a basis for action by a certifier under this section.

A DBE or its SEDO's involvement in fraud or other serious criminal activity affecting business integrity or potential to impact continued eligibility could be another basis for suspending the firm. This is not an exclusive or exhaustive list of offenses that could form a basis for a suspension; certifiers should use good judgment to invoke the provisions of this section when misconduct on the part of SEDOs or DBE firms warrants prompt action. We also note that not all criminal offenses are necessarily grounds for suspension. For example, a conviction for driving under the influence of alcohol or drug possession would not provide a basis for a suspension in most cases.

The Department is maintaining the NPRM's distinction between mandatory and discretionary grounds for suspension. If an OA directs a certifier to take suspension action, or in a case involving fraud or other serious criminal activity, then taking suspension action is mandatory. Otherwise, including cases involving the failure to file a timely DOE, the action is discretionary.

Few commenters addressed the timing and procedural provisions of the proposed summary suspension section, and we are adopting them without change. We believe that the provisions are clear and appropriate to what is intended to be a summary procedure. In a hearing under this section, we would apply the same requirements (*e.g.,* with respect to representation by attorneys, separation of functions) as applied to decertification proceedings under § 26.87. To make sure that the firm has received the notice initiating the procedure, we recommend that certifiers send emails having a ''read receipt'' feature.

We wish, however, to clarify that, once a certifier issues a notice of suspension, the firm has the burden of production. This means coming forward with evidence to argue that a suspension should not be issued. Just as in a decertification action, however, the ultimate burden of persuasion rests with the certifier that proposes the action. It is the certifier that must show, by a preponderance of the evidence, that the suspension is appropriate, and that the firm's eligibility should be removed.

What kind of evidence might a firm produce to show that a suspension should not be issued? While this evidence would necessarily vary from case to case, some examples might be that, even without the participation of a deceased or incarcerated SEDO, other SEDOs' participation is sufficient to meet ownership and control requirements. In the case of a SEDO whose affairs were placed in a conservatorship, a firm might be able to show that the conservator was a socially and economically disadvantaged individual who can maintain the required degree of ownership and control.

The NPRM proposed notifying DBEs of a notice of suspension by email.

Some commenters suggested that the requirement for certified mail be retained, in order to provide greater certainty that the notice had been received. We believe, however, that email is more prompt, important in a time-sensitive matter like a summary. DBEs have to provide email addresses to certifiers as part of the normal certification process and are responsible for updating the address as needed and reading emails when they arrive. Moreover, many email systems include features that confirm receipt of a message.

One result of a summary suspension proceeding can be the decertification of a firm. In a case where a firm is certified in more than one State through interstate certification, however, the suspension and a resulting removal of eligibility apply only in the State that took action to suspend the firm. This is unlike the regular interstate decertification procedure included in the final regulation, in which a decertification action can apply to all States in which the firm is certified.

We have noted that, with respect to firms that fails to file a timely DOE and documentation of gross receipts, the summary suspension process of § 26.88(b)(2)(ii) enables more rapid action than the decertification procedures of § 26.87. The final rule provides failure to file a timely DOE as an optional ground for summary suspension.

Where a certifier fails to follow the procedures of this section properly, the rule makes available to an affected firm a petition for an enforcement order that could vacate an improper second elective suspension within a 12-month period or require a certifier that did not take final action on a suspension within 30 days to lift the suspension and reinstate the firm's certification.

27. Appeals to the Departmental Office of Civil Rights (DOCR) (§ 26.89)

NPRM

The NPRM proposed reinserting language from the 2014 rule that was inadvertently omitted. This includes the requirement that appellants notify DOCR in its appeal decision of other certifiers that have denied or decertified the firm.

The Department proposed modifying existing procedures for certification appeals to the DOCR to improve administrative efficiency. The time for appellants to file appeals would be reduced from 90 to 45 days. Our proposals sought to streamline the process and balance the needs of firms, recipients, and DOCR. We left intact the firm's ability to demonstrate that there was good cause for a late filing and explain to the Department why it would be in the interest of justice to accept the appeal.

The requirement that records be sent from certifiers to DOCR in an indexed and organized fashion would be strengthened by allowing DOCR to reject poorly organized records, resulting in a directive to send a corrected record within 7 days. Failure by the certifier to do so would be a failure to cooperate under § 26.109(c). The NPRM proposed new language wherein DOCR could summarily dismiss an appeal if warranted, such as situations wherein the firm does not set forth a full and specific statement under § 26.89(c), if a firm withdraws its appeal request, or if a certifiers requests to reconsider its decision. The rule would explicitly state that DOCR does not issue advisory opinions and that the 180-day target for issuing an appeals decision would be met ''if practicable.''

Comments

Several comments from recipients supported the NPRM's time frames for setting the time frame for appeals at 45 days rather than the current 90 days, while a DBE organization suggested using 60 days as a middle ground. Two commenters said DOT should not have more than 180 days to decide a case once a complete record had been received. One of these also suggested that the effect of a UCP's decertification decision should be stayed until DOCR had decided the appeal. A recipient noted that, especially with respect to voluminous records in large cases, indexing and organizing the record can be a major task that may not be able to be accomplished in 45 days.

DOT Response

The final rule incorporates all the proposed changes. Forty-five days is reasonable in our view for appellants to state in their appeal the reasons why they believe the certifier's decision is erroneous, what significant facts the certifier failed to consider, or the provisions of the rule the certifier did not properly apply. On this point, we reiterate language in our 2014 preamble, that the appeal ''is not an opportunity to add new factual information that was not before the certifying agency; [H]owever, it is completely within the discretion of the Department whether to supplement the record with additional, relevant information made available to it by the appellant as provided in the existing rule.'' (79 FR 59579 (October 2, 2014).

To ensure that certifiers' records sent to the Department for certification appeal purposes are as complete and useful as possible, the final rule requires that the records include video or audio recordings, or written transcripts, of any hearings in the case. In addition, certifiers must make audio recordings of on-site interviews. This information is invaluable, particularly in cases hinging on ownership and control issues.

The NPRM sought to streamline DBE and ACDBE processes and balance the needs of firms, recipients, and DOCR. In the last several years, the number of appeals has been low compared to the number of adverse certification decisions. Also, many UCPs have transitioned to electronic application processing. We think it is rare that a UCP could not submit organized and indexed records to DOCR, even those that may be voluminous, within 45 days. This is reasonable in our view particularly considering that effort it takes for both program participants (firms and certifiers) to submit/review application material, participate in an on-site interview, craft and review denial or decertification letters, then appeal.

The Department takes seriously the appeal obligations of firms and certifiers. DOCR will dismiss firms' non-compliant appeals (as § 26.89(c) specifies) and remand matters to certifiers with instructions to augment or fix its record within a specified time, and the OAs will act upon non-compliance (*e.g.,* by conducting compliance reviews).

The Department has decided not to include in the final rule the proposed provision setting a 180-day time frame for decisions in appeal cases. The parallel provision in the current regulation has often proved confusing. It did not relate, as some have thought, to a clock that starts when an appeal letter arrives. Rather, it related to the time when a complete record is available to the Department, something that has often occurred well after the Department received an appeal letter and the precise date for what is often an iterative process can be uncertain. Moreover, the ''if practicable'' language of the proposal made the timeframe essentially aspirational. The proposal that the Department send a letter when the timeframe was exceeded would likely occupy staff time that could otherwise be more productively used in completing appeals cases. Using its resources, the Department will do its best to respond to appeals promptly. If there is a systematic delay in processing appeals (*e.g.,* because all available staff are assigned to a major project for a

time), the Department intends to place a notice on its website informing the public of the situation.

28. Updates to Appendices F and G

NPRM

The NPRM proposed to remove the Uniform Certification Application and personal net worth (PNW) forms from Appendices F and G, respectively. In addition, the NPRM proposed technical and terminological changes within the appendices, most notably renaming the current affidavit of certification the ''Declaration of Eligibility'' (DOE). The DOE would be used both in initial applications and in the annual submission to certifiers. Consistent with the proposals concerning personal net worth, the ''retirement accounts'' line item would be deleted from the PNW form.

Comments

There were few comments on these proposals. One recipient supported them. Another expressed concern about how changes in the forms would be communicated to certifiers if the forms were no longer to be found in the regulation itself. It was also concerned about maintaining uniformity in the absence of a regulatory requirement. One commenter suggested changing the submission requirement of a DOE to every other year because, in their view, there is not much change between years and the change would lower the paperwork burden on certification agencies.

DOT Response

The final rule fully adopts the Department's proposed changes. The annual submission by firms of a DOE is made easier in our view by the widespread use of electronic systems that notify firms and recipients when the DOE is due.

29. Miscellaneous Program Elements and Concerns

There were a wide variety of comments that did not fit neatly within the NPRM's numbered areas of proposed change.

Legal Defensibility of DBE Program

Commenters on this issue expressed deep concern that, in the present legal climate, the DBE program was vulnerable to renewed legal challenges. Consequently, commenters said, it was important to have a discussion in the preamble to the final rule of the continuing compelling need for a race-conscious program, based on recent disparity studies and material that has been provided to Congress in the context of authorizing legislation. A recent report from the Department of Justice was mentioned as a possible source of evidence supporting a continuing compelling need.[9] Given some of the proposals in the NPRM, another comment said, it was important to demonstrate how revisions to the program would remain consistent with the narrow tailoring requirement for race-conscious programs.

Paperwork Reduction Act

Two commenters said that the Paperwork Reduction Act statement in the NPRM underestimated the burdens on airports in the ACDBE program. For the small business ACDBE program, an airport said it would take 120 staff hours rather than the estimated 5.6. For the active participants list, the commenters believed that the staff hour commitment would be 40 hours rather than the projected 42. For other proposed reporting requirements, the commenters said that the burden would be 25 or 40 hours, rather than the projected 3.2 hours. Other commenters thought proposed reporting, directory and related requirements, would increase costs beyond the Department's projections. Recipients would have to make organizational changes, hire staff, and acquire or modify software. The Department should, commenters said, retain existing flexibility and provide funding for changes that a final rule requires.

Advisory Committee

A commenter said that the Department should create a standing advisory committee under the Federal Advisory Committee Act to provide ongoing feedback and recommendations to the Department concerning implementation issues and to suggest guidance that could be helpful in the future. The committee would include representatives of all the principal interests involved in the program such as DBEs and ACDBEs, non-DBEs, recipients in various OA programs, and organizations representing them. Similarly, another commenter suggested having a national roundtable of people to share data and experiences.

Training

Several commenters suggested that the Department provide additional training to program participants, including DBEs, prospective applicants, recipients, and certifiers. The program, a commenter added, should encourage technical guidance and instruction for DBEs.

Incentives for Prime Contractors and Recipients

Several commenters suggested giving incentives to prime contractors who meet or exceed goals, analogous to incentives given for finishing a contract ahead of schedule. There could be incentives for prime contractors to form joint ventures with DBEs. Recipients could publicize good performance by prime contractors. Stipends could be provided to encourage prime contractors to enter mentor-protégé programs. Mentor-protégé programs could be made more attractive by removing some of the restrictions in the current mentor-protégé provision of the regulation (§ 26.35(b)(2)(i) and (ii)). There could be ''extra credit'' toward DBE goals on a federally assisted contract for having used DBEs on private sector work, or by giving points on the next procurement for a contractor who exceeded DBE goals on a previous one. Prime contractors could also be encouraged to set up ''one-stop shopping'' hubs to inform DBEs of opportunities. Recipients could provide incentives to prime contractors to use newer, smaller DBEs rather than old standbys.

A commenter suggested that States with excellent DBE programs receive preferences in discretionary grant programs.

Add Other Types of Firms to the Program

A letter-writing campaign resulted in numerous docket entries recommending that there be a national MBE program and goals, in addition to the DBE program and goals. Other commenters suggested allowing SBA-certified 8(a) firms into the DBE program automatically.

Term Limits

Two comments suggested either term limits—like those in SBA programs—for all DBEs/ACDBEs or ''graduation'' for firms who had been in the program for a lengthy period and received many contracts.

Miscellaneous Program Suggestions

Among ideas suggested by commenters to improve the program were set-asides, sole-source contracts for DBEs, providing surplus recipient or DOT property to DBEs, simplifying prequalification standards and requirements for responding to solicitations for small firms, making

[9] U.S. Department of Justice, ''The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence,'' (Jan. 31, 2022), See *https://www.govinfo.gov/content/pkg/FR-2022-01-31/pdf/2022-01478.pdf* and *https://www.justice.gov/crt/page/file/1463921/download.*

provisions like those concerning Alaska Native Corporation firms or SBA programs available to African-American firms, assistance with bonding and insurance requirements (*e.g.,* by reducing performance bonds for DBEs to 50 percent or having prime contractor take out subcontractor default insurance in place of requiring bonds for DBEs), increasing overall goals to more than 10 percent, maintaining a national DBE database at DOT, doing more to encourage unbundling on all types of contracts, giving DBEs the first opportunity to get contracts under $500,000, supporting greater use of mentor-protégé programs, requiring recipients to conduct updated disparity studies, adding supplier outreach and diversity programs, strengthening the role of DBE liaison office and require additional reporting from them, adding an ''ombudsman'' function to help newer firms get work, and channeling funds to ''subject matter experts'' to provide technical assistance to DBEs.

Other Program Concerns

Some comments referenced the longstanding concern that only a few established DBE firms get most of the work, limiting opportunities for the rest. One commenter said that in their State, 10 DBEs got 46 percent of the work, while 30 did 80 percent of the work. A study from a non-DBE contractors group said that DBEs had the most capacity in the smallest areas of contracting opportunity, but the lowest capacity in the most significant contracting areas (*e.g.,* heavy highway and bridge work). Commenters expressed continuing concern about fraud in the program.

DOT Response

The DBE program ''has the important responsibility of ensuring that firms competing for DBE contracts are not disadvantaged by unlawful discrimination.'' This statement, in the preamble to the Department's 1999 final DBE rule (64 FR 5096, 5096 (February 2, 1999)) encapsulates the program's longstanding purpose. That preamble discussed, at length, how the program and its regulation met the constitutional ''strict scrutiny'' requirement for programs using racial classifications, including how the part 26 provisions met each of the elements of the ''narrow tailoring'' prong of strict scrutiny articulated by the courts. *See id.* at 5101–5103. The constitutionality of the program has been challenged several times in Federal court, but in each case, the courts have upheld the program. *See Midwest Fence Corp.* v. *Dep't of Transp.,* 840 F.3d 932, 941, 935–36 (7th Cir. 2016); *W. States Paving Co.* v. *Wash. State Dep't of Transp.,* 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc.* v. *Minn. Dep't of Transp.,* 345 F.3d 964, 967–68 (8th Cir. 2003); *Adarand Constructors, Inc.* v. *Slater,* 228 F.3d 1147, 1155 (10th Cir. 2000). Courts have also relied upon these decisions' findings about the constitutionality of the program when ''as applied'' challenges have been brought. Here again, the program has withstood these strict scrutiny challenges, largely due to the fact that recipients properly following program mandates may rely upon the Congressional findings of compelling need. *See Mountain West Holding Co.* v. *Montana,* 691 F. App'x 326 (9th Cir. 2017, memorandum opinion); *Dunnet Bay Construction Co.* v. *Borggren,* 799 F. 3d 676 (7th Cir. 2015); *Northern Contracting, Inc.* v. *Illinois,* 473 F.3d 71 (7th Cir. 2007); *Associated General Contractors of America, San Diego Chapter, Inc.* v. *California Department of Transportation,* 713 F. 3d 1187 (9th Cir. 2013); *Geyer Signal, Inc.* v. *Minnesota Department of Transportation,* No. 11–321 (JRT/LIB), 2014 WL 1309092 (D. Minn. Marc. 31, 2014; *Geod Corporation* v. *New Jersey Transit Corporation,* 678 F. Supp. 2d 276 (D.N.J. 2009), and 746 F. Supp. 2d 642 (D.N.J. 2010).

Repeated reauthorizations of the program by Congress (listed in § 26.3 (a) of the rule), and extensive evidence supporting it, underscore the continuing compelling need for the program to combat discrimination and its effects.[10] These actions have been based on statistical and anecdotal evidence of the persistence of discrimination affecting firms seeking work in DOT-assisted contracts, often in the form of the numerous disparity studies that have been conducted on behalf of DOT recipients and other parties. In this important respect, the DBE program differs significantly from other programs that may use race-based classifications in order to advance worthy, but conceptually distinct, objectives such as achieving diversity.

We emphasize that the present part 26 and the revisions this final rule makes to modernize administrative provisions of the program and leave intact the mechanics of goal setting as has been the case over many decades. Part 26 does not allow quotas nor impose any penalties for failing to meet goals, and it requires that recipients use race- and gender-neutral means to the maximum extent to achieve DBE participation goals before resorting to race- and gender-conscious means. The program retains the basic narrow tailoring building blocks which, as noted above, have repeatedly been upheld by courts.

We believe there would be value in establishing a standing Federal advisory committee to provide input to the Department on the continuing implementation of the program and suggestions for guidance on issues that may arise in the future. However, this and several other suggestions for changes in the program (*e.g.,* applying term limits to firm's participation) are outside the scope of this rulemaking, beyond the Department's statutory authority, or both.

Part 23

Subpart A—General

30. Aligning Part 23 Objectives With Part 26 Objectives (§ 23.1)

NPRM

The NPRM proposed to add two new program objectives to part 23 to align it with the objectives in part 26. These objectives, similar to those in §§ 26.1(f) and (g), promote the use of ACDBEs in all types of concessions activities at airports and assist the development of firms that can compete in the marketplace outside the ACDBE program. The proposal received support from trade associations, consultants, and airport recipients, with one trade association cautioning against simply adding similar objectives due to differences in business activities between the DBE and ACDBE programs. Instead, the commenter suggested adopting the following single objective: ''To support the development of ACDBEs that can compete independently for concessions opportunities at airports receiving DOT financial assistance.''

DOT Response

The change suggested by the one commenter is not substantively different from language proposed. In addition, support for adding the two program objectives is unanimous. Therefore, the final rule retains both objectives as proposed.

[10] *See* BIL, Sec. 11101(e)(1) (''. . . testimony and documentation . . . provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination . . . .''); *Congressional Record—Senate,* S5898, S5899 (August 5, 2021); *Congressional Record—House,* H3506, H3507 (June 30, 2021); ''DRIVING EQUITY: THE U.S. DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM''—Remote Hearing Before the Committee on Transportation and Infrastructure, 116th Cong. 64 (Sept. 23, 2020), available at *https://www.govinfo.gov/content/pkg/CHRG-116hhrg43413/pdf/CHRG-116hhrg43413.pdf.*

31. Definitions (§ 23.3)

NPRM

For consistency and clarity, the NPRM proposed that § 23.3 adopt existing definitions in part 26 which are also applicable to part 23. The definitions for terms such as, ''Alaska Native,'' ''Assets,'' ''Contingent liability,'' ''Days,'' ''Immediate Family Member,'' ''Liabilities,'' ''Operating Administration'' or ''OA,'' and ''Socially and economically disadvantaged individual'' were proposed to be added or amended to ensure that the definitions and terms contained in both parts aligned. Additional definitions for ''Airport Concession Disadvantaged Business Enterprise (ACDBE),'' ''Part 26,'' ''Personal Net Worth,'' ''Affiliation,'' ''Concession,'' ''Subconcession or subcontractor,'' and ''Sublease'' were either proposed to be added or amended to clarify existing requirements in part 23 or to correct errors and replace obsolete cross-references within the regulation.

Comments and DOT Response

A majority of commenters in general supported the addition or alteration of the definitions at large.

Assets

For the definition of ''assets,'' one commenter suggested that the Department clarify the requirements for demonstrating ownership of sole and separate property. For example, if ownership of property or assets were to be demonstrated by evaluating the title, this should be clarified in the ''assets'' definition.

The Department adds the part 26 definition of ''assets'' to part 23 without revision to ensure consistency in its meaning across both parts. We added other definitions from § 26.5 to § 23.3 for this same reason. The final rule does not adopt the commenter's proposed ''asset'' definition in part 23 because it would otherwise make the definition inconsistent with its counterpart in part 26.

Airport Concession Disadvantaged Business Enterprise (ACDBE)

Commenters were evenly divided in support and opposition of the NPRM's proposal to modify the definition of ''ACDBE.'' The proposed change is intended to clarify that a firm does not need to be operational or demonstrate that it previously performed contracts at the time of its application for certification. Comments in favor of the change indicated that the proposal would increase the number of available ACDBE firms and that previous experience of the firm was less important in the concessionaire industry, as long as airports are permitted to consider experience of the individual owner when selecting a firm. The commenters opposing the change expressed concern about how an unqualified firm could become competent in a particular line of work in which the firm has no experience.

The final rule adopts the definition of ACDBE as proposed. The Department acknowledges the distinction between the experience of a firm and SEDO and believes that the experience of the individual owner is more relevant for purposes of certification in the concession context. Moreover, conditioning certification on a firm's experience would present significant barriers for firms seeking ACDBE certification status. See preamble discussion on § 26.71 for discussion on the operations requirement for DBEs.

Concession

The final rule incorporates the term ''traveling public'' into the ''concession'' definition to clarify that businesses that do not primarily serve the traveling public should not be considered concessions. A majority of commenters supported this change. However, the comments in opposition expressed concern that a revision restricting the term ''concession'' to the traveling public would negatively impact an airport recipient's ability to meet its participation goals by limiting the number of businesses that may be considered an ACDBE concession. The commenters said that without additional guidance or clarity, this change would result in confusion within the industry because there is significant subjectivity involved in determining what businesses are intended to serve the traveling public.

The final rule adopts the definition of concession as proposed. The legislative and regulatory history of the concessions provision has always focused on businesses that serve the traveling public at the airport, which supports the final rule's revision. The Department does not believe that including the term ''traveling public'' in the definition will cause confusion or inhibit airport recipients' from achieving participation goals. Instead, it merely reflects the Department's longstanding interpretation of the regulation.

Personal Net Worth (PNW)

The Department received several comments on changes to the PNW definition in part 26, ranging from the PNW cap adjustment to other aspects of the PNW calculation (*e.g.,* exclusion of retirement assets, removal of community property rules, etc.). These areas are discussed at greater length in the part 26 preamble. For part 23, we are limiting the discussion of the definition of PNW to what the NPRM's preamble referred to as the ''third exemption.'' That term refers to the exclusion from the PNW calculation those assets that a SEDO can demonstrate were necessary to obtain financing for purposes of entering or expanding a concessions business subject to part 23 at an airport.

The final rule's amendments to part 23 aligns the PNW definition with that of part 26, effectively eliminating the PNW's ''third exemption.'' While one trade association supported this change, another requested that the Department consider retaining the exclusion due to significant cost increases associated with doing business as an ACDBE.

The Department recognizes the substantial cost increases associated with concessions and addresses this concern, in part, through proposed increases to the PNW cap to $2,047,000. and other changes to the PNW calculation. However, the final rule removes the ''third exemption'' language from the PNW definition in part 23. In the 2005 final rule, the Department under the third exemption allowed the exclusion to a maximum of $3 million. As noted in the current rule § 23.3, the Department suspended the effectiveness of the provision with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012. As proposed, the definition removes this reference entirely, and the definition of personal net worth in part 23 refers back to that found in part 26.

Sublease, Subconcession or Subcontractor

For the proposed definitions of sublease, subconcession or subcontractor, all commenters were unanimous in their support. However, several commenters requested the proposed definition of ''sublease'' be expanded to clarify the requirements to be considered a subtenant. Commenters suggested that a definition of sublease address whether a capital investment from the ACDBE is required or whether the facility development cost can be paid monthly as a ''lease cost.'' They also suggested that the definition address if the terms of the primary lease must be a direct pass-through and whether a concessionaire must manage a location with its own personnel.

This final rule adopts the term sublease as proposed to clarify how airport recipients should count direct

ownership arrangement participation generated by ACDBEs in subtenant arrangements. Generally, airport recipients may credit the entire amount of gross receipts generated from a sublease completely operated and owned by an ACDBE. However, airport recipients must look beyond the agreement to evaluate the capacity the ACDBE is performing and ensure that the agreement does not improperly restrict the ACDBE's ownership and control.

Under the sublease definition, all requirements applicable to the concession under the primary lease passes on to the sublessee, including the management of personnel. The ACDBE must also be responsible for its proportionate share of facility development costs and capital investment. Facility development cost can be paid monthly as a ''lease cost''. However, the total lease costs to be paid must be proportionate to the ACDBE's responsible share of capital investment required under the primary lease.

For the definition of subconcession or subcontractor, the final rule removes the term subcontractor from the definition title and adopts the definition as proposed by the NPRM. With this change, the term subconcession is now found in the definition section, as well as in Appendix A of the regulation.

Other Definition Changes

Commenters proposed additional amendments or changes to definitions that were not addressed by the NPRM.

One commenter proposed revisions to the definition of ''joint venture.'' The commenter expressed that the current definition in which the ACDBE is ''responsible for a distinct, clearly defined portion of the work of the contract,'' places restrictions on minority joint venture partners' financing, management, and operations that would not be required of a majority joint venture partner. The commenter believed that the language unfairly restricts ACDBE joint venture partners in that it imposes conditions on their participation that are not similarly imposed on the non-ACDBE participants. To address this, the commenter proposed revising the definition to balance the one-sided conditions that the current language imposes on ACDBE joint venture partners.

The final rule retains the existing definition of joint venture. Credit toward ACDBE goals must be based on a commercially useful function. Any change to remove the requirement for an ACDBE joint venture participant to perform independently a distinct portion of the joint venture's work would adversely affect the integrity of the program.

In addition to the definitions above, another commenter suggested that the Department add a definition for ''contract award'' to clarify the term's use in other sections in Parts 23 and 26.

The Department has opted not to define contract award in the regulatory text as commenters requested. Given the wide array of contexts the term contract award appears across Parts 23 and 26, we decided against adding a definition for the term to avoid confusion.

Subpart B—ACDBE Programs

32. Socially and Economically Disadvantaged Owned Financial Institutions (§ 23.23)

A commenter suggested that the Department consider options to address capital access issues that hinder small businesses from competing for concession opportunities. The Department is sensitive to concerns regarding access to capital. The FAA's 2023 updated Best Practices for Fostering Participation from New DBEs and ACDBEs at Airports (April 11, 2023) letter recommended evaluating the availability of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in an airport recipient's community. See *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.* The letter recommends airport recipients make reasonable efforts to use such institutions and encourage prime concessionaires to use them, as well.

Recognizing that capital access has historically been, and continues to be, a significant barrier to ACDBE participation within the program, the final rule seeks to reduce this barrier by amending the administrative provisions under § 23.23 to add a new paragraph that applies the related requirement in § 26.27, to part 23. This change codifies best practices in the letter by requiring recipients, for their ACDBE programs, to thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their communities and to make reasonable efforts to use these institutions. Recipients must also encourage prime concessionaires to use such institutions.

The term ''financial institution'' under this provision includes but is not limited to traditional banking institutions and Community Development Financial Institutions (CDFIs).

33. Direct Ownership, Goal Setting, and Good Faith Efforts Requirements (§ 23.25)

NPRM

The NPRM proposed changes to § 23.25 clarifying that all businesses must make good faith efforts to meet the concession-specific goals as set by recipients pursuant to this section regardless of whether a concession-specific goal is based on goods and services or direct ownership arrangements. Airport recipients may set concession-specific goals on purchases or leases of goods and services only after performing an analysis that shows there is de minimis availability for ACDBE direct ownership arrangement participation for that opportunity.

Comments

The majority of comments, which were received from trade associations, consultants, ACDBEs, and recipients, generally supported the NPRM's clarifying modifications to § 23.25. However, one commenter noted supplying evidence to support setting concession-specific goals based on goods and service purchases versus direct ownership arrangements, in some instances, would not be possible until a successful proposer is selected. The commenter explained that recipients are not able to obtain a firm's purchase commitments at the time of award. Moreover, purchase goals could be impacted by purchase requirements if the firm is a licensed or franchised operation.

Another commenter suggested that the Department add an appendix to part 23, similar to the detailed guidance in part 26 Appendix A, to reflect the differences in good faith effort requirements for DBE and ACDBE program bidders and offerors.

DOT Response

The Department adopts the changes to § 23.25 as proposed by the NPRM. The timing of when evidence may become available in order to perform the analysis required under this section should not present an issue to recipients who are determining whether to set a concession-specific goal based on goods and services purchases. In addition, airport recipients do not need a firm's actual purchase commitments at the time of award to perform the analysis in paragraph (e)(1)(i) of this section.

Recipients calculate their overall ACDBE goals for concessions other than car rental by evaluating the relative availability of ACDBEs in the categories of work that concession operations will

likely entail. Because the rule at § 23.47 provides that the base of an airport's goal for concessions other than car rental is the total gross receipts of concessions, this approach is necessary when setting overall goals. Recipients may meet their overall goals through the application of concession-specific goals, as explained in § 23.25. Under the revised § 23.25 (e)(1)(i), an analysis that finds a particular concession opportunity has only de minimis availability of direct ownership arrangement participation may be used by recipients as evidence in support of setting a concession-specific goal based on goods and services for that opportunity. Such analysis would satisfy the good faith efforts requirement that recipients must make to explore, to the maximum extent practicable, opportunities for participation via direct ownership arrangements.

In response to comments, the Department will not add a separate appendix for guidance on good faith efforts to part 23. Appendix A to part 26 provides guidance on good faith efforts concerning DBE contract goals. This guidance is referenced in § 26.53(b)(2)(vi), which is made applicable to concession-specific goals through § 23.25(e)(1)(iv). Notwithstanding differences between the ACDBE and DBE program, we do not believe this issue is significant to warrant creating a new appendix on good faith efforts in part 23.

34. Fostering Small Business Participation (§ 23.26)

NPRM

The NPRM proposed to add a provision that would closely mirror the § 26.39 requirement for recipients to create an element for their ACDBE Program specifically designed to foster small business participation in concession activities. As part of the proposed element, recipients would be required to actively implement their programs through various strategies that include race- and gender-neutral small business set-asides, prime subleasing opportunities and alternative concession contracting approaches (*e.g.,* direct leasing). One feature proposed for part 23 that is distinct from part 26, is the requirement for recipients to periodically report on the implementation of race-neutral strategies under the small business element for their ACDBE programs.

Comments

ACDBE Small Business Element

Support for the proposed ACDBE small business element was expressed by several members of a trade association, who commented that part 23 needed to make the small business element (SBE) a requirement in order to achieve small business participation for airport concessions. An airport consultant believed the proposed part 23 SBE requirement would foster creativity among recipients when structuring their small business elements.

Comments opposing the proposal were concerned that the new SBE requirement would be overly burdensome and that the Department underestimated the time it would take. However, commenters' estimated range of time to complete the task varied. One airport authority estimated it would take 120 hours, not the 5.6 hours estimated by the Department; a member of a trade organization thought ''at least 40.'' Another commenter mentioned that small hub and non-hub airports would be particularly affected, as they have limited concession opportunities and revenue streams, making it difficult for them to attract bidders.

Others opposing the new requirement expressed that SBE would not work for part 23 as it does for part 26 because the industries involved in the DBE program (federally assisted contracting) and the ACDBE program (airport concession opportunities) are different. They noted that set-asides under the small business element could unintentionally harm both small businesses and other concessionaires by forcing a choice between them for feasible concession locations. Others expressed doubt about the feasibility of subleasing opportunities for airport concessions, as such opportunities are rare, and multi-unit operations do not support subleasing. If adopted, commenters recommended that recipients should conduct a small-business analysis on opportunities without an ACDBE goal to determine the viability of a small business sublease.

Reporting on Small Business Element

The Department received some comments, both from trade associations and recipients, on the proposed requirement for recipients to periodically report on the implementation of race-neutral strategies under their small business element. These commenters viewed the requirement as unduly burdensome and costly. However, if adopted in the final rule, one commenter recommended that the Department establish a supplemental report to the Uniform Report for reporting on a recipient's small business element in order to minimize the administrative burdens.

DOT Response

The Department believes that the ACDBE SBE requirements will not impose any significant burdens on recipients because it mirrors the current DBE SBE requirements that recipients must currently implement under § 26.39. Instead, the ACDBE SBE requirement should serve as a mere extension to the SBE requirements that recipients have currently in place for their DBE programs.

Smaller hub airports may benefit from statewide small business element consortiums permitting them to pool resources with other recipients who are required to actively implement SBEs under both DBE and ACDBE programs. Upon request, FAA will engage interested recipients on the mechanics and steps needed to establish and implement statewide consortiums for SBEs.

Furthermore, distinctions may exist in how certain small business strategies apply across the DBE and ACDBE programs. The list of strategies in the proposed § 23.26 for the ACDBE program is designed to give recipients some ideas on how to accomplish the objectives of the rule. It is not an exhaustive list, nor is any strategy listed in the regulation mandatory. Airport recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating airport concession opportunities for small businesses.

In selecting SBE strategies, the Department still expects airport recipients to be forward-looking and innovative in their approaches. This means that recipients should not completely foreclose the possibility of using certain strategies (*e.g.,* subleasing opportunities for small businesses) over others because they do not appear to be viable options at the time. Rather, they should continuously explore creative ways on how to make those strategies possible.

Section 23.26(c) mandates that airport recipients incorporate certain assurances within their SBEs. These include the confirmation that their SBEs are authorized under State law, and that certified ACDBEs meeting the specified size criteria are presumptively eligible to participate. In addition, airport recipients must assure that no limitations are placed on the number of contracts awarded to participating firms and that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses.

Reporting on Small Business Element

The ACDBE SBE requirement needs a reporting feature for the Department to

evaluate not only the effectiveness of each recipients' element, but also whether recipients are actively implementing their SBEs, as required by 23.26(g). In an effort to minimize burdens, the Department will adopt the recommendation that the part 23 SBE reporting requirement be added as a supplemental report to the part 23 Uniform Report. This will alleviate the time burden noted by a commenter as described above. However, as explained in the supporting statement developed by the Department in support of the rulemaking and associated information collection that has been submitted to OMB for approval, we disagree with their estimate of 120 hours. Recipients are already required to implement SBEs for DBE programs, and they also must collect and report their race neutral participation annually, so this minimal supplemental information is not burdensome. Therefore, we believe that the Department's estimate of 5.6 hours is appropriate.

35. Retaining and Reporting Information About ACDBE Program Implementation (§ 23.27) (Active Participants List)

Comments

The Department received numerous comments on the NPRM's proposal to add an active participants list requirement to part 23, with the majority opposing the proposal. Supporters believed the change would benefit the program administration and assist car rental companies in locating certified ACDBE vendors. However, many opposed the change, finding it unduly burdensome and costly, and highlighting the logistical complexities in acquiring all the data from every firm that reaches out via email, phone, or fax inquiring about concession opportunities. One trade organization member thought 60 hours was more appropriate for this task than the 42 proposed by the Department.

Commenters also raised concerns about the active participants list not meeting its intended purpose of providing accurate data on ACDBE and non-ACDBE firms seeking concession opportunities. They noted that the NAICS codes used by various concessionaires are inconsistent, and the data from proposals and responses to solicitations and negotiated procurements would not provide accurate information. Commenters argued that this approach would result in an undercount of actual active participation and lead to incorrect calculations of goals and participation. A commenter suggested that the number of firms certified in concession-operating trades would be a better indicator of the number of ACDBE firms wanting to participate.

One commenter recommended that the Department provide a clarifying definition for ''active participants'' at the end of § 23.27(c) to include individuals or firms that have submitted proposals, attended outreach events, or made inquiries about concession opportunities from the recipient.

DOT Response

The final rule is adding a requirement that recipients develop and maintain an active participants list. The ''active participant'' list adopted in this rule is parallel to the bidders list requirement in § 26.11. Similar to the bidders list requirement in part 26, creating and maintaining an ''active participants'' list gives recipients another valuable way to measure the relative availability of ready, willing and able ACDBEs when setting their overall goals. It also gives the Department data to evaluate the extent to which the objectives of § 23.1 are being achieved.

The Department has elected to adopt the proposal and require recipients to collect the data from all active participants for concession opportunities by requiring the information under this section to be submitted with their proposals, or with initial responses to negotiated procurements. The Department acknowledges that the collection of active participants data from only these sources may not capture every firm that seeks to perform work on concession opportunities. However, in absence of concession-specific NAICS codes, the Department believes that narrowing the source of this data collection to only proposals and initial responses to negotiated procurements would produce the most accurate and consistent data on firms who compete for and perform work on concession opportunities. The commenter's estimate of 60 hours to complete the task is slightly above our estimate that it would take around 42 hours to complete. We believe 42 hours would be a rough average, with small airports taking much less time.

Recipients should not rely exclusively on an active participants list that does not reflect the relative availability of ACDBEs in their local market area to the maximum extent feasible. Such reliance may result in skewed goal calculations and potentially undercounting of participation. This is not the intent, nor should such a scenario occur under the rule. The FAA will not approve a goal-setting methodology that is not rationally related to the relative availability of ACDBEs in a recipient's market. If a recipient decides to use an active participants list that is not demonstrative of all ready, willing and able ACDBEs relative to all businesses that are ready, willing and able to participate in a recipient's ACDBE program, then the active participants list must be used in combination with other data sources to ensure that it meets the standard in the existing regulations that apply to alternative methods used to derive a base figure for the ACDBE availability estimate. See § 23.51.

Subpart C—Certification and Eligibility of ACDBEs

36. Size Standards (§ 23.33)

See discussion of requirements in § 26.65.

37. Certifying Firms That Do Not Perform Work Relevant to the Airport's Concessions (§ 23.39)

NPRM

Section 23.55(k) prohibits recipients from counting costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the ''build-out'') toward ACDBE goals. The NPRM proposed to add a paragraph to § 23.39 clarifying that certifiers may not certify applicant firms that intend to perform activities exclusively related to ''build-out'' for which participation cannot be counted.

Comments

The Department received comments from recipients, prime concessionaires, consultants and trade associations, all of whom generally supported the NPRM's proposed change. Some commenters requested that the Department ensure the change does not exclude the certification of firms that provide services such as electrical, plumbing or work to concessionaires as a maintenance service, not related to initial construction (*e.g.,* car rental offices, advertising displays). Other commenters expressed concern that the change would allow certifiers to make discretionary decisions about businesses they are unfamiliar with, unless that business has an opportunity to appeal the decision in the event they are denied.

DOT Response

The Department is not adopting its proposal to permit certifiers to refrain from certifying applicant ACDBE firms if they determine the firms intend to perform only activities exclusively related to the renovation, repair, or construction of a concession facility

(''build-out''). We agree with the comments and seek to avoid a change that could result in erroneous certification denials based on subjective determinations by certifiers on whether the work an applicant firm intends to perform is exclusively related to build-out.

Notwithstanding our position, the Department shares similar concerns to comments raised above for the definition of disadvantaged business enterprise for applicant firms that cannot have their participation counted toward ACDBE goals under § 23.55(k). The Department strives to reduce wasted time and effort that UCPs encounter when processing applications from firms that seek certification in construction-related work that cannot be credited toward ACDBE goals.

To address this, we adopt a similar approach to that taken under part 26. The Department will include an item in the ACDBE portion of the Uniform Certification Application (UCA) asking applicants to detail the kinds of work that they anticipate performing on concession opportunities. Accordingly, if the applicant's response reasonably suggested to the certifier that the work it performs would be construction-related activities exclusively in connection with build-out of concession facilities that otherwise could not be counted toward ACDBE goals under § 23.55(k), we would encourage the certifier to recommend that the applicant withdraw its application, thereby avoiding certification of firms that would not be able to utilize their ACDBE status to obtain an airport concession opportunity.

38. Removing Consultation Requirement When No New Concession Opportunities Exist (§ 23.43)

NPRM

The NPRM proposed to amend § 23.43 to require consultation only when the recipient's ACDBE goal methodology includes opportunities for new concession agreements.

Comments

The majority of commenters, predominantly recipients, endorsed the NPRM's proposal to remove the requirement for recipients to perform consultation when there are no concession opportunities to evaluate or promote. They cited that the proposal would alleviate burdens on recipients and preserve the resources of ACDBEs who may attend a meeting only to learn that there are no opportunities in which they can participate.

The Department received one comment from a car rental concessionaire that disagreed with the proposed change to remove the consultation requirement even when the recipient wishes to change its ACDBE goal requirement as long as there are no new concession opportunities. They were opposed to any change that would remove the consultation requirement when recipients propose to adjust their ACDBE goal. Therefore, they recommended the Department revise the proposed amendment to § 23.43 to remove the consultation requirement only when there are no new concession opportunities and when no adjustment is being made, or is proposed to be made, to the recipient's ACDBE goal.

DOT Response

Section 23.43 requires consultation only when the ACDBE goal methodology includes opportunities for new concession agreements. The Department agrees that consultation under § 23.43 is still necessary when an adjustment is being made, or is proposed to be made, to the base figure of the recipient's ACDBE goal. However, we do not believe it is necessary to make this explicit in the regulatory text since adjustments usually arise only when there are new concession opportunities.

That aside, the Department is concerned that the text of § 23.43 references only opportunities for new concession agreements that become available during the goal period. It is silent on new goods and service purchase opportunities. This omission may be construed to mean that consultation is required only when new direct ownership opportunities become available during the goal period. This is not the case. The final rule intends for the consultation requirement to apply when there are new concession opportunities for both direct ownership arrangements and purchases of goods and services.

For this reason, the Department makes a minor revision to the § 23.43 to account for new opportunities that may arise in the form of both direct ownership arrangements and goods and service purchases. Depending on the nature of the opportunities, this revision in addition to the overall change will allow recipients to focus their consultation efforts on firms in the position to take advantage of those opportunities available.

39. Non-Car Rental Concession Goal Base (§ 23.47)

Comments

The NPRM would have amended § 23.47(a) to clarify that airport recipients may use the alternative method in § 23.51(c)(5) to supplement with goods and service purchases those portions of the base figure of their overall non-car rental goals where there is no feasible direct ownership arrangement participation available. The Department received several comments from industry trade associations, recipients, consultants, and non-ACDBE firms, who generally supported the clarifying changes to § 23.47(a) but felt that additional clarification was necessary.

One commenter sought clarification on whether the proposed changes would require setting purchasing goals for every contract without a direct ownership goal. Another commenter suggested the final rule address reporting of gross revenues for concessions in the Uniform Report.

Finally, the Department received one comment requesting clarification on the term ''substantial majority'' in § 23.51(b)(3) and asked whether it should be based on a count of the number of interested concessionaires or their size. The commenter also inquired about how a recipient should account for the relative availability of concessionaires outside its putative geographic area if the NPRM's proposed changes to interstate certification expands the number of concessionaires in a recipient's geographic area.

Although not raised in the NPRM, one commenter requested that the Department adopt a national ACDBE goal setting process for car rentals similar to Transit Vehicle Manufacturers (TVM). The commenter stated that adopting a national goal would better achieve the objectives of the ACDBE program and increase participation in the car rental industry.

DOT Response

The final rule will not adopt the proposed changes to § 23.47. As proposed, the revisions to this section would have allowed recipients to supplement with purchases and/or leases of goods and services the portion of their base where no feasible direct ownership arrangement participation is available. With few exceptions, § 23.47 is clear that the base of a recipient's overall goal for concessions other than car rentals includes only the total gross receipts of all concessions. The base does not include the dollar value of purchases and/or leases of goods and

services. The Department does not intend to change that. Instead, the Department intends only to clarify when goods and services concession goals can or should be used in light of the statutory requirement for recipients to explore, to the maximum extent practicable, direct ownership arrangements.

We believe the final rule achieves this objective with its revisions to § 23.25(e)(1)(i).

The boundaries of a recipient's market area should be determined by the number of firms which seek to do concession business with that airport and their locations. The market area may be different for different types of concessions, so another factor is the area in which the firms which receive the substantial majority of concessions-related revenues are located.

We recognize that the changes to interstate certification may increase the number of interested concessionaires located outside a recipient's putative geographic area. The Department's Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program (*https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise;* June 25, 2013), however, makes clear that a recipient's local market area is not necessarily the same as the political jurisdiction in which it is geographically located. Therefore, the changes to the interstate certification provisions do not impact how airport recipients determine the relative availability of ACDBEs under § 23.51(c). Recipients still must determine their market area for goals in accordance with § 23.51(b).

The final rule will not adopt regional and national car rental goals for the ACDBE program. The recommendation to establish these goals is outside of the scope of the rule.

40. Counting ACDBE Participation After Decertification (§ 23.55)

NPRM

Sections 23.39(e) and 23.55(j) allow for participation of ACDBE firms that lost certification for exceeding size and PNW limits to count towards ACDBE goals for the remainder of a concession agreement. However, this continued participation depends on those decertified firms maintaining their eligibility in all other respects (*e.g.,* control, ownership). The current regulation does not contain any provision that instructs airport recipients on how they must monitor these decertified firms to ensure their eligibility in this regard.

The NPRM proposed requiring declarations from decertified firms to track their eligibility for continued counting purposes. Under the rule, airport recipients would be responsible for gathering declarations and monitoring eligibility, not the certifying entity. If a decertified firm becomes ineligible due to ownership or control changes, its participation will no longer count. Failure to provide a ''no-change affidavit'' also stops the continued counting of participation of these firms.

Comments

Most comments were in favor of the requirement for former ACDBE firms to submit declarations to § 23.55. However, many were opposed to making the airport recipient, rather than the certifying agency, responsible for submission and monitoring. These individuals and organizations argued that this responsibility might be too burdensome for airports and that the State UCP, as the certifier, is better equipped to monitor those firms. They also pointed out that airports are not certifiers and do not have the necessary expertise to monitor submissions.

Finally, one commenter recommended counting decertified firm participation beyond the current concession agreement term, as it is a common industry practice to extend concession agreements. They argued that an ACDBE that has secured a contract should be allowed to continue to benefit from the agreement as long as they maintain eligibility in all other respects.

DOT Response

The Department believes that the steps arising under proposed § 23.55(j) should not be burdensome since they are not significantly different or greater than those recipient obligations currently performed. Non-certifying airport recipients are already required to include the monitoring and compliance measures that they will use in their ACDBE programs, including levels of effort and resources devoted to this task. In implementing these measures, non-certifying recipients must, at a minimum, conduct annual verifications of the status of the ACDBE's certification eligibility and review records. They must also perform on-site reviews of concession workplaces to determine whether ACDBEs are actually performing the work for which credit is being claimed and that participants are not circumventing program requirements.

Section 23.55(j) does not expand these monitoring obligations. Rather, it provides non-certifying airport recipients a framework and tools to monitor former ACDBE firms that lost certification for exceeding small business size standard or PNW. This monitoring is necessary for airport recipients to determine if these firms' participation can continue to be counted towards ACDBE goals for the remainder of a concession agreement. If the non-certifying recipient finds through its monitoring efforts that the former ACDBE has relinquished an element of control or ownership during the performance of an agreement, the monitoring recipient would immediately cease counting that firm's participation toward the goal.

Counting a decertified firm's participation beyond the current concession agreement term deprives eligible ACDBE firms of opportunities. Therefore, the Department will not change the status quo under paragraph (e) of § 23.39, which prohibits a recipient from counting a former ACDBE's participation toward goals beyond the termination date for the concession agreement in effect at the time of the decertification. The regulation will continue to require recipients to ensure that prime concessionaires make up any loss of ACDBE participation with good faith efforts.

41. Shortfall Analysis Submission Date (§ 23.57)

NPRM

Section 23.57 requires recipients to submit a shortfall analysis and corrective action plan if they do not meet their ACDBE participation goal. The plan explains the reasons for the differences between their overall goal and the awards and commitments in that fiscal year and the specific steps and milestones they will take to remedy the shortfall. The Department proposed extending the due date for submitting a shortfall analysis from within 90 days of the end of the fiscal year to 30 days after submitting the Uniform Report per 49 CFR 23.27(b).

Comments

Commenters unanimously supported the proposed amendment noting the 30-day extension would allow recipients to perform a more thorough shortfall analysis using current data from the Uniform Report.

DOT Response

The final rule adopts the change to the shortfall provisions in § 23.57 and

sets the due date to April 1 for the shortfall analysis, which is 30 days after Uniform Report due date on March 1.

Subpart E—Other Provisions

42. Long-Term Exclusive Agreements (§ 23.75)

Comments

Five-Year Term for Long-Term Agreements

The NPRM did not propose to redefine ''long-term'' to a longer period greater than five years because of concerns that doing such would reduce the degree of FAA's oversight to ensure that long-term concession agreements include adequate ACDBE participation. However, the NPRM did request additional comment from stakeholders on keeping the term at 5 years rather than revising it to 10 years.

Several commenters agreed on extending the term to 7 to 10 years or more. The reasons for extending the term included attracting a diverse pool of bidders/proposers, allowing for investment amortization, establishing brand recognition, improving customer service, and reducing the workload for recipient staff during concession solicitations. The Department received one comment stating that the definition of long-term agreement should be revised to State that agreements are only considered long-term if an agreement contains options that result in a lease period of more than ten years.

Options and Definition of an Exclusive Agreement

The current regulation does not define the term ''exclusive,'' nor does it include ''options'' in its definition of ''long-term'' under § 23.75(a). To ensure that these terms are addressed in the rule, the NPRM proposed to revise the definition of ''long-term exclusive agreement'', under § 23.75(a) to include the definition of ''exclusive'' and to state an agreement is long-term if it includes options that result in a lease period of more than five years.

In response to the proposal to define ''exclusive agreements'' in § 23.75(a), commenters asked why the proposal still required FAA approval for an exclusive agreement with an ACDBE. They also suggested defining ''exclusive agreement'' as a contract that does not have ACDBE participation at the airport's approved goal levels for the applicable trade. Another commenter asked for clarification on the term ''type of business activity.''

Long-Term Agreements and Holdovers

The NPRM raised concerns over holdover tenancies that may cause an exclusive agreement to become long-term and preclude potential ACDBE competitors from participating in agreements in the same manner as other agreements currently prohibited under the rule. While the NPRM did not put forth any specific proposals on how best to address holdover tenancies in the context of § 23.75, the Department sought public comment on the matter.

The few comments received in response to holdover tenancies in the NPRM recommended the Department to provide flexibility and allow holdovers up to 12 months without triggering long-term exclusive agreement requirements.

Special Local Circumstances

One comment requested the Department define the term ''special local circumstances.'' The commenter believed that without further explanation, the evaluation of ''special local circumstances'' is completely subjective for each application and may lead to unfair inconsistencies across the country and, possibly, within a single airport. Another commenter requested clarification on whether the amortization period required for investment was sufficient to be considered a ''special local circumstance.''

Amending Document Requirements

In response to stakeholder concerns about the documentation and information that recipients must submit to the FAA for approval of long-term exclusive agreements, the NPRM proposed several changes to § 23.75(c). These changes aimed to address unclear, unfeasible, or non-pertinent documentation requirements. This included removing or replacing requirements under paragraph (c)(2)(ii) to review the extent of ACDBE participation before the exercise of each renewal option and the assurances under paragraph (c)(3) that require any ACDBE participant to be in an acceptable form. The proposal also included changes that allow for certain documentation and information required for approval of long-term exclusive (LTE) agreements to be submitted prior to the release of the solicitation or request for proposals and others, prior to award of the contract.

The Department received a comment stating that the proposed revisions to the information and documentation requirements would significantly increase the time between when a solicitation is prepared and when it can be released, which could impair an airport's ability to obtain timely, market-relevant proposals. The comment explained that the timelines proposed would require airports to initiate a solicitation process about 12 months in advance of a contract's expiration in order to ensure that a new contract is in place. They noted that this was of particular concern because market conditions can change significantly over a 12-month period. They urged delaying the implementation of the proposed changes to the documentation requirements to avoid disrupting ongoing and planned procurement processes.

The Department also received a comment that recommended completely overhauling the long-term exclusive agreement approval process and adopting a two-step process. This process would require the airport recipient to submit a goal analysis to the FAA as a notification before solicitation. After the solicitation process concluded, the airport recipient would send FAA information on the level of interest and availability of ACDBEs and show that the contract was awarded to a proposer that met the goal or made good faith efforts to meet the goal. Another commenter suggested that the final rule only require a recipient to perform a goal analysis for the specific opportunity, along with the type of concession and term of the proposed long-term exclusive agreement, which would both be sent to the FAA for approval.

DOT Response

Five-Year Term for Long-Term Agreements

The Department recognizes that most concession agreements extend beyond a term of five years. Thus, the final rule extends the definition of long term to ten years to ease burdens that fall on airports required to implement LTE requirements under part 23. We note that this aids smaller hub airports that have fewer concession opportunities, increasing the likelihood of long-term exclusive agreements subject to FAA approval under § 23.75(c). Extending the definition to ten years also aims to mitigate any additional burdens placed on smaller hub airports by the new FAA approval requirements of leases that become long term as a result of holdovers as discussed below. The Department elected not to extend the term beyond ten years in order to maintain FAA oversight to ensure long-term exclusive concession agreements maintain adequate ACDBE participation.

Long-Term Agreements and Holdovers

Holdover provisions of an airport lease, agreement, or contract may permit

a recipient airport to extend the terms of an existing airport lease, in the event both the airport recipient and the tenant desire to continue the relationship as it exists, without executing a new lease. The length of holdover periods is often not defined in the lease and may continue on a month-to-month basis once the lease term ends.

Notwithstanding that holdovers may bridge gaps to meet short-term needs, the Department is starting to see longer holdover periods following the end of concession lease terms. These extended holdover periods have a similar effect of precluding potential ACDBE competitors from participating in opportunities as long-term exclusive agreements that require approval by the FAA pursuant to § 23.75. If not addressed, the use of holdovers in these cases, without FAA oversight, circumvents the requirements under § 23.75. For this reason, the final rule now makes clear that exclusive leases, agreements, or contracts that become long-term as a result a holdover, absent an approved plan to release a solicitation for that opportunity or renegotiate the lease or contract, are generally prohibited.

The final rule adds an oversight mechanism in the new paragraph (e) for FAA to monitor short-term leases that become long-term as a result of holdovers. Under the rule, airport recipients must submit a ''holdover plan'' to FAA for approval at least 60 days prior to the expiration of the current contract, agreement, or lease. Holdover plans include the same information and documentation for LTE agreements under the amended paragraphs (c)(3), (c)(4), (c)(6) and (c)(7) of § 23.75, in addition to a written explanation for the holdover and the method and date the airport recipient will use to solicit or renegotiate the concession contract, agreement, or lease in holdover status.

The written explanation for a holdover is similar to the existing special local circumstance provision. Airport recipients must articulate a need for a holdover period that causes an exclusive agreement to become a long-term lease or contract. Reasons that may support a holdover are bridging operational gaps that might occur due to renegotiations and transitions of lessees or expected delays in solicitation or re-bidding processes. The requirement for airport recipients to submit the solicitation method that they intend to apply, as well as a date it will renegotiate or re-bid a concession opportunity, provides a definitive strategy and timeframe to afford an opportunity for ACDBE participation.

Under this provision, recipients are also required to submit the information and documentation required under § 23.75(c)(3), (c)(4), (c)(6) and (c)(7). This includes an ACDBE contract goal analysis, ACDBE certification documentation and investment information, and the final long-term exclusive concession agreement. These items are necessary for FAA to determine the anticipated length of the holdover period and the level of ACDBE participation precluded by the holdover. Airport recipients that are unable to produce this information or documentation must submit an explanation as to why the item is not available or cannot be submitted as part of their holdover plan.

Definition of an Exclusive Agreement

The final rule adopts the definition of ''exclusive'' as proposed. Evaluating whether an agreement is ''exclusive'' requires examining the agreement in reference to the type of business covered (*e.g.,* management contract, advertising, web-based or electronic businesses, food and beverage, parking). A determination on whether a certain business activity under a contract, lease or agreement is exclusive should be made based on the totality of the circumstances. *See* Principles for Evaluating Long-Term, Exclusive Agreements in the ACDBE Program, June 10, 2013, § 1.2, at pp. 5–6.

In response to comments, the Department will not adopt a definition of ''exclusive'' that exempts LTE agreements with ACDBE participation from the requirements of § 23.75. Such a change is inconsistent with the intent of § 23.75, which is to provide for the review of LTE agreements to ensure adequate ACDBE participation throughout the term of the agreement, irrespective of whether an ACDBE or a non-ACDBE enterprise is the prime concessionaire being considered for award of an exclusive, long-term agreement. See 57 FR 18401 (Apr. 30, 1992). Not requiring the review of a long-term concession agreement with ACDBE participation would allow low ACDBE goals set on contracts to remain in place for extended lease periods without justification, thereby precluding those opportunities from generating more meaningful ACDBE participation.

Special Local Circumstances

We are not defining ''special local circumstances'' in this final rule. The term is intended to be broad and flexible to account for a wide range of scenarios that may justify the use of a long-term exclusive agreement. Contrary to the comment's concern that without further explanation, the evaluation of ''special local circumstances'' may lead to unfair inconsistencies, to date, FAA has not disapproved any request for approval of an LTE agreement based on an inadequate special local circumstance.

In response to the comment seeking clarification on whether the amortization period required for investment was sufficient to be considered a ''special local circumstance,'' the answer is no. The LTE Guidance provides several examples of special local circumstances, which include the market size relative to the number of available vendors, reduced enplanements, an extreme act of nature, new business concepts, and severe economic factors (for instance, an airline goes out of business). The LTE Guidance makes clear that the amortization of the initial investment alone is not sufficient to justify approval of a long-term exclusive agreement, but may be a factor among others (*e.g.,* marketplace concepts and full-kitchen restaurants that require more costly development) to support the special local circumstances provision under the rule.

Amending Document Requirements

The Department is electing to amend the document requirements under § 23.75. First, paragraph (c)(2)(i) is removed from § 23.75, eliminating the requirement that an LTE agreement provide the ''number of ACDBEs that reasonably reflects their availability in a recipient's market area, . . . and account for a percentage of the estimated annual gross receipts equivalent to a level set in accordance with § 23.47 through § 23.49.'' This provision is removed since the agreement may not provide opportunities for direct ownership and is now included via the new requirement to submit an ACDBE contract goal analysis under paragraph (c)(3).

Second, paragraph (c)(2)(ii) is removed, eliminating the requirement that airport recipients ''review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted.'' Removing this provision is necessary to prevent a prime concessionaire from terminating an ACDBE from an LTE agreement after it made an investment simply because a decrease in participation may be warranted upon the exercise of an option.

Third, paragraph (c)(2)(iii) is removed, eliminating the requirement that an LTE agreement include a

provision that provides for the termination of an ACDBE during the term of the LTE agreement, without the recipient's consent. This provision is redundant and unnecessary since § 26.53, which applies to part 23 by reference, already establishes the requirements for the replacement or substitution of the ACDBEs, including those that are party to an LTE agreement or contract.

Fourth, the requirement in paragraph (c)(3), which requires recipients to submit assurances that any ACDBE participant will be in an acceptable form such as a sublease, joint venture, or partnership is replaced. The new provision now requires recipients submit an ACDBE contract goal analysis which captures goals set on both direct ownership arrangements and goods and service purchases.

Next, the requirement in paragraph (c)(7) for recipients to provide information on the estimated gross receipts and net profit to be earned by the ACDBE is removed. This financial disclosure requirement applies only to the ACDBE and may be a discriminatory practice since the process does not require the same from the non-ACDBE.

Section 23.75(c) is amended to now require airport recipients to submit items in paragraphs (c)(1) through (3) of this section prior to releasing the solicitation or request for proposals (RFP) and items in paragraphs (c)(4) through (7) prior to award of the contract.

The Department agrees that the 90-day period to submit those items before the solicitation is released may be shortened to mitigate impacts to some airport recipients' planned procurement processes. The FAA does not anticipate 90 days will be required to review and approve LTE agreements. Therefore, the final rule shortens the 90-day period to submit the items in paragraphs (c)(1) through (3), to at least 60-days prior to release of the solicitation. The 45-day period to submit items in paragraphs (c)(4) through (7) before contract award will remain unchanged.

Next, the Department disagrees with comments to simplify the information and documentation requirements under § 23.75(c) to two items (*e.g.,* contract goal analysis, and evidence that goal was met, or good faith efforts were made, etc.). ACDBE participation is a key part of the information needed for approval and each item in paragraphs (c)(1) through (c)(7) is valuable for FAA to determine whether arrangements have been made for adequate ACDBE participation throughout the LTE agreement. For this reason, the final rule retains the information and documentation requirements in § 23.75(c) as proposed by the NPRM.

The final rule adds a new paragraph (d) to § 23.75 that addresses the requirements for agreements awarded through direct negotiation. Because there is no competition for awards made through direct negotiation, this provision omits the requirement under paragraph (c)(2) for airport recipients to submit a copy of the solicitation because solicitations are not used for direct negotiated procurements. Under the rule, airport recipients are still required to submit the items in paragraphs (c)(1) and (c)(3) through (7) of the updated § 23.75.

43. Local Geographic Preferences (§ 23.79)

NPRM

The current § 23.79 prohibits recipients from using local geographic preference, which is defined under the rule as any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as, or with, a concession at an airport. The proposed revision to § 23.79 clarifies that regardless of a concession's certification status, any local geographic preferences that gives a concession located in a local area an advantage over concessions from other places is prohibited.

Comments

There was unanimous support for the NPRM's proposed revisions to § 23.79. Commenters agreed with the revisions to clarify that local geographic preferences are not permitted regardless of concession certification status but that recipients may request concepts that are local to a specific region when soliciting proposals.

One commenter suggested that the Department include within the regulation examples of what requirements could constitute ''advantage'' for local concessionaires over other concessionaires from other places.

DOT Response

The final rule adopts the changes to § 23.79. This clarifying change makes clear that the provision prohibiting local geographic preferences applies not just to ACDBEs but all firms, regardless of their concession certification status. The final rule also leaves the existing definition of local geographic preference unchanged. Section 23.79 defines local geographic preference as any requirement that gives a concessionaire located in one place (*e.g.,* [recipient's] local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at [recipient's] airport.

Under the definition of local geographic preference, an example of what may constitute an advantage is a preference criteria used in the evaluation of bids or proposals based on a firm's geographic location, or owner's residency. Another example of what may constitute advantage is the placement of unreasonable local requirements on firms in order for them to qualify to do business. Nothing in this section should be construed as preempting State licensing requirements or prohibiting concepts that are local to a specific region when soliciting proposals. However, airport recipients should still report to the FAA all other State or local law, regulation, or policy pertaining to minorities, women, or disadvantaged business enterprises concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of part 23. The FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern. See § 23.77.

44. Appendix A to Part 23: Uniform Report of ACDBE Participation Form

NPRM

Section 23.27(b) requires recipients to submit an annual report on ACDBE participation using the Uniform Report found in Appendix A. The Department proposed to remove the Uniform Report of ACDBE Participation from Appendix A to Part 23 and instead post the form on DOT's website. This is an administrative action that does not affect the public's ability to comment on any amendments to the information collections in the form.

Comments

In the NPRM, the Department estimated that it would take primary airports 3.2 hours to comply with the proposed ACDBE Annual Report of Percentages of ACDBEs in Various Categories in § 23.27(d). The commenter objected to the Department's estimate, approximating that it would take at least 40 hours.

Block #5 Instructions of Appendix A, Definition of Goods and Services

The NPRM proposed revising the definition of ''goods/services'' in the block #5 instructions to clarify that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported. The

majority of commenters supported the proposal to revise the definition of ''goods/services.'' However, concerns were raised on the calculation of Columns A and C in block #5 of Appendix A. Some commenters inquired about why purchases were not included in the total line for Column A but included in Column C, which could lead to misrepresentation of data.

A few commenters focused on goods/services and recommended that the Department revisit the calculation, as recipients are not clear on how to utilize goods/services. One commenter noted that goods/services were not sufficiently addressed in the NPRM, and another requested clarification on reporting gross revenues if the goal is based on purchases.

Block #5 New Joint Venture Participation Category

No comments were received in response to the NPRM's proposal to amend the instructions in all blocks of the Uniform Report to include the definition of ''joint venture'' as defined in § 23.3 as a new participation category. The purpose of the change was to provide guidance to recipients on how to count ACDBE participation derived from joint ventures.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The Department received several comments on the NPRM's proposal to amend the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED).

Two stakeholders provided comments regarding the proposed change to block #11, expressing concerns about the amount of time it would take to complete the reporting and the lack of detailed information that airports may have regarding ownership demographics. As a result, neither commenter supported the proposed change to Appendix A, blocks #10 and #11. Instead, they recommended that recipients report the ethnicity and gender of the largest socially and economically disadvantaged shareholder, the owner with primary control, or the owner who holds the highest position within the business. Additionally, commenters suggested that certifying entities should make detailed information on the owners and their firms more easily accessible to non-certifying airports.

DOT Response

The final rule adopts the Department's proposal and will post the Uniform Report of ACDBE Participation on Department's website as amended below. A commenter's estimate of 40 hours to complete this task is unreasonable; based on the supporting statement DOT developed in support of this rulemaking and the information collection that has been submitted to OMB for approval, this task should take −4 hours, much less time on average.

Block #5 Instructions of Appendix A, Definition of Goods and Services

For the goods and services to be credited toward goals, goods and services must be purchased by concessionaires and management contractors from firms that meet definitions of ''concession'' and ''ACDBE'' under § 23.3. Purchases of goods and services by the airport cannot be credited toward goals. For this reason, the final rule adopts the definition of ''goods/services'' in the block #5 instructions as proposed, with the clarification that only participation in the form of goods and services purchased by concessionaires and management contractors from ACDBEs should be reported.

In response to comments, the existing Block #5 instructions are clear that recipients should enter in Column A, purchases of goods and services (ACDBE and non-ACDBE combined) at the airport.

Block #5 New Joint Venture Participation Category

The final rule will adopt the new participation category for joint ventures as proposed.

Blocks #10 and #11 Reporting of ACDBEs Owned by Members of Different Socially Disadvantaged Groups

The final rule adopts the proposed amendment to the requirements under block #11 in the Uniform Report to allow for participation to be reported by ACDBEs owned by multiple partners who are from different groups and whose members are presumed socially and economically disadvantaged (SED). The Department disagrees with comments that information on individual SEDOs would be difficult to obtain and that implementation of this new reporting requirement would be burdensome. Demographic information of individual SEDOs should be readily available to non-certifying airports since they are already obligated to collect racial and ethnic data of lessees, concessionaires and contractors under the existing Title VI nondiscrimination requirements in 49 CFR part 21.

In addition, the final rule expands the MAP–21 reporting requirements under § 26.11 to include ACDBEs and the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity. Non-certifying airports will be able to more easily obtain information on individual SEDOs and their firms and report this information each year on the Uniform Report.

45. Technical Corrections

Commenters unanimously supported the Department's proposal to make the provisions in part 23 consistent with the provisions of part 26, clarify existing requirements, correct typographical errors, and revise obsolete and/or duplicative provisions, and make cross references, as appropriate. The final rule fully adopts the proposal.

46. Duration

The Department received a comment on the length of time that a certification remains in effect. The commenter suggested the Department cap the number of years that a firm may remain certified for. In their view, the indefinite nature of certification stifles outreach and implicitly closes the door to other small eligible firms. By adding a maximum duration for certification, the program could open opportunities for new and developing firms to take advantage of the program.

The final rule will not adopt the above recommendation. The authorizations and statutes governing the airport improvement program do not provide the Department flexibility to place limitations or timeframes on certification of firms.

Regulatory Analysis and Notices

A. Executive Order: 12866 (''Regulatory Planning and Review''), Executive Order 13563 (''Improving Regulation and Regulatory Review''), Executive Order 14094 (Modernizing Regulatory Review), and 49 CFR Part 5 and DOT Order 2100.6A

This final rule has been deemed significant under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' as amended by Executive Order 14094 (''Modernizing Regulatory Review'') and the Department's regulations and orders (49 CFR part 5 and DOT Order 2100.6A, available at *https://www.transportation.gov/sites/dot.gov/files/2021-06/DOT-2100.6A-Rulemaking-and-Guidance-%28003%29.pdf*), because of its interest to the small business community and

transportation industries. It has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

The objective of the rule is to amend reporting and eligibility requirements for the Department's Airport Concession Disadvantaged Business Enterprises (ACDBE) program and Disadvantaged Business Enterprise (DBE) program. These programs are implemented and overseen by recipients of certain Department funds. The changes in this rule would affect businesses participating in the programs, recipients of Department funds who oversee the programs, and the Department.

The Department conducted a regulatory impact analysis, available in the docket, to assess the effects of the rule. Businesses, recipients, and the Department would incur some costs due to increased reporting requirements. At the same time, they would experience overall cost savings because the rule simplifies provisions and would relax requirements—for example, by allowing recipients to conduct virtual on-site visits.

Table 1 summarizes the estimated costs and cost savings of the rule over a ten-year analysis period (non-Federal Government). The rule has annualized net cost savings of $58.7 million at a 3 percent discount rate and $6.74 million at a 7 percent discount rate.

Table 1—Summary of Costs and Cost Savings of the Rule, 10-Year Period

[Rounded to Thousands]

TABLE 1—COSTS AND COST SAVINGS, 10-YEAR PERIOD

[Dollars, rounded to the nearest 1,000]

	Undiscounted	Present value 3%	Annualized 3%	Present value 7%	Annualized 7%
Total cost savings	203,668,000	178,773,000	20,957,000	152,727,000	21,744,000
Total cost	134,030,000	120,073,000	14,075,000	105,400,000	15,005,000
Net cost savings	69,638,000	58,700,000	6,882,000	47,327,000	6,739,000

The Department determined that amending the rules is necessary because many portions of the current rules seem outdated for today's DBE and ACDBE marketplace. They might inhibit firm growth and success, and limit recipient and sponsors' ability to effectively monitor program compliance by all participants in a post-pandemic environment. The rule updates several core provisions of the regulation to maintain optimal program performance, improve operational cohesiveness, and provide contemporary solutions for program deficiencies.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461 (Aug. 16, 2002)) requires agencies to review regulations to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if issued, would not have a significant economic impact on a substantial number of small entities. The Department prepared an IRFA as part of the Department's regulatory impact analysis (Appendix C of the regulatory impact analysis), available in the docket DOT–OST–2022–0051–008.

DOT invited all interested parties to submit data and information regarding the potential economic impact on small entities that would come from promulgating the NPRM. DOT considered the comments received in the public comment process when preparing the Final Regulatory Flexibility Analysis, and we received no comments on the preliminary finding of non-significance.

C. Executive Order 13132 (''Federalism'')

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). It would not include any provision that: (1) has substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and the responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. The DBE and ACDBE programs are governed by Federal regulations 49 CFR parts 26 and 23. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084 (''Tribal Consultation and Coordination'')

This rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rulemaking does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by State, local or Tribal governments, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. The 2021 threshold after adjustment for inflation is $165 million, using the Implicit Price Deflator for the Gross Domestic Product. The assessment may be included in conjunction with other assessments, as it is here. The final rule is unlikely to result in expenditures by State, local, or Tribal governments of more than $100 million annually.

F. Paperwork Reduction Act

This final rule adds 6 new collections of information and 17 existing collections being revised that require approval by OMB under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3501 *et seq.*). Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing notice of the proposed information collection and a 60-day comment period, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The Department met these requirements when it published a notice of the proposed information in its July 21, 2022, NPRM and accompanying submission to OIRA. Comments to these collections are described above.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). The purpose of this rulemaking is to amend the Department's DBE and ACDBE regulations. Paragraph 4(c)(5) of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Transit Administration's implementing procedures, ''[p]lanning and administrative activities that do not involve or lead directly to construction, such as: . . . promulgation of rules, regulations, directives . . .'' 23 CFR 771.118(c)(4) and Federal Highway Administration's implementing procedures, ''[p]romulgation of rules, regulations, and directives.'' 23 CFR 771.117(c)(20). In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS.

The purpose of this rulemaking is to make technical improvements to the Department's DBE program, including modifications to the forms used by program and certification-related changes. While this rule has implications for eligibility for the program—and therefore may change who is eligible for participation in the DBE program—it does not change the underlying programs and projects being carried out with DOT funds. Those programs and projects remain subject to separate environmental review requirements, including review under NEPA. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects in 49 CFR Part 23 and 26

Administrative practice and procedure, Airports, Civil Rights, Government contracts, Grant programs—transportation; Mass transportation, Minority Businesses, Reporting and recordkeeping requirements.

Issued this 27 day of February, 2024, at Washington, DC.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR parts 23 and 26 as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

■ 1. The authority citation for part 23 is revised to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44 FR 29637, 3 CFR, 1979 Comp., p. 393.

■ 2. Amend § 23.1 by:
■ a. In paragraph (e), removing the word ''and'' at the end of the paragraph;
■ b. Redesignating paragraph (f) as paragraph (h); and
■ c. Adding new paragraph (f) and paragraph (g).

The additions read as follows:

§ 23.1 What are the objectives of this part?

* * * * *

(f) To promote the use of ACDBEs in all types of concessions activities at airports receiving DOT financial assistance;

(g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE program; and

* * * * *

■ 3. Revise § 23.3 to read as follows:

§ 23.3 What do the terms used in this part mean?

Administrator means the Administrator of the Federal Aviation Administration (FAA).

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR 121.103(h)) do not apply to this part.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the ACDBE program.

Airport Concession Disadvantaged Business Enterprise (ACDBE) means a firm seeking to operate as a concession that is a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)

Assets has the same meaning the term has in 49 CFR part 26.

Car dealership means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

Concession means one or more of the types of for-profit businesses that serve the traveling public listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services

to the traveling public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.

(2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

Example 1 to paragraph (2): A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However, the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be ''located on the airport'' solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be ''located on the airport,'' however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts or subcontracts.

(v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (*e.g.,* skydiving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

Concessionaire means a firm that owns and controls a concession or a portion of a concession.

Contingent liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant firm, legal claims and judgments, and provisions for Federal income tax.

Days means calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary.

Direct ownership arrangement means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

Good faith efforts means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, or registered domestic partner.

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the Tribe, band, nation, group, or community resides. See definition of ''tribally-owned concern'' in this section.

Joint venture means an association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

Large hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Management contract or subcontract means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

Material amendment means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

Medium hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Nonhub primary airport means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

Operating Administration or *OA* means any of the following: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The ''Administrator'' of an OA includes his or her designee(s).

Part 26 means 49 CFR part 26, DOT's Disadvantaged Business Enterprise Program regulation.

Personal net worth or PNW has the same meaning the term has in 49 CFR part 26.

Primary airport means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

Primary industry classification means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the U.S. Census Bureau of the U.S. Department of Commerce. The U.S. Census Bureau also makes materials available through its website (*https://www.census.gov/naics/*).

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for ACDBE program purposes.

Race-conscious means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

Race-neutral means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to ACDBE firms.

Small Business Administration or *SBA* means the United States Small Business Administration.

Small business concern means a for profit business that does not exceed the size standards of § 23.33.

Small hub airport means a publicly owned commercial service airport that has a number of passenger boardings equal to at least 0.05 percent of all passenger boardings in the United States but less than 0.25 percent of such passenger boardings.

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a certain group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. Socially and economically disadvantaged individuals include:

(1) Any individual determined by a recipient to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if the certifier requires it.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) ''Black Americans,'' which includes persons having origins in any of the Black racial groups of Africa;

(ii) ''Hispanic Americans,'' which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) ''Native Americans,'' which includes persons who are enrolled members of a federally or State-recognized Indian Tribe, Alaska Natives, or Native Hawaiians.

(iv) ''Asian-Pacific Americans,'' which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong.

(v) ''Subcontinent Asian Americans,'' which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Subconcession means a firm that has a sublease or other agreement with a prime concessionaire rather than with the airport itself, to operate a concession at the airport.

Sublease means a lease by a lessee (tenant) to a sublessee (subtenant). Sublease is an example of a subconcession in which the sublessee is independently responsible for the full financing and operation of the subleased concession location(s) and activities. A sublease passes on to the sublessee all requirements applicable to the concession under the primary lease, including proportionate share of the rent and capital expenditures.

Tribally-owned concern means any concern at least 51 percent owned by an Indian Tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (*i.e.,* ''You must do XYZ'' means that recipients must do XYZ).

§ 23.13 [Amended]

■ 4. Amend § 23.13 by:

■ a. In paragraph (b) introductory text, in the first sentence, removing the word ''of'' appearing after the word ''interpretations''; and

■ b. In paragraph (d) introductory text, removing the phrase ''are for the purpose of authorizing'' and adding in its place the word ''authorize''.

■ 5. Revise § 23.21 to read as follows:

§ 23.21 Who must submit an ACDBE program to FAA, and when?

(a) If you are a primary airport and receive FAA financial assistance, you must submit an ACDBE program plan meeting the requirements of this part to the FAA for approval.

(1) The recipient must submit this program plan on the same schedule as provided for in 23.45(a) of this part.

(2) Timely submission and FAA approval of a recipient's ACDBE program plan is a condition of eligibility for FAA financial assistance.

(b) If you are a primary airport that does not have an ACDBE program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.,* you must submit an ACDBE program plan to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you may implement one plan for all your locations. However, you must establish a separate ACDBE goal for each airport.

(d) If a recipient makes any significant changes to their ACDBE program at any time, the recipient must provide the amended program to the FAA for approval before implementing the changes.

(e) If a recipient is a non-primary airport, non-commercial service airport, a general aviation airport, reliever airport, or any other airport that does not have scheduled commercial service, it is not required to have an ACDBE program. However, the recipient must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 6. Amend § 23.23 by adding paragraph (c) to read as follows:

§ 23.23 What administrative provisions must be in a recipient's ACDBE program?

* * * * *

(c) You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their community and make reasonable efforts to use these institutions. You must also encourage prime concessionaires to use such institutions.

■ 7. Amend § 23.25 by revising paragraphs (d), (e), and (f) to read as follows:

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

* * * * *

(d) Your ACDBE program must include race-neutral measures that you will take. You must maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of race-neutral measures you can implement:

(1) Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under this part;

(2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;

(3) When practical, structuring concession activities to encourage and facilitate the participation of ACDBEs;

(4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the recipient's ACDBE program will affect the procurement process;

(6) Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and

(7) Establishing a business development program (*see* § 26.35 of this chapter); technical assistance program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) In setting concession-specific goals for concession opportunities other than car rental, you are required to explore, to the maximum extent practicable, all available options to set goals that concessionaires can meet through direct ownership arrangements. A concession-specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis of the relative availability of ACDBEs and all relevant evidence reasonably supports that there is *de minimis* availability for direct ownership arrangement participation for that concession opportunity.

(ii) In setting car rental concession-specific goals, you cannot require a car rental company to change its corporate structure to provide for participation via direct ownership arrangement. When your overall goal for car rental concessions is based on purchases or leases of goods and services, you are not required to explore options for direct ownership arrangements prior to setting a car rental concession-specific goal based on purchases or leases of goods and services.

(iii) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(iv) If the goal applies to purchases or leases of goods and services from ACDBEs, calculate the goal as a percentage of the total estimated dollar value of all purchases to be made by the concessionaire.

(v) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(vi) The administrative procedures applicable to contract goals in §§ 26.51 through 26.53 of this chapter apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the non-car rental concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to car rental and non-car rental ACDBE goals at the airport to make good faith efforts to meet goals when set pursuant to paragraph (e) of this section.

* * * * *

■ 8. Add § 23.26 to read as follows:

§ 23.26 Fostering small business participation.

(a) Your ACDBE program must include an element to provide for the structuring of concession opportunities to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of concession opportunities that may preclude small business participation in solicitations.

(b) This element must be submitted to the FAA for approval as a part of your ACDBE program no later than October 7, 2024. As part of this program element

you may include, but are not limited to including, the following strategies:

(1) Establish a race-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small business set-aside concession opportunities which may include consideration of size and availability of small businesses to operate the concession.

(2) Consider the concession opportunities available through all concession models.

(3) On concession opportunities that do not include ACDBE contract goals, require all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate.

(4) Identify alternative concession contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities.

(c) This element should include an objective, definition of small business, verification process, monitoring plan, and implementation timeline.

(d) Your element must include the following assurances:

(1) Your element is authorized under State law;

(2) Certified ACDBEs that meet the size criteria established under your element are presumptively eligible to participate in your element;

(3) There are no geographic preferences or limitations imposed on any concession opportunities included in your element;

(4) There are no limits on the number of concession opportunities awarded to firms participating in your element but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;

(5) You will take aggressive steps to encourage those minority and women owned firms that are eligible for ACDBE certification to become certified; and

(6) Your element is open to small businesses regardless of their location (*i.e.,* that there is no local or other geographic preference).

(e) A State, local, or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the requirements of this part.

(f) This element must not include local geographic preferences per § 23.79.

(g) You must submit an annual report on small business participation obtained through the use of your small business element. This report must be submitted in a format acceptable to the FAA based on a schedule established and posted to the agency's website, available at *https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.*

(h) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your ACDBE program.

■ 9. Amend § 23.27 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

* * * * *

(b) You must submit an annual report on ACDBE participation to the FAA by March 1 following the end of each fiscal year. This report must be submitted in the format acceptable to the FAA and contain all of the information described in the Uniform Report of ACDBE Participation.

(c) You must create and maintain active participants list information as described in paragraph (c)(2) of this section and enter it into a system designated by the FAA.

(1) The purpose of this active participants list is to ensure that you have the most accurate data possible about the universe of ACDBE and non-ACDBEs who seek work in your airport concessions program as a tool to help you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 23.1 are being achieved.

(2) You must obtain the following active participants list information about ACDBE and non-ACDBEs who seek to work on each of your concession opportunities.

(i) Firm name;

(ii) Firm address including ZIP code;

(iii) Firm status as an ACDBE or non-ACDBE;

(iv) Race and gender information for the firm's majority owner;

(v) NAICS code applicable to the concession contract in which the firm is seeking to perform;

(vi) Age of the firm; and

(vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (*e.g.,* less than $1 million; $1–3 million; $3–6 million; $6–10 million, etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all active participants for your concession opportunities by requiring the information in paragraph (c)(2) of this section to be submitted with their proposals or initial responses to negotiated procurements. You must enter this data in FAA's designated system no later than March 1 following the fiscal year in which the relevant concession opportunity was awarded.

(d) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 of this chapter must report to DOT's Departmental Office of Civil Rights each year, the following information:

(1) The number and percentage of in-state and out-of-state ACDBE certifications for socially and economically disadvantaged by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of ACDBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) The number of decertified firms:

(i) Total in-state and out-of-state firms decertified;

(ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;

(iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.

(4) Number of in-state and out-of-state ACDBEs summarily suspended;

(5) Number of in-state and out-of-state ACDBE applications received for an individualized determination of social and economic disadvantage status; and

(6) Number of in-state and out-of-state ACDBEs whose owner(s) made an individualized showing of social and economic disadvantaged status.

§ 23.31 [Amended]

■ 10. Amend § 23.31 by removing paragraph (c).

■ 11. Revise § 23.33 to read as follows:

§ 23.33 What size standards do recipients use to determine the eligibility of applicants and ACDBEs?

(a) Except as provided in paragraph (b) of this section, recipients must treat a firm as a small business eligible to be certified as an ACDBE if the gross receipts of the applicant firm and its affiliates, calculated in accordance with 13 CFR 121.104 averaged over the firm's previous five fiscal years, do not exceed $56.42 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) *Banks and financial institutions.* $1 billion in assets;

(2) *Passenger car rental companies.* $75.23 million average annual gross receipts over the firm's previous five fiscal years;

(3) *Pay telephones.* 1,500 employees; and

(4) *New car dealers.* 350 employees.

(c) For size purposes, gross receipts (as defined in 13 CFR 121.104(a)), of affiliates should be included in a manner consistent with 13 CFR 121.104(d), except in the context of joint ventures. For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (*e.g.,* subcontracts from a joint venture entity to joint venture partners).

■ 12 Revise § 23.35 to read as follows:

§ 23.35 What is the personal net worth (PNW) limit for disadvantaged owners of ACDBEs?

(a) The Department will adjust the PNW cap by May 9, 2024 by multiplying $1,600,000 by the growth in total household net worth since 2019 as described by ''Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)'' produced by the Board of Governors of the Federal Reserve (*https://www.federalreserve.gov/releases/z1/*), and normalized by the total number of households as collected by the Census in ''Families and Living Arrangements'' (*https://www.census.gov/topics/families/families-and-households.html*) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at *https://www.Transportation.gov/DBEPNW.* Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.

(b) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}}$$

§ 23.37 [Amended]

■ 13. Amend § 23.37 in the second sentence of paragraph (b) by removing the phrase ''does not do work relevant to the airport's concessions program'' and adding the phrase ''does not perform work or provide services relevant to the airport's concessions program'' in its place.

■ 14. Revise § 23.39 to read as follows:

§ 23.39 What are other ACDBE certification requirements?

(a) The provisions of § 26.83(c)(1) of this chapter do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. You must review those persons' résumés and/or work histories. You must maintain a complete audio recording of the interviews. The certifier must also visit one or more active job sites (if there is one). These activities comprise the ''on-site review'' (OSR), a written report of which the certifier must keep in its files.

(2) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, articles of incorporation/organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued certificates of good standing;

(3) Analyze the bonding and financial capacity of the firm; lease and loan agreements; and bank account signature cards;

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received; and payroll records;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform;

(7) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service; and

(8) Require applicants for ACDBE certification to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this chapter.

(b) In reviewing the Declaration of Eligibility required by § 26.83(j) of this chapter, you must ensure that the ACDBE applicant provides documentation that it meets the applicable size standard in § 23.33.

(c) For purposes of this part, the term *prime contractor* in § 26.87(j) of this chapter includes a firm holding a contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of § 26.63(c)(2) of this chapter do not apply. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.63(c)(1) of this chapter.

(e) You must use the Uniform Certification Application found in part 26 of this chapter without change. However, you may provide in your ACDBE program, with the written approval of the concerned Operating Administration, for supplementing the form by requesting specified additional information consistent with this part. The applicant must state that it is applying for certification as an ACDBE and complete all of section 5.

(f) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

■ 15. Amend § 23.43 by adding paragraph (c) as to read follows:

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

* * * * *

(c) The requirements of this section do not apply if no new concession opportunities will become available during the goal period. However, recipients must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

■ 16. Amend § 23.45 by revising paragraphs (a), (b), and (h) to read as follows:

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your overall goals meeting the requirements of this subpart are due based on a schedule established by the FAA and posted on the FAA's website.

(b) You must then submit goals every three years based on the published schedule.

* * * * *

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or race-conscious/race-neutral ''split.'' The adjusted goal represents the FAA's determination of an appropriate overall goal for ACDBE participation in the recipient's concession program, based on relevant data and analysis. The adjusted goal is binding.

* * * * *

§ 23.51 [Amended]

■ 17. Amend § 23.51 in paragraph (c)(1) by removing ''*www.census.gov/epcd/cbp/view/cbpview.html*'' and adding in its place *https://www.census.gov/programs-surveys/cbp.html.*''

§ 23.53 [Amended]

■ 18. Amend § 23.53 in paragraph (d)(2) by removing ''a ACDBE'' and adding ''an ACDBE'' in its place.

■ 19. Amend § 23.55 by:

■ a. Revising paragraph (e);

■ b. In paragraph (g), removing ''a ACDBE'' and adding ''an ACDBE'' in its place; and

■ c. Revising paragraphs (h)(1) and (2) and (j).

The revisions read as follows:

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

* * * * *

(e) Count 100 percent of fees or commissions charged by an ACDBE firm for a bona fide service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

* * * * *

(h) * * *

(1) Count 100 percent of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count 100 percent of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

* * * * *

(j) When an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the business size standards of this part during the performance of a contract or other agreement, the firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement. However, you must verify that the firm in all other respects remains an eligible ACDBE and you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (*e.g.,* in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

(1) The firm must inform the recipient in writing of any change in circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any material change. Reporting must be made as provided in § 26.83(i) of this chapter.

(2) The firm must provide to the recipient, annually on December 1, a Declaration of Eligibility, affirming that there have been no changes in the firm's circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any other material changes, other than changes regarding the firm's business size or the owner's personal net worth.

* * * * *

■ 20. Amend § 23.57 by revising paragraph (b)(3)(i) to read as follows:

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

* * * * *

(b) * * *

(3) * * *

(i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, by April 1, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval.

* * * * *

§ 23.59 [Amended]

■ 21. Amend § 23.59 in paragraph (b) by removing ''DBEs' '' and adding ''ACDBEs' '' in its place.

§ 23.71 [Amended]

■ 22. Amend § 23.71 by removing the first sentence.

■ 23. Revise § 23.75 to read as follows:

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions.

(1) For purposes of this section, a long-term agreement is one having a term of more than ten years, including any combination of base term and options or holdovers to extend the term of the agreement, if the effect is a term of more than ten years.

(2) For purposes of this section, an exclusive agreement is one having a type of business activity that is conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement; and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term exclusive concession agreement, you must submit the following information to the FAA regional office, the items in paragraphs (c)(1) through (3) of this section must be submitted at least 60 days before the solicitation is released and items in paragraphs (c)(4) through (7) of this section must be submitted at least 45 days before contract award:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the solicitation.

(3) ACDBE contract goal analysis developed in accordance with this part.

(4) Documentation that ACDBE participants are certified in the appropriate NAICS code in order for the participation to count towards ACDBE goals.

(5) A general description of the type of business or businesses to be operated by the ACDBE, including location and concept of the ACDBE operation.

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE, if applicable.

(7) Final long-term exclusive concession agreement, subleasing or other agreements.

(d) In order to obtain FAA approval of a long-term exclusive concession agreement that has been awarded through direct negotiations, you must submit the items in paragraphs (c)(1) and (3) through (7) of this section at least 45 days before contract award.

(e) In order to obtain FAA approval of an exclusive concession agreement that becomes long-term as a result of a holdover tenancy, you must submit to the responsible FAA regional office a holdover plan for FAA approval at least 60 days prior to the expiration of the current lease term. The holdover plan shall include the following information:

(1) A description of the special local circumstances that warrant the holdover.

(2) Anticipated date for renewal or re-bidding of the agreement.

(3) The method to be applied for renewal or re-bidding of the agreement.

(4) Submission of all items required under paragraphs (c)(3), (4), (6), and (7) of this section for the agreement in holdover status or an explanation as to why the item is not available or cannot be submitted.

§ 23.77 [Amended]

■ 24. Amend § 23.77 in paragraph (b) by removing the term ''disadvantaged business enterprise'' and adding in its place ''Disadvantaged Business Enterprise''.

■ 25. Revise § 23.79 to read as follows:

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives a concessionaire located in one place (*e.g.,* your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23 [Removed]

■ 26. Remove appendix A to part 23.

PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

■ 28. The authority citation for part 26 is revised to read as follows:

Authority: 23 U.S.C. 304 and 324; 42 U.S.C. 2000d, *et seq.;* 49 U.S.C. 47113, 47123; Sec. 1101(b), Pub. L. 114–94, 129 Stat. 1312, 1324 (23 U.S.C. 101 note); Sec. 150, Pub. L. 115–254, 132 Stat. 3215 (23 U.S.C. 101 note); Pub. L. 117–58, 135 Stat. 429 (23 U.S.C. 101 note).

§ 26.1 [Amended]

■ 29. Amend § 26.1 in paragraph (f) by removing ''federally-assisted'' and add in its place ''federally assisted''.

■ 30. Revise § 26.3 to read as follows:

§ 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102–240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Pub. L. 112–141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114–94;, and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102–240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA–21, Public Law 105–178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114–94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58), Public Law 117–58.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Mariana Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

■ 31. Amend § 26.5 by:

■ a. Revising the definitions of *Alaska Native* and *Department* or *DOT;*

■ b. Removing the definition *Disadvantaged business enterprise* or *DBE* and adding the definition *Disadvantaged Business Enterprise* or *DBE* in its place;

■ c. Adding the definitions for *FTA Tier I recipient* and *FTA Tier II recipient* in alphabetical order;

■ d. Removing the definition of *Home state;*

■ e. Removing the definition of *Indian tribe* and adding the definition of *Indian Tribe* or *Native American Tribe* in its place;

■ f. Adding the definitions for *Notice of decision* and *Notice of intent* in alphabetical order;

■ g. Removing the definition *Personal net worth* and adding the definition *Personal net worth* or *PNW* in its place;

■ h. Revising the definitions of *Primary industry classification, Principal place of business, Recipient,* and *Secretary;*

■ i. In the definition of *Socially and economically disadvantaged individual:*

■ i. In the introductory text, removing the phrase ''as a members of groups'' and adding in its place the phrase ''as a member of a group'';

■ ii. In paragraph (2)(iv), removing the locations ''Republic of the Northern Marianas Islands'' and ''Kirbati'' and adding in their place the locations ''Republic of the Northern Mariana Islands'' and ''Kiribati'', respectively;

■ iii. In paragraph (2)(v), removing the location ''the Maldives Islands'' and adding in its place the location ''Maldives'';

■ j. Removing the definition of *Transit vehicle manufacturer* and adding in its place the definition *Transit vehicle manufacturer (TVM);* and

■ k. Adding the definition of *Unsworn declaration* in alphabetical order.

The revisions and additions read as follows:

§ 26.5 Definitions

* * * * *

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

* * * * *

Department or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

* * * * *

FTA Tier I recipient means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds $670,000 in FTA funds in a Federal fiscal year.

FTA Tier II recipient means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed $670,000 in FTA funds in a Federal fiscal year.

* * * * *

Indian Tribe or *Native American Tribe* means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

* * * * *

Notice of intent or NOI means recipients letter informing a DBE of a suspension or proposed decertification.

Notice of decision or NOD means determination that denies a firm's application or decertifies a DBE.

* * * * *

Personal net worth or *PNW* means the net value of an individual's reportable assets and liabilities, per the calculation rules in § 26.68.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available online on the U.S. Census Bureau website: *www.census.gov/naics/.*

* * * * *

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term does not include construction trailers or other temporary construction sites.

* * * * *

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

Secretary means DOT's Secretary of Transportation or the Secretary's designee.

* * * * *

Transit vehicle manufacturer (TVM) means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

* * * * *

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

* * * * *

■ 32. Revise § 26.11 to read as follows:

§ 26.11 What records do recipients keep and report?

(a) You must submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.

(b) You must continue to provide data about your DBE program to the Department as directed by DOT Operating Administrations.

(c) You must obtain bidders list information as described in paragraph (c)(2) of this section and enter it into a system designated by the Department.

(1) The purpose of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 26.1 are being achieved.

(2) You must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of your federally assisted contracts:

(i) Firm name;

(ii) Firm address including ZIP code;

(iii) Firm's status as a DBE or non-DBE;

(iv) Race and gender information for the firm's majority owner;

(v) NAICS code applicable to each scope of work the firm sought to perform in its bid;

(vi) Age of the firm; and

(vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (*e.g.,* less than $1 million; $1–3 million; $3–6 million; $6–10 million; etc.) rather than requesting an exact figure from the firm.

(3) You must collect the data from all bidders for your federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. You must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded. In the case of a ''design-build'' contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), the data must be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

(d) You must maintain records documenting a firm's compliance with the requirements of this part. At a

minimum, you must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

(e) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 must report to DOT's Departmental Office of Civil Rights each year, the following information:

(1) The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);

(2) The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;

(3) The number of decertified firms:

(i) Total in-state and out-of-state firms decertified;

(ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;

(iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.

(4) The number of in-state and out-of-state firms summarily suspended;

(5) The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;

(6) The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

■ 33. Revise the heading for subpart B to read as follows:

Subpart B—Administrative Requirements for DBE Programs for Federally Assisted Contracting

■ 34. Revise § 26.21 to read as follows:

§ 26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA primary recipients receiving funds authorized by a statute to which this part applies;

(2) All FTA recipients receiving planning, capital and/or operating assistance must maintain a DBE program.

(i) FTA Tier I recipients must have a DBE program meeting all the requirements of this part.

(ii) Beginning 180 days after the publication of the final rule, FTA Tier II recipients must maintain a program locally meeting the following requirements of this part:

(A) Reporting and recordkeeping under § 26.11;

(B) Contract assurances under § 26.13;

(C) Policy statement under § 26.23;

(D) Fostering small business participation under § 26.39; and

(E) Transit vehicle procurements under § 26.49.

(3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds $250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a conforming DBE program to the concerned Operating Administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except goals that are reviewed by the relevant OA).

(2) You do not have to submit regular updates of your DBE program plan if you remain in compliance with this part. However, you must submit significant changes to the relevant OA for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your DBE program until all funds from DOT financial assistance have been expended.

■ 35. Amend § 26.29 by:

■ a. Revising paragraph (d);

■ b. Redesignating paragraph (e) as paragraph (g); and

■ c. Adding new paragraph (e) and paragraph (f).

The revision and additions read as follows:

§ 26.29 What prompt payment mechanisms must recipients have?

* * * * *

(d) Your DBE program must include the mechanisms you will use for proactive monitoring and oversight of a prime contractor's compliance with subcontractor prompt payment and return of retainage requirements in this part. Reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient monitoring and oversight mechanism.

(e) Your DBE program must provide appropriate means to enforce the requirements of this section. These means must be described in your DBE program and should include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(f) Prompt payment and return of retainage requirements in this part also apply to lower-tier subcontractors.

* * * * *

■ 36. Revise § 26.31 to read as follows:

§ 26.31 What information must a UCP include in its DBE/ACDBE directory?

(a) In the directory required under § 26.81(g), you must list all firms eligible to participate as a DBE and/or ACDBE in your program. In the listing for each firm, you must include its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE and/or ACDBE.

(b) You must list each type of work a DBE and/or ACDBE is eligible to perform by using the most specific NAICS code available to describe each type of work the firm performs. Pursuant to § 26.81(n)(1) and (3), your directory must allow for NAICS codes to be supplemented with specific descriptions of the type(s) of work the firm performs.

(c) Your directory may include additional data fields of other items readily verifiable in State or locally maintained databases, such as State licenses held, Prequalifications, and Bonding capacity.

(d) Your directory must be an online system that permits the public to search and/or filter for DBEs by:

(1) Physical location;

(2) NAICS code(s);

(3) Work descriptions; and

(4) All optional information added pursuant to paragraph (c) of this section. The directory must include a prominently displayed disclaimer (*e.g.,* large type, bold font) that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.

(e) You must make any changes to your current directory entries by November 5, 2024.

■ 37. Amend § 26.35 by revising paragraph (b)(2) introductory text to read as follows:

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

* * * * *

(b) * * *

(2) In the mentor-protégé relationship, you must:

* * * * *

■ 38. Revise § 26.37 to read as follows:

§ 26.37 What are a recipient's responsibilities for monitoring?

(a) A recipient must implement appropriate mechanisms to ensure compliance with the requirements in this part by all program participants (*e.g.,* applying legal and contract remedies available under Federal, State, and local law). The recipient must set forth these mechanisms in its DBE program.

(b) A recipient's DBE program must also include a monitoring and enforcement mechanism to ensure that work committed, or in the case of race-neutral participation, the work subcontracted, to all DBEs at contract award or subsequently is performed by the DBEs to which the work was committed or subcontracted to, and such work is counted according to the requirements of § 26.55. This mechanism must include a written verification that you have reviewed contracting records and monitored the work site to ensure the counting of each DBE's participation is consistent with its function on the contract. The monitoring to which this paragraph (b) refers may be conducted in conjunction with monitoring of contract performance for other purposes such as a commercially useful function review.

(c) You must effectively implement the following running tally mechanisms:

(1) With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.

(2) With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.53(g).

§ 26.39 [Amended]

■ 39. Amend § 26.39 in paragraph (b) introductory text by removing the phrase ''by February 28, 2012''.

■ 40. Amend § 26.45 by:

■ a. Revising paragraph (a);

■ b. Removing in paragraph (c)(1) ''*www.census.gov/epcd/cbp/view/cbpview.html*'' and adding in its place *https://www.census.gov/programs-surveys/cbp.html;*

■ c. Removing in paragraph (f)(1)(i) the words ''Website'' and adding in their place the word ''website''; and

■ d. Removing in paragraph (f)(3) the text ''incuding'', ''race-conscioous'', and ''26.51(c)'' and adding in their places the text ''including'', ''race-conscious'', and ''§ 26.51(c)'', respectively.

The revision reads as follows:

§ 26.45 How do recipients set overall goals?

(a) *General rule.* (1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are an FTA Tier II recipient or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) $670,000 or less in FTA or $250,000 or less in FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year.

* * * * *

§ 26.47 [Amended]

■ 41. Amend § 26.47 in paragraph (c)(3)(i) by removing the words ''Operational Evolution Partnership Plan'' and adding in their place the term ''CORE 30''.

■ 42. Revise § 26.49 to read as follows:

§ 26.49 What are the requirements for transit vehicle manufactures (TVMs) and for awarding DOT-assisted contracts to TVMs?

(a) If you are an FTA recipient, you must require in your DBE program that each TVM, as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(1) Only those TVMs listed on FTA's list of eligible TVMs, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid.

(2) A TVM that fails to follow the requirements of this section and this part will be deemed as non-compliant, which will result in removal from FTA's eligible TVMs list and ineligibility to bid.

(3) An FTA recipient's failure to comply with the requirements set forth in paragraph (a) of this section may result in formal enforcement action or appropriate sanction as determined by FTA (*e.g.,* FTA declining to participate in the vehicle procurement).

(4) Within 30 days of becoming contractually required to procure a transit vehicle, an FTA recipient must report to FTA:

(i) The name of the TVM that was the successful bidder; and

(ii) The Federal share of the contractual commitment at that time.

(b) If you are a TVM, you must establish and submit to FTA an annual overall percentage goal for DBE participation.

(1) In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts on which you will bid on during the fiscal year in question, less the portion(s) attributable to the manufacturing process performed entirely by your own forces.

(i) You must consider and include in your base figure all domestic contracting opportunities made available to non-DBEs.

(ii) You must exclude from this base figure funds attributable to work performed outside the United States and its territories, possessions, and commonwealths.

(iii) In establishing an overall goal, you must provide for public participation. This includes consultation with interested parties consistent with § 26.45(g).

(2) The requirements of this part with respect to submission and approval of overall goals apply to you as they do to recipients, except that TVMs set and submit their goals annually and not on a triennial basis.

(c) TVMs must comply with the reporting requirements of § 26.11, including the requirement to submit the Uniform Report of DBE Awards or Commitments and Payments, in order to remain eligible to bid on FTA assisted transit vehicle procurements.

(d) TVMs must implement all other requirements of this part, except those relating to UCPs and DBE certification procedures.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of the equipment must meet the same requirements (including goal approval by FHWA or FAA) that TVMs must meet in FTA assisted procurements.

(f) Recipients may establish project-specific goals for DBE participation in the procurement of transit vehicles from specialized manufacturers when a TVM cannot be identified.

(1) Project-specific goals established pursuant to this section are subject to the same review and approval and must be established as prescribed in the project goal provisions of § 26.45.

(2) FTA must approve the decision to use a project goal before the recipient issues a public solicitation for the vehicles in question.

(3) To support the request to develop a project goal, recipients must demonstrate that no TVMs are available to manufacture the vehicle.

§ 26.51 [Amended]

■ 43. Amend § 26.51 in paragraph (f)(4) introductory text by removing the words ''through the use of'' and adding in their place the word ''using''.

■ 44. Amend § 26.53 by:

■ a. Revising paragraphs (b)(2)(v) and (b)(3)(ii);

■ b. Adding paragraph (c)(1) and a reserved paragraph (c)(2); and

■ c. Revising paragraphs (e), (f), and (g).

The revisions and addition read as follows:

§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

* * * * *

(b) * * *

(2) * * *

(v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation according to the requirements of paragraph (c)(1) of this section.

(3) * * *

(ii) Provided that, in a negotiated procurement, such as a procurement for professional services, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient. This paragraph (b)(3)(ii) does not apply to a design-build procurement, which must follow the provisions in paragraph (e) of this section.

* * * * *

(c) * * *

(1) For each DBE listed as a regular dealer or distributor you must make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in § 26.55(e)(2)(iv)(A), (B), and (C) and (e)(3) under the contract at issue. Your preliminary determination shall be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, you are required to make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.

(2) [Reserved]

* * * * *

(e) In a design-build contracting situation, in which the recipient solicits proposals to design and build a project with minimal-project details at time of letting, the recipient may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, the recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. The recipient and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, *e.g.,* replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.

(f)(1)(i) You must require that a prime contractor not terminate a DBE or any portion of its work listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm per paragraph (g) of this section) without your prior written consent, unless you cause the termination or reduction. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by the recipient. This requirement applies to instances that include, but are not limited to, when a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

(ii) You must include in each prime contract a provision stating that:

(A) The contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided in this paragraph (f); and

(B) Unless your consent is provided under this paragraph (f), the prime contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

(2) You may provide such written consent only if you agree, for reasons stated in your concurrence document, that the prime contractor has good cause to terminate the listed DBE or any portion of its work.

(3) Good cause does not exist if the prime contractor seeks to terminate a DBE or any portion of its work that it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged, or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph (f)(3), good cause includes the following circumstances:

(i) The listed DBE subcontractor fails or refuses to execute a written contract;

(ii) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with

normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;

(iii) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;

(iv) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;

(v) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR parts 180, 215, and 1200 or applicable State law;

(vi) You have determined that the listed DBE subcontractor is not a responsible contractor;

(vii) The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;

(viii) The listed DBE is ineligible to receive DBE credit for the type of work required;

(ix) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and

(x) Other documented good cause that you determine compels the termination of the DBE subcontractor.

(4) Before transmitting to you its request to terminate a DBE subcontractor or any portion of its work, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you sent concurrently, of its intent to request to terminate and the reason for the proposed request.

(5) The prime contractor's written notice must give the DBE 5 days to respond, advising you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract/or portion thereof and why you should not approve the prime contractor's request. If required in a particular case as a matter of public necessity (*e.g.,* safety), you may provide a response period shorter than 5 days.

(6) In addition to post-award terminations, the provisions of this section apply to pre-award deletions or changes to DBEs or their listed work put forward by offerors in negotiated procurements.

(g) When a DBE subcontractor or any portion of its work is terminated by the prime contractor as provided in paragraph (f) of this section, or if work committed to a DBE is reduced due to overestimations made prior to award, the prime contractor must use good faith efforts to include additional DBE participation to the extent needed to meet the contract goal. The good faith efforts shall be documented by the contractor. If the recipient requests documentation under this provision, the contractor shall submit the documentation within 7 days, which may be extended for an additional 7 days, if necessary, at the request of the contractor, and the recipient shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

* * * * *

■ 45. Amend § 26.55 by:

■ a. Removing the word ''actually'' in paragraph (a) introductory text and twice in paragraph (c)(1);

■ b. In paragraph (c)(2), removing the words ''in order'';

■ c. In paragraph (c)(3), removing the words ''on the basis of'' and adding in their place the word ''within'';

■ d. Revising paragraph (e);

■ e. In paragraph (f), removing the cross-reference ''§ 26.87(i)'' and adding in its place the cross-reference ''§ 26.87(j)''; and

■ f. Revising paragraph (h).

The revisions read as follows:

§ 26.55 How is DBE participation counted toward goals?

* * * * *

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies (including transportation costs).

(ii) For purposes of this section, a regular dealer is a firm that owns (or leases) and-operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.

(iii) Items kept and regularly sold by the DBE are of the ''general character'' when they share the same material characteristics and application as the items specified by the contract.

(iv) You must establish a system to determine that a DBE regular dealer per paragraph (e)(2)(iv)(A) of this section, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question. This system must also ensure that a regular dealer of bulk items per (e)(2)(iv)(B) of this section owns/leases and operates distribution equipment for the products it sells. This requirement may be administered through questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system you implement must be maintained and used to identify all DBE suppliers with capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF. This requirement is a programmatic safeguard apart from that described in § 26.53(c)(1).

(A) To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer and receives credit for 60 percent of the cost of materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory.

(B) A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in paragraph (e)(2)(ii) of this section if the firm both owns and operates distribution equipment used to deliver the products. Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.

(C) A DBE supplier of items that are not typically stocked due to their unique characteristics (*e.g.,* limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items per paragraph (e)(2)(iv)(B) of this section. If the DBE supplier of these items does not own or lease distribution equipment, as descried above, it is not a regular dealer.

(D) Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are not regular dealers within the meaning of paragraph (e)(2) of this section.

(3) If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (*e.g.,* a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (*e.g.,* FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

(4) With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do not count any portion of the cost of the materials and supplies themselves.

(5) You must determine the amount of credit awarded to a firm for the provisions of materials and supplies (*e.g.,* whether a firm is acting as a regular dealer, distributor, or a transaction facilitator) on a contract-by-contract basis.

* * * * *

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has paid the DBE the amount being counted.

■ 46. Revise § 26.61 to read as follows:

§ 26.61 Burden of proof

(a) In determining whether to certify a firm, the certifier must apply the standards of this subpart. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.

(b) The firm has the burden of demonstrating, by a preponderance of the evidence, *i.e.,* more likely than not, that it satisfies all of the requirements in this subpart. In determining whether the firm has met its burden, the certifier must consider all the information in the record, viewed as a whole.

(1) *Exception 1.* In a decertification proceeding the certifier bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.

(2) *Exception 2.* If a certifier has a reasonable basis to believe that an individual who is a member of a group in § 26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the certifier bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

■ 47. Revise § 26.63 to read as follows:

§ 26.63 General certification rules.

(a) *General rules.* Except as otherwise provided:

(1) The firm must be for-profit and engaged in business activities.

(2) In making eligibility determinations, a certifier may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.

(3) A certifier cannot condition eligibility on State prequalification requirements for bidding on contracts.

(4) Certification is not a warranty of competence or suitability.

(5) A certifier determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the ''curative measures'' provisions of this part.

(6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.

(b) *Indirect ownership.* A subsidiary (*i.e.,* S) that SEDOs own and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances.

(1) *Look-through.* SEDOs own at least 51 percent of S through their ownership of P (*i.e.,* the parent firm) as shown in the examples following.

(2) *Control.* SEDOs control P, and P controls S.

(3) *One tier of separation.* The SEDOs indirectly own S through P and no other intermediary. That is, no applicant or DBE may be more than one entity (P) removed from its individual SEDOs.

(4) *Examples.* The following examples assume that S and its SEDOs satisfy all other requirements in this part.

(i) *Example 1 to paragraph (b)(4).* SEDOs own 100 percent of P, and P owns 100 percent of S. S is eligible for certification.

(ii) *Example 2 to paragraph (b)(4).* Same facts as Example 1, except P owns 51 percent of S. S is eligible.

(iii) *Example 3 to paragraph (b)(4).* SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$.

(iv) *Example 4 to paragraph (b)(4).* SEDOs own and control P, and they own 52 percent of S by operation of this paragraph (b). However, a non-SEDO controls S. S is ineligible.

(v) *Example 5 to paragraph (b)(4).* SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.

(vi) *Example 6 to paragraph (b)(4).* P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of § 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.

(c) *Indian Tribes, NHOs, and ANCs*— (1) *Indian Tribes and NHOs.* A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.

(2) *Alaska Native Corporations (ANCs).* (i) Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:

(A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by

Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(ii) As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (*e.g.,* information that would appear in a UCP directory).

(iii) If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

■ 48. Revise § 26.65 to read as follows:

§ 26.65 Business Size Determinations.

(a) *By NAICS Code.* A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The certifier must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated ''receipts'' (computed on a cash basis), as defined in 13 CFR 121.104(a) and averaged over the firm's preceding five fiscal years, exceed the applicable SBA size cap(s).

(b) *Statutory Cap.* Even if a firm is a small business under paragraph (a) of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, over the firm's previous three fiscal years exceed $30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at *https://www.transportation.gov/DBEsizestandards.* 50.

■ 49. Revise § 26.67 to read as follows:

§ 26.67 Social and economic disadvantage.

(a) *Group membership*—(1) *General rule.* Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).

(2) *Native American group membership.* An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.

(3) *Questioning group membership.* (1) Certifiers may not question claims of group membership as a matter of course. Certifiers must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.

(i) If a certifier has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.

(ii) A certifier's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The certifier may not require the individual to provide evidence beyond that related to group membership.

(iii) The owner must email the certifier evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The certifier must email the owner a decision no later than 30 days after receiving timely submitted evidence.

(iv) If a certifier determines that an individual has not demonstrated group membership, the certifier's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in § 26.89(a), and of the right to reapply at any time under paragraph (e) of this section.

(b) *Rebuttal of social disadvantage.* (1) If a certifier has a reasonable basis to believe that an individual who is a member of a group in paragraph (a)(1) of this section is not, in fact, socially disadvantaged, the certifier must initiate a § 26.87 proceeding, regardless of the firm's DBE status. As is the case in all section § 26.87 proceedings, the certifier must prove ineligibility.

(2) If the certifier finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

(c) *Rebuttal of economic disadvantage*—(1) *Personal net worth.* If a certifier has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the certifier may rebut the individual's presumption of economic disadvantage.

(i) The certifier must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.

(ii) The certifier must proceed as provided in § 26.87.

(2) *Economic disadvantage in fact.* (i) To rebut the presumption, the certifier must prove that a reasonable person would not consider the individual economically disadvantaged. The certifier may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that the certifier considers relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The certifier need only demonstrate ''ballpark'' values based on available evidence. The reasonable person is not

party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.

(ii) The certifier must proceed as provided in § 26.87.

(d) *Non-presumptive disadvantage.* An owner who is not presumed to be SED under paragraph (a) of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

(1) To attempt to prove individual SED, the owner provides the certifier a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.

(2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.

(3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.

(4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.

(5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.

(6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

Example 1 to paragraph (d). A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, *e.g.,* an economic recession that caused widespread unemployment.

■ 50. Add § 26.68 to read as follows:

§ 26.68 Personal net worth.

(a) *General.* An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.

(b) *Required documents.* Each owner on whom the firm relies for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at *https://www.Transportation.gov/DBEFORMS.* A certifier may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement. The certifier must have a legitimate and demonstrable need for the additional information.

(c) *Reporting.* The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.

(1) The owner excludes her ownership interest in the applicant or DBE.

(2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

Example 1 to paragraph (c)(2). The owner and her spouse hold joint title to their primary residence, for which they paid $300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of $150,000. The owner may exclude her $75,000 share of the $150,000 of total equity.

(3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.

(4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.

(5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.

(6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

Example 2 to paragraph (c)(6). When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.

(7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than $20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

(8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.

(9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.

(10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

(d) *Regulatory adjustments.* (1) The Department will adjust the PNW cap by May 9, 2024 by multiplying $1,600,000 by the growth in total household net worth since 2019 as described by ''Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)'' produced by the Board of Governors of the Federal Reserve (*https://www.federalreserve.gov/releases/z1/*), and normalized by the total number of households as collected by the Census in ''Families and Living Arrangements'' (*https://www.census.gov/topics/families/families-and-households.html*) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at *https://www.Transportation.gov/DBEPNW.* Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.

(2) The Department will use the following formula to adjust the PNW limit:

$$\text{Future Year PNW Cap} = [\$1{,}600{,}000] * \frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)}}$$

(e) *Confidentiality.* Notwithstanding any provision of Federal or State law, a certifier must not release an individual's PNW statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 or to any other State to which the individual's firm has applied for certification under § 26.85.

■ 51. Revise § 26.69 to read as follows:

§ 26.69 Ownership.

(a) *General rule.* A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.

(b) *Overall Requirements.* A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:

(1) *Acquisition.* The SEDO acquires ownership at fair value and by one or more ''investments,'' as defined in paragraph (c) of this section.

(2) *Proportion.* No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.

(3) *Maintenance.* This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.

(i) The SEDO may not withdraw or revoke her investment.

(ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO's investment.

(A) *Example 1 to paragraph (b)(3)(ii).* SEDO and non-SEDO own DBE 60/40. Their respective investments are approximately $600,000 and $400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In Year 3, the non-SEDO contributes a $2 million asset to the business. The SEDO, as a result, owns 60 percent of a $2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth $1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.

(B) *Example 2 to paragraph (b)(3)(ii).* Same facts except that the DBE purchases the asset with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership interest.

(C) *Example 3 to paragraph (b)(3)(ii).* Same facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise § 26.71 concerns.

(iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2 above, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its net value of $60,000.

(c) *Investments.* A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an ''investment'' in the firm, as are additional purchases, contributions, and qualifying gifts.

(1) Investments are unconditional and at full risk of loss.

(2) Investments include a significant outlay of the SEDO's own money.

(3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.

(i) The person who has title to the asset owns it in proportion to her share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) *Purchases and capital contributions.* (1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(3) Contributions of time, labor, services, and the like are not investments or components of investments.

(4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.

(5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in § 26.70.

(6) Guarantees are not investments.

(7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.

(8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) *Gifts.* A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

(1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the

firm other than as a lessor or provider of standard support services;

(2) The transferor does not derive undue benefit; and

(3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(f) *Curative measures.* The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

(1) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

(2) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.

(3) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.

(4) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.

(5) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph (g) of this section.

(g) *Anti-abuse rules.* (1) The substance and not the form of transactions drives the eligibility determination.

(2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.

(3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

Example 1 to paragraph (g)(3). SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money and she must repay him. The firm is ineligible under paragraphs (g)(1) and (2) of this section.

■ 52. Add § 26.70 to read as follows:

§ 26.70 Debt-financed investments.

(a) Subject to the other provisions of this subpart, a SEDO may borrow money to *finance* a § 26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the investment by the time the firm applies for certification.

Example 1 to paragraph (a) introductory text. A SEDO who borrows $9,000 of her $10,000 cash investment in Applicant, Inc., must have repaid, from her own funds, at least $500 of the loan's principal by the time Applicant, Inc. applies for certification.

Example 2 to paragraph (a) introductory text. A SEDO who finances $8,000 of a $10,000 investment in Applicant may apply for Applicant's certification at any time.

Example 3 to paragraph (a) introductory text. A SEDO who contributes to the Applicant equipment worth $40,000, which she purchased with $10,000 of her own money and $30,000 of seller financing may apply for Applicant's certification at any time.

(1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.

(2) Money that the SEDO receives as a § 26.69(e) gift is her own money.

(3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.

(b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply.

(1) The SEDO is the sole debtor.

(2) The firm is not party to the loan in any capacity, including as a guarantor.

(3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.

(4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.

(5) The loan agreement permits prepayments, including by refinancing.

(c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.

Example 4 to paragraph (c). SEDO finances $40,000 of a $50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining $20,000 debt. The SEDO's investment is now $10,000.

(d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under § 26.69(f).

■ 53. Revise § 26.71 to read as follows:

§ 26.71 Control.

(a) *General rules.* (1) One or more SEDOs of the firm must control it.

(2) Control determinations must consider all pertinent facts, viewed together and in context.

(3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.

(b) *SEDO as final decision maker.* A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.

(c) *Governance.* Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.

(1) *Highest officer position.* A SEDO must hold the highest officer position in the company (*e.g.,* chief executive officer or president).

(2) *Board of directors.* Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

(i) *Quorum requirements.* Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.

(ii) *Shareholder actions.* A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.

(3) *Partnerships.* In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.

(4) *Exception.* Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.

(d) *Expertise.* At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.

(e) *SEDO decisions.* The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.

(f) *Delegation.* A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.

(1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.

(2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.

(3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.

(g) *Independent business.* (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.

(2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

(i) *Exception 1.* Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

(ii) *Exception 2.* A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.

(h) *Franchise and license agreements.* A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

■ 54. Revise § 26.73 to read as follows:

§ 26.73 NAICS Codes.

(a) A certifier must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the certifier only that its SEDO controls the firm with respect to that type of work. The certifier must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.

(1) A correct NAICS code is the one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.

(2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

(3) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.

(4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.

(5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (*e.g.,* a ''work code'') does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

(b) [Reserved]

■ 55. Amend § 26.81 by:

■ a. Revising paragraph (a)(1);

■ b. Removing paragraph (a)(5);

■ b. In paragraph (e), removing the word ''the'' from the first sentence; and

■ c. Revising paragraph (g).

The revisions read as follows:

§ 26.81 Unified Certification Programs.

(a) * * *

(1) All recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval.

* * * * *

(g) Each UCP must maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other States certified under the provisions of this part), the information required by § 26.31. The UCP must make the directory available to the public electronically, on the internet. The UCP must update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

* * * * *

■ 56. Amend § 26.83 by revising the section heading and paragraphs (c)(1)(i), (c)(3), (h), (i)(3), (j), (k), (l), and (m) and adding paragraph (n) to read as follows:

§ 26.83 What procedures do certifiers follow in making certification decisions?

* * * * *

(c)(1) * * *

(i) A certifier must visit the firm's principal place of business, virtually or in person, and interview the SEDO,

officers, and key personnel. The certifier must review those persons' résumés and/or work histories. The certifier must maintain a complete audio recording of the interview. The certifier must also visit one or more active job sites (if there is one). These activities comprise the ''on-site review'' (OSR), a written report of which the certifier must keep in its files.

* * * * *

(3) The certifier must ensure that the SEDO signs the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribed to as true under penalty of perjury that all information provided is current, accurate, and complete.

* * * * *

(h)(1) Once a certifier has certified a firm, the firm remains certified unless and/or until the certifier removes certification, in whole or in part (*i.e.,* NAICS code removal), through the procedures of § 26.87.

(2) The certifier may not require a DBE to reapply for certification, renew its certification, undergo a recertification, or impose any functionally equivalent requirement. The certifier may, however, conduct a certification review at any reasonable time and/or at regular intervals of at least two years. The certification review may, at the certifier's discretion, include a new OSR. The certifier may also make an unannounced visit to the DBE's offices and/or job site. The certifier may also rely on another certifier's report of its OSR of the DBE.

(i) * * *

(3) The DBE must notify the certifier of a material change in its circumstances that affects its continued eligibility within 30 days of its occurrence, explain the change fully, and include a duly executed DOE with the notice. The DBE's non-compliance is a § 26.109(c) failure to cooperate.

(j) A DBE must provide its certifier(s), every year on the anniversary of its original certification, a new DOE along with the specified documentation in § 26.65(a), including gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation (and its probative value) may vary by business type, size, history, resources, and overall circumstances. However, the following documents may generally be considered ''safe harbors,'' provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed Federal income tax returns as filed. Non-compliance, whether full or partial, is a § 26.109(c) failure to cooperate.

(k) The certifier must advise each applicant within 30 days of filing whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

(l) The certifier must render a final eligibility decision within 90 days of receiving all information required from the applicant under this part. The certifier may extend this time period once, for no more than an additional 30 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. On a case-by-case basis, the concerned OA may give the certifier one deadline extension if it approves a written request explaining why the certifier needs more time. The certifier's failure to issue a compliant decision by the applicable deadline is a constructive denial of the application, appealable to DOT under § 26.89. In this case, the certifier may be subject to enforcement actions described in §§ 26.103 and 26.105.

(2) The certifier must make an entry in DOCR's Online Portal within 5 days of a denial. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(m)(1) A certifier may notify the applicant about ineligibility concerns and allow the firm to rectify deficiencies within the period in paragraph (l) of this section.

(2) If a firm takes curative measures before the certifier renders a decision, the certifier must consider any evidence it submits of having taken such measures. The certifier must not automatically construe curative measures as successful or abusive.

(i) *Example 1 to paragraph (m)(2).* The firm may obtain proof of an investment, transaction, or other fact on which its eligibility depends.

(ii) *Example 2 to paragraph (m)(2).* An owner or related party may create a legally enforceable document of irrevocable transfer to the SEDO.

(iii) *Example 3 to paragraph (m)(2).* The firm may amend an operating agreement, bylaw provision, or other governance document, provided that the amendment accurately reflects the parties' relationships, powers, responsibilities, and other pertinent circumstances.

(n) Except as otherwise provided in this paragraph (n), if an applicant for DBE certification withdraws its application before the certifier issues a decision, the applicant can resubmit the application at any time. However, the certifier may place the reapplication at the ''end of the line,'' behind other applications that have been made since the firm's previous application was withdrawn. The certifier may apply the § 26.86(c) waiting period to a firm that has established a pattern of withdrawing applications before its decision.

■ 57. Revise § 26.85 to read as follows:

§ 26.85 Interstate certification.

(a) *Applicability.* This section applies to a DBE certified in any UCP.

(b) *General rule.* When a DBE applies to another UCP for certification, the new UCP must accept the DBE's certification from its jurisdiction of original certification (JOC). The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction.

(c) *Application procedure.* To obtain certification by an additional UCP, the DBE must provide:

(1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)

(2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and

(3) A new DOE.

(d) *Confirmation of eligibility.* Within 10 business days of receiving the documents required under paragraph (c) of this section, the additional UCP must confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.

(e) *Certification.* If the DBE fulfills the requirements of paragraph (c) of this section and the UCP confirms the DBE's certification per paragraph (d) of this section, the UCP must certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.

(f) *Noncompliance.* Failure of the additional UCP to comply with paragraphs (d) and (e) of this section is considered non-compliance with this part.

(g) *Post-interstate certification proceedings.* (1) After the additional UCP certifies the DBE, the UCP may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.

(2) A UCP must provide a complete unredacted copy of the DBE's certification materials to the additional UCP within 30 days of receiving the

request. Confidentiality requirements of §§ 26.83(d) and 26.109(b) do not apply.

(3) Once the new UCP certifies, then it must treat the DBE as it treats other DBEs, for all purposes.

(4) The DBE must provide an annual DOE with documentation of gross receipts, under § 26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.

(h) *Decertifications.* (1) If any UCP has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.,* NAICS code removal), it must notify the other UCPs in which the DBE is certified (''other jurisdictions'') via email. The notice must explain the UCP's reasons for believing the DBE's certification should be removed.

(2) Within 30 days of receiving the notice, the other jurisdictions must email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. The other jurisdictions' responses may provide written arguments and evidence and may propose additional reasons to remove certification. A jurisdiction's failure to timely respond to the reasonable cause notice will be deemed to be a concurrence.

(3) After a UCP receives all timely responses, it must make an independent decision whether to issue a NOI and what grounds to include.

(4) Other UCPs may, before the hearing, submit written arguments and evidence concerning whether the firms should remain certified, but may not participate in the hearing.

(5) If the UCP finds the firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. The NOD must include appeal instructions provided on the Departmental Office of Civil Rights' web page, available at *https://www.transportation.gov/dbeappeal.* The UCP must email a copy of its decision to the other jurisdictions within 3 business days.

(6) The rules of this paragraph (h)(6) do not apply to attempts to decertify based upon a DBE's actions or inactions pertaining to §§ 26.83(j) (Declaration of Eligibility) and 26.87(e)(6) (failure to cooperate).

(7) Decertifications under this paragraph (h) must provide due process to DBEs.

(i) If a UCP decides not to issue a NOD removing the DBE's certification, no jurisdiction may initiate decertification proceedings, within one year, on the same or similar grounds and underlying facts.

(ii) If a DBE believes a UCP unfairly targets it with repeated decertification attempts, the DBE may file a complaint to the appropriate OA.

(8) The Department's appeal decisions are binding on all UCPs unless stated otherwise.

■ 58. Revise § 26.86 to read as follows:

§ 26.86 Decision letters.

(a) When a certifier denies a firm's request for certification or decertifies the firm, the certifier must provide the firm a NOD explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. A certifier must also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at *https://www.transportation.gov/dbeappeal.*

(b) The certifier must promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.

(c) The certifier must establish a waiting period for reapplication of no more than 12 months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The certifier must inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.

(d) An appeal does not extend the waiting period.

■ 59. Revise § 26.87 to read as follows:

§ 26.87 Decertification.

(a) *Burden of proof.* To decertify a DBE, the certifier bears the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of this part.

(b) *Initiation of decertification proceedings.* (1) A certifier may determine on its own that it has reasonable cause to decertify a DBE.

(2) If an OA determines that there is reasonable cause to believe that a DBE does not meet the eligibility criteria of this part, the OA may direct the certifier to initiate a proceeding to remove the DBE's certification.

(i) The OA must provide the certifier and the DBE written notice describing the reasons for the directive, including any relevant documentation or other information.

(ii) The certifier must immediately commence a proceeding to decertify as provided by paragraph (e) of this section.

(3) Any person may file a complaint explaining, with specificity, why the certifier should decertify a DBE. The certifier need not act on a general allegation or an anonymous complaint. The certifier must keep complainants' identities confidential as provided in § 26.109(b).

(i) The certifier must review its records concerning the DBE, any material the DBE and/or complainant provides, and any other available information. The certifier may request additional information from the DBE or conduct any other investigation that it deems necessary.

(ii) If the certifier determines that there is reasonable cause to decertify the DBE, it initiates a decertification proceeding. If it determines that there is not such reasonable cause, it notifies the complainant and the DBE in writing of its decisions and the reasons for it.

(c) *Notice of intent (NOI).* A certifier's first step in any decertification proceeding must be to email a notice of intent (NOI) to the DBE.

(1) The NOI must clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason.

(2) The NOI must notify the DBE of its right to respond in writing, at an informal hearing, or both.

(3) The NOI must inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.

(4) If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, the certifier issues a NOD decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.

(d) *Response to NOI.* (1) If the DBE wants a hearing, it must email the certifier saying so within 10 days of the NOI. If the DBE does not do so, it loses its opportunity for a hearing.

(2) The certifier and DBE may negotiate a different hearing date from that stated in the NOI. Parties must not engage in dilatory tactics.

(3) If the DBE does not want a hearing, or does not give timely notice to the certifier that it wants one, the DBE may still provide written information and arguments to the certifier rebutting the reasons for decertification stated in the NOI.

(e) *Hearings.* (1) The purpose of the hearing is for the certifier to present its case and for the DBE to rebut the certifier's allegations.

(2) The hearing is an informal proceeding with rules set by the hearing officer. The SEDO's attorney, a non-SEDO, or other individuals involved with the DBE may attend the hearing and answer questions related to their own experience or more generally about

the DBE's ownership, structure and operations.

(3) The certifier must maintain a complete record of the hearing, either in writing, video or audio. If the DBE appeals to DOT under § 26.89, the certifier must provide that record to DOT and to the DBE.

(f) *Separation of functions.* The certifier must ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) The certifier's method of implementing this requirement must be made part of its DBE program and approved by the appropriate OA.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of this part.

(g) *Notice of decision.* The certifier must send the firm a NOD no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI.

(1) The NOD must describe with particularity the reason(s) for the certifier's decision, including specific references to the evidence in the record that supports each reason. The NOD must also inform the firm of the consequences of the decision under paragraph (i) of this section and of its appeal rights under § 26.89.

(2) The certifier must send copies of the NOD to the complainant in an ineligibility complaint or to the OA that directed the certifier to initiate the proceeding.

(3) When sending a copy of an NOD to a complainant other than an OA, the certifier must not include information reasonably construed as confidential business information, unless the certifier has the written consent of the firm that submitted the information.

(4) The certifier must make an entry in DOCR's Online Portal within 5 days of the action. The certifier must enter the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision.

(h) *Status of firm during proceeding.* (1) A DBE remains certified until the certifier issues a NOD.

(i) [Reserved]

(j) *Consequences.* Decertification has the following effects on contract and overall goals and DBE participation:

(1) When a prime contractor has made a commitment to use the decertified firm, but a subcontract has not been executed before the certifier issues the NOD, the certified firm does not count toward the contract goal. The recipient must direct the prime contractor to meet the contract goal with an eligible DBE or demonstrate the certifier that it has made good faith efforts to do so.

(2) When the recipient has made a commitment to using a DBE prime contractor, but a contract has not been executed before a decertification notice provided for in paragraph (g) of this section is issued, the decertified firm does not count toward the recipient's overall DBE goal.

(3) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm and may continue to receive credit toward the DBE goal for the firm's work. In this case, however, the prime contractor may not extend or add work to the contract after the firm was notified of its decertification without prior written consent from the recipient.

(4) If a prime contractor has executed a subcontract with the firm before the certifier has notified the firm of its decertification, the prime contractor may continue to use the firm as set forth in paragraph (j)(3) of this section; however, the portion of the decertified firm's continued performance of the contract must not count toward the recipient's overall goal.

(5) If the recipient executed a prime contract with a DBE that was later decertified, the portion of the decertified firm's performance of the contract remaining after the certifier issued the notice of its decertification must not count toward an overall goal, but the DBE's performance of the contract may continue to count toward satisfying the contract goal.

(6) The following exceptions apply to this paragraph (j):

(i) If a certifier decertifies a firm solely because it exceeds the business size standard during the performance of the contract, the recipient may continue to count the portion of the decertified firm's performance of the contract remaining after it issued the notice of its decertification toward the recipient's overall goal as well as toward the contract goals.

(ii) If the certifier decertifies the DBE because it was acquired by or merged with a non-DBE, the recipient may not continue to count the portion of the decertified firm's performance on the contract remaining after the certifier decertified it toward either the contract goal or the overall goal, even if a prime contractor has executed a subcontract with the firm or the recipient has executed a prime contract with the DBE that was later decertified. In this case, if eliminating the credit of the decertified firm will affect the prime contractor's ability to meet the contract goal, the recipient must direct the prime contractor to subcontract to an eligible DBE to the extent needed to meet the contract goal or demonstrate to the recipient that it has made good faith efforts to do so.

■ 60. Revise § 26.88 to read as follows:

§ 26.88 Summary suspension of certification.

(a) *Definition.* Summary suspension is an extraordinary remedy for lapses in compliance that cannot reasonably or adequately be resolved in a timely manner by other means.

(1) A firm's certification is suspended under this part as soon as the certifier transmits electronic notice to its owner at the last known email address.

(2) During the suspension period, the DBE may not be considered to meet a contract or participation goal on contracts executed during the suspension period.

(b) *Mandatory and elective suspensions*—(1) *Mandatory.* The certifier must summarily suspend a DBE's certification when:

(i) The certifier has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity.

(ii) The OA with oversight so directs.

(2) *Elective.* (i) The certifier has discretion to suspend summarily if it has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity.

(ii) An owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that § 26.83(j) requires.

(c) *Coordination with other remedies.* In most cases, a simple information request or a § 26.87 NOI is a sufficient response to events described in paragraphs (b)(1) and (2) of this section. The certifier should consider the burden to the DBE and to itself in determining whether summary suspension is a more prudent and proportionate, effective response. The certifier may *elect* to suspend the same DBE just once in any 12-month period.

(d) *Procedures*—(1) *Notice.* The certifier must notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN must explain the action, the reason for it, the consequences, and the evidence on which the certifier relies.

(i) Elective SSNs may not cite more than one reason for the action.

(ii) Mandatory SSNs may state multiple reasons.

(iii) The SSN, regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the certifier should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments lieu of or in addition to attending the hearing.

(2) *Hearing.* The hearing date must be a business day that is at least 15 but not more than 25 days after the date of the notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within 10 days of the notice and will have forfeited its certification if it does not acknowledge the notice within 15 days. The show-cause hearing must be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

(3) *Response.* The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides. Email submissions correctly addressed are effective when sent. The certifier may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than 30 days after the notice.

(4) *Scope and burdens.* (i) Suspension proceedings are limited to the suspension ground specified in the notice.

(ii) The certifier may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.

(iii) The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

(6) *Duration.* The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) *Recourse*—(1) *Appeal.* The DBE may appeal a final decision under paragraph (c)(5)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (d)(2) of this section applies.

(2) *Enforcement.* (i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:

(A) The certifier sends a second elective SSN within 12 months, or

(B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.

(ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (c)(6) of this section.

(3) In either case, the DBE must:

(i) Email the request under the subject line, ''REQUEST FOR ENFORCEMENT ORDER'' in all caps;

(ii) Limit the request to a one-page explanation that includes:

(A) The certifier's name and the suspension dates;

(B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and

(C) The general nature and date of the firm's response, if any, to the second suspension notice; and

(D) The suspension notice(s).

■ 61. Revise § 26.89 to read as follows:

§ 26.89 Appeals to the Department.

(a)(1) Applicants and decertified firms may appeal adverse NODs to the Department.

(2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.

(3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.

(4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

(b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.

(c)(1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.

(2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.

(d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.

(e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.

(f)(1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.

(2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.

(3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.

(4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.

(5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.

(6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.

(7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.

(g) The Department does not issue advisory opinions.

(h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.

(i) DOCR posts final decisions to its website, available at *https://www.transportation.gov/DBEDecisions*.

§ 26.91 [Amended]

■ 62. Amend § 26.91 by:

■ a. Removing the words ''recipients'' and ''recipient'' wherever they appear and adding in their places the words ''certifiers'' and ''certifier'', respectively; and

■ b. In paragraph (b)(1), removing the cross-reference ''§ 26.87(i)'' and adding in its place the cross-reference ''§ 26.87(j)''.

§ 26.103 [Amended]

■ 63. Amend § 26.103 in paragraph (d)(2) by removing the words ''being in compliance'' and adding in their place the word ''complying''.

Appendix A to Part 26 [Amended]

■ 64. Amend appendix A by:

■ a. Removing the word ''Conducing'' in paragraph IV.A.(1) and adding in its place the word ''Conducting''; and

■ b. Adding at the end of paragraph VI after the word ''efforts'' the phrase ''except in design-build procurement''.

Appendix B to Part 26 [Removed and Reserved]

■ 66. Remove and reserve appendix B to part 26.

Appendices E Through G to Part 26 [Removed]

■ 67. Remove appendices E through G to part 26.

[FR Doc. 2024–05583 Filed 4–8–24; 8:45 am]

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Part III

Office of Personnel Management

5 CFR Parts 210, 212, 213, et al.
Upholding Civil Service Protections and Merit System Principles; Final Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 210, 212, 213, 302, 432, 451, and 752

[Docket ID: OPM–2023–0013]

RIN 3206–AO56

Upholding Civil Service Protections and Merit System Principles

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to reinforce and clarify longstanding civil service protections and merit system principles, codified in law, as they relate to the involuntary movement of Federal employees and positions from the competitive service to the excepted service, or from one excepted service schedule to another. In this final rule, OPM adopts many of the provisions from the proposed rule with some modifications and clarifications based on comments received from the public. The final regulations will better align OPM regulations with relevant statutory text, congressional intent, legislative history, legal precedent, and OPM's longstanding practice.

DATES: Effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *employeeaccountability@opm.gov* or by phone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

The Office of Personnel Management (OPM) is issuing final regulations governing competitive service and competitive status, employment in the excepted service, and adverse actions. The final rule also makes conforming changes to the regulations governing performance-based actions and awards.

This rule clarifies and reinforces longstanding civil service protections and merit system principles, reflected in the passage of the Pendleton Civil Service Reform Act of 1883. The Act ended the patronage, or ''spoils,'' system for Federal employment and initiated the competitive civil service. For the past 140 years, Congress has enacted statutes and agencies have promulgated rules that govern the civil service, beginning with laws that limited political influence in employment decisions and growing over the years to establish comprehensive laws regulating many areas of Federal employment. These changes were designed to further good government. Subsequent statutes, including, among others, the Lloyd-La Follette Act of 1912, the Veterans' Preference Act of 1944, as amended, the Civil Service Reform Act of 1978 (CSRA), and the Civil Service Due Process Amendments Act of 1990, extended and updated these civil service provisions.

Whereas the Pendleton Act eliminated the spoils system and introduced a merit-based civil service as a key pillar of our democratic system, the CSRA was the signature, bipartisan reform that has most shaped the system we have today.[1] It created an elaborate ''new framework'' [2] of the modern civil service, protected career Federal employees from undue partisan political influence, and extended adverse action rights by statute to a larger cohort of employees, so that the business of government can be carried out efficiently and effectively, in compliance with the law, and in a manner that encourages individuals to apply to participate in the civil service.

The 2.2 million career civil servants active today are the backbone of the Federal workforce. They are dedicated and talented professionals who provide the continuity of expertise and experience necessary for the Federal Government to function optimally across administrations. These employees take an oath to uphold the Constitution and are accountable to agency leaders and managers who, in turn, are accountable to the President, Congress, and the American people for their agency's performance. At the same time, these civil servants must carry out critical tasks requiring that their expertise be applied objectively (performing data analysis, conducting scientific research, implementing existing laws, etc.).

Congress has dictated a well-established way in which agencies can control their workforces. If a Federal employee refuses to implement lawful direction from leadership, there are mechanisms for agencies to respond through discipline, up to and including removal, as appropriate, under chapter 75 of title 5, U.S. Code. If a Federal employee's performance has been determined to be unacceptable, the agency may respond under chapter 75 (on the basis that action is necessary to promote the efficiency of the service) or pursue a performance-based action under chapter 43 of title 5, U.S. Code, at the agency's discretion. Under the law, however, a mere difference of opinion with leadership does not qualify as misconduct or unacceptable performance or otherwise implicate the efficiency of the service in a manner that would warrant an adverse action.

Career civil servants have a level of institutional experience, subject matter expertise, and technical knowledge that incoming political appointees have found to be useful and may lack themselves. Such civil servants' ability to offer their objective analyses and educated views when carrying out their duties, without fear of reprisal or loss of employment, contribute to the reasoned consideration of policy options and thus the successful functioning of incoming administrations and our democracy. These rights and abilities must continue to be protected and preserved, as envisioned by Congress when it enacted the CSRA, and expanded and strengthened those protections through subsequent enactments such as the Civil Service Due Process Amendments Act.[3]

[1] *See Lindahl* v. *OPM,* 470 U.S. 768, 773 (1985) (explaining that the CSRA ''overhauled the civil service system'').

[2] *Id.* at 774; *see United States* v. *Fausto,* 484 U.S. 439, 443 (1988).

[3] Public Law 101–376, 104 Stat. 461, H.R. 3086 (Aug. 17, 1990); *see also* H.R. Rep. 101–328 (Nov. 3, 1989).

Congress has generally charged the OPM Director with executing, administering, and enforcing the laws governing the civil service.[4] In chapter 75, Congress provided certain Federal employees with specified procedural rights and provided OPM with broad authority to prescribe regulations to carry out the chapter's purposes.[5] Moreover, OPM regulations govern the movement of positions from the competitive service to the excepted service.[6] Pursuant to its authority, OPM issues this rule to clarify and reinforce longstanding civil service protections and merit system principles as codified in the CSRA. OPM amends its regulations in 5 CFR chapter I, subchapter B, as follows:

First, the rule amends 5 CFR part 752 (Adverse Actions) to clarify that civil servants in the competitive service or excepted service who qualify as ''employees'' under 5 U.S.C. 7501, 7511(a)—meaning they have fulfilled their probationary or trial period requirement or durational requirement and are not excluded from the definition of ''employee'' by 5 U.S.C. 7511(b)[7]—will retain the rights previously accrued upon an involuntary move[8] from the competitive service to the excepted service, or from one excepted service schedule to another, or any subsequent involuntary move, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights.[9] The rule also conforms the regulation for non-appealable adverse actions with statutory language in 5 U.S.C. 7501 and Federal Circuit precedent to clarify which employees are covered. The rule amends 5 CFR part 212 (Competitive Service and Competitive Status) to further clarify a competitive service employee's status in the event the employee and/or their position is moved involuntarily to an excepted service schedule. OPM also updates the regulations to reflect the repeal of 10 U.S.C. 1599e, effective December 31, 2022, and restores a one-year probationary period for covered Department of Defense employees appointed to permanent positions within the competitive service in the Department of Defense on or after December 31, 2022.

Second, the rule amends 5 CFR part 210 (Basic Concepts and Definitions (General)) to interpret the phrases ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining''[10] in 5 CFR 210.102. These terms of art—which would apply throughout OPM's Civil Service Regulations in 5 CFR chapter I, subchapter B[11]—describe positions of the character generally excepted from chapter 75's protections. OPM reinforces the longstanding interpretation that, in creating this exception in 5 U.S.C. 7511(b)(2), Congress intended to except noncareer political appointees[12] from civil service protections.

Third, the rule amends 5 CFR part 302 to provide specific procedures that apply when moving individuals or positions from the competitive service to the excepted service, or from one excepted service schedule to another, for the purposes of good administration, to add transparency, and to provide a right of appeal to the Merit Systems Protection Board (MSPB or Board) to the extent any such move is involuntary and characterized as stripping individuals of any previously accrued civil service status and protections.

On September 18, 2023, OPM issued a notice of proposed rulemaking, which was published at 88 FR 63862. After consideration of public comments on the proposed regulatory amendments, OPM has determined that the issuance of these revised regulations is essential to strengthen and protect the foundations of the civil service and its merit system principles.[13] These principles were critical to the Pendleton Act's repudiation of the spoils system; essential to continued compliance with the statutory schemes for performance management, as enacted by Congress (and subsequently expanded) to extend procedural entitlements to most career employees following a specified period of service; and essential to the creation of the modern civil service on which this country depends and under which it has thrived for 140 years.[14] The final rule is also critical to the Federal Government's ability to recruit and retain the talent that agencies need to deliver on their complex missions. Individuals considering whether to accept a career civil service position need to know that they will be valued for their knowledge, skills, and abilities; evaluated based on merit; and not only protected from retribution for offering their candid opinions but encouraged to do so. Policies that cast doubt on these fundamental characteristics of a career civil service job restrict the pool of applicants interested in Federal Government jobs and disadvantage agencies in competing for top talent.

OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of this final rule.

[4] *See* 5 U.S.C. 1103(a)(5)(A).

[5] *See* 5 U.S.C. 7504, 7514.

[6] *See, e.g.,* 5 CFR part 212.

[7] OPM notes that employees appointed pursuant to Schedule C have no expectation of accruing such rights, considering the longstanding interpretation of 5 U.S.C. 7511(b)(2) and E.O. 10577, Rule VI, Schedule C, as amended. There are a small number of additional, discrete, positions for which the appointing authority similarly precludes the accrual of such rights, by the appointing authority's own terms.

[8] The final rule further discusses the differences between voluntary and involuntary moves in Section IV(A).

[9] As explained further *infra,* an individual can voluntarily relinquish rights when moving to a position that explicitly results in the loss of, or different, rights. An agency's failure to inform an employee of the consequences of a voluntary transfer cannot confer appeal rights to an employee in a position which has no appeal rights by statute. This is distinguishable from situations where the individual was coerced or deceived into taking the new position with different rights. *See Williams* v. *MSPB,* 892 F.3d 1156 (Fed. Cir. 2018).

[10] *See* 5 CFR 213.3301, 302.101, 432.102, 451.302, 752.202, 752.401.

[11] The relevant regulatory language currently varies slightly. For instance, 5 CFR part 752 refers to positions ''of a confidential, policy-determining, policy making, or policy-advocating character.'' But 5 CFR part 213 describes these positions as being ''of a confidential or policy-determining character,'' 5 CFR part 302 uses ''of a confidential, policy-determining, or policy-advocating nature,'' and 5 CFR part 451 uses ''of a confidential or policy-making character.'' In this final rule, OPM adopts ''confidential, policy-determining, policy making, or policy-advocating'' and ''confidential or policy-determining'' as two, interchangeable alternatives to describe these positions.

[12] The term ''career employee,'' as used here, refers to appointees to competitive service permanent or excepted service permanent positions. The terms ''noncareer political appointee'' and ''political appointee,'' as used here, refer to individuals appointed by the President or his appointees pursuant to Schedule C (or similar authorities) who serve at the pleasure of the current President or his political appointees and who have no expectation of continued employment beyond the presidential administration in which the appointment occurred.

[13] OPM's authorities to issue regulations only extend to title 5, U.S. Code. A position may be placed in the excepted service by presidential action, under 5 U.S.C. 3302, by OPM action, under authority delegated by the President pursuant to 5 U.S.C. 1104, or by Congress. These proposed regulations apply to any situation where an agency moves positions or people from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive order, or an OPM issuance, to the extent that these provisions are not inconsistent with applicable statutory provisions. For example, to the extent that a position is placed in the excepted service by an act of Congress, an OPM regulation will not supersede a statutory provision to the contrary. However, an OPM regulation may prescribe the procedures by which agencies would be required to move positions unless inconsistent with that statutory provision. Similarly, these regulatory provisions also apply where positions previously governed by title 5 will be governed by another title going forward, unless the statute governing the exception provides otherwise.

[14] E.O. 14003, sec. 2.

II. Digest of Public Comments

In response to the proposed rule, OPM received 4,097 comments during the 60-day public comment period from a variety of individuals (including current and former civil servants), organizations, and Federal agencies. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from enthusiastic support of the proposed regulations to categorical rejection. Approximately 67 percent of the overall comments were supportive of the proposed regulatory amendments.[15] Of the approximately 33 percent of comments that were opposed, more than 95 percent of those comments consisted of one of four form letters.[16]

In the proposed rule, OPM requested comments on a variety of topics regarding the implementation and impacts of this rulemaking.[17] OPM received many comments in response and incorporated them in the relevant sections that follow. Such information was useful for better understanding the effect of these final revisions on civil service protections, merit system principles, and the effective and efficient business of government, in compliance with the law.

In the next section, we address the background for these regulatory amendments and related comments. In subsequent sections, we address the specific amendments, provide a regulatory analysis, and list procedural considerations. OPM concludes with the amended regulatory text.

III. Background and Related Comments

A. The Career Civil Service, Merit System Principles, and Civil Service Protections

It is critical to our government that career Federal employees be protected from undue partisan influence so that business can be carried out efficiently and effectively, in compliance with the law.

President George Washington based most of his federal appointments on merit. Subsequent presidents, though, deviated from this policy, to varying degrees.[18] ''By the time Andrew Jackson was elected president in 1828,'' the patronage or '' 'spoils system,' . . . was in full force.'' Under this system, Federal employees were generally appointed, retained, or removed based on their political affiliations and support for the political party in power rather than their capabilities or competence.[19] A change in administration often triggered the widespread removal of Federal employees to provide jobs for the supporters of the new President, his party, and party leaders.[20] This spoils system often resulted in party managers ''pass[ing] over educated, qualified candidates and distribut[ing] offices to 'hacks' and ward-heelers who had done their bidding during campaigns and would continue to serve them in government.'' [21] Theodore Roosevelt, who served as a Civil Service Commissioner before becoming the Vice President and then President of the United States, described the spoils system as ''more fruitful of degradation in our political life than any other that could possibly have been invented. The spoilsmonger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office.'' [22] George William Curtis, a reformer and proponent of a merit-based civil service, described that, under the spoils system, ''[t]he country seethe[d] with intrigue and corruption. Economy, patriotism, honesty, honor, seem[ed] to have become words of no meaning.'' [23] Ethical standards for Federal employees were at a low ebb under this system. ''Not only incompetence, but also graft, corruption, and outright theft were common.'' [24]

To protect career Federal employees from undue partisan influence, civil service advocates and then Congress sought to establish a Federal nonpartisan career civil service that would be selected based on merit rather than political affiliation.[25] Such a workforce, though initially limited in scope, would reinvigorate government, making it more efficient and competent.[26] This reform movement came to a head in 1881 when President James Garfield was shot by a disappointed office seeker who believed he was entitled to a Federal job based on the work he had done for Garfield and his political party.[27]

The Pendleton Act of 1883 [28] ended this patronage system for covered positions and created the competitive civil service. Coverage has grown as a proportion of the Federal workforce over time to cover nearly all career positions.[29] The Pendleton Act required agencies to appoint Federal employees covered by the Act based on competency and merit.[30] It also established the Civil Service Commission (CSC) to help implement and enforce the government's adherence to merit-based principles.[31]

Commenters generally agreed [32] with this background,[33] especially the point that the corruption of the spoils era and evolving complexity of government necessitated a nonpartisan career civil service. A professor concurred with OPM's contention that the growing complexity of issues facing the United States in the late nineteenth century, ''combined with the pathologies engendered by the Jacksonian spoils system (culminating in the assassination of President Garfield) led to the creation of a competitive civil service.'' Comment 42.[34] Other commenters noted that the Pendleton Act was intended to eliminate the influence of personal loyalty and partisan activity as the key qualifications for career appointees, and replace them with ''fitness, capacity,

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[15] Approximately five of the 4,097 comments could be considered neutral—neither supportive nor opposed.

[16] The form letters are described below where relevant.

[17] *See* 88 FR 63862, 63881.

[18] *See, e.g.,* Nat'l Archives, Milestone Documents, ''Pendleton Act (1883),'' *https://www.archives.gov/milestone-documents/pendleton-act.*

[19] U.S. Merit Sys. Prots. Bd., ''What is Due Process in Federal Civil Service,'' p. 4. (May 2015), *https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf.*

[20] U.S. Off. of Pers. Mgmt., ''Biography of an Ideal,'' p. 83 (2003), *https://dml.armywarcollege.edu/wp-content/uploads/2023/01/OPM-Biography-of-an-Ideal-History-of-Civil-Service-2003.pdf.*

[21] *See* Anthony J. Gaughan, ''Chester Arthur's Ghost: A Cautionary Tale of Campaign Finance Reform,'' 71 Mercer L. Rev. 779, at pp. 787–78 (2020), *https://digitalcomons.law.mercer.edu/cgi/viewcontent.cgi?article=1313&context=jour_mlr.*

[22] U.S. Off. of Pers. Mgmt., *supra* note 20 at pp. 182–83.

[23] *Id.* at p. 182. In 1871, Curtis was appointed by President Ulysses S. Grant to chair the first Civil Service Commission. *See id.* at p. 196.

[24] *Id.* at pp. 183–84.

[25] *See* Gaughan, *supra* note 21 at p. 787; U.S. Merit Sys. Prots. Bd., *supra* note 19 at pp. 3–5.

[26] *See* Gaughan, *supra* note 21 at p. 787.

[27] *See* U.S. Merit Sys. Prots. Bd., *supra* note 19 at pp. 4–5; U.S. Off. of Pers. Mgmt., *supra* note 20 at pp. 198–201.

[28] Public Law 16; Civil Service Act of 1883, (Jan. 16, 1883) (22 Stat. 403).

[29] Nat'l Archives, *supra* note 18.

[30] 22 Stat. 403–04 (stating that hiring should be based on an ''open, competitive examination'' of the employee's ''relative capacity and fitness . . . to discharge the duties of the service into which they seek to be appointed.'').

[31] *Id.* at 403.

[32] One notable dissent comes in Comment 4097, from an advocacy nonprofit organization. Commenter opposed the rule and did not dispute the factual bases of the Pendleton Act but argued that its limited treatment of removal rights supports a view that modern removal protections can now be eliminated for certain career civil servants. OPM disagrees with this argument as explained in later sections.

[33] *See* 88 FR 63862, 63863–67 (detailing background in proposed rule).

[34] Comments filed in response to this rulemaking are available at *http://www.regulations.gov/comment/OPM-2023-0013-nnnn,* where ''nnnn'' is the comment number. Note that the number must be four digits, so insert preceding zeroes as appropriate.

honesty [and] fidelity.'' Comment 2816; *see also* Comments 2822, 3029.

The contours of the civil service and merit system principles that resulted were borne of extensive debates in which one view clearly prevailed. A former federal official commented that ''Congress decided to target the threats of increased incompetence and patronage in a spoils system, and decided that the benefits of a professionalized civil service outweighed concerns about bureaucratic inertia.'' Comment 2816. Commenter noted that ''opponents of the Pendleton Act argued [at the time] that civil service protections were 'one step in the direction of the establishment of an aristocracy in this country, the establishment of another privileged class.' '' *Id.* Commenter concluded that ''arguments that the civil service should be responsive to, rather than insulated from, the churn of partisan politics are echoed by contemporary critics of civil service protections. But these arguments against a professional civil service were soundly rejected with the passage of the Pendleton Act and have been proven to have been incorrect over more than a century of experience.'' *Id.*

A legal nonprofit organization similarly commented that the features of the ''civil service that frustrate its critics—fealty to Congressional programs, dedication to government institutions, consideration of the public interest, and a mission broader than simply serving political appointees—are core components of the system established by an elected Congress almost 150 years ago.'' Comment 2822. Congress ''has spoken clearly about its vision for the civil service for a century and a half, and consistently rejected a civil service that is merely an extension of a President's will.'' *Id.*

Several commenters noted that the Pendleton Act was extraordinarily successful in establishing the foundation for the modern civil service. A former federal official explained that the Act had the qualitative benefit of improving targeted employees' professional backgrounds. Comment 2816. As discussed further in Section III(E), the nonpartisan civil service ensured that the United States government would be capable of combating problems ''unimagined when the Pendleton Act was passed, including auto safety, climate change, and the airworthiness of planes.'' *See* Comment 42.

Even with respect to the enactment of the Pendleton Act, a subsequent President saw the need to address removals more specifically not long afterward.[35] In 1897, President William McKinley addressed removals by issuing Executive Order 101, which mandated that ''[n]o removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'' [36] Congress, far from objecting to this Order, later essentially codified these requirements in the Lloyd-La Follette Act of 1912 [37] to establish that covered Federal employees were to be both hired and removed based on merit. Specifically, section 6 of the Act provided no person in the ''classified civil service'' [38] of the United States can be removed ''except for such cause as will promote the efficiency of said service'' and for reasons given in writing. The Act also mandated providing notice to the person whose removal is sought and ''of any charges [proffered] against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support'' of the removal.

Congress, over time, has codified, renewed, and expanded protections to civil servants. A former federal official quoted Rep. James Tilghman Lloyd, one of the Lloyd-La Follette Act's namesakes, as saying the Act sought to ''do away with the discontent and suspicion which now exists among the employees [of the civil service] and [ ] restore that confidence which is necessary to get the best results from the employees.'' Comment 2816. It would, according to Rep. Lloyd, ensure that civil servants ''being dismissed from service would have the benefit of a written record of charges against them, with reports made to Congress, and the ability to have Congress subject their dismissal to 'special inquiry' if department heads 'trump up charges' to dismiss civil servants.'' [39] *Id.*

Thereafter, Congress enacted further requirements and reforms. In 1944, Congress passed the Veterans' Preference Act,[40] which, among other things, granted federally employed veterans extensive rights to challenge adverse employment actions, including the right to file an appeal with the CSC and provide the CSC with documentation to support the appeal. Based on the evidence presented, the CSC would issue findings and recommendations regarding the adverse employment action. In short, the Veterans' Preference Act provided eligible veterans with adverse action protections and access to an appeals process.[41] Then, in 1962, President John F. Kennedy issued Executive Order 10988 to extend similar adverse action rights to a broader swath of the civil service, specifically, employees in the competitive service.[42]

B. Conduct and Performance Under the Civil Service Reform Act of 1978

To synthesize, expand upon, and further codify the patchwork of processes that had developed over almost a century, and to protect a broader group of civil servants and govern personnel actions, Congress in 1978 passed the CSRA [43]—the most comprehensive Federal civil service reform since the Pendleton Act.

One factor that led to the CSRA, as a whistleblower protection nonprofit organization explained, was that ''whistleblowers at the Senate Watergate hearings'' showed that the Nixon Administration ''tried to implement the Malek Manual, a secret blueprint to replace the civil service merit system with a political hiring scheme'' that would have begun ''by purging all Democrats from federal employment.'' Comment 3340.[44] Those abuses led to passage of the CSRA ''to shield the merit system with enforceable rights against similar future abuses.'' *Id.*[45]

[35] The Pendleton Act does specify that ''no person in the public service is . . . under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.'' 22 Stat. at 404.

[36] U.S. Merit Sys. Prots. Bd., *supra* note 19 at p. 5.

[37] 37 Stat. 555 (1912).

[38] The ''classified civil service'' refers to the competitive service. *See* 5 U.S.C. 2102.

[39] Citing 48 Cong. Rec. 2653–54 (1912).

[40] 58 Stat. 387 (1944).

[41] Agencies initially were not required to comply with the CSC's recommendations in adverse action appeals, but Congress amended the Veterans' Preference Act in 1948 to require compliance. *See* 67 Stat. 581 (1948); *see also* U.S. Merit Sys. Prots. Bd., *supra* note 19 at pp. 7–8.

[42] E.O. No. 10988, 27 FR 551 (Jan. 19, 1962) (''The head of each agency, in accordance with the provisions of this order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights *identical* in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended.'') (emphasis added).

[43] 92 Stat. 1111 (1978); *see. Fausto,* 484 U.S. at 455 (''The CSRA established a comprehensive system for reviewing personnel action taken against federal employees.'').

[44] Citing Dobrovir, Gebhardt and Devine, ''Blueprint for Civil Service Reform,'' Fund for Constitutional Government (1976).

[45] That these concerns have been ongoing can be seen in Congress' enactment of the Presidential Transitions Improvements Act of 2015 referenced in note 155, *infra.*

The CSRA made significant organizational changes to civil service management, adjudications, and oversight. It replaced the CSC, dividing its duties among OPM [46] and the MSPB, which initially encompassed the Office of Special Counsel (OSC).[47] OSC later became a separate agency to which specific duties were assigned.[48] OPM inherited the CSC's policy, managerial, and administrative duties, including the obligation to establish standards, oversee compliance, and conduct examinations as required or requested.[49] OPM was also obligated to, among other things, advise the President regarding appropriate changes to the civil service rules, administer retirement benefits, adjudicate employees' entitlement to these benefits, and defend adjudications at the Board.[50] The MSPB adjudicates challenges to personnel actions taken under the civil service laws,[51] among other things, and OSC investigates and prosecutes prohibited personnel practices.[52] Other, more specific enactments confer upon these entities the obligations or authorities to promulgate regulations on specific topics.

The CSRA codified fundamental merit system principles, which had developed since 1883.[53] These principles are summarized here:

Merit System Principles [54]

1. Recruit, select, and advance on merit after fair and open competition.
2. Treat employees and applicants fairly and equitably.
3. Provide equal pay for equal work and reward excellent performance.
4. Maintain high standards of integrity, conduct, and concern for the public interest.
5. Manage employees efficiently and effectively.
6. Retain or separate employees on the basis of their performance.
7. Educate and train employees if it will result in better organizational or individual performance.
8. Protect employees from improper political influence.
9. Protect employees against reprisal for the lawful disclosure of illegality and other covered wrongdoing.

The CSRA also established an ''elaborate new framework'' related to civil service protections for employees in the competitive and excepted services. Challenges to non-appealable adverse actions, appealable adverse actions, and ''prohibited personnel practices'' are channeled into separate procedural tracks.[55] The procedures an agency must follow in taking an adverse action and whether the agency's action is appealable to the MSPB depend on the action the agency seeks to impose.

Suspensions of 14 days or less are not directly appealable to the MSPB.[56] But an employee against whom such a suspension is proposed is entitled to certain procedural protections, including notice, an opportunity to respond, representation by an attorney or other representative, and a written decision.[57]

More rigorous procedures apply before agencies may pursue removals, demotions, suspensions for more than 14 days, reductions in grade and pay, and furloughs for 30 days or less, if the subject of the contemplated action meets the definition of an ''employee'' under 5 U.S.C. 7511(a) by satisfying probationary or length of service conditions.[58] These employees, other than those who are statutorily excepted from chapter 75's protections, receive the civil service protections outlined in 5 U.S.C. 7513.[59] Under section 7511(a)(1), ''employee'' refers to an individual who falls within one of three groups: (1) an individual in the competitive service who either (a) is not serving a probationary or trial period [60] under an initial appointment; or (b) has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (2) a preference eligible [61] in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive agency, or in the United States Postal Service or Postal Regulatory Commission; or (3) an individual in the excepted service (other than a preference eligible) who either (a) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (b) has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.[62]

In the event of a final MSPB decision adverse to the employee, employees may seek judicial review by petitioning to the appropriate Federal appellate or district court.[63]

Excepted from these procedural protections and rights to appeal conferred on other employees under chapter 75 are certain civil servants described in 5 U.S.C. 7511(b), including, among other categories not relevant here, those officers appointed by the President with the advice and consent of the Senate and other officers whom the President is permitted to appoint himself or herself. Also excepted are individuals ''whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character.'' [64] These determinations must be made by ''(A) the President for a position that the President has excepted from the competitive service; (B) the Office of Personnel Management for a position

[46] Congress envisioned that: ''OPM would be the administrative arm of Federal personnel management, serve as Presidential policy advisor, . . . promulgate regulations, set policy, run research and development programs, implement rules and regulations, and would manage a centralized, innovative Federal personnel program.'' 124 Cong. Rec. S27538 (daily ed. Aug. 24, 1978) (bill summary of the CSRA of 1978, S. 2540).

[47] U.S. Gov't Accountability Off., ''Civil Service Reform—Where it Stands Today,'' at p. 2 (May 13, 1980), *https://www.gao.gov/assets/fpcd-80-38.pdf.* The Equal Employment Opportunity Commission and Office of Government Ethics also handle duties previously covered by the CSC.

[48] *See* Cong. Rsch. Serv., ''Merit Systems Protection Board (MSPB): A Legal Overview,'' p. 4 (March 25, 2019), *https://crsreports.congress.gov/product/pdf/R/R45630.*

[49] *See* 5 U.S.C. 1103(a)(5), (a)(7).

[50] *Id.; see* 5 U.S.C. 8461.

[51] *See* 5 U.S.C. 1204, 7513(d).

[52] *See* 5 U.S.C. 1212.

[53] *See* 47 Cong. Ch. 27 (Jan. 16, 1883), 22 Stat. 403.

[54] *See* 5 U.S.C. 2301.

[55] *See Fausto,* 484 U.S. at 443, 445–47; *see* 5 U.S.C. 1212, 1214, 2301, 2302, 7502, 7503, 7512, 7513; *see also* 5 U.S.C. 4303 (review of actions based on unacceptable performance).

[56] 5 U.S.C. 7503; *Fausto,* 484 U.S. at 446.

[57] 5 U.S.C. 7503(b)(1)–(4); 5 CFR part 752, subpart B.

[58] *See* 5 CFR 752.401, 404, and 1201.3; *see also* 5 U.S.C. 7512(1)–(5), 7514; *Fausto,* 484 U.S. at 446–47.

[59] 5 U.S.C. 7513(d), 7701(a).

[60] The term ''probationary period'' generally applies to employees in the competitive service. ''Trial period'' applies to employees in the excepted service and some appointments in the competitive service, such as term appointments, which have a 1-year trial period set by OPM. A fundamental difference between the two is the duration in which employees must serve. The probationary period is set by law to last 1 year. When the trial period is set by individual agencies, it can last up to 2 years. *See* 5 CFR 315.801 through 806; *see also* U.S. Merit Sys. Prots. Bd., Navigating the Probationary Period After *Van Wersch* and *McCormick,* (Sept. 2006), *https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf.*

[61] The term ''preference eligible'' refers to specified military veterans and family members with derived preference pursuant to statute, such as an unmarried widow, and the wife or husband of a veteran with a service-connected disability. *See* 5 U.S.C. 2108(3).

[62] 5 U.S.C. 7511(a)(1).

[63] 5 U.S.C. 7513(d), 7701–7703, 7703(a)(1), (b)(2). The appropriate federal appellate court will generally be the U.S. Court of Appeals for the Federal Circuit but, in some instances, where appellant asserts whistleblower retaliation, employees may appeal to the Federal Circuit or another circuit court. Cases that include claims under certain discrimination statutes are appealable to Federal district courts. *See* 5 U.S.C. 7703(b)(2).

[64] 5 U.S.C. 7511(b)(2)(A), (B), and (C).

that the Office has excepted from the competitive service; or (C) the President or the head of an agency for a position excepted from the competitive service by statute.'' [65] As detailed further in Section IV(B), it is evident that Congress, in using this and similar language in various parts of title 5, U.S. Code, intended this exception to apply to the voluntary filling of noncareer political appointments that carry no expectation of continued employment beyond the presidential administration during which the appointment occurred.[66]

The unique responsibilities of politically appointed employees, many of whom are listed under excepted service Schedule C, allow hiring and termination to be done purely at the discretion of the President or the President's political appointees. This is a specific exception from the competitive service and, for that reason, each position listed in Schedule C is revoked immediately upon the position becoming vacant.[67] Agencies may terminate political appointees at any time. This also means that, absent any unique circumstance provided in law [68] or a request to stay by an incoming administration, these positions are vacated following a presidential transition.

Prior to the CSRA, agencies relied only on provisions codified at chapter 75 to remove Federal employees or to change an employee to a lower grade, even if the reason for removal was for unacceptable performance. The CSRA created chapter 43 of title 5, U.S. Code, as an additional process for empowering supervisors to address performance concerns.[69] Accordingly, in addition to using the provisions of chapter 75, agencies can address performance concerns under chapter 43. Under this scheme established by Congress, the decision of which chapter to use is left to the discretion of the manager tasked with pursuing the action.

Through various enactments currently reflected in chapters 43 and 75, Congress has created conditions under which certain employees—*i.e.,* those with the requisite tenure in continued employment—may earn a property interest in that continued employment. For such employees, Congress has mandated that removal and the other actions described in subchapter II of chapter 75 may be taken only ''for such cause as will promote the efficiency of the service.'' [70] This property interest in continued employment has been a feature of the Federal civil service since at least 1912, when the Lloyd-La Follette Act required just cause to remove a Federal employee. The Supreme Court in *Board of Regents of State Colleges* v. *Roth,* recognized that restrictions on loss of employment, such as tenure, can create a property right.[71] In *Cleveland Board of Education* v. *Loudermill,*[72] the Court also held:

> Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.[73]

In short, once a government requires cause for removals, constitutional due process protection will attach to that property interest and determine the minimum procedures by which a removal may be carried out. Any new law addressing the removal of a Federal employee with a vested property interest in the employee's continued employment must, at a minimum, comport with due process. This obligation drives some of the procedures in both chapters 43 and 75, while other procedures have been developed in accordance with Congress' assessments of what is good policy.[74] Regardless of the nature of the particular action specified, agencies must follow the procedures specified by Congress to effectuate a removal under those chapters, as a matter of law, unless they are changed by Congress.

An advocacy nonprofit organization opposed to this rule argued that the Lloyd-La Follette Act and predecessor executive orders ''were not understood (or applied)'' to give federal employees a property right to their jobs before ''the Supreme Court interpreted the Act as having that effect in *Arnett* v. *Kennedy* (1974).'' Comment 4097. Commenter's point is incorrect, and, in any event, irrelevant. As observed in note 71 above, the Supreme Court recognized in earlier cases that due process rights could attach to public employment. And Congress, far from limiting or ending such rights, has enacted new statutes since *Arnett,* notably the CSRA and the Civil Service Due Process Amendments Act, conferring robust procedural rights on broader groups of Federal employees. In any event, although Congress has, from time to time, tinkered with the procedures required in various agency settings, it has done nothing since *Arnett* purporting to remove due process rights from incumbents who have accrued them, which suggests approval of the Supreme Court's approach in that case.

Finally, in addition to establishing the requirements and procedures for challenging adverse actions and performance-based actions, the CSRA includes a mechanism for an employee in a ''covered position'' to challenge a ''personnel action'' that constitutes a ''prohibited personnel practice'' because it has been taken for a prohibited reason.[75] ''Covered position'' means any position in the competitive service, a career appointee in the Senior Executive Service, or a position in the excepted service unless ''conditions of good administration warrant'' a necessary

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[65] 5 U.S.C. 7511(b)(2).

[66] *See infra,* Sec. IV.(B); *see also* 5 CFR 6.2 (''Positions of a confidential or policy-determining character shall be listed in Schedule C''); 213.3301 Schedule C (''positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials''). Political appointees serve at the pleasure of the President or other appointing official and may be asked to resign or be dismissed at any time. They are not covered by civil service removal procedures, have no adverse action rights, and generally have no right to appeal terminations. *See, e.g.,* 5 U.S.C. 7511(b)(2) (excluding noncareer, political appointees from definition of ''employees'' eligible for adverse action protections); 5 CFR 317.605 (''An agency may terminate a noncareer or limited appointment at any time, unless a limited appointee is covered under 5 CFR 752.601(c)(2).''); 734.104 (listing employees who are appointed by the President, noncareer SES members, and Schedule C employees as ''employees who serve at the pleasure of the President.''); 752.401(d)(2) (excluding noncareer, political appointees under Schedule C from adverse action protections).

[67] *See* 5 CFR 213.3301.

[68] Such as 5 CFR 212.401, discussed further in Section IV.

[69] U.S. Merit Sys. Prots. Bd., ''Addressing Poor Performers and the Law,'' p. 4. (Sept. 2009), *https://www.mspb.gov/studies/studies/Addressing_Poor_Performers_and_the_Law_445841.pdf.*

[70] *See* 5 U.S.C. 7503(a), 7513(a); 5 CFR 752.102(a), 752.202(a).

[71] 408 U.S. 564, 576–77 (1972). The Court described three earlier decisions—*Slochower* v. *Bd. of Educ.,* 350 U.S. 551 (1956), *Wieman* v. *Updegraff,* 344 U.S. 183 (1952), and *Connell* v. *Higginbotham,* 403 U.S. 207 (1971)—where the Court held that public employees had due process rights. Before the Court explicitly recognized that restrictions on the loss of employment could create a property right, the Court protected statutorily-conferred public employment rights under other legal theories. *See, e.g., United States* v. *Wickersham* 210 U.S. 390, 398–399 (1906); *Keim* v. *United States,* 177 U.S. 290, 296 (1900); *see also Indiana ex rel. Anderson* v. *Brand* (303 U.S. 95 (1938); *Hall* v. *Wisconsin,* 103 U.S. 5 (1880) (enforcing statutory rights to public employment benefits under theories of contractual entitlement, even when legislatures changed those statutory entitlements).

[72] 470 U.S. 532 (1985).

[73] *Id.* at 541.

[74] The exact procedures required will turn on the factual situation and may be different from instance to instance.

[75] 5 U.S.C. 2302(a)(1), (a)(2), (b). Challenges to a personnel action on the basis that it constitutes a prohibited personnel practice may be brought by anyone in a covered position, regardless of their entitlement to adverse action rights.

exception on the basis that the position is of a ''confidential, policy-determining, policy-making, or policy-advocating character.'' [76]

At 5 U.S.C. 2302(a)(2)(A), Congress lists personnel actions that can form the basis of a prohibited personnel practice under 5 U.S.C. 2302(b). The CSRA, as described in the proposed rule,[77] also codified a comprehensive list of prohibited personnel practices.[78]

C. The Competitive, Excepted, and Senior Executive Services

The CSRA also established a new service—the Senior Executive Service, or SES—''to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and is otherwise of the highest quality.'' [79] As described further below, the SES is distinct from the competitive service and the excepted service.[80] It consists of senior government officials, both noncareer and career, who share a broad set of responsibilities to help lead the work of the Federal Government.

In the competitive service, individuals must complete a competitive hiring process before being appointed. This process may include a written test or an equivalent evaluation of the individual's relative level of knowledge, skills, and abilities necessary for successful performance in the position to be filled.[81]

Although most government employees are in the competitive service, about one-third are in the excepted service.[82] The excepted service includes all positions in the Executive Branch that are specifically excepted from the competitive service by statute, Executive order, or by OPM regulation.[83] For positions excepted from the competitive service by statute, selection must be made pursuant to the provisions Congress enacted for those positions. Applicants for excepted service positions under title 5, U.S. Code, like applicants for the competitive service, are to be selected ''solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.'' [84] Agencies filling positions in the excepted service ''shall select . . . from the qualified applicants in the same manner and under the same conditions required for the competitive service.'' [85] This means that agencies should generally afford veterans' preference in the same manner they would have for the competitive service, though, in a few situations [86] where the reason for the exception makes this essentially impossible, OPM (or the President) has exempted the position from regulatory requirements and imposed a less stringent standard.[87]

The President is authorized by statute to provide for ''necessary exceptions of positions from the competitive service'' when warranted by ''conditions of good administration.'' [88] The President has delegated to OPM—and, before that, to its predecessor, the CSC—concurrent authority to except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable.[89] The President has further delegated authority to OPM to ''decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule.'' [90]

OPM has exercised its delegated authority, and implemented exercises of presidential authority, by prescribing five schedules for positions in the excepted service, which are currently listed in 5 CFR part 213:

- Schedule A—Includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants, such as attorneys, chaplains, and short-term positions for which there is a critical hiring need.
- Schedule B—Includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants. Unlike Schedule A positions, Schedule B positions require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level. Schedule B positions engage in a variety of scientific, professional, and technical activities.
- Schedule C—Includes positions that are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. These positions include most political appointees below the cabinet and subcabinet levels.
- Schedule D—Includes positions that are not of a confidential or policy-determining character for which competitive examination makes it difficult to recruit certain students or recent graduates. Schedule D positions generally require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level. Positions include those in the Pathways Programs.
- Schedule E—Includes positions of administrative law judges.[91]

As described *supra,* competitive and excepted service incumbents, except those in Schedule C—and others excluded under 5 U.S.C. 7511(b)—become ''employees'' for purpose of civil service protections after they satisfy the probationary or length of service requirements in 5 U.S.C. 7511(a). Excepted service employees, except those in Schedule C and others excluded under section 7511(b), maintain the same notice and appeal rights for adverse actions and performance-based actions as competitive service employees.[92]

[76] 5 U.S.C. 2302(a)(2)(B), 3302.

[77] *See* 88 FR 63862, 63866.

[78] 5 U.S.C. 2302(b). OSC investigates allegations of prohibited personnel practices brought by employees in covered positions and may investigate in the absence of such an allegation, to determine if a prohibited personnel practice occurred. 5 U.S.C. 1214(a)(1)(A), (a)(5). If OSC concludes that a prohibited personnel practice has occurred and, if OSC is unable to obtain a satisfactory correction from an agency responsible for a prohibited personnel practice, OSC may petition the MSPB to grant corrective action. If OSC proves its claim, the MSPB may order the corrective action it deems appropriate. *See* 5 U.S.C. 1214(b)(2)(B), (C), (b)(4)(A).

[79] 5 U.S.C. 3131.

[80] 5 U.S.C. 2101(a) (definition of civil service), 2102(a)(1) (competitive service), 2103(a) (excepted service) 3132(a)(2) (Senior Executive Service).

[81] *See* 5 U.S.C. 3304 (''An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title.''); *see also* U.S. Off. of Pers. Mgmt., ''Competitive Hiring,'' *https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/.*

[82] *See* Cong. Rsch. Serv., ''Categories of Federal Civil Service Employment; A Snapshot,'' at p. 4 (May 26, 2019), *https://sgp.fas.org/crs/misc/R45635.pdf.*

[83] *See* 5 U.S.C. 2103; 5 CFR parts 213, 302.

[84] 5 U.S.C. 2301(b)(1).

[85] 5 U.S.C. 3320. Part 302 of title 5 of OPM's regulations establishes the mechanisms by which compliance with section 3320 can be achieved.

[86] *See infra* notes 357–361.

[87] 5 CFR 302.101(c).

[88] 5 U.S.C. 3302.

[89] E.O. 10577, sec. 6.1(a) (1954); 5 CFR 6.1(a) (1988) (''The Commission is authorized to except positions for the competitive service whenever it determines that appointments thereto through competitive examination are not practicable'' and that ''[u]pon the recommendation of the agency concerned, it may also except positions which are of a confidential or policy-determining character.'').

[90] E.O. 10577, sec. 6.1(b); 5 CFR 6.1(b); *see* 28 FR 10025 (Sept. 14, 1963) (reorganizing the civil service rules).

[91] 5 CFR 6.2.

[92] *See* 5 U.S.C. 4303, 7513(d). There are, however, some notable differences between non-removal protections afforded to competitive service and excepted service employees, such as assignment rights in the event of a reduction in force. *See* 5 CFR 351.501 and 502. Employees who are reached for release from the competitive service during a reduction in force are entitled to an offer of assignment if they have ''bump'' or ''retreat'' rights to an available position in the same competitive area. ''Bumping'' means displacement of an employee in a lower tenure group or a lower subgroup within the same tenure group. ''Retreating'' means displacement of an employee in

However, and as noted here, excepted service employees must satisfy different durational requirements before these rights become available. So-called ''preference eligibles''—specified military veterans and family members with derived preference pursuant to statute [93]—in an executive agency, the Postal Service, or the Postal Regulatory Commission must complete 1 year of current continuous service to avail themselves of the relevant notice and appeal rights.[94] Employees in the excepted service who are not preference eligibles and (1) are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or (2) have completed 2 years of current or continuous service in the same or similar position, have the same notice and appeal rights as qualifying employees in the competitive service.[95]

Likewise, any employee who is (1) a preference eligible; (2) in the competitive service; or (3) in the excepted service and covered by subchapter II of chapter 75, and who has been reduced in grade or removed under chapter 43, is entitled to appeal the action to the MSPB.[96] However, these appeal rights do not apply to (1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2); (2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; or (3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.[97]

Finally, the SES is a service separate from the competitive and excepted services.[98] The SES has a separate system for hiring executives, managing them, and compensating them.[99] The SES is also governed by separate adverse action procedures, in Subchapter V of chapter 75. As described more fully in Section IV, the adverse action processes in 5 U.S.C. 7501–7515 and the exclusion from such rights and coverage in 5 U.S.C. 7511(b), do not apply to the SES. The SES adverse action procedures, unlike the rules governing the competitive and excepted services, make no mention—let alone an exception—for positions of ''a confidential, policy-determining, policy-making, or policy-advocating character.'' [100]

A member of the SES can be a career appointee, noncareer appointee, limited term appointee or limited emergency appointee. These terms are defined at 5 U.S.C. 3132(a).[101] Congress established rules restricting noncareer appointments, as well as limited term and limited emergency appointments.[102] The adverse action rights for SES set out in Subchapter V, 5 U.S.C. 7541–7543, apply only to career appointees to the SES. Removal of career employees for less than fully successful executive performance is governed by a separate provision at 5 U.S.C. 3592. By contrast, none of these provisions affect an agency head's ability to remove a member of the noncareer SES.

D. The Prior Schedule F

On October 21, 2020, President Donald Trump issued Executive Order 13957, ''Creating Schedule F in the Excepted Service,'' which risked altering the carefully crafted legislative balance that Congress struck in the CSRA.[103] That Executive Order, if fully implemented, could have transformed the civil service by purportedly stripping adverse and performance-based action grievance and appeal rights from large swaths of the Federal workforce—thereby turning them into at-will employees. It could have also sidestepped statutory requirements built into the Federal hiring process intended to promote the objective of merit-based hiring decisions. It would have upended the longstanding principle that a career Federal employee's tenure should be linked to their performance and conduct, rather than to the nature of the position that the employee encumbers. It also could have reversed longstanding requirements that, among other things, prevent political appointees from ''burrowing in'' to career civil service jobs in violation of merit system principles.

Before it could be implemented, however, Executive Order 13957 was revoked, and Schedule F abolished, by President Biden through Executive Order 14003, ''Protecting the Federal Workforce.'' [104]

OPM received many comments related to Schedule F from both proponents and critics of it and Executive Order 13957. The lawfulness and wisdom of the policy choices embodied in now-revoked Schedule F are in most respects outside the scope of this rulemaking. Regardless of whether Executive Order 13957 was a valid exercise of authority, it is not directly at issue here. Nonetheless, numerous commenters addressed the topic and OPM has determined that it would be prudent to set forth its views in response to those comments. The various parts of the Executive Order, Schedule F, and related comments are thus addressed below. The validity of this rule does not depend on the legality or wisdom of Executive Order 13957.

1. Adverse Action Rights, Performance-Based Action Rights, and Appeals

Section 5 of Executive Order 13957 directed agency heads to review their entire workforces to identify any employees covered by chapter 75's adverse action rules (which apply broadly to employees in the competitive and excepted services) who occupied positions of a ''confidential, policy-determining, policy-making, or policy-advocating character.'' These included positions the agency assessed for the first time, without guidance or precedent, to allegedly include these characteristics. Agencies were then to petition OPM for its approval to place them in Schedule F, a newly-created category of positions to be excepted from the competitive service. If these positions had been placed in Schedule F, the employees encumbering them would have, according to the text of the Executive Order, been stripped of any adverse action procedural rights and MSPB appeal rights under chapter 75 discussed *supra.* Thus, the Order attempted to subject employees to removal, at will, by virtue of the involuntary placement of the positions they occupied in this new schedule (and regardless of any rights they had already

the same tenure group and subgroup. Meaning, they are entitled to the positions of employees with fewer assignment rights. Employees in excepted service positions have no assignment rights to other positions unless their agency, at the agency's discretion, chooses to offer these rights to positions. Even with these differences, merit system principles are at the core of civil service protections relating to hiring, conduct, and performance matters as applied to both career competitive and excepted service employees.

[93] *See* 5 U.S.C. 2108(3); *see also supra* note 61.

[94] *See* 5 U.S.C. 7511(a)(1)(B).

[95] *See* 5 U.S.C. 7511(a)(1)(C).

[96] *See* 5 U.S.C. 4303(e).

[97] *See* 5 U.S.C. 4303(f).

[98] *See* 5 U.S.C. 2102 (competitive service does not include SES), 2103 (excepted service does not include SES),

[99] *See* 5 U.S.C. 5131–5136.

[100] *See* 5 U.S.C. 7541–7543.

[101] 5 U.S.C. 3393, 3394.

[102] 5 U.S.C. 3134.

[103] 85 FR 67631 (Oct. 21, 2020).

[104] 86 FR 7231 (Jan. 22, 2021).

accrued or any reliance on those rights).[105]

An express rationale of this action was to make it easier for agencies to ''expeditiously remove poorly performing employees from these positions without facing extensive delays or litigation.'' [106] This new sweeping authority was purportedly necessary for the President to have ''appropriate management oversight regarding'' the career civil servants working in positions deemed to be of a ''confidential, policy-determining, policy-making, or policy-advocating character,'' and to incentivize employees in these positions to display what presidential appointees at an agency would deem to be ''appropriate temperament, acumen, impartiality, and sound judgment,'' in light of the importance of these functions.[107] Executive Order 13957 did not acknowledge existing mechanisms to provide ''appropriate management oversight,'' such as chapter 43 and chapter 75 procedures, or the multiple management controls that agencies have in place to escalate matters of importance to agency administrators.[108]

Executive Order 13957 instructed agency heads to review existing positions to determine which, if any, should be placed into Schedule F. The Order also instructed that, after agency heads conducted their initial review, they were to move quickly and petition OPM by January 19, 2021—the day before the Inauguration—to place positions within Schedule F. After that, agency heads had another 120 days to petition OPM to place additional positions in Schedule F.

In contrast to past excepted service schedules designed to address unique hiring needs upon a determination that appointments through the competitive service was ''not practicable,'' [109] movement into Schedule F was designed to be broad and numerically unlimited, potentially affecting a substantial number of jobs across all Federal agencies. For example, according to the Government Accountability Office, the Office of Management and Budget petitioned to place 68 percent of its workforce within Schedule F.[110] Moreover, the Executive Order did not make the underlying determination that particular positions were ''of a confidential, policy-determining, policy-making or policy-advocating character.'' [111] In essence, the exception was created in advance of any determination. The Executive Order instead announced that any position that could be described in these terms, and which was not encumbered by an appointee under Schedule C, should be placed in a separate and new excepted service schedule. The Executive Order then directed *agencies* to determine which of their positions met that criterion and compile a list of individuals for OPM to consider placing in Schedule F.

2. Hiring

Section 3 of Executive Order 13957 provided that ''[a]ppointments of individuals to positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a presidential transition shall be made under Schedule F.'' [112] The stated rationale for removing these positions from the competitive hiring process (or from other excepted service schedules in which some of these positions were previously placed) was, again, because of the importance of their corresponding duties and the need to have employees in these positions that display ''appropriate temperament, acumen, impartiality, and sound judgment.'' [113] The stated purpose was to ''provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures'' [114] or, presumably, for positions already in the excepted service, without the constraints imposed by 5 CFR part 302. The Order indicated that this change was intended to ''mitigate undue limitations on their selection'' and relieve agencies of ''complicated and elaborate competitive service processes or rating procedures that do not necessarily reflect their particular needs.'' [115] These changes were to give agencies ''greater ability and discretion to assess critical qualities in applicants to fill these positions, such as work ethic, judgment, and ability to meet the particular needs of the agency.'' [116]

The Executive Order did not address that the competitive hiring process permits agencies to assess all competencies that are related to successful performance of the job, including appropriate temperament, acumen, impartiality, and sound judgment. They also permit agencies to fulfill the congressional policy to confer a preference on eligible veterans or their family members entitled to derived preference. The qualifications requirements, specialized experience, interview process, and other assessment methodologies available to hiring managers facilitate an agency's ability to identify the best candidate. The Order also did not address the existence of longstanding rules, grounded in the need to establish lack of unlawful bias in proceedings under Federal anti-discrimination statutes, that require assessment of any such competencies.[117] The summary

[105] Since performance-based actions under 5 U.S.C. 4303 are tied, in part, to subchapter II of chapter 75, employees would purportedly have also been stripped of performance-based action procedural rights and MSPB appeal rights, had an agency chosen to proceed with an action under chapter 43.

[106] E.O. 13957, sec. 1.

[107] The Executive Order stated that ''[c]onditions of good administration . . . make necessary excepting such positions from the adverse action procedures set forth in chapter 75 of title 5, United States Code.'' E.O. 13957, sec. 1. The ''conditions of good administration'' language appears in 5 U.S.C. 3302. We note that Section 3302 is placed in Subchapter I of chapter 33, a subchapter addressing examination, certification, and appointment. It relates only to exclusions of positions from the competitive service requirements relating to those topics when conditions of good administration warrant and does not purport to confer authority on the President to except positions from the adverse action provisions of chapter 75. Similarly, chapter 75 does not itself purport to confer authority on the President to except positions from the scope of chapter 75. The authority to regulate under chapter 75 is conferred directly upon OPM unlike the authority to regulate under section 3302, which is conferred upon the President. Compare 5 U.S.C. 7514 (''The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter . . .) to 5 U.S.C. 3302 (''The President may prescribe rules governing the competitive service.''). Of course, a President could order the Director of OPM to promulgate regulations relating to chapter 75. Any such rule, however, would then be subject to the requirements of the Administrative Procedure Act.

[108] Matters of importance can be raised to agency administrators in various ways, such as by filing a complaint with an agency's Inspector General, raising concerns with an agency's human resources office, and filing a grievance.

[109] *See infra* notes 355–359.

[110] Gov't Accountability Off., ''Civil Service—Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category for Federal Positions,'' (Sept. 2022), *https://www.gao.gov/assets/gao-22-105504.pdf.*

[111] 5 U.S.C. 7511(b)(2) (''This subchapter does not apply to an employee . . . (2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—(A) the President for a position that the President has excepted from the competitive service.''); *see also* E.O. 13957, sec. 5 (only listing broad duties—including ''viewing'' or ''circulating'' proposed regulations and other non-public policy proposals—that agency heads should consider when petitioning the OPM Director to place positions in Schedule F).

[112] 85 FR 67631, 67632.

[113] 85 FR 67631.

[114] *Id.*

[115] 85 FR 67631, 67632. The procedures Congress has adopted for hiring in the competitive service were designed, in part, to implement the stated congressional policy of veterans' preference. *See* 5 U.S.C. 1302. How this congressional mandate would be realized in these circumstances was not addressed.

[116] 85 FR 67632.

[117] *See* 5 CFR part 300. Validation generally requires that the criteria and methods by which job applicants are evaluated have a rational

imposition of new competencies would be contrary to existing statutory requirements and could potentially be discriminatory in application, even if that were not the agency's intent. Finally, the Order recited that the normal statutory veterans' preference requirements that would have applied to identified positions [118] would not apply, and that agencies would be required to apply veterans' preference requirements only ''as far as administratively feasible.'' [119]

As noted above, OPM received many comments about the prior Schedule F and its potential impacts on adverse action rights, performance-based action rights, appeals, and hiring.

Comments Regarding Departure of Schedule F From Precedents

Many individuals and organizations commented that Schedule F represented an unprecedented departure from Congressional intent, longstanding legal interpretations, and past practices. A joint comment by a nonprofit organization and former federal official agreed that Schedule F was ''an aberration, divorced from established legal interpretation and historical precedent'' and ''there can be no doubting that it would have disrupted the functions of government, even if ultimately overturned by the courts.'' Comment 2134. The comment continued that ''even a small movement of positions into Schedule F would have amounted to presidential usurpation of the role of Congress, which has firmly enshrined the merit system in law to protect Americans and preserve democracy against authoritarian overreach.'' *Id.* Other commenters argued that the process in which Schedule F was created was deficient because it intended to significantly alter longstanding statutory protections. Comment 1316 argued that ''[i]f the executive, or one of its appointees, wishes to change the operation of an agency, they must do so by lobbying for a change in the law that authorizes it or implement[ ] changes in accordance with those laws and the constraints of the Administrative Procedure Act.'' A comment from Members of Congress stated that Schedule F not only would have ''jeopardize[d] the livelihoods of tens of thousands of hard-working, career civil servants,'' but also would ''upend civil service precedent.'' Comment 48. As explained in the proposed rule [120] and here, OPM agrees that Schedule F risked altering the carefully crafted legislative balance that Congress struck in the CSRA and the history of protections leading up to it.

To be clear though, this rulemaking takes no position on whether Executive Order 13957 was based on legal error, nor is this rulemaking premised on such a conclusion. Instead, as OPM explained in the proposed rule,[121] there were a number of existing mechanisms that would address the policy concerns identified in the Executive Order without establishing a new schedule, and the creation of Schedule F risked undermining other objectives of the civil service laws.[122] The basis for this rulemaking, as explained herein, is to clarify and reinforce the retention of accrued rights and status following an involuntary move to or within the excepted service and promulgate a definition of what it means to be a ''confidential, policy-determining, policy-making, or policy-advocating'' position consistent with decades of practice and how the Executive Branch, Congress, and the courts have understood that phrase to encompass political appointees.

A few commenters opposed to this rule argued that the President has the authority to issue civil service reform in a manner like Schedule F. An advocacy nonprofit organization stated that the order was ''grounded on firm legal authority'' because title 5 specifically authorizes the President to exempt policy-influencing positions from civil service appeals. Comment 4097. Commenter argued that ''statutory context makes clear'' this authority extends to both political appointees and career officials. Commenter continued that the ''fact that prior presidents have restrained themselves in their dealings with subordinates does not imply they lacked this authority.'' *Id.* Commenter asserted that the ''Supreme Court has already concluded that 'policymaking positions in government may be excepted from the competitive service to ensure presidential control, *see* 5 U.S.C. 2302(a)(2)(B), 3302' (*Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 2010).'' [123]

The ''confidential, policy-determining, policy-making or policy-advocating'' provision was intended to permit agency heads to directly appoint a cadre of political appointees who have a close and confidential working relationship with the President's appointees to further and support the priorities of the President and the President's appointees. As discussed extensively throughout this final rule, the term of art, ''confidential, policy-determining, policy-making or policy-advocating,'' has a longstanding meaning that equates to political appointments, typically made under Schedule C. OPM, in this rulemaking, is defining that phrase as it is used in the statutory exception in 5 U.S.C. 7511(b)(2) for the reasons explained in the proposed rule [124] and in Section IV(B).[125]

Comment 4097 also argued that a separate provision, 5 U.S.C 2302(a)(2)(B), defining a ''covered position'' for the purposes of protections from prohibited personnel practices, similarly excludes from protections positions excepted from the competitive service because of their ''confidential, policy-determining, policy-making, or policy-advocating character.'' Commenter claimed this demonstrates that ''policymaking positions in government may be excepted from the competitive service to ensure presidential control.'' Although this final rule does not directly amend regulations dealing with prohibited personnel practices, OPM construes this statutory language in 5 U.S.C 2302(a)(2)(B) as aligning with the reasoning in OPM's final rule with respect to chapter 75. It simply means that positions of a ''confidential, policy-determining, policy-making, or policy-advocating'' character have long been understood to be political appointees and, in addition to not having adverse action rights, are not covered by protections against prohibited personnel practices.[126] That is perfectly consistent with the nature of Schedule C employees. Congress has chosen to extend these protections only to the career civil service as described further in Section IV(B).

This commenter also cited 5 U.S.C. 3302, which says a President may make necessary exceptions of positions from the competitive service if ''conditions of good administration warrant,'' to support the assertion that career policymaking positions in government

relationship to performance in the position to be filled.

[118] *See* 5 U.S.C. 3320.

[119] 85 FR 67631, 67632–33 (sec. 4(i) (Schedule F)); *see also* 5 CFR part 302.

[120] 88 FR 63862, 63867–69.

[121] *Id.*

[122] *See also* E.O. 14003 at 2 (providing a similar assessment).

[123] The full cite to this opinion is 561 U.S. 477 (2010).

[124] 88 FR 63862, 63871–73.

[125] *See also* Comment 2134 (''The preamble and the regulation accurately reflect the executive branch's historical understanding that Congress intended for the competitive service exception for 'confidential, policy-determining, policy-making, or policy-advocating' positions to apply only to a small class of political appointee positions.'').

[126] OPM notes, though, that the rule does not amend regulations related to prohibited personnel practices.

may be excepted from the competitive service to ensure presidential control. Again, OPM's rule does not change this Presidential authority to except positions from the competitive service where necessary and where conditions of good administration warrant such action. But, as explained above, OPM disagrees that the authority to make exceptions in section 3302 also allows for the removal of incumbents' accrued adverse action rights under chapter 75.[127] Section 3302 and the ''warrant[ed]'' by ''conditions of good administration'' standard relates to whether positions should be excepted from the competitive service. Congress did not suggest—in chapter 33 or chapter 75—that the same standard also be used in determining whether to remove civil service protections for the incumbents of such positions. Further, as explained in Sections IV.(A)–(B), OPM does not believe the exception in 5 U.S.C. 7511(b)(2) can remove the previously accrued adverse action rights of the incumbents of such positions.

As noted above, commenter also cited *Free Enterprise Fund* to support its assertion that the President can issue an action like Schedule F. The application of *Free Enterprise Fund* and other Appointments Clause and removal cases to this rulemaking are addressed further at Section III(F), but in short, commenter's reliance on this case is beside the point and inapt. Whether a president can lawfully enact Schedule F by executive order does not affect the ability of OPM to promulgate this rule pursuant to its authority. In any event, in *Free Enterprise Fund,* the Supreme Court examined the constitutionality of multiple layers of removal restrictions for select positions at an independent agency (one layer of removal protections for the commissioners of the SEC and the next layer of protections for members of the Public Company Accounting Oversight Board (PCAOB or Board)). As an initial matter, most of the agencies that hire and fire subject to title 5 are not independent agencies, so they would not have multiple for-cause limitations on removal (*i.e.,* most Secretaries, Directors, and other agency heads can be removed at will by the President). But even in most independent agencies, the removal restrictions at issue in *Free Enterprise Fund* are of limited relevance. There, the Supreme Court focused specifically on the removal protections of Board members, whom the Court held were executive officers ''as the term is used in the Constitution'' and who exercise ''significant authority.'' It clarified that ''many civil servants within independent agencies would not qualify'' as executive officers and none of the civil servants or corresponding protections addressed by the dissenting opinion introduce the same constitutional problems as those of the Board. One group the dissent specifically mentions are employees in the Senior Executive Service.[128] Even though SES employees work on policy and have significant leadership responsibilities, they also have civil service protections. The majority states that ''none of the positions [the dissent] identifies,'' which would include SES positions, ''are similarly situated to the Board.'' [129] ''Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board,'' the majority added. In other words, *Free Enterprise Fund* explicitly declined to hold that career SES positions, which have adverse action protections under 5 U.S.C. 7541–7543, pose constitutional concerns in and of themselves. Commenter invokes *Free Enterprise Fund* to argue that a lower-level strata of career civil servants (with fewer responsibilities and authority) cannot have civil service protections if they keep confidences or work on policy. But the Court stressed that ''[n]othing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.'' If nothing in *Free Enterprise Fund* casts doubt on the civil service system within independent agencies, it does not cast any doubt on the civil service system within the Executive Branch generally.[130]

Further, in *Free Enterprise Fund,* the Supreme Court crafted a narrow remedy to address the unique problem the statute presented, holding that members of the Board would have to be removable at will by the Commission to render the statutory scheme consistent with the Constitution. More recently, in *United States* v. *Arthrex,*[131] the Supreme Court crafted a different remedial solution for another statutory scheme presenting employees with significant responsibilities who enjoyed statutory removal protections. *Arthrex* concerned Administrative Patent Judges (APJs), whose duties included sitting on the Patent Trial and Appeal Board and issuing binding decisions. The Federal Circuit, sitting *en banc,* had held that APJs were principal officers whose appointments were unconstitutional because neither the Secretary nor Director could review their decisions or remove them at will. To remedy this constitutional violation, the Federal Circuit invalidated the APJs' tenure protections, making them removable at will by the Secretary. The Supreme Court, however, vacated and remanded, concluding that it was preferable to reform the statute to require the Director, a Presidential appointee who already oversaw APJs for other functions, to serve as a final reviewing and issuing official for decisions rendered by the Patent Trial and Appeal Board. The Court left the APJs' tenure provisions intact. The limited solutions adopted by the Supreme Court in *Free Enterprise Fund* and *Arthrex* are far removed from a proposal to remove previously accrued adverse action rights from thousands of traditional civil servants simply because, for example, some of their work might touch on policymaking. Nothing in this rulemaking is contrary to *Free Enterprise Fund* or any other binding precedent. On the other hand, an overwhelming number of precedents are contrary to commenter's positions, as described in this final rule.

Comment 4097 argued that ''[t]he CSRA also allows the President to except positions from the competitive service for the purpose of nullifying removal restrictions.'' The Supreme Court has cautioned against using vague statutory provisions to alter ''fundamental details of a regulatory scheme,'' stating that Congress ''does not hide elephants in mouseholes.'' [132] Commenter seems to suggest that Congress did just that when it enacted the CSRA, even though that authority went undiscovered and unexercised for these purposes in over 40 years. Under this assertion, all a President would have to do is proclaim by unilateral order that ''good administration warrants'' a change and the carefully balanced and longstanding civil service protections provided by Congress would fall away if the positions could be characterized as having a ''confidential'' [133] or ''policy''

[127] *See supra* note 107.

[128] *See* 561 U.S. at 541.

[129] *Id.* at 506.

[130] *Free Enterprise Fund* notes that civil service statutes in section 7511 contain an exception from adverse action rights for positions of a confidential, policy-determining, policy-making, or policy-advocating character, but it did not define what those phrases mean. *See* 561 U.S. at 506.

[131] 141 S. Ct. 1970 (2021).

[132] *See Whitman* v. *Am. Trucking Assocs., Inc.,* 531 U.S. 457, 468 (2001).

[133] In describing positions with confidential or policy characteristics, E.O. 13957 states ''The heads of executive departments and agencies (agencies) and the American people also entrust these career professionals with non-public information that must be kept confidential.'' If that were the sole

character—terms commenter argued require no further elaboration. That would be contrary to the very purpose of the CSRA, a result that Congress could not have possibly intended.

As explained in Comment 2134, a joint comment by a nonprofit organization and a former federal official, and further in Section IV(B), Congress, courts, and the Federal Government have parsed the meaning of the term of art ''confidential, policy-determining, policy-making or policy-advocating'' over at least the past 90 years and consistently viewed it as applying to noncareer political appointees.[134] Further, competitive service employees have in the past been moved involuntarily to excepted service schedules that do not contain adverse action rights, but those incumbents have kept rights they have accrued (as detailed in Section IV(A)). Executive Order 13957 and Schedule F's attempt to strip accrued rights by moving positions into the excepted service would run contrary to longstanding precedent, including *Roth* v. *Brownell,*[135] as explained in Section IV(A). *See* Comment 2134. OPM therefore disagrees with commenter's broad assertion that the CSRA allows the President to except positions from the competitive service ''for the purpose of nullifying removal restrictions.''

Comments Regarding Schedule F's Use of an Exception To Broadly Eliminate Adverse Action Rights

Commenters supportive of the rule agreed with OPM and argued that, because the terms ''confidential'' and ''policy-making, policy-determining, or policy-advocating'' are so broad, Schedule F had no limiting principle and used the exception in 7511(b)(2) to broadly swallow adverse action rights. A professor commented that the ''lack of clear definition and breadth of Schedule F allows it to serve as a promise for wide scale partisan retribution for any federal employee who might raise concerns about the legality of [a] policy agenda.'' Comment 50. A labor union argued that ''the plain purpose of Schedule F was to create an exception so broad, it swallowed the rule of apolitical, merit based Federal employment and rendered meaningless the protections afforded to career Federal employees by the CSRA.'' Comment 2640. As described in the proposed rule [136] and in this final rule, OPM shares some of these concerns.

One commenter opposed to this rule argued that the statutory exceptions in 7511(b)(2) are broad enough to include career positions. Comment 4097 argued that ''[n]othing in the words 'confidential, policy-determining, policy-making, or policy-advocating' hints at covering only political appointments or references the duration of an employee's tenure. Instead, the CSRA makes clear these terms cover both career and noncareer positions.'' OPM disagrees that these words can be read in isolation or separated from their historical context and development. As explained in Section IV(B) and shown in Comment 2134, which extensively details the context, history, and meaning of these terms of art, they have, except in Executive Order 13957, always meant noncareer political appointees. Section 7511 was amended as part of the Civil Service Due Process Amendments of 1990, in which Congress, for the first time, extended the ability to accrue adverse action rights (and for certain adverse actions, appeal rights) to individuals in the excepted service other than preference eligibles, who already had the ability to accrue such rights. Congress did not intend to undercut this extension of rights by permitting broad exclusions. In discussing what positions would be excluded from such rights, Congress stated that the bill ''explicitly denies procedural protections'' to these types of political appointees—''presidential appointees, individuals in Schedule C positions [which are positions of a confidential or policy-making character] and individuals appointed by the President and confirmed by the Senate,'' and that ''[e]mployees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed'' because they ''explicitly serve at the pleasure of the President or the presidential appointee who appointed them.'' [137]

We also discuss below the argument that Congress did not distinguish between career and noncareer positions in the SES in discussing the possibility that SES positions could involve policy-influencing duties. In brief, the SES was a new service, created in the CSRA and has its own distinct rules, rather than building on the existing structure of the competitive and excepted services. In the SES scheme, Congress did not need to address exclusions because the only SES appointees covered by the sections addressing procedural and appeal rights were career appointees. There was no attempt to distinguish between those whose duties could be regarded as policy-influencing and those whose duties could not be so characterized. Congress included separate provisions limiting the number of noncareer appointees.

Comment 4097 also suggested that concerns about Schedule F are misguided because the schedule would have been limited to a small group of senior policy-influencing positions. There are approximately 4,000 political positions in the civil service (though some commenters noted between 20–25 percent of those usually remain unfilled). *See* Comment 2134.[138] Of these, between 1,000 to 1,500 positions are Schedule C political appointees—a number that has stayed relatively steady since the 1950s. *See id.* Comment 4097 estimates Schedule F would have covered between two and three percent of the federal workforce, which would have grown the positions vulnerable to political favor (even if not explicitly ''subject'' to such favor) by over an order of magnitude, from 4,000 to 50,000 positions. Comment 4097 attempts to

standard for a ''confidential'' position, it would be hard to think of a career position that would not have been ''confidential,'' since the incumbents of virtually all positions have this obligation regarding non-public information. Such a novel reading of the adverse action exclusion could have led to untenable results. Of course, Congress, the courts, and the Federal Government have historically not read these and similar terms so broadly and have instead long given them, as used in 5 U.S.C. 7511(b)(2), a much narrower meaning.

[134] Comment 2134, as detailed in Section IV(B), explained that the phrase ''confidential, policy determining, policy-making or policy-advocating'' was first used in the CSRA in 1978. Before then, though, phrases such as ''confidential or policy-determining'' and ''policy-making and confidential'' were used. Those phrases were interchangeable and had the same meaning.

[135] 215 F.2d 500 (D.C. Cir. 1954), *cert. denied sub nom, Brownell* v. *Roth,* 348 U.S. 863 (1954) (confirming that employees with competitive status retained their appeal rights upon involuntary movement to the excepted service).

[136] 88 FR 63862, 63871–73.

[137] H.R. Rep. No. 101–328, at 4–5, as reprinted in 1990 U.S.C.C.A.N. at 698–99.

[138] *See also* U.S. Civil Serv. Comm'n, ''Maintaining the Integrity of the Career Civil Service,'' p. 10 (1960), *https://babel.hathitrust.org/cgi/pt?id=uc1.aa0005815857&seq=20&q1=%22competitive+status%22*; U.S. Off. Of Pers. Mgmt., ''General, Questions and Answers'' (detailing the different types of political appointments, including presidential appointments requiring senate confirmation (PAS), presidential appointments not requiring senate confirmation (PA), noncareer Senior Executive Service positions, Schedule C positions, and others), *https://www.opm.gov/frequently-asked-questions/political-appointees-and-career-civil-service-positions-faq/general/which-types-of-political-appointments-are-subject-to-opmrsquos-pre-hiring-approval/*; P'ship for Pub. Serv., Center for Presidential Transition, ''Frequently Asked Questions About the Political Appointment Process,'' (estimating there are 1,200 PAS positions, 750 noncareer SES positions, 450 PA positions, and 1,550 Schedule C positions), *https://presidentialtransition.org/appointee-resources/ready-to-serve-prospective-appointees/frequently-asked-questions-about-the-political-appointment-process/*.

rationalize the scope of Schedule F by contending it would have been limited to ''senior policy-influencing officials''—a term that does not appear in Executive Order 13957. But as explained above and in the proposed rule,[139] the GAO found that Schedule F was interpreted by agencies to have a broad reach, with one agency, for example, petitioning to place 68 percent of its workforce within Schedule F, including positions at the GS–9 level.[140]

Confirming that the number of employees that would have been subject to Schedule F extends beyond senior positions responsible for agency policy, Comment 4097 included a spreadsheet labelling a career line attorney at an agency's general counsel's office as a ''policy'' employee. OPM notes that government attorneys are generally Schedule A employees, and therefore, by definition, are specifically ''not of a confidential or policy-determining character,'' [141] but in any event, whatever limiting principles commenter may have in mind for justifying Schedule F, they remain unclear. While commenter states that two to three percent of the federal workforce would have been impacted by Schedule F, commenter then suggests that up to 10 percent of jobs [142] could fit its interpretation of confidential and policy positions, which would equate to approximately 250,000 employees. The number of positions that could be covered by a Schedule F-type action is thus indeterminate and without meaningful boundary.

Commenter added that, because of Schedule F's allegedly limited scope, OPM's recruitment concerns are ''meritless.'' It claimed that ''Schedule F would have virtually no applicability to technical positions such as IT and cybersecurity that OPM cites as ongoing recruitment challenges.'' This statement certainly does not capture the nature of cybersecurity and other technical positions which require the maintenance of confidences while fending off cyberattacks from foreign countries or domestic bad actors with respect to data breaches, for example. It is difficult to imagine situations where the requirement to maintain confidences would be more important. Commenter concluded that OPM does not ''offer any evidence that making confidential and policy-influencing career positions at-will—as opposed to converting them to political appointments—would create recruitment challenges.'' As detailed further in Section V.(B), regarding the impact of politicization on recruitment, hiring, and retention, OPM received a significant number of comments concerned about the negative impacts of Schedule F, or a similar effort, on federal civil service recruitment. Because of Schedule F's unprecedented treatment of the confidential and policy exception in 5 U.S.C. 7511(b), the concerns about such a schedule were broad and not isolated to discrete parts of the workforce. For instance, concerned commenters included academic researchers showing the negative impact of politicization on recruitment to individuals, including those in IT and technical positions who expressed that the existence of an action like Schedule F would dissuade them from seeking federal employment.

Comments Regarding Schedule F and Politicization in Hiring and Firing

Comment 4097 also argued that, contrary to widespread opinion, Schedule F rejected the spoils system and was sufficiently protective from the dangers of politicization. Commenter contended that ''if E.O. 13957 was intended to fill the bureaucracy with political loyalists, President Trump chose an extremely odd way of doing it. He could have directly converted career positions to political positions, dismissed career incumbents through a reduction in force, and filled the roles with political appointees.'' None of these alternatives is simple or free of costs. For instance, additional Schedule C positions would require an agency to budget for and create new slots, obtain OPM's approval of such slots, and pursue a variety of other procedural steps designed to sustain civil service protections and merit system principles. Reductions in force are complex and the outcomes are unpredictable. They have often been the subject of extended litigation.[143]

Commenter argued that the White House Office of Presidential Personnel would not have been involved in Schedule F appointments, but commenter does not address why that would promote efficiency or lead to less agency politicization. The prior administration was slow to fill even the political slots at its disposal and many remained unfilled. *See, e.g.,* Comment 2124 (''Increasing [politically-based appointments] by a factor of 5 or more will certainly mean that more jobs will go unfilled and more tasks will go uncompleted.''). Under Schedule F, agency political and career leadership could target, interview, and/or select politically-aligned applicants just as well as PPO.

Regarding Schedule F's purported protections from the dangers of politicization, an advocacy nonprofit organization argued that ''Schedule F made sure to protect these policymaking employees from discriminatory firing based on political beliefs or party allegiance.'' *See* Comment 3892; *see also* Comment 2346. Once hirings and firings are at-will, however, the employee might not have an entitlement to written notice of the reasons for the adverse action, an opportunity to respond, or a written decision.[144] Nor would the decision generally be appealable.[145] It would thus be, at a minimum, difficult for employees to protect themselves from actions based on political beliefs or party allegiance because no cause (or evidence) would be required prior to such an action. Under Schedule F, because such an employee would be at-will, the employer would need to give little or no reason prior to a termination. In short, Schedule F leaves innumerable ways for politics to factor into these traditionally merit-based decisions in a manner that would be difficult to detect or remedy.

Comment 4097 contended that ''OPM's concerns about a return to the patronage system also ignore the evidence that the Federal Government ended patronage because it had become obsolete'' and passed the Pendleton Act because ''patronage no longer served their interests.'' Although the influence of politics in the civil service was greatly diminished following the Pendleton Act, it has taken consistent legislative, executive, and regulatory action to stem the tide of patronage over the past 140 years. For instance,

[139] 88 FR 63862, 63868.

[140] *See supra* note 110. A former OPM official involved in the Schedule F approval process told GAO that ''positions above GS–11 were generally included'' but OMB's approved petition ''also included positions at the GS–9 and GS–10 levels.'' *Id.* at p. 19 & n.14.

[141] 5 CFR 213.3101 (describing Schedule A positions).

[142] *See* Comment 4097, p. 24 (surmising that 90% of jobs are not policy-influencing). Because there are millions of civil servants, each percentage point in this estimate equates to a significant number of potentially impacted employees.

[143] *See, e.g., James* v. *Von Zemensky,* 284 F.3d 1310 (Fed. Cir. 2002) (construing whether a ''staff adjustment'' resulting in the separation of a physician in the Veterans Health Administration of the Department of Veterans Affairs, could be appealed under the reduction-in-force statute and regulations, notwithstanding Congress' placement of VHA positions under title 38, U.S. Code, for at least some purposes); *Harants* v. *U.S. Postal Serv.,* 130 F.3d 1466 (Fed. Cir. 1997) (construing a reassignment during a Postal Service reorganization that the employee had accepted as an appealable reduction-in-force action in the context of complex developments, including intervening MPSB opinions, cancellations, and restorations, a stay of enforcement, and a subsequent reduction-in-force notice).

[144] 5 U.S.C. 7513(b).

[145] 5 U.S.C. 7513(d).

Comment 2134 gave an overview of the election of 1936, which featured concerns about the return of the spoils system, and executive action in the 1950s to create Schedule C due to concerns that political actors were burrowing in as career civil servants. As previously mentioned, the CSRA was enacted in the aftermath of the Nixon Administration's plan to implement the Malek Manual, a blueprint to replace the civil service merit system with a political hiring scheme that would begin by purging all Democrats from federal employment.

Comment 4097 also contended that today's rank-and-file government jobs are not enticing enough to invite patronage and that ''the really big bucks aren't in the political appointments game.'' At the same time, commenter argued that confidential and policy positions are so important to the functioning of government that the President should have unfettered control over these positions. Executive Order 13957 likewise justified removing protections from these positions because the ''importance of the functions they discharge.'' Commenter seems to recognize the threat of unqualified individuals discharging important functions. OPM agrees that qualified individuals should discharge important functions, and this rule is based on OPM's determination that injecting politicization into the nonpartisan career civil service (or creating the conditions where it can be injected by individual actors) runs counter to merit system principles and would not only harm government employees, agencies, and services, but also the American people that rely on them, as discussed in the proposed rule [146] and further below.

Comments Regarding Schedule F as a Performance Management Tool

One of the justifications for Schedule F was that it allegedly allowed agencies to address poor performance, but many commenters asserted that this rationale was flawed and a pretext for removing protections and culling the civil service of dissenting opinions. Comment 13, a former OMB official, commented that ''[t]he proponents of Schedule F claim that it is needed for accountability and to be able to fire poor performers. Yet they offer little or no support for their claims. Thousands of poor performers are dismissed annually, and even more are transferred to other positions.'' This commenter argued that the last Administration's ''own presidential appointees [were the ones] who most visibly resisted his directives, not career civil servants.'' [147] Comment 2816, a former federal official, argued that Schedule F ''relied on vague and conclusory assertions that competitive selection procedures inhibit the hiring of candidates with appropriate 'work ethic, judgment, and ability to meet the particular needs of the agency,' and that more 'flexibility to expeditiously remove poorly performing employees' was needed without any consideration of the countervailing considerations that favor strong employee protections.'' *See also* Comment 3803. A professor argued that it was not civil service incompetence that spurred Schedule F, but *competence.* Comment 42. ''This competence insisted on following scientific consensus on climate change. It insisted that cures such as ivermectin and hydroxyquinoline would not treat Covid-19. The legal expertise in the federal bureaucracy insisted that impounding funds that Congress had explicitly delegated for Ukraine was illegal. These are some of the most prominent examples of bureaucratic competence coming into conflict with the preferences'' of the previous Administration. *Id.* Finally, commenters noted that, while some want to ''eliminate incompetent people or redundant roles—[ ] allowing elected officials to hand-pick civil service members prevents neither.'' Comment 2828.

OPM agrees that Schedule F was poorly designed as an effort to meaningfully improve performance management or allow managers to more effectively address performance issues. Agencies were directed to move employees occupying ''confidential, policy-determining, policy-making, or policy-advocating'' positions into Schedule F, thereby purportedly making them at-will employees who could be terminated without any adverse action procedures. But the characteristics of an employee's job—including whether the employee works on policy—has nothing to do with an employee's performance. Schedule F sought to streamline terminations based on the type of work that an employee performs, not based on how well the employee performs. It is therefore difficult to understand how Schedule F can be reconciled with its purported aim of addressing poor performance.

If the concern is that managers face some difficulties in attempting to take actions under chapter 75 or chapter 43, the solution is not for the Executive Branch to issue an executive order seeking to undermine those statutory provisions. Nor would such an executive order effectively address the complexity of the various remedial schemes Congress has created. For example, creating Schedule F will do nothing to prevent a particular employee from lodging a complaint of unlawful discrimination under the various civil rights statutes; will do nothing to stop administrative judges of the Equal Employment Opportunity Commission from presiding over discovery in relation to such claims and adjudicating them; and may result in decisions adverse to managers that will then be non-reviewable in a Federal court. Similarly, excepting individuals from adverse action rights would likely lead to attempts to file constitutional claims in the Federal district courts, thereby defeating the benefits of the claim-channeling provisions of the CSRA.[148]

Still, some commenters argued that Schedule F was a valid tool to remove poor performers and increase accountability. For instance, Comment 7 contended that ''Schedule F and similar tools 'aim[ ] to increase accountability and efficiency in the Federal government by removing 'poor-performing employees.' '' *See also* Comments 45, 1811, 3130; 4097. Comment 4097, an advocacy nonprofit organization, argued that civil service protections and merit-based hiring procedures ''make it difficult to hire the best candidates and prohibitively difficult to dismiss employees for all but the worst offenses.'' With respect to merit-based hiring procedures, we observe that even if we accepted this premise as true, which OPM does not, commenter ignores the fact that merit-based hiring procedures contained in title 5 are the law of the land. If a commenter believes they ''make it difficult to hire the best candidates'' the solution is to make this argument to Congress, not attempt to evade the requirements established in title 5. We also note that many of the ''difficulties'' commenter observes arise from the Veterans' Preference Act, as amended, which is codified throughout title 5's provisions on hiring. An observer might argue that there should be no veterans' preference, but that would seem a grave disservice to the sacrifice and commitment of veterans across the Nation. And even if a persuasive policy argument in favor of veterans' preference reform could be made, it

[146] 88 FR 63862, 63881.

[147] Citing James P. Pfiffner, ''President Trump and the Shallow State: Disloyalty at the Highest Levels,'' Presidential Studies Quarterly, Vol. 53, Issue 3 (Sept. 2022), *https://doi.org/10.1111/psq.12792.*

[148] OPM discusses performance management further in Section V.(B).

would have to be made to Congress. Finally, the merit-based hiring procedures are one of the ways agencies can defend themselves from unsupported assertions of illegal discrimination. Attempts to create unwarranted exceptions to avoid legal requirements have been counterproductive and resulted in substantial litigation.[149]

As to difficulties dealing with ''poor performers,'' there already exist a variety of tools to address inappropriate conduct and unacceptable performance and civil servants are removed using these tools, as described above and explored further below in the Section V.(B). Commenter also does not address civil servants who are terminated during their probationary/trial periods or before they have met their durational requirements when their civil service protections would attach. The purpose of probation is to permit observation of new appointees on the job before their appointments became permanent. It is sometimes described as the final stage of the examining process. Such filtering, when done properly, addresses many performance issues early and grants the agency wide latitude to remove that worker.[150]

Commenter attributes any misalignment with a President's political agenda (or ''policy resistance'') as ''misconduct'' which justifies termination, even if such conflict cannot be proved. But a mere difference of opinion with leadership does not qualify as misconduct or unacceptable performance or otherwise implicate the efficiency of the service in a manner that would warrant an adverse action. To the contrary, identifying objections to government action early in internal discussions ultimately strengthens government policy by addressing meritorious considerations and explaining why other objections are unwarranted. Moreover, Executive branch employees have an affirmative obligation to report waste, fraud, and abuse to appropriate authorities, which could fall under commenter's broad notion of ''policy resistance'' [151] and is another reason this notion is unworkable

Comment 4097 cited some examples of what commenter considers to be poor performance, misconduct, or other justifications for Schedule F. Comment 2822, a legal nonprofit organization, examined many of those examples and those in *Tales from the Swamp,* written by the same author as Comments 3156 and 4097 and cited throughout those two comments. It concluded that *Tales from the Swamp* ''regularly engages in cherry-picking, slanted interpretation, and outright inaccuracy to justify its conclusions in support of Schedule F.'' Regarding *Tales from the Swamp's* complaints about agency losses in court, Comment 2822 stated it ''makes a substantial and baseless leap'' from the previous Administration's ''loss rate in court (true) to career staff sabotage being the culprit (unsupported).'' Comment 2822 explained that ''the most thorough report prepared on the'' previous Administration's ''record in court found that the Administration regularly 'ignored clear-cut statutory and regulatory duties,' with losses on statutory interpretation grounds making up the bulk (117) of the administration's losses in court.'' [152] In many of these cases, ''the Administration lost 'because the agency had acted outside of the bounds of its authority or had adopted an interpretation that blatantly contradicted the statute at issue.' These losses were the result of unlawful policy efforts by political decisionmakers, not the product of agency staff doing a poor job of building a rulemaking record.'' Comment 2822 criticized *Tales from the Swamp's* other examples of alleged poor performance [153] and finds ''many of the anecdotes relied on by *TFTS* lack crucial context, or mischaracterize important facts about agencies' work'' and the ''only thing these anecdotes consistently show is that some political appointees'' during the last Administration ''occasionally found it challenging to implement their regulatory goals. But that experience is not unique to Trump-era political appointees, and it does not justify reorienting the civil service towards political fealty.''

Many commenters argued that, instead of poor performance or accountability, Schedule F was motivated by a desire to increase political loyalty in nonpartisan career civil servants. A professor argued that the previous administration has touted the prior Schedule F as a way ''to impose personal loyalty tests, and to use government as an instrument of his power. This is at odds with the purpose and traditions of the American state.'' Comment 50; *see also* Comments 448, 1779. Other commenters pointed to numerous public statements which, they argue, demonstrate the intent behind Schedule F, including calls from the previous Administration to ''root out'' political opponents, referring to civil servants as the ''deep state'' that needs to be ''destroyed'' or ''brought to heel,'' and statements that they would ''pass critical reforms making *every* executive branch employee fireable by the president of the United States.'' *See* Comments 50, 668, 2512 (citing news articles documenting the previous Administration and its supporters' desire to purge the civil service), 3398. Such firings would likely be at odds with statutory, regulatory, or constitutional protections and rights as explained in this final rule.

3. Political Appointees in Career Civil Service Positions

Executive Order 13957 could have facilitated burrowing in. ''Burrowing in'' occurs when a current (or recently departed) political appointee is hired into a permanent competitive service, nonpolitical excepted service, or career SES position without having to compete for that position or having been appropriately selected in accordance with merit system principles and the normal procedures applicable to the

[149] *See, e.g., Nat'l Treasury Employees Union* v. *Horner,* 854 F.2d 490 (D.C. Cir. 1988), which overturned OPM's decision to place all Professional and Administrative Career positions in Schedule B of the excepted service after entering into a consent decree that required OPM to develop a new examination for such positions. The Federal court of appeals, on review from a district court determination that OPM had violated the Administrative Procedure Act in excepting this broad category from the competitive service, noted that filling positions through the competitive process was the norm and OPM could depart from that norm only when ''necessary'' for ''conditions of good administration,'' quoting 5 U.S.C. 3302. The court also noted that OPM, while asserting that the cost of developing a new examination was prohibitive, did not present evidence that would meet the standard of review. *Cf. Gingery* v. *Dept. of Defense,* 550 F.3d 1547 (Fed. Cir. 2008) (holding that President Clinton's creation of the Federal Career Intern Program, a Schedule B appointing authority, did not permit the agency to use OPM's modified process for agency pass-overs of preference eligibles in an excepted service hiring process, in light of Congress' command, at 5 U.S.C. 3320, to apply the same procedures used for the competitive service, *i.e.,* the procedures specified in 5 U.S.C. 3318).

[150] On December 13, 2023, OPM issued guidance to agencies on Maximizing Effective Use of Probationary Periods, available at *https://www.chcoc.gov/content/maximizing-effective-use-probationary-periods.* This guidance advises agencies to periodically remind supervisors and managers about the value of the probationary period and to make an affirmative decision regarding the probationer's fitness for continued employment. The guidance also provides practical tips for supervisors and recommends good management practices for supervisors and managers to follow during this critical assessment opportunity.

[151] *See* 5 CFR 2635.101(b)(11).

[152] Citing Bethan A. Davis Noll, '' 'Tired of Winning': Judicial Review of Regulatory Policy in the Trump Era,'' 73 Admin. L. Rev. 353, 397–98, 397 fig.5 (2021), *https://www.law.nyu.edu/sites/default/files/DavisNoll-TiredofWinning_0.pdf.*

[153] These include Department of Education enforcement against for-profit colleges, FDA laboratory test oversight, USDA attempts to narrow food stamp eligibility, the rollback of offshore drilling safety requirements, re-issuance of the school nutrition rule, and the classical architecture mandate.

position under civil service law. OPM has long required that ''politics play no role when agencies hire political appointees for career Federal jobs.'' [154] OPM adopted procedures to review appointments of such individuals for compliance and Congress has now essentially codified that procedure by requiring OPM to submit periodic reports of its findings.[155] Executive Order 13957, interpreted broadly, could have opened the door for agency heads to move current political appointees into new Schedule F positions, or transferred vacancies in existing positions to Schedule F, without competition and in a manner not based on merit system principles. In effect, this would have allowed political appointees on Schedule C appointments, who would normally expect to depart upon a presidential transition, to ''burrow'' into permanent civil service appointments.

Comments Regarding Schedule F and Burrowing In

One commenter argued that Schedule F would have reduced burrowing in because the burrowed employee would be removable at will anyway. *See* Comment 4097. That view overlooks the ability of burrowed employees to obtain a job in the first place because these employees could be hired into Schedule F without the usual filters for qualifications currently in place in the competitive civil service. Schedule F would have allowed unqualified employees to be hired, albeit at will, who may never have been able to enter the competitive service. Regardless of whether employees moved would be ultimately removable, the opening of the door to the conversion of Schedule C political appointees to Schedule F positions—or, indeed, the hiring of any number of new candidates because they were politically aligned with the existing administration—increased the risk of burrowing in. We discuss burrowing further in Section IV(A).

4. Additional Comments Regarding the Potential Impacts of Schedule F

Comments Regarding Potential Negative Outcomes of Schedule F

Several former and current civil servants, individuals, organizations, and Members of Congress commented on what they perceived as the negative aspects of Schedule F. A former OMB official contended that Schedule F would inhibit, if not prevent, successful presidential transitions and would degrade the performance of government employees by replacing career civil servants with political appointees. Comment 13. A professor contended that ''[t]aking qualified and even expert civil servants and making them weigh the tradeoff between voicing the views based on their expertise and keeping their jobs would utterly undermine their expertise.'' Comment 42. Also ''it would mean that presidents would not be getting advice based on expertise but on what employees thought they wanted to hear'' and ''Congressional will as expressed in the statutes that enable the executive branch to make policy would be discounted.'' Not only would career civil servants and institutional expertise be harmed (*see* Comment 2267), but commenters, including Members of Congress, detailed the potential impact of Schedule F to communities, small businesses, and families across America (Comment 48); the environment (Comment 33); National Park Service personnel, national parks, and the public who values them (Comment 1094); critical infrastructure (Comment 2501); federal investigations and prosecutions (Comment 2616); and the SNAP program and other hunger safety nets (Comment 3149); to name a few.

Several commenters expressed concerns about the potential impact of Schedule F on whistleblowers. Comment 3340, a whistleblower protection nonprofit organization, argued that ''Schedule F would have given the President blank check discretion to cancel the Whistleblower Protection Act by removing employees from the competitive service,'' removing their civil service protections, and then firing them. *See also* Comments 3466, 3894. If Schedule F allowed removals at will, commenters claimed that it would be difficult to prove an employee was removed because of protected and important whistleblowing activities. Also, if an incumbent was in a ''confidential, policy-making, policy-determining, or policy-advocating'' position for the purposes of adverse action protections and excluded from such protections under section 7511(b)(2), as Schedule F attempted, then such a position would also presumably be excluded from the definition of ''covered position'' for the purposes of the prohibited personnel practices under section 2302(a)(2)(B)(i).

A professor commented that Schedule F would also have weakened legislative power. Comment 50 expressed that ''[t]he Founders were deeply concerned with the amassing of centralized power, and Schedule F frustrates the institutional design of checks and balances. In particular, it weakens legislative power. The creation of the civil service system was a response to a spoils system that led to abuses of state resources and power.''

Another commenter identified possible costs of Schedule F. Commenter argued that ''a likely consequence of Schedule F would be a greater reliance on private contractors to carry out the work of federal government agencies'' and a ''[g]reater reliance on contractors would, almost certainly, be more expensive than our current system.'' Comment 2109. Commenter further noted that ''the federal government is the source of a considerable amount of scientific and economic data that both businesses and researchers around the world trust and rely upon'' and argued that this ''data is trusted precisely because it is curated by career civil servants who are free from political influence. If concerns about political influence in the generation of this data begin to seep into the public consciousness, enormous amounts of social value will be lost.'' *Id.*

Comments Regarding Schedule F and the Pendleton Act

One commenter who opposed the rule argued that the 19th-century reformers who created America's civil service believed that tenure and job protections were ''inimical to merit'' and that ''[t]he Pendleton Act consequently deliberately made minimal changes to the dismissal process'' besides prohibiting removal for making or failing to make ''political contributions.'' Comment 4097. Commenter, an advocacy nonprofit organization, argued that Schedule F would have ''returned the federal civil service to its foundations.'' While the Pendleton Act focused on merit-based hirings, Congress did address removals even at this early stage in the development of the career civil service—it forbade removals on political or religious grounds.[156]

[154] U.S. Off. of Pers. Mgmt., ''Guidelines on Processing Certain Appointments and Awards During the 2020 Election Period,'' *https://chcoc.gov/sites/default/files/2020%20Appointments%20and%20Awards%20Guidance%20Attachments_508.pdf*.

[155] *See* The Edward ''Ted'' Kaufman and Michael Leavitt Presidential Transitions Improvement Act of 2015, Public Law 114–136 (Mar. 18, 2016), which requires OPM to submit these reports to Congress.

[156] *See* Ari Hoogenboom, ''The Pendleton Act and the Civil Service,'' The Am. Historical Rev., Vol. 64, No. 2c, p. 307 (Jan. 1959) (''The Pendleton Act forbade removals on political or religious grounds.''); *see also* Nat'l Archives, *supra* note 18, quoting Pendleton Civil Service Reform Act of 1883, sec. 2 (''[I]t shall be the duty of [the commissioners of the Civil Service Commission]: First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, . . . Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as

Continued

Commenter adds that the reformers who created the civil service feared that requiring ''a virtual trial at law'' to dismiss an employee would ''entrench incompetence and intransigence in the federal workforce'' and that ''[n]ot until the 1960s did the general federal workforce gain the ability to appeal dismissals. The experience of the past six decades has demonstrated the folly of that decision.'' This may be commenter's conclusion, but Congress has concluded otherwise and repeatedly strengthened employee rights during the period in question—through the CSRA, the Civil Service Due Process Amendments Act of 1990, and the Whistleblower Protection Act and its amendments.[157] Moreover, at the time of the Pendleton Act's enactment, there was a rigorous debate about the extent of merit-based hirings and removals protections and the compromise position on the latter was that further removal protections were unnecessary at the time because hiring based on merit would ''remov[e] the temptation to an improper removal.'' [158] Commenter quotes from George William Curtis, one of the drafters of the Pendleton Act, regarding the ''fear'' of ''virtual trial[s] at law,'' but further context is important here too. Curtis' longer quote starts ''*[h]aving annulled all reason from the improper exercise of the power of dismissal,* we hold that it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed.'' [159] Removing improper bases for removals was a key antecedent to the statement regarding virtual trials at law. Curtis added, ''If the front door [is] properly tended, the back door [will] take care of itself.'' [160] At the time, this meant that, if civil service restrictions prevented the President from appointing a hand-picked replacement for a person he removed, his incentive to remove for political reasons would be diminished.[161]

Regardless of how the Pendleton Act should be best interpreted, Congress has since established procedures set out in the CSRA and other laws, which channels employee appeals to an administrative agency, the MSPB, and reviewing courts.

Comments Regarding Comparison of Schedule F to State-Level Civil Service Reforms

Comment 4097 also argued that several states have adopted policies like Schedule F and that such efforts have proven successful. Commenter asserted that Arizona, Florida, Georgia, Indiana, Mississippi, Missouri, Texas, and Utah have instituted Schedule F-type reforms and concluded that ''[e]valuations generally show positive results, while fears of a return to patronage failed to materialize.''

As explained in the following sections, OPM received comments from civil servants in these states that described the various ways in which they believe that their jobs have worsened because of these reforms. Also, a former federal official counters Comment 4097's assertion about the benefits of these state reforms. *See* Comment 2816. The former federal official cited a ''lengthy survey of state-level civil service changes that reduced civil service protections in the 2000s'' which found that ''in many cases, reforms were politically driven efforts to establish and defend political actors' capacities . . . to carry out the agendas of elected executives, legislators, and other policy makers.'' The study notes that some State governors ''aggressively pushed reforms designed to remove merit system barriers to direct and tighten policy control over state agencies and their employees.'' These types of initiatives, as with Schedule F, ''are often 'sold' in terms of a need to enhance executive leadership and accountability for results and, inevitably, to allow the removal of the legions of 'unresponsive, incompetent, insulated, bureaucrats' who the public is easily convinced lurk in the shadows of state agencies.'' The report continues that ''there has been '[g]rowing awareness among policy makers, public employees and their organizations, and human resource professionals that' state-level reforms to weaken civil service protections 'have not delivered the benefits they promised and may well dampen enthusiasm for [similar] initiatives by the states that contemplate sudden, wholesale, changes in existing arrangements.' '' Comment 2816 continued that, in their study of civil service employee responses to Georgia's reforms, ''these authors found measurable decline in the number of employees saying they liked their jobs and an increase in those intending to leave employment within the coming year. Employees did not believe the reforms would result in high-performing employees being rewarded, did not trust that performance would take precedence over office politics, and did not believe as much as before the changes that performance appraisals were conducted fairly and believing they understood their job expectations.'' The study concludes that ''[o]ver 75 percent of state employees disagreed that the reforms 'had resulted in a state workforce that is now more productive and responsive to the public.' '' OPM finds this comment and study persuasive as a more rigorous examination than Comment 4097's conclusions that some HR professionals believe at-will status is useful and an ''essential piece of modern government management.'' It also undercuts Comment 4097's argument that OPM ''ignore[s] the evidence from the states that at-will employment is both consistent with a merit system and can improve government performance.'' Comment 4097 does not show that these changes are consistent with merit system principles nor that they improve performance. It also did not identify the metrics by which performance could improve; it just stated that they make employees more responsive and give management more flexibility.

Comments Regarding Potential Effect of Schedule F on the Number of Political Appointees

Commenters opposed to the rule argued that the civil service does not have enough political appointees and Schedule F would have given administrations greater control over the federal workforce and priorities. Comment 3190, a law school clinic, contended that ''Schedule F proposed to expand the class of political appointees from roughly 4,000 positions to 20,000–50,000 positions'' and that ''[u]nder such a modest change, political appointees would still constitute only 2.5 percent of the federal workforce.'' As explained further below and in Comment 2134, a joint comment by a nonprofit organization and former

follows: . . . [T]hat no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.''

[157] Public employees have been challenging their removals in court since at least the 1800s. *See, e.g., Ex Parte Hennen,* 38 U.S. (13 Pet.) 230 (1839); *United States.* v. *Wickersham,* 201 U.S. 390, 398–399 (1906).

[158] *See, e.g.,* Debate in the Senate on the Civil Service Reform Act of 1883, December 14th, 1882, *https://digital.lib.niu.edu/islandora/object/niu-gildedage%3A24020.*

[159] George William Curtis, President, Address at the Annual Meeting of the National Civil-Service Reform League, Nat'l Civil-Serv. Reform League (Aug. 1, 1883), in Proceedings at the Annual Meeting of the National Civil Service Reform League, pp. 3, 24–25.

[160] Paul P. Van Riper, ''History of the United States Civil Service,'' at p. 102 (1958).

[161] David Rosenbloom, ''Federal Service and the Constitution,'' at pp. 87–88; Van Riper, *supra* note 160, at p. 102.

federal official, the number of political appointees has stayed relatively stable for 70 years, so such a change would be anything but ''modest.'' [162] Also, this comment appears to concede that a possible, and perhaps desired, effect of Schedule F was to create a new category of ''political appointees.'' This runs counter to Comment 3156, written by the same author as Comment 4097. Comment 3156 takes issue with Comment 50, saying Comment 50's characterization of Schedule F positions as ''political appointees is simply wrong.'' Comment 4097 then argued that Schedule F was designed to ''keep these policy-influencing positions in the career civil service,'' such that they would not be political appointees. Even amongst proponents of Schedule F and opponents of this rulemaking, there are disagreements regarding what Schedule F meant and the breadth of its potential effects on the civil service. And one aspect of a ''career'' appointment, as that term has long been understood, is the opportunity to serve the United States across administrations with the concomitant accrual of career status and adverse action rights—an opportunity Schedule F would have jeopardized.

Ultimately, President Biden rescinded Executive Order 13957 before any positions could be placed into Schedule F. As noted above, on January 22, 2021, President Biden issued Executive Order 14003, ''Protecting the Federal Workforce,'' rescinding Executive Order 13957, stating that ''it is the policy of the United States to protect, empower, and rebuild the career Federal workforce,'' and that the Schedule F policy ''undermined the foundations of the civil service and its merit system principles.'' [163]

If a future Administration concludes that a policy that implements the principles of Schedule F is preferable to this rule and seeks to rescind this rule and replace it with such a policy, a future Administration would need to comply with the Administrative Procedure Act and principles of reasoned decision-making.[164] For example, to rescind this rule and replace it with a new Schedule F-type policy, a future Administration would need to, among other things: explain how the new policy is consistent with the carefully crafted legislative balance that Congress struck in the CSRA; set forth reasons for why it is departing from OPM's prior determination, reconfirmed here, that creating a new schedule for at-will employees who are not political appointees—similar to Schedule F—is inconsistent with that balance; justify the departure from the fundamental principle that career Federal employees' tenure should be linked to their performance rather than to the nature of their position; address whether that departure is consistent with the accrued property interests of employees, the settled expectations of career Federal employees' tenure, and the decisions individuals have made in response to those expectations; explain why any novel definition of ''confidential, policy-determining, policy-making, or policy-advocating character'' is consistent with the CSRA; discuss why that novel definition is being adopted even though it departs from long-established understandings—reconfirmed in this preamble—of what that phrase means; and explain how a new policy would (1) ensure that new hires formerly required to go through the competitive hiring process have the knowledge, ability, expertise, and skills necessary to work effectively; (2) adequately protect career Federal employees against potential political retaliation or coercion; and (3) make certain that critical positions in the federal workforce currently and ably held by career Federal employees will continue to function even if they may be replaced by individuals regardless of qualification or suitability.

E. General Comments

As explained in Section II, OPM received more than 4,000 comments regarding this rulemaking whereby commenters provided useful insights into various aspects of these regulatory amendments. The comments below relate to general concepts regarding the civil service, civil service protections, and merit system principles that inform this rulemaking. In the following sections, OPM considers comments related to specific provisions of this final rule, the need for this rule, regulatory alternatives, and the costs and benefits of this rule.

Comments Regarding Why Civil Servants Should Be Nonpartisan

As a baseline concept, many commenters agreed with OPM that career civil servants should be nonpartisan. An association of administrative law judges cited Alexander Hamilton in Federalist No. 79, as saying ''[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will.'' Comment 1042. The association argued that ''[t]he principles of merit service require the federal government to base hiring decisions upon experience and expertise, and serve to ensure a nonpartisan, expert federal workforce.'' An individual commenter cited research that politicization of the civil service ''has significant consequences for the proper functioning of government.'' Comment 1427. This research included that of David Lewis (2008) on increased politicization of OPM during the 1980s and the resulting ill effects. Commenter argued that this report shows that politicization had ''severe consequences for agency competence.'' Experienced career professionals left the agency and it was hard to replace them. These developments, in turn, discouraged promising entry-level candidates from applying to work in the agency, which resulted in decreased morale and difficulty conducting long-term planning. By the 1990s, commenter argued, the agency had suffered reputational damage. *See also* Comments 46 (supporting nonpartisan career civil service with studies showing politicization undercuts Federal Government performance and economic growth); 2822 (noting that civil service laws ''emphasize responsibilities to the government, U.S. citizens, the Constitution, laws, and ethical principles'' and not ''political agendas''). One commenter suggested a reason for the differences in performance between neutral and politicized staff was that that ''career civil servants who perceive their agencies to be politicized are less likely to invest in training and more likely to leave the agency'' thereby reducing long-term government expertise. Comment 2446. OPM appreciates these views and agrees that the career civil service should remain nonpartisan.

Commenters further argued that the United States civil service is already more politicized than those of peer countries. A professor argued that, among those countries, the United States ''is an outlier in terms of its existing level of politicization.'' Comment 50. This is because ''[w]e use about 4,000 political appointees to run the executive branch. Up to the top five layers of leadership in a department or agency can be appointees, a sharp

[162] The overall number of federal employees has also remained relatively stable. In fact, there were more federal employees during the last years of the Reagan Administration than there are today. *See, e.g.,* U.S. Off. of Pers. Mgmt., ''Executive Branch Employment Since 1940,'' *https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/.*

[163] E.O. 14003, 86 FR 7231, 7231 (Jan. 22, 2021), *https://www.federalregister.gov/documents/2021/01/27/2021-01924/protecting-the-federal-workforce.*

[164] *See, e.g., Perez* v. *Mortgage Bankers Ass'n,* 575 U.S. 92, 101 (2015) (agencies under the Administrative Procedure Act must ''use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance'').

contrast with most peer countries where only the top layer is part of the political class.'' *Id.* Commenter noted that this presents a problem when Presidents invariably struggle to fill these slots, leading to delays in appointments and vacancies in leadership. *See also* Comments 2186 (''[T]he United States' executive branch is more politicized than our peers.'' (citing 2007 OECD survey)), 3359 (''Compared to other major democracies, the United States already maintains a higher number of political appointees.'').

Conversely, some commenters argued that career civil servants need more political alignment with an administration's policies to be more ''accountable'' to the President. A former political appointee argued that a merit system ''is important only as far as it helps the government better serve the American people,'' and that ''the American people are best served when the government is in the control of the President they chose to entrust with control over the Executive Branch.'' Comment 50; *see also* Comment 3892 (''The federal bureaucracy is not currently adequately or constitutionally accountable to the elected president.''). As explained in later sections, executive branch employees are already tasked with executing the administration's policies and there is little evidence that further politicization improves government performance for the American people. Politicization is associated with poorer performance outcomes, as described below.

Some commenters opposed to the rule asserted that the Constitution allows a president to closely control executive branch civil servants. A law school clinic argued that, ''as a general matter, the Constitution gives the president the authority to remove those who assist him in carrying out his duties,'' because ''[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities.'' Comment 3190. For this proposition, commenter cited *Seila Law LLC* v. *Consumer Financial Protection Bureau* [165] (quoting *Free Enterprise Fund*).[166] Commenter cited general concepts in these cases regarding independent agencies—the CFPB in *Seila Law* and the SEC in *Free Enterprise Fund*—which explore the specific removal protections of principal officers therein, and the constitutionality of multiple layers of removal protections, as supportive of commenter's propositions. But as explained above regarding *Free Enterprise Fund* and further in Section III(F), nothing in those holdings or their progeny conflict with this final rule regarding title 5 protections to the career civil service. Career employees, the vast majority of whom would not be considered inferior officers, are accountable through a supervisory chain that typically runs upwards through layers of political appointees. As the official ultimately responsible for the agency can generally be removed at the President's will, and as those officials are ultimately responsible for the performance management of their subordinates, accountability is maintained. The fact that accountability in the form of removal may involve certain processes for those employees covered by adverse action procedures and, in some cases, appeal rights, does not make those protections unconstitutional.

Some commenters argued that a subset of civil servants actively work against the policies of conservative administrations. A legal organization opposed to the rule asserted that ''[i]nsulating federal employees from removal and answerability emboldens political activists with the federal government to disrupt or delay Presidential initiatives.'' Comment 2866; *see also* Comment 2652. Comment 3156, an advocacy nonprofit organization, further contended that ''[a]ny authority civil servants purport to exercise derives its legitimacy from the election of the President, and any attempt by civil servants in the executive branch to undermine the lawful actions of a President are an attack on the Constitution and on democracy itself.'' OPM does not agree that employing civil servants—without consideration of their political views—thwarts the agenda of any President, and commenter's objections lack any well-founded support. Republican and Democratic administrations have achieved important policy goals with a nonpartisan career civil service whose members undoubtedly encompass a wide variety of personal political perspectives. One former civil servant explained that ''[t]he Reagan and later administrations successfully implemented new policy directions with the professional Civil Service.'' Comment 3038. A legal nonprofit organization concurred and added that civil servants ''did not stop [the last Administration's] deregulatory efforts'' and to the extent that regulatory agenda was significantly delayed, ''the best explanation is not left-wing civil servants' resistance to a conservative agenda.'' Comment 2822.

For example, in the first term of the George W. Bush Administration, agencies helped to establish new and reimagined personnel systems for both the Department of Homeland Security and the Department of Defense in response to the terrorist attacks on America on September 11, 2001.[167] Implementing these systems required two sets of complex regulations promulgated jointly by OPM and each agency. Government attorneys then vigorously defended these programs against legal challenges in the Federal courts.[168] As noted in the 2003 edition of *Biography of an Ideal,* with respect to DHS:

> OPM successfully advocated the paramount importance of equipping the new Department with a modern human resources system that would make possible the flexible use of all aspects of the system as tools to help management accomplish strategic objectives and results. The legislation establishing DHS granted authority for the Secretary of Homeland Security and the Director of OPM to create, by jointly issued regulation after extensive employee involvement and consultation with stakeholders (such as unions, employee associations, academic experts, and executives in the corporate and nonprofit sectors), modern pay and job evaluation systems. . . .[169]

The career civil service fulfilled the tasks they were asked to perform to stand up these systems rapidly regardless of their personal politics or views.

Comments Regarding Nonpartisan Career Civil Servants and Neutral Competence

Several commenters supportive of this rule touted that a significant benefit of a nonpartisan career civil service is their ''neutral competence.'' A former OMB official who joined the agency in 1980 commented that, ''[l]ike other OMB career staff, I was not primarily a Democrat or a Republican, but instead I strongly endorsed and practiced the ethos of 'neutral competence' that served the president, without regard to the party of the president.'' Comment 13. An employee with the Bureau of Land Management commented that ''[c]ivil service positions provide a continuous level of expertise and neutrality to the functioning of the

[165] 140 S. Ct. 2183, 2191 (2020).

[166] 561 U.S. at 513–14.

[167] *See* Homeland Security Act of 2002, Public Law 107–296 (2002); National Defense Authorization Act for Fiscal Year 2004, 108–36 (2003).

[168] *See, e.g., Nat'l Treasury Employees Union* v. *Chertoff,* 452 F.3d 839 (D.C. Cir. 2006) and *Am. Fed. of Gov. Employees* v. *Gates, rehearing denied,* 486 F.3d 1316 (D.C. Cir. 2007).

[169] U.S. Off. of Pers. Mgmt, *supra* note 20, at pp. 307–08.

federal government. Making these positions political appointees would destroy institutional knowledge and result in crippling inefficiencies.'' Comment 3758; *see also* Comments 659, 678, 1818 (touting ''value of the experience of those who have worked in [a policy] area and the need to insulate them from political pressures of a specific administration''). A federal policy analyst commented ''I have worked closely and successfully with political appointees under the Obama, Trump, and Biden administrations to issue regulations and policy guidance consistent with the policy priorities of those administrations.'' Comment 3195. Commenter continued that ''[n]aturally, I have personal opinions about the policy work I do, and I sometimes disagree with my politically appointed leaders about specific policies or projects. In fact, robust civil service protections have empowered me—and, collectively, my coworkers and other career employees—to occasionally share policy recommendations or serious concerns with agency leadership, which sometimes results in leadership changing course.'' Commenter concluded that this is a ''perfectly normal and healthy process, as career civil servants are supposed to provide candid deliberative advice to the politically appointed leaders which ultimately make the decisions. . . . At the same time, I and other career federal employees certainly understand that we are not decisionmakers. Elections in a democracy have consequences, and it is entirely appropriate for agencies to pursue the policy preferences of the elected President that appoints its leaders.'' A former civil servant added ''[h]istory makes the case that stable societies with healthy economies rely on steady, capable administration. For security, for uninterrupted routine transactions and for predictable decisions and communication. When things work, unfortunately, few people notice.'' Comment 3038. A 32-year civil servant described serving under six presidents—three Republicans and three Democrats—and working ''every day devoted to serving the Constitution, the laws and regulations, [ ] agency missions and the American people.'' Commenter asserted that ''our system thereby strikes an appropriate balance between presidential control and professional independence.'' Comment 2371; *see also* Comments 2208 (33-year federal attorney who served under several administrations), 2258 (former HHS attorney who also served under several administrations).

A few commenters opposed to the rule argued that career civil servants are not politically neutral—they instead seek to influence policy through *politicized* competence. Comment 3156 argued that contrary to the premise of OPM's rulemaking, career federal employees ''have strong views on policy and actively desire to shape it.'' Commenter asserted that they offer ''politicized competence'' instead of ''neutral competence.'' An advocacy nonprofit organization commented that the federal civil service is not politically neutral because in the 2016 presidential election, for example, ''federal employee donations—as recorded by the FEC—went 95 percent to the Democratic nominee for president.'' Comment 3892. OPM recognizes that many federal civil servants have their own constitutionally protected political and policy preferences, which they are free to express subject to the requirements of the Hatch Act and other statutes and regulations. But even assuming commenter's beliefs about the policy and political preferences of civil servants are accurate, these comments do not convincingly tie a civil servant's personal beliefs to concrete and actionable unacceptable performance or misconduct.

Comment 4097, an advocacy nonprofit organization, tried to equate political misalignment with poor performance. Commenter argued that ''scholars virtually universally accept the fact that federal employees have their own policy views and often seek to advance them.'' Commenter cites one article, Nou (2019),[170] for this proposition, but Nou's analysis is much more nuanced and measured. Nou's article is about hierarchical dynamics in government and she qualifies the findings as ''an initial exploration of the implication'' of overt (not covert) civil servant disobedience. ''The aim is to . . . examine principles for normatively evaluating the practice.'' The article's ''hope is to start, not end, more nuanced conversations—to move past simplistic references to the 'deep state' or 'the resistance' towards a greater appreciation of the complexity of intra-executive branch dynamics.'' Nou's preliminary conclusions are that ''[b]ureaucratic resistance, broadly defined, is neither exceptional nor unprecedented.'' Nou contends that ''[e]ven the most ardent proponents of executive power may have to acknowledge that some forms of it are inevitable in hierarchies with imperfect information.'' Nou also explains that it would be ''difficult, if not impossible, to verify empirically'' whether bureaucratic resistance changed qualitatively under the previous Administration.[171] Nou's article—focused on macro group dynamics—does not support commenter's proffer that it is universally understood that civil servants advance their own policy views instead of those of the administration or their agencies.

Comment 4097 continued, arguing that ''[s]cholars find it very clear that bureaucrats are not neutral parties in the policymaking process. Rather, they have their own set of interests that they actively work to protect.'' For this, commenter also cited one article, Potter (2017b).[172] But commenter's proposition does not align with Potter (2017b) nor with a related citation in the comment to Potter (2017a).[173] Potter does not examine the relationship between individual bureaucrats' political ideologies and the speed with which they act. Instead, she explains that ''[r]ules take a long time to complete'' and ''[b]ecause agencies make important—and binding—policy through rulemaking, political overseers keep a watchful eye over the process. Each branch of government—the president, Congress, and the courts—plays a role in overseeing agency rulemaking.'' Potter continues that, ''[w]hile each branch of government's authority over rulemaking is exercised in a different manner, the key insight here is that each branch has the power to overturn an agency rule or, at a minimum, raise the agency's cost of doing business.'' Rule reversals and rebukes are significant setbacks with ''long-term consequences for agency reputations, autonomy, and bureaucrats' career trajectories.'' Potter's thesis is that agencies can anticipate, and possibly stave off, some types of oversight by pacing their rules to line up with a favorable president, Congress, and/or courts. Potter finds that ''the pace of rules slows significantly when [any of these three] are more inclined to disagree with—and potentially punish—the agency issuing the rule in

[170] *See* Jennifer Nou, ''Civil Servant Disobedience,'' Univ. of Chicago Law Sch., Public Law and Legal Theory Working Papers (2019), *https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2247&context=public_law_and_legal_theory.*

[171] *See id.* at p. 351.

[172] Rachel Augustine Potter, ''The strategic calculus of bureaucratic delay,'' Midwest Pol. Sci. Assoc., (2017b), *https://www.mpsanet.org/strategic-calculus-of-bureaucratic-delay/.*

[173] Rachel Augustine Potter, ''Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking. Journal of Politics,'' (2017a), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759117.*

question.'' [174] Instead of employees' personal politics or policy preferences, Potter finds that agencies time regulation strategically ''[b]ecause bureaucrats seek to avoid negative political repercussions such as rule overturns or reprimands.'' [175]

Comment 4097 expressed frustration with career civil servants in the last Administration, in which the author of the comment was a political appointee, but does not consider the roles and impacts of the court system or a divided Congress on the policy priorities of that Administration—two key factors that Potter highlights as impacting regulatory timing. Instead, Comment 4097 included a list of instances that allegedly show career employees withholding information from political appointees in the last Administration, refusing ideologically distasteful work, delaying and ''slow-walking'' work, providing unacceptable work product, leaking information, and being insubordinate. For these points, the comment largely cited a separate publication by the author of the comment, *Tales from the Swamp.* As described above, another commenter, Comment 2822, addressed and many of these examples.

In sum, Comment 4097 pointed to select articles and makes conclusions that the articles do not fully support and with which OPM does not agree. Still, commenter claimed OPM's rulemaking ignores whether ''federal employees may have their own goals and motivations or how they behave when their goals differ from the President's'' but, as shown in the proposed rule and here, OPM has thoroughly examined this dynamic, as has Congress when it enacted civil service protections and merit system principles that include disciplinary mechanisms for when employees do engage in improper behavior. Indeed, it is Congress' views that are paramount, and this rule is in furtherance of the statutory scheme and protections that Congress enacted through the CSRA.

Comments Regarding the Benefits of a Nonpartisan Civil Service

Many commenters agreed with OPM that career civil servants provide experience and expertise that benefit the country. For instance, Comments 148 and 686 described the work civil servants do to protect ''our legal system, our transportation networks, the safety of our food and drugs, our borders, our air and water, our farmlands, and so much more.'' Several other commenters asserted that a professional and nonpartisan civil service bolsters legitimacy and public trust in government. As a result, the American public holds civil servants in higher esteem than elected officials and political officers. A former federal official argued that, while as of May 2022, ''trust in career employees at government agencies had declined from previous years, a majority of Americans still reported having a great deal or fair amount of confidence in career employees to act in the best interest of the public; substantially more Americans believe this about career employees than about political appointees.'' Comment 2186; *see also* Comment 2814 (a research and advocacy nonprofit organization, arguing ''Americans tend to hold these public servants in relatively high esteem, recognizing their professionalism and independence'' which ''contrasts particularly with Americans' views of elected officials and political officers.''). The former federal official cited a study which found that ''emphasizing the technocratic expertise of agency officials, including that they could not be hired for their political views or fired for disagreements with political leaders,'' resulted in a ''statistically significant . . . [increase] in legitimacy scores.'' The study found smaller increases in perceived legitimacy from emphasizing public participation and found no increase in perceived legitimacy from emphasizing the responsiveness of the agency action to the President's priorities and White House staff. The study also cautioned that ''the conclusion that expertise and political insulation boost legitimacy has a converse: those desiring to erode public support for agencies ought to weaken the civil service.'' This risks a negative feedback loop concerning agencies' legitimacy and civil-service protections (*i.e.,* fewer protections lead to worse perceptions, which lead to fewer protections, and so on).

Relatedly, commenters noted that political appointees are associated with lower program performance. A professor cited studies to this effect.[176] Comment 50. The research found a ''negative relationship between political appointment status and program performance, while showing that appointees selected because of their campaign or party experience were especially likely to undermine performance.'' [177] The professor also cited findings that ''[m]ore politicized environments undermine incentives for career bureaucrats to invest in their skills, and instead encourages them to look for work elsewhere.'' [178] This proposition is supported by other comments that discuss the potential effects of politicization on recruitment, hiring, and retention (*see* Section V.(B)). Another professor noted that the ''consensus,'' as ''evidenced by a large volume of peer reviewed research,'' is that ''highly politicized bureaucracies are less transparent, less responsive and less accountable to the public, less conducive to stable governance, less capable of operating effectively, and more prone to corruption and clientelism than those with more neutral bureaucratic structures.'' Comment 1927.

This view regarding the performance benefits of career civil servants as compared to political appointees is not new. A few commenters pointed to a 1989 commission led by former Federal Reserve Chair Paul Volcker proposing that the U.S. ''reduce the number of political appointees, pointing to the delays and performance problems associated with America's reliance on often inexperienced appointees.'' *See* Comment 3973 (an anti-poverty nonprofit organization). A similar recommendation ''was made again in a 2003 report.'' *Id.*

Data submitted by other commenters also highlight the benefits of civil service protections and merit system principles on performance outcomes and reducing government corruption. A professor asserted that a recent ''systemic review of empirical research'' on the use of merit-based processes across countries concluded that ''factors such as meritocratic appointments/recruitment, tenure protection, impartiality, and professionalism are strongly associated with higher government performance and lower corruption.'' Comment 50. A former federal official presented that ''a professional and independent civil service that is insulated from the whims of political appointees also has been shown to meaningfully reduce opportunities for corruption.'' Comment 2816. This commenter cited a study of

[174] Potter (2017b), *supra* note 172.

[175] Potter (2017a), *supra* note 173, at p. 28.

[176] Citing David E. Lewis, ''Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?'' The Journal of Pol. 69, no. 4, pp. 1073–88 (2007), *https://www.jstor.org/stable/10.1111/j.1468-2508.2007.00608.x.*

[177] Citing Nick Gallo and David E. Lewis, ''The Consequences of Presidential Patronage for Federal Agency Performance,'' Journal of Pub. Admin. Rsch. and Theory, Vol. 22, Issue 2, pp. 219–43 (Apr. 2012), *https://doi.org/10.1093/jopart/mur010.*

[178] Citing Mark Richardson, ''Politicization and expertise: Exit, effort, and investment.'' The Journal of Pol. 81, no. 3, pp. 878–91 (2019), *https://doi.org/10.1086/703072.*

520 experts across 52 countries that found, ''even when controlling for a very broad range of political and institutional factors, bureaucratic professionalism is a statistically significant deterrent of corruption.''

This difference in performance is due in large part to civil service job stability and the opportunity to accumulate expertise. A former federal official cited one study that found that ''previous experience within an agency's bureau, and prior length of tenure, had significant positive impacts on program performance.'' Comment 2186. While removing ''low performers who are hampering an agency's mission'' is important, proposals that would ''facilitate rapid mass firings of experienced employees to suit a presidential administration's political agenda would likely impact the ability of agencies to preserve institutional knowledge and use it to improve agency operations over time.'' Comment 1181, an individual, contended that research by political scientists Sean Gailmard and John Patty shows that the protections of the United States civil service system ''generate better outcomes because they allow public officials a time horizon and security to invest in task-specific expertise in public sector skills. Politicizing the workplace does the opposite.'' [179] *Id.; see also* Comments 50, 1759 (professors citing the same research). This commenter wrote that recent research confirms this point, ''showing that more politicized environments undermine incentives for career bureaucrats to invest in their skills, and instead encourages them to look for work elsewhere.'' Commenter concluded that, ''[s]ince much of federal employment work is technical in nature, and requires deep knowledge of programs, this makes both task-specific knowledge and institutional experience important, and impossible to easily replace.''

Comment 1427, an individual, cited James Rauch (1995), who researched city governments during the Progressive Era and argued that lessons learned there can apply to the Federal Government. Rauch demonstrates that the ''institution of civil service protections was responsible for a greater focus on larger and longer-term infrastructure, which led to significantly increased economic development for cities with civil service protections over those without.'' Commenter concluded that the same can be extrapolated to the Federal Government—''that civil servants with career protections will be able to focus on long-term projects with beneficial economic impact, rather than seeing their efforts driven only by their political patron.''

Comment 4097, an advocacy nonprofit organization, took issue with OPM's assertion, in the proposed rule, that there is little evidence showing that firing of career civil servants without appropriate process will improve the government's performance. In a footnote, commenter argued that performance between political appointees and career civil servants is not the relevant metric—it should be ''how at-will career officials perform relative to tenured career officials.'' Commenter then pointed again to ''state HR directors'' who report that at-will employment ''is an essential modern management tool,'' and that this rulemaking would deny federal agencies that ''tool.''

It is the Federal statutory scheme, as demonstrated by Section 7511(b)(2), not OPM rulemaking, that is ''denying'' Federal agencies this purported ''tool.'' Through the CSRA, Congress chose to make removal protections the default for career employees, allowing only for limited exceptions.

In addition, commenter cited no data or studies demonstrating that at-will employees outperform ''tenured career officials'' in state, let alone federal, agencies. Also, unless a civil servant, whose protections are governed by title 5, is in their probation/trial period or has not met the durational requirements under 5 U.S.C. 7511, they will generally [180] have adverse action protections, as noted above. So the pool of at-will federal employees is difficult to gauge for a comparison. There is little doubt that at-will employment without initial procedures or back-end review makes firing easier, but that does not demonstrate that at-will employment produces better results. And although there is a legitimate purpose for a small cadre of Schedule C employees to act as confidantes and handle particularly sensitive tasks for presidential appointees, turning a large segment of the career staff—who do not ordinarily function in that fashion—into at-will employees would be an altogether different proposition and inconsistent with the historic trend of congressional enactments extending protections to larger segments of the workforce.

Moreover, at-will civil servants would suffer from the same deficiencies as political appointees under the studies cited above, in that they would lack the job stability that incentivizes ''invest[ing] in task-specific expertise in public sector skills.'' *See* Comment 1181. Also, as shown by Comment 2186, a former federal official, studies looking at state reforms leading to at-will employment found ''[o]ver 75 percent of state employees disagreed that the reforms 'had resulted in a state workforce that is now more productive and responsive to the public.' '' For these reasons, Comment 4097 has not shown that hypothetical at-will federal employees would outperform career civil servants.

Commenters supportive of the rule also noted that career civil servants tend to be more moderate than political appointees. Comments 50, a professor, and 1227, an individual, cited research by Brian Feinstein and Abby K. Wood which looked at donation records and concluded that political appointees tend to be at ideological extremes on both the right and left, ''while career officials tend to be more moderate.'' [181] *See also* Comment 2822 (legal nonprofit organization).

A few commenters opposed to the rule argued that career civil servants are too partisan and skew left compared to the public. *See* Comment 1958 (an advocacy nonprofit organization). Comment 3156, an advocacy nonprofit organization, examined donor information, and attempts to refute Comment 50's conclusions, above, by arguing that the federal workforce has ''self-politicized'' and that the premise ''that civil servants are more moderate than political appointees—no longer holds.'' Whether or not there is probative value in examining donation differences between career civil servants and political appointees, no commenter established a connection between donation records or trends in donations to unacceptable performance by career civil servants. Federal workers are entitled to their political opinions and to support candidates on their free time (subject to the Hatch Act and other applicable laws). But they also must fulfill the duties of their positions appropriately or face an adverse action.

Comments Regarding the Nonpartisan Career Civil Service's Support of Presidential Transitions

Various commenters supportive of the rule argued that career civil servants are important because they provide stability

[179] Citing Sean Gailmard and John W. Patty, ''Learning while governing: Expertise and accountability in the executive branch,'' Univ. of Chicago Press (2012).

[180] For instance, they would not have adverse action protections if excluded from the definition of ''employee'' under 5 U.S.C. 7511(b)(2).

[181] *See* Brian Feinstein and Abby K. Wood, ''Divided Agencies.'' S. Cal. L. Rev. 95, 731 (2021), *https://southerncalifornialawreview.com/wp-content/uploads/2022/12/WoodFeinstein_Final.pdf.*

and continuity between administrations. A former OMB official commented that his ability to provide nonpartisan, objective, informed analyses—''using the work of OMB's 400+ career staff—greatly assisted [administration] transitions.'' Comment 13.

A group of former OMB employees expressed a similar commitment to providing expertise through presidential transitions. Comment 2511 contended that having in place an effective and knowledgeable career staff ''has proven to be a vital capability for new leaders after Inauguration Day—especially as new Administrations seek solid footing and/or confront unexpected challenges.'' Another former OMB employee added that ''the virtues of institutional memory, dedication to democratic governance principles, and professionalism evident at OMB are comparably shared at every federal department and agency.'' Comment 2538. Career employees at OPM similarly play a significant role in advising incoming administrations as to options for filling critical positions during the first few days of the administration. OPM staff produce a Presidential Transition Guide to Federal Human Resources Management Matters that assists incoming leaders on this point.[182]

A public service nonprofit organization concurred, writing ''[c]areer employees allow a president to begin their administration by tapping into valuable institutional expertise that can help drive their agenda from day one, rather than starting from scratch.'' Comment 44; *see also* Comment 46 (an individual). OPM agrees that civil servants are a valuable bridge across administrations, especially during the critical transition period. Our government, our democracy, and the American public rely on this smooth transition of power so that everything from the critical matters of the day to routine services are not stalled.

Beyond the transition period, political appointees rely on career civil servants to carry out their policies and missions, commenters argued. Comment 1493, a former political appointee, stated, ''I relied heavily on the experience, expertise, and advice of senior career civil service employees in evaluating and managing programs, developing policy and regulatory proposals, investigating and resolving cases, and otherwise administering the laws Congress has authorized those agencies to implement and enforce. I depended on those employees to provide advice and guidance based not on their allegiance to a particular politician or political party, but rather on their thorough understanding of the applicable statutes and regulations, their institutional knowledge of the history of the agencies, and their substantial technical expertise.'' Even friction between political appointees and career civil servants has benefits. OPM received a comment from a former Schedule C political appointee who expressed ''[t]here was no problem accomplishing the agenda of the administration. In fact, the expertise and experience of the civil servants made it possible.'' Comment 3522. Comment 2816, a former federal official, cited studies that found benefits to some ''friction between political agency heads and career staff'' which ''have served to protect the public interest in a variety of ways.'' For instance, these agencies ''tend to move more cautiously through rulemakings, utilizing less hurried rulemakings with particularly thorough records, with these rulemakings just as likely to produce final rules as in agencies with less internal conflict.''

Comments Regarding the American Public and Government's Reliance Interests

Many commenters agreed with OPM that the American public relies on the nonpartisan civil service in all aspects of their lives. Comments 148 and 686 explained that these civil servants are ''hired via fair processes, are often paid less than their private sector counterparts, and are retained via the benefit of steady work and pride of service.'' A private sector scientist described benefiting from the ''tremendous value provided by fellow scientists and engineers employed by our national agencies,'' and from ''the countless more who contribute to a functioning society.'' Comment 451. An individual described relying ''on multiple agencies'' every day, from experts who protect consumers from fraudulent business practices to those who manage the infrastructure and transportation needs of the country. Comment 1201. Commenter concluded that ''[a]llowing these workers to be fired for political reasons would be disastrous.'' Comment 3641 (an individual) adds that politicization ''would be bad for individuals and businesses'' because many companies rely on civil servants and their ''public data to make decisions.''

Several others commented about the many ways they and other Americans benefit from a nonpartisan career civil service. *See* Comments 136 (former air traffic controller who served for 25 years), 817 (an economic researcher whose work ''relies heavily on the efforts of career civil servants across the Federal Government''), 842 (adding that other nations also rely on the work of our federal agencies), 1155 (plant scientist and assistant professor who works closely with career employees at USDA), 1157 (former DOE, FWS, NPS, Forest Service, Army Corps of Engineers, Bureau of Reclamation, EPA, and NOAA civil servant who was ''consistently impressed with the dedication, expertise, and professionalism of staff''), 1299 (small business owner who works closely with federal agencies on climate change issues), 1518 (cancer researcher who relies on HHS science and NIH grants), 2082 (small business owner who relies on the ''stability of our government and its rules to conduct business''). An individual argued that even high-level political officials, such as members of Congress and the President, ''rely on the advice, expertise, and execution capabilities of a professional civil service.'' Comment 1047. By ensuring that the civil service is staffed by individuals chosen for their merit and ''protected from political winds, we ensure a more stable, effective, and reliable government.'' Comment 1047 concluded that, ''[i]n essence, this rule isn't just about protecting jobs; it's about protecting the integrity of our government and the quality of our democracy. By ensuring that our civil service is merit-based, we are fostering an environment where the best and brightest can thrive, irrespective of the political climate.''

Many nonprofit organizations commented that Congress relies on a nonpartisan civil service to manage complex federal programs and therefore has an interest in legislating civil service protections and merit system principles. *See* Comments 2222, 2559, 2620, 3095 (coalition of public interest organizations), 3149, 3687. They contended that Congress directly creates agencies, details agency authority, and sets policy goals for the agency to achieve using its authority, and ''may choose to grant an agency the authority to issue legislative rules, enforce provisions of law, or adjudicate claims.'' [183] They asserted that, while ''leaders in the executive branch may

[182] For example, the Guide published for the 2020 election year is available at *https://www.opm.gov/about-us/reports-publications/presidential-transition-guide-2020.pdf.* The importance of an effective transition was also the subject of ''The Fifth Risk'' (2018), a book by author Michael Lewis.

[183] Citing Todd Garvey & Sean M. Stiff, ''Congress's Authority to Influence and Control Executive Branch Agencies,'' Cong. Rsch. Serv., R45442, p. 10 (Mar. 2023), *https://crsreports.congress.gov/product/pdf/R/R45442.*

shape implementation of agency programs, the agencies (and their staff) are themselves supposed to be stewards of programs created, funded, and given direction by acts of Congress,'' and protecting the expertise and experience of agency staff ''ensures that agencies can fulfill this role.'' A coalition of public interest organizations argued that ''[a]gencies exist to carry out programs created and authorized by Congress that last much longer than any single administration, and our organizations see significant value in preserving the knowledge civil servants build over the course of many years carrying out these programs.'' Comment 3095. A legal nonprofit organization concluded that, while ''[s]ome critics argue that the role of civil servants is 'diligently following orders and implementing policies of elected officials,' or 'accomplishing the agenda of a president' rather than protecting 'the office of the president [or] their institutions,' '' civil servants instead have ''responsibilities to the Constitution, to Congress, to the law, and to the American people. The critics' exclusive focus on implementation of a president's agenda misunderstands and distorts the structural role of our civil servants.'' Comment 2822 (citations omitted). OPM agrees that Congress, as a co-equal branch of government, has a vested interest in a well-functioning federal workforce, especially since that workforce is tasked with carrying out the programs Congress authorizes. Congress plays an important role in legislating civil service protections, as it has done regularly since 1883.

Another concern of politicization expressed by commenters is that it lowers responsiveness to the public and Congress. A professor cited research for this proposition.[184] Comment 50; *see also* Comment 3687 (a science advocacy organization) (discussing the ''virtuous circle'' of feedback from positive customer experiences leading to improved employee performance and back again). Commenter explained that, while ''Senate-confirmed appointees have been shown to be more reliable trustees of Congressional intent based on scrutiny in appointment, inserting thousands of unilateral appointments into the civil service would effectively impede Congress's ability to provide oversight.''

Commenters cited data showing the many benefits that federal civil servants provide to Americans across the country. Comment 44, a public service nonprofit organization, argued that the approximately 2.2 million civil servants are ''primarily located outside of the Washington DC region.'' At least 80% of the federal workforce is located across the country as well as around the world. Commenter continued, ''[o]ur nation's federal employees deliver essential services including Social Security and Medicare benefits, assist small businesses, care for veterans, disrupt international criminal syndicates, maintain the safety of our transportation systems, protect the food supply, find cures for diseases, carry out the nation's foreign policy, and advance our national security.'' OPM agrees that civil servants are fanned out across the country and the world, which allows them to be more responsive to constituents regarding the local and international functions of government.

Comments Regarding Regulated Entities' Reliance Interests

Another benefit of a nonpartisan civil service, many nonprofit organizations commented, is that they provide valuable certainty to regulated entities. *See* Comments 2222, 3095 (coalition of public interest organizations), 3149, 3687, 3973. They argued that regulatory certainty provides ''a stable framework for regulated entities, partners, and federal grantees to understand their regulatory obligations and plan for the future, including across presidential administrations.'' This predictability provides the ''certainty that these entities need to make investments, ensure compliance with legal requirements, and focus on delivering impact in their work rather than navigating uncertain and ever-changing legal frameworks.'' Further, ''stable regulatory frameworks advance values of uniformity and fairness.'' By contrast, ''substantial turnover in federal staff in service of whipsaw changes to federal regulations can cause turmoil for partners and regulated entities.'' They concluded that ''purges of agency staff are a poorly-tailored and excessively blunt tool for policy change, handicapping agencies' ability to actually develop and implement new policies while also potentially misdiagnosing barriers to policy change as personnel-related rather than legal, political, or practical.'' OPM agrees with these commenters and their conclusions regarding benefits the nonpartisan civil service provides to regulated entities.

Comments Regarding Concerns About Politicization of the Nonpartisan Civil Service

OPM received several comments from individuals concerned about a politicized civil service and the effects of politicization on them, their communities, and larger society. *See* Comments 80, 502, 1030. Comment 373, an individual, argued that the amount of ''institutional knowledge and training that would be lost if these roles ever became [politically] appointed would be unfathomable'' and that the people that would be paying the cost from this constant churn would be ordinary citizens who rely on the ''daily affairs of government that no one ever thinks about.'' An individual from Ohio stated that government employees account for a significant percentage of the workforce in that state. Comment 312. Commenter concluded that protecting the federal workforce ''is vital to protecting Ohio's economy.'' *Id.* Comment 460, an individual, concluded that the ''rule will reinforce public trust in our government institutions and ensure that civil servants can carry out their duties without undue political interference, thus maintaining the high standards of public service that our society expects and deserves.''

OPM also received several comments from current and former civil servants who are concerned about improper political influence and removals. These included concerns like, ''[a]s a government employee, I have worked with both [Republican and Democrat] appointees. I have never feared for my job because of the civil service protections. My expertise is what I am paid for, not my political party.'' Comment 470; *see also* Comments 60, 1991. An attorney and current civilian employee of the U.S. Department of Health and Human Services, expressed ''I have long planned to build my career primarily in public service. While not without its flaws, the minor miracle of the modern civil service system is a major motivating factor in my decision to pursue this career in public service and in particular to focus on the federal government.'' Comment 1401. Commenter adds ''[t]he already-published plans'' of some organizations to ''fundamentally alter or eviscerate the civil service system—and ultimately to vitiate the concept of professionalism itself—would, in the micro, certainly require me to rethink my own career and would, more broadly, drastically threaten the functioning of our United States government.'' OPM received similar comments from a career employee in the Department of Defense (Comment 1349), a member of the Foreign Service (Comment 2320), a federal contractor (Comment 2338), and a contractor at the Office of Community

[184] See Abby K Wood and David E Lewis, ''Agency Performance Challenges and Agency Politicization,'' Journal of Pub. Admin. Rsch. And Theory, Vol. 27, Issue 4, pp. 581–95 (Oct. 2017), *https://doi.org/10.1093/jopart/mux014.*

Oriented Policing Services (Comment 2749), to name a few.

Finally, commenters were concerned that experiences from other countries and states with a politicized civil service showed possible downsides of further politicizing the civil service. Comment 74 contended that, ''[a]s a scholar of India who has watched the politicization of the bureaucracy unfold under the current ruling party and its deeply detrimental effects on public welfare and civic society,'' politicization ''represents an existential threat to democracy and state functioning in the US.'' Comment 1649 stated ''I have lived in a country with a political rather than merit based civil service and can testify as to the appalling impact of that system on public safety, institutional integrity, and community trust. There are many things that don't work well in the American system, but our civil service is one of the few that does.'' And Comment 2186, a former federal official, cited a 2005 report for the European Institute of Public Administration which argued that efforts to weaken state-level civil service protections had a ''tendency to punish state employees'' with ''demoralizing 'bureaucrat bashing' rhetoric of the ideologically and politically driven reformers.'' But there has been ''[g]rowing awareness among policy makers, public employees and their organizations, and human resource professionals that'' state-level reforms to weaken civil service protections ''have not delivered the benefits they promised and may well dampen enthusiasm for [similar] initiatives by the states that contemplate sudden, wholesale, changes in existing arrangements.''

F. OPM's Authority To Regulate

The OPM Director has direct statutory authority to execute, administer, and enforce all civil service rules and regulations as well as the laws governing the civil service.[185] The Director also has authorities Presidents have conferred on OPM pursuant to the President's statutory authority.[186]

As explained here, in enacting the CSRA, Congress conveyed broad regulatory authority over Federal employment directly to OPM throughout title 5.[187] In addition, many of these specific statutory enactments, including chapter 75, expressly confer on OPM authority to regulate. Pursuant to 5 U.S.C. 7514, OPM may issue regulations to carry out the purpose of subchapter II of chapter 75, and pursuant to 5 U.S.C. 7504, OPM may issue regulations to carry out the purpose of subchapter I of chapter 75.

The same is true with respect to chapter 43. Pursuant to 5 U.S.C. 4305, OPM may issue regulations to carry out subchapter I of chapter 43.

Prior to the reorganization proposal[188] approved by Congress that created OPM, the CSC exercised its broad authorities, in part, to establish rules and procedures concerning the terms of being appointed in the competitive or excepted services and of moving between these services. Since its inception in 1978, OPM has used that same authority, as well as other statutory authorities such as 5 U.S.C. 1103(a)(5) and 5 U.S.C. 1302, to establish rules and procedures concerning the effects on an employee of being appointed in, and of moving between, these services. OPM has used these authorities to create government-wide rules for Federal employees regarding a broad range of topics, such as hiring, promotion, performance assessment, pay, leave, political activity, retirement, and health benefits.[189] For instance:

- 5 CFR part 6 requires OPM to publish in the **Federal Register** on a regular basis the list of positions that are in the excepted service.[190]
- 5 CFR 212.401(b), promulgated in 1968,[191] well before the CSRA, provides that ''[a]n employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position.'' This regulation, as discussed further in Section IV(A), was intended to preserve competitive service status and rights for employees who were initially appointed to positions in the competitive service and whose positions were subsequently moved involuntarily into the excepted service (such as administrative law judges).[192]
- 5 CFR 302.102, promulgated in part to implement 5 U.S.C. 3320, provides that when an agency wishes to move an employee from a position in the competitive service to one in the excepted service, the agency must: ''(1) Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service while he/she occupies the position; and (2) Obtain from the employee a written statement that he/she understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.'' [193]
- 5 CFR part 432 sets forth the procedures to be followed, if an agency opts to pursue a performance-based action against an employee under chapter 43 of title 5, U.S. Code. As with the adverse action rules in part 752, the rules applicable to performance-based actions apply broadly to employees in the competitive and excepted services, with specific exceptions that include political appointees.[194]
- 5 CFR part 752 implements chapter 75 of title 5, U.S. Code, and sets forth the procedural rights that apply when an agency commences the process for taking an adverse action against an ''employee,'' as defined in 5 U.S.C. 7511. These regulations apply broadly to employees in the competitive and excepted services meeting the section 7511 criteria.[195]

Moreover, the President, pursuant to his own authorities under the CSRA, as codified at 5 U.S.C. 3301 and 3302, has explicitly delegated a variety of these authorities to OPM concerning execution, administration, and enforcement of the competitive and excepted services. For example, under Civil Service Rule 6.1(a), ''OPM may except positions from the competitive service when it determines that . . . appointments thereto through competitive examination are not practicable.'' [196] And under Civil

[185] *See* 5 U.S.C. 1103(a)(5)(A). This authority does not include functions for which either the MSPB or OSC is primarily responsible. Among other authorities, the MSPB has specific adjudicative and enforcement authority upon the satisfaction of threshold showings that an employee has established appeal rights. It also has authority to administer statutory provisions relating to adjudication of adverse action appeals. OSC has specific and limited investigative and prosecutorial authority. *See* 5 U.S.C. 1213–1216.

[186] *See* Presidential rules codified at 5 CFR parts 1 through 10.

[187] *See, e.g.,* 5 U.S.C. 1103, 1302, 3308, 3317, 3318, 3320; Chapters 43, 53, 55, 75.

[188] President Jimmy Carter, ''Reorganization Plan'' No. 2, secs. 101 and 102 (May 23, 1978). The plan specifies in section 102 that ''[e]xcept as otherwise specified in this Plan, all functions vested by statute in the United States Civil Service Commission, or the Chairman of said Commission, or the Boards of Examiners established by 5 U.S.C. 1105 are hereby transferred to the Director of the Office of Personnel Management.''

[189] *See, e.g.,* 5 CFR parts 2, 6, 212, 213, 335, 430, 550, 630, 733, 734, 831, 890.

[190] 5 CFR 6.1(c), 6.2; *see* 28 FR 10025 (Sept. 14, 1963), as amended by E.O. 11315; E.O. 12043, 43 FR 9773 (Mar. 10, 1978); E.O. 13562, 75 FR 82587 (Dec. 30, 2010); *see also* E.O. 14029, 86 FR 27025 (May 19, 2021).

[191] *See* 33 FR 12408 (Sept. 4, 1968).

[192] *Id.*

[193] *See* 55 FR 9407 (Mar. 14, 1990), as amended at 58 FR 58261 (Nov. 1, 1993).

[194] *See* 54 FR 26179 (June 21, 1989), redesignated and amended at 54 FR 49076 (Nov. 29, 1989), redesignated and amended at 58 FR 65534 (Dec. 15, 1993); 85 FR 65982 (Oct. 16, 2020); 87 FR 67782 (Nov. 10, 2022).

[195] *See* 74 FR 63532 (Dec. 4, 2009), as amended at 85 FR 65985 (Oct. 16, 2020); 87 FR 67782 (Nov. 10, 2022).

[196] 5 CFR 6.1(a).

Service Rule 6.1(b), ''OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule.'' [197]

Comments Regarding OPM's Statutory Authority

Several commenters, as discussed further in Section IV regarding the specific regulatory amendments, argued that regulatory changes proposed by OPM in its proposed rule fell within OPM's statutory authority. Certain Members of Congress commented that these are ''critical regulatory updates that would continue the efforts of the Pendleton Act of 1883 and the Civil Service Reform Act of 1978.'' Comment 48, *see also* Comment 2134 (joint comment by nonprofit organization and former federal official, providing extensive background on this point, as summarized in Section IV).

A few comments, like Comment 4097, commented that OPM does not have the statutory authority to issue the regulatory amendments in this rule. OPM will discuss these arguments further in the following section because they relate to the specific amendments. *See* Sec. IV.

Comments Regarding the President's Constitutional Authority

A few commenters argued that this rule would improperly restrict the powers of the President and is, therefore, unconstitutional. A former political appointee argued that the rule ''is an attempt to usurp Presidential authority by the bureaucrats in the Executive Branch sworn to serve the Constitution.'' Comment 45. Comments 462 and 2012 (submitted by the same individual) argued that ''[a]ll employees of the Executive Branch serve at the sole discretion of the President and any laws, rules, regulations, or guidelines that restrict this discretionary power subvert the authority of the U.S. Constitution and as such are unconstitutional.'' As described above, in Executive Order 14003, the President declared that ''[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government.'' [198] The President ordered that ''[i]t is the policy of the United States to protect, empower, and rebuild the career Federal workforce,'' and that the Federal Government ''should serve as a model employer.'' The Order described Executive Order 13957 (and Schedule F), as ''unnecessary to the conditions of good administration,'' and therefore revoked Executive Order 13957 because it ''undermined the foundations of the civil service and its merit system principles, which were essential'' to the Pendleton Act's ''repudiation of the spoils system.'' Far from usurping the President's authority, this rule effectuates the discretionary authority and policy positions of the President.

Also, while it is true that the President has broad and significant authority over the civil service, such as the power to create excepted service schedules when ''necessary'' and when ''conditions of good administration warrant'' or direct OPM to issue regulations, it is not the case that all employees of the Executive Branch serve ''at the sole discretion'' of the President. This argument disregards 140 years of precedent and the role of Congress in shaping the civil service—which is tasked with executing Congressional programs—as expressed most notably in the Pendleton Act, the Lloyd-La Follette Act, the CSRA, and other statutory changes designed to protect the civil service from actions contrary to merit.

Comments 2866, a legal organization, and 4097, an advocacy nonprofit organization, made a related argument that this final rule would violate Supreme Court precedent in *Free Enterprise Fund,* which the commenters argued ''held that the President has general authority to remove subordinates, and it is unconstitutional to shield inferior officers from Presidential control.'' These comments suggest that OPM's construction in this final rule would ''give inferior officers with substantive policymaking or administrative authority binding removal protections.'' As previewed in Section III(E), above, relating to a similar comment, nothing in this rule conflicts with *Free Enterprise Fund* or its progeny.

First, these comments are mistaken in their assertion that ''many senior career officials are inferior officers.'' OPM is not aware of any judicial decision holding so and the comments cite none. Instead, the comments cite Justice Breyer's dissent in *Free Enterprise Fund,* which listed several civil service positions that the dissent worried might be imperiled and subject to at-will removal under the majority's analysis. The majority, however, responded to Justice Breyer's concerns by explaining that ''none of the [civil service] positions [the dissent] identifies are similarly situated to the [PCAOB].'' [199] The Court went on to clarify that ''many civil servants within independent agencies would not qualify as 'Officers of the United States' '' because they do not '' 'exercise[e] significant authority pursuant to the laws of the United States.' '' [200] Neither the comments nor the *Free Enterprise* dissent explained which, if any, civil service positions might exercise such ''significant authority,'' or which are ''established by law.'' [201] That is not surprising, as even in 1879, ninety percent of the government's workforce was undoubtedly composed of employees rather than officers, and ''[t]he applicable proportion has of course increased dramatically since'' then.[202]

Second, inferior officer status, even where it applies, does not require employees to be at will. The Supreme Court has consistently upheld for-cause and good-cause removal restrictions for inferior officers. Over 130 years ago, the Supreme Court held that Congress may constitutionally provide removal restrictions to inferior officers in the military. In *United States* v. *Perkins,*[203] an inferior officer in the Navy challenged his removal without cause as unlawful, as Congress had provided that such inferior officers could be removed in peacetime only pursuant to a court-martial sentence.[204] The Supreme Court agreed, holding that it ''ha[d] no doubt'' that Congress ''may limit and restrict the power of removal'' for inferior officers.[205]

Perkins was consistent with the contemporaneous judgment of both Congress and the President that merit-based appointments and removals from federal positions were in the Nation's interest. When Congress enacted the Pendleton Act, it provided for merit-based selection and prohibited removal based on partisan politics [206] and those removal restrictions applied to inferior officers appointed by the President.[207] President McKinley strengthened those removal restrictions by amending the Civil Service rules to prohibit removals ''except for just cause and upon written charges filed with the head of the department.'' [208] And Congress soon thereafter codified those restrictions to provide that ''no person'' in the Civil

[197] 5 CFR 6.1(b).

[198] 86 FR 7231.

[199] 561 U.S. at 506.

[200] *Id.* (quoting *Buckley* v. *Valeo,* 424 U.S. 1, 126 (1976)).

[201] U.S. art. II, § 2, cl. 2.

[202] 561 U.S. at 506 n.9. (citing *United States* v. *Germaine* 99 U.S. 508, 509 (1879)).

[203] 116 U.S. 483 (1886).

[204] *Id.* at 483–84.

[205] *Id.* at 485.

[206] 22 Stat. 403, 403–04 (1883).

[207] *See* 29 Cong. Rec. 416–17 (1897).

[208] *United States* v. *Wickersham,* 201 U.S. 390, 398 (1906).

Service may be removed ''except for such cause as will promote the efficiency of said service.'' [209]

Those longstanding removal restrictions constitutionally apply to inferior officers. In *United States* v. *Arthrex, Inc.,*[210] as discussed above, the Supreme Court explained that administrative patent judges can properly serve as inferior officers with restrictions on their removal, so long as their decisions are subject to review by a superior who is accountable to the President. Although the Federal court of appeals had invalidated the officers' removal restrictions,[211] the Supreme Court reinstated them.[212] *Arthrex* is just another decision confirming the principle that Congress may permissibly restrict removal of inferior officers, as it has for over a century.

Indeed, the independent counsel in *Morrison* v. *Olson,*[213] constitutionally enjoyed a restriction on her removal except for ''good cause.'' [214] By statute, the independent counsel had ''full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,'' could conduct ''grand jury proceedings and other investigations,'' could pursue ''civil and criminal'' litigation, and could appeal any adverse court decisions.[215] The Supreme Court nonetheless held that the independent counsel was constitutionally subordinate to the Attorney General because, ''[m]ost importantly, the Attorney General retains the power to remove the counsel for 'good cause,' a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are 'faithfully executed.' '' [216] Accordingly, the Court held that the independent counsel properly served as an inferior officer, and that the removal restriction ''does not violate the separation-of-powers.'' [217] And *Free Enterprise Fund* confirmed that the holdings in *Morrison* and *Perkins* continue to stand for the proposition that Congress may enact certain ''restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.'' [218]

Third, these comments suggest that inferior officers within independent agencies cannot have any removal restrictions. Both the Trump and Biden Administrations, however, have consistently taken the position that inferior officers within independent agencies can constitutionally have removal restrictions.[219] As the Solicitor General explained in 2018, when inferior officers within an independent agency can be removed for ''failure to perform adequately or to follow agency policies,'' such removal restrictions ''afford[ ] a constitutionally sufficient degree of accountability and Executive Branch control.'' [220]

The comments' comparisons of civil service removal restrictions to those at issue in *Free Enterprise Fund* fail to describe the materially significant difference in degree of those restrictions. The inferior officers in *Free Enterprise Fund* could be removed only for willful violations of federal securities laws, willful abuse of authority, or failure to enforce compliance with the securities laws ''without reasonable justification or excuse.'' [221] Thus, the inferior officers of the PCAOB could not be removed ''for violations of *other* laws,'' and could not be removed even if they were to ''cheat[ ] on [their] taxes.'' [222] Those ''rigorous'' removal restrictions,[223] applied to the Board's inferior officers, who had ''significant independence in determining [their] priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without . . . preapproval or direction'' by any other officer.[224] By contrast, members of the civil service can be removed for ''the efficiency of the service,'' [225] subject to the civil service's prohibited personnel practices which, as a general matter, is both good policy and constitutional. And members of the civil service are overseen by other officers within the Executive Branch, who can direct policy and approve or disapprove of their actions. The Court in *Free Enterprise Fund* noted that the removal provisions that apply to the more general civil service are substantially different from the stringent removal restrictions for the PCAOB, and the Court made clear that ''[n]othing in our opinion'' should ''be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.'' [226]

Other commenters supportive of the rule argued that it in no way infringes on the President's legal authority. Comment 422, an individual, explained that ''the proposed rule does not eliminate the ability of the executive to, within the confines of legislation, execute policy decisions or discretion'' and ''the proposed provisions retain the distinction between the career civil service and political/excepted appointments, who retain their abilities to direct policy within the delegation of authority provided to by law.'' As explained above, OPM agrees that the President has significant power over the civil service and this final rule does not infringe on those powers. Instead, it makes regulatory changes, in line with OPM's authorities (some conferred directly by Congress and others conferred by the President, by re-delegation of an authority conferred upon him by Congress) to clarify and reinforce statutory texts and advance the President's policy, as stated in Executive Order 14003, ''to protect, empower, and rebuild the career Federal workforce.''

Comments Regarding Regulatory Justifications

Some commenters argued that the rule is procedurally unlawful because it is a pretext to block Schedule F. Comment 164, a form comment, stated that ''[t]he attempt to counter Schedule F through this rule amounts to a Deep State Protection Scheme that would undemocratically undermine to [sic] core constitutional principle that executive power is vested in the president.'' Comment 101, another form comment, stated there is a ''discrepancy between the stated purpose of the rule and its actual intended purpose'' which, the comment contends, is to prevent Schedule F. Comment 1958, an advocacy nonprofit organization, argued that ''[r]egulations are supposed to be responsive to specific problems. OPM's proposal is not an attempt to address an ongoing, active problem. Instead, it is a blatant defensive play'' against Schedule F. Comments 2866, a legal organization, and 3156 argued that *Department of Commerce* v. *New York* [227] held that the stated intent behind the actions of executive agencies cannot be different from the agencies' actual motivation.'' They also argue that ''OPM's stated intent of enhancing efficiency is demonstrably different

[209] Lloyd La-Follette Act, Public Law 62–336, sec. 6, 37 Stat. 539, 555 (1912).

[210] 141 S. Ct. 1970, 1986–87 (2021).

[211] *Id.* at 1987.

[212] *Id.*

[213] 487 U.S. 654 (1988).

[214] *Id.* at 663.

[215] *Id.* at 662.

[216] *Id.* at 696.

[217] *Id.* at 697.

[218] 561 U.S. at 483.

[219] *See, e.g.,* Resp. Br. 45–55, *Lucia* v. *SEC,* No. 17–130 (U.S. Feb. 21, 2018); Petr. Br. 44–65, *SEC* v. *Jarkesy,* No. 22–859 (U.S. Aug. 28, 2023).

[220] Resp. Reply Br. 17, *Lucia* v. *SEC,* No. 17–130 (U.S. Apr. 16, 2018).

[221] 561 U.S. at 486 (quoting 15 U.S.C. 7217(d)(3)).

[222] *Id.* at 503.

[223] *Id.*

[224] *Id.* at 505.

[225] 5 U.S.C. 7513(a).

[226] 561 U.S. at 507.

[227] 139 S. Ct. 2551, 2573 (2019).

from their actual motivation of impeding future implementation of Schedule F to undermine future administrations.''

As explained extensively in the proposed rulemaking and in this final rule, OPM set forth a variety of reasons for promulgating this final rule. And, far from hiding concerns about Schedule F, the proposed rulemaking includes extensive discussion [228] about the prior Schedule F and OPM's view that its implementation would have constituted a stark and unwarranted departure from 140 years of civil service protections and merit system principles. The proposed rule and this final rule note that Schedule F sought to exploit the exception in section 7511(b)(2). As observed in the proposed rule [229] and by several commenters responding to that notice,[230] however, Congress, OPM, and other agencies had long understood the meaning of the phrase ''confidential, policy-determining, policy-making, or policy-advocating character'' to be a gloss on the description of positions that could be placed in Schedule C of the excepted service at 5 CFR 213.3301(a), *i.e.,* ''positions of a confidential or policy-nature.'' In light of the issuance of Executive Order 13957, and its departures from the common understanding of the meaning of section 7511(b)(2), OPM determined to issue this rule. Among other reasons, the rule elucidates the proper scope of the exception in 5 U.S.C. 7511(b)(2) and clarifies any confusion that may have been introduced by the promulgation of the now-revoked order and schedule.

OPM is authorized by Congress and the President, throughout title 5, to regulate the civil service and carry out the purposes of the civil service statutes. OPM does not and cannot prevent a President from creating excepted service schedules or from moving employees, and this rule does not do that. Instead, the rule promulgates certain definitions clarifying the meaning of statutory language based on longstanding legislative history and intent, legal precedent, and past practices.

IV. Regulatory Amendments and Related Comments

In this section, OPM discusses the regulatory amendments to 5 CFR parts 210, 212, 213, 302, 432, 451, and 752 and related comments. The first subsection discusses the retention of status and civil service protections upon an involuntary move to or within the excepted service (revisions to parts 212 and 752). The second discusses the definition for positions of a ''confidential, policy-determining, policy-making or policy-advocating'' character as used in 5 U.S.C. 7511(b)(2) (revisions to parts 210, 213, 302, 432, 451, and 752). And the third discusses processes for moving employees and positions to or within the excepted service and related appeal rights (revisions to part 302).

A. Retention of Status and Civil Service Protections Upon a Move

OPM amends 5 CFR part 752 (Adverse Actions) to reflect OPM's longstanding interpretation of 5 U.S.C. 7501 and 7511 and the congressional intent underlying the statutes, including exceptions to civil service protections outlined in 5 U.S.C. 7511(b). These amendments clarify that ''employees,'' under 5 U.S.C. 7501, 7511(a), in the competitive service or excepted service will retain the rights previously accrued upon an involuntary move from the competitive service to the excepted service, or from one excepted service schedule to another, or any subsequent involuntary move, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights. The rule also conforms the regulation for non-appealable adverse actions with statutory language in 5 U.S.C. 7501 and Federal Circuit precedent to clarify which employees are covered. OPM amends 5 CFR part 212 (Competitive Service and Competitive Status) to further clarify a competitive service employee's status in the event the employee and/or their position is moved involuntarily to Schedules A, B, C, or any schedule created after the promulgation of this rule.

A voluntary movement is generally characterized by an employee initiating a reassignment, conversion, or transfer by pursuing and accepting an offer to serve in a different position, either at the employee's own agency or another Federal agency. A voluntary move may extinguish accrued rights, depending on the circumstances of each such situation.[231] If, on the other hand, an agency initiates an action to move the employee's position from the competitive service to the excepted service or from one schedule in the excepted service to another, based on the nature of the position, that movement will be regarded as involuntary, vis a vis the incumbent, and should not affect previously accrued rights. Similarly, if an employee is reassigned to a different position by the agency, on the agency's own initiative, to better meet agency needs, the reassignment or conversion will be regarded as involuntary and should not affect previously accrued rights.

As noted above in Section III(B), adverse action protections and related eligibility and procedures are covered in 5 U.S.C. chapter 75. Subchapter I covers suspensions for 14 days or less and 5 U.S.C. 7501 defines ''employee'' for the purposes of adverse action procedures for suspensions of this duration. Under 5 U.S.C. 7504, OPM may prescribe regulations to carry out the purpose of subchapter I. Subchapter II covers removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less. In subchapter II, 5 U.S.C. 7511 defines ''employee'' for the purposes of entitlement to adverse action procedures. Under 5 U.S.C. 7514, OPM may prescribe regulations to carry out the purposes of subchapter II except as it concerns any matter where the MSPB may prescribe regulations.

Performance-based actions under chapter 43 and related eligibility and processes are covered in 5 U.S.C. 4303. Section 4303(e) defines when an employee is entitled to appeal rights to the MSPB. Chapter 43 cross-references chapter 75, providing that any employee who is a preference eligible, in the competitive service, or covered by subchapter II of chapter 75, and who has been reduced in grade or removed under section 4303, is entitled to appeal the action to the MSPB under 5 U.S.C. 7701. Under 5 U.S.C. 4305, OPM may issue regulations to carry out subchapter I of chapter 43.

OPM received several overarching comments regarding the proposed changes to Parts 212 and 752. OPM will discuss these comments, followed by specific comments related to these regulatory changes.

Comment Regarding the History of Status and Rights Upon an Involuntary Move

A joint comment from a nonprofit organization and a former federal official provided an extensive history of retention of accrued status and civil service protections upon the involuntary movement to an excepted service schedule or within the excepted service and agreed with OPM that this rulemaking would reinforce and clarify the longstanding legal interpretations

[228] *See* 88 FR 63862, 63867–69, 63874, 63878.

[229] *Id.* at 63883.

[230] *See, e.g.,* Comment 2134, a joint comment by a nonprofit organization and former federal official, at pp. 12–33.

[231] *See, e.g., Garcia* v. *Dep't of Homeland Sec.,* 437 F.3d 1322, 1328 (Fed. Cir 2006); *Shoaf* v. *Dep't of Agriculture,* 260 F.3d 1336, 1341–42 (Fed. Cir. 2001); *Staats* v. *U.S. Postal Serv.,* 99 F.3d 1120, 1123 (Fed. Cir. 1996) (regarding voluntariness in the retirement context).

and practice pertaining to employees' retention of accrued civil service status and protections. *See* Comment 2134. Commenter concluded that OPM's proposed regulatory provisions on retention are a clarification, rather than an expansion, of rights. Because of its thorough citation to facts and sources relevant to these regulatory changes, OPM will summarize portions of the comment here.

Commenter began the analysis with a detailed historical treatment of status and civil service protections and then turned to *Roth* v. *Brownell,*[232] a key precedent on this issue, and its progeny.

Commenter detailed that, before *Roth,* the enactment of the Veterans Preference Act of 1944 enhanced the civil service rights of preference eligible employees. Consistent with the Ramspeck Act of 1940 and applicable executive orders,[233] the CSC's regulations at the time acknowledged that some employees in excepted service positions enjoyed competitive status.

Commenter noted that, in 1950, the United States Court of Claims reviewed the CSC's regulations applicable to nonveterans and explained that ''employees serving under other than a probational or temporary appointment in the competitive service, *and employees having a competitive status who occupy positions in Schedule A and B,* shall not be removed or demoted except for such cause as will promote the efficiency of the service and in accordance with set procedures.'' (emphasis in original).[234]

In 1953, President Eisenhower created Schedule C in Executive Order 10440, which purported to strip employees, ''[e]xcept as may be required by the Veterans' Preference Act,'' of accrued procedural protections upon their movement to Schedule C.[235] President Eisenhower then issued Executive Order 10463, which purported to remove accrued procedural protections from employees in Schedule A, as well. An unfavorable decision in *Roth* v. *Brownell* would later lead President Eisenhower to revoke and replace both executive orders.

Commenter explained that, in *Roth,* the D.C. Circuit considered a decision by Attorney General Herbert Brownell to challenge these civil service protections. Though plaintiff, Roth, had been appointed to the competitive service under the Ramspeck Act and President Roosevelt's 1941 Executive Order, a 1947 order by President Truman moved his position to a reestablished Schedule A. In 1953, the Eisenhower Administration moved his Schedule A position to Schedule C and purported to remove his civil service status and procedural protections. The Executive Director of the CSC had stated in a letter to Roth that career employees whose jobs were moved to Schedule C retained their civil service protections. The D.C. Circuit ruled for plaintiff and ordered his reinstatement. The court held that neither of these moves stripped Roth of the competitive status and protections he had accrued, explaining that ''[t]he power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear,'' and ''[i]t is immaterial here that the President has long been 'authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof . . . [because] [c]omplete control over admissions does not obviate the removal requirements of the Lloyd-La Follette Act.' '' [236]

Commenter explained that, a month after the *Roth* decision, President Eisenhower issued Executive Order 10577, revoking Executive Orders 10440 and 10463.[237] The new Executive Order provided that ''an employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position.'' In January 1955, the CSC issued new guidance consistent with the court's order in *Roth* and Executive Order 10577, redefining for Federal agencies the coverage of the competitive civil service and the removal protection of certain Federal employees under the Lloyd-La Follette Act. The CSC explained that an employee who is serving with competitive status in a competitive position at the time his position is listed under Schedules A, B, or C, continues to be in the competitive service during his occupancy of that position (thus the employee is entitled to the removal protection of the Lloyd-La Follette Act, which applies to the competitive civil service). The CSC also explained that, where proposed appointees to a Schedule A, B, or C position are serving in the competitive service, the employees shall not be appointed until they are advised in writing that acceptance of the excepted appointment will result in their leaving the competitive service. This will put the employees clearly on notice that, upon acceptance of the excepted position, they will no longer be under the protection of the Lloyd-La Follette Act.[238] A few days after this issuance, the CSC published a **Federal Register** notice to codify the Eisenhower Administration's recognition of these rights.[239]

In giving its instructions to agencies about movement of employees after January 23, 1955, to Schedule A, B, or C positions, the CSC also took steps to protect employees who were moved prior to that time. It stated that employees in three groups who were moved prior to January 23, 1955, would still be considered to be in the competitive service.[240]

Commenter showed that contemporaneous legal analyses, such as a 1955 law review article, concluded that *Roth* had confirmed the durability of personally accrued status, at least in the case of an involuntary move.[241] That same year, the Comptroller General demonstrated the broad applicability of *Roth* by confirming the appropriateness of the National Labor Relations Board's award of backpay to a similarly situated

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[232] 215 F.2d 500 (D.C. Cir. 1954), *cert. denied sub nom, Brownell* v. *Roth,* 348 U.S. 863 (1954).

[233] Citing Ramspeck Act, Public Law 76–880, sec. 1, 54 Stat. 1211 (1940), *https://www.loc.gov/resource/llsalvol.llsal_054/?sp=1245&st=image;* E.O. 9830 (Feb. 24, 1947), *https://www.archives.gov/federal-register/codification/executive-order/09830.html;* E.O. 8743 (Apr. 23, 1941), *https://www.archives.gov/federal-register/codification/executive-order/08743.html.*

[234] Citing *Lamb* v. *United States,* 90 F. Supp. 369, 372–73 (Ct. Cl. 1950) (''[W]e conclude that a government employee having competitive status and serving in an excepted position in Schedule A, must be separated from such position in accordance with the Civil Service Regulations, regardless of the length of time he has occupied such excepted position.'').

[235] Citing E.O. 10440, sec. 6.4 (Mar. 31, 1953) (''Except as may be required by the Veterans' Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedule C or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedules A and B of persons who have competitive status, however they may have been or may be appointed.''), *https://www.presidency.ucsb.edu/documents/executive-order-10440-amendment-civil-service-rule-vi.*

[236] *Roth,* 215 F.2d at 501–02.

[237] Citing E.O. 10577 (Nov. 23, 1954), *https://www.presidency.ucsb.edu/documents/executive-order-10577-amending-the-civil-service-rules-and-authorizing-new-appointment.*

[238] Citing Press Release, U.S. Civil Sev. Comm'n, 1 (Jan. 24, 1955).

[239] Citing Appeals from Employees Entitled to But Denied Protection of Lloyd-La Follette Act, Civil Serv. Comm'n Prop. Reg. 5 CFR pts. 9 &20, 20 FR 599, 601 (Jan. 28, 1953), *https://archive.org/details/sim_federal-register-find_1955-01-28_20_20/mode/2up.*

[240] Citing Press Release, U.S. Civil Serv. Comm'n, pp. 1–2 (Jan. 24, 1955).

[241] Citing De Seife, Rodulphe, 5 Cath. U.L. Rev. 110 (1955), *https://scholarship.law.edu/cgi/viewcontent.cgi?article=3073&context=lawreview.*

employee who had been improperly removed.[242]

On May 12, 1955, the CSC highlighted the difference between an employee's voluntary and involuntary movement to Schedule C, explaining that under civil service rules, ''a vacant Schedule C job may not be filled by the appointment of an employee serving in the competitive service until the employee has been given notice in writing that acceptance of the position will result in his leaving the competitive service. Leaving the competitive service would result in his giving up the job-removal protections of the Lloyd La Follette Act.'' On the other hand, ''if an occupied job in the competitive civil service is moved to Schedule C, an incumbent who has civil-service status continues to have the removal protection of the Lloyd-La Follette Act during his occupancy of the position.'' [243]

As commenter demonstrated, the next several presidential administrations did not differ in their interpretation regarding the retention of status and rights. Under President Lyndon Johnson, for example, the CSC codified the principle of retained status at 5 CFR 212.401(b).[244] OPM notes that this regulation remained unchanged until this final rule, which, consistent with the intent of the original regulation, modifies the regulation to cover any newly created schedules.

Under President Ford, the CSC acknowledged the continuing relevance of *Roth* in a memorandum emphasizing that employees retained accrued status and civil service protections upon movement to positions designated as confidential or policy-determining.[245] A related handout for officials with presidential transition responsibilities explained that Schedule C employees with status were entitled to appeal their removal to the CSC under the commission's regulations at 5 CFR part 752.[246]

Still further, a decade after enactment of the CSRA, and during the Reagan Administration, OPM issued a government-wide advisory that cited *Roth* as establishing the guiding principle for removing employees with status from Schedule C positions, explaining that an employee who was serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who is still serving in that position may be removed from that position only ''for such cause as will promote the efficiency of the service'' and in accordance with the procedures established by 5 U.S.C. 7511 *et seq.* and part 752 of OPM's regulations.[247]

Commenter also referenced subsequent cases and administrative opinions where this reasoning prevailed. For instance, in *Saltzman* v. *United States,*[248] the Court of Claims held that the plaintiff, despite occupying a position that was now in the excepted service, was entitled to the civil service protections afforded to competitive service employees, explaining that ''Plaintiff never lost the rights he acquired under the Lloyd La Follette Act when he acquired permanent competitive status in the classified civil service.''

Commenter then discussed *Stanley* v. *Department of Justice,*[249] where the Federal Circuit reviewed the adverse action rights of term-limited Bankruptcy Trustees who were moved into Schedule C because they were proclaimed to be encumbering positions that were ''confidential, policy-determining, policy-making or policy-advocating'' in character. As explained below in response to another contention in Comment 4097, this 2005 ruling was entirely consistent with the longstanding view that an employee cannot be stripped of status involuntarily but can waive it voluntarily.

Analogous principles apply to employees subject to transfers of functions.[250] In 1980, for instance, the Comptroller General agreed with OPM guidance determining ''that employees who transfer to the Peace Corps would be transferred incident to a transfer of functions and accordingly would retain their status as employees with competitive civil service appointments notwithstanding that the Peace Corps' appointment authority is solely under the Foreign Service Act of 1946 as amended.'' [251]

Further, the MSPB has held that a determination under 5 U.S.C. 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position.[252] The MSPB has also required agencies to follow applicable procedures when making determinations under 5 U.S.C. 7511(b)(2). In *Blalock* v. *Department of Agriculture,*[253] for example, the MSPB rejected an agency's claim that it had removed employees from their Schedule A positions by reduction-in-force (RIF) procedures and appointed them to new Schedule C positions. It found that this RIF was improper and the redesignation was not a ''reorganization.'' Therefore, the agency could not have conducted a RIF and the agency's abolishment of their Schedule A positions constituted individual adverse actions against the incumbents. The MSPB directed the agency to reinstate preference eligible employees whom it had separated without adhering to applicable adverse action procedures.

OPM appreciates Comment 2134 providing such extensive and detailed factual history and agrees with the comment's analyses and conclusion that

[242] Citing Gov. Accountability Off., Op. for Guy Farmer, Chairman, NLRB (July 25, 1955), *https://www.gao.gov/products/b-123414.*

[243] Citing Press Release, U.S. Civil Serv. Comm'n, 3 (May. 12, 1955).

[244] Citing Revision of Regulations, U.S. Civil Serv. Comm'n, Final Reg. 5 CFR ch. I, subch. B (other than pt. 213), 33 FR 12402–08 (Sep. 4, 1968) (''An employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position.''), *https://archives.federalregister.gov/issue_slice/1968/9/4/12396-12526.pdf#page=23.*

[245] Citing Memo. from Raymond Jacobson, Exec. Dir., CSC, 5 (Nov. 10, 1976), *https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf.*

[246] Citing CSC, Procedures for Removals from Excepted Positions, p. 2 (1976), *https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf.*

[247] Citing Memo. from Constance Horner, Dir., U.S. Off. of Pers. Mgmt. to heads of departments and agencies, ''Civil Service and Transition to a New Presidential Administration,'' pp. 8–9 (Nov. 30, 1988), *https://www.cia.gov/readingroom/docs/CIA-RDP90M01364R000800330004-0.pdf.*

[248] 161 Ct. Cl. 634 (1963).

[249] 423 F.3d 1271 (Fed. Cir. 2005), *cert. denied,* 547 U.S. 1098 (2006).

[250] *See* 5 U.S.C. 3503, 5 CFR 351.301–302.

[251] Citing Matter of Clement J. Zalocki, House of Reps., B–19818 L/M, 1980 WL 16731 (Comp. Gen. 1980), *https://www.gao.gov/products/b-198187-lm.*

[252] Citing *Thompson* v. *Dep't of Justice,* 61 M.S.P.R. 364 (Mar. 30, 1994) (No. DE–1221–92–0182–W–1), *subsequent history at* 70 M.S.P.R. 251, *aff'd,* 106 F.3d 426 (Fed. Cir. 1997), *Chambers* v. *Dep't of the Interior,* No. DC–0752–004–0642–M–2, 2011 WL 81797 (M.S.P.B. Jan. 11, 2011) (Member Rose concurring) (inadvertently citing paragraph (b)(8) instead of (b)(2): ''For the section 7511(b)(8) exclusion to be effective as to a particular individual, the appropriate official must designate the position in question as confidential, policy-determining, policy-making, or policy-advocating before the individual is appointed.''); *Owens* v. *Dep't of Health & Human Servs.,* 2017 WL 3400172 (July 31, 2017) (No. AT–0752–17–0516–I–1) (citing *Briggs* for the proposition that ''a determination under 5 U.S.C. 751l(b)(2) is not adequate unless it is made before the employee is appointed to the position''); *Vergos* v. *Dep't of Justice,* 2003 WL 21417091 (June 6, 2003) (No. AT–0752–03–0372–I–1) (citing *Thompson* for the proposition that a ''determination under the 5 U.S.C. 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position''). *See also King* v. *Briggs,* 83 F.3d 1384, 1387 (Fed. Cir. 1996) (noting, in affirming a Board decision reinstating the Executive Director of the Council on Disabilities, that the administrative judge who adjudicated the Director's appeal had found that ''the Council 'had never made a determination that [Briggs'] position was a confidential, policy-making, policy-determining, or policy-advocating position,' and thus excluded from the definition of employee in section 7511(a),'' and ''even if the Council had made such a determination, 'it never communicated that fact' to Briggs.'').

[253] 28 M.S.P.R. 17, 20 (1985), *aff'd sub nom., Huber* v. *MSPB,* 793 F.2d 284 (Fed. Cir. 1986).

''OPM correctly characterized as 'longstanding' the executive branch's interpretations of sections 7501 and 7511 of title 5, as well as the congressional intent as to the meanings of those sections.''

Comments Regarding Property Interests in a Position and the Retention of Accrued Status and Rights Upon an Involuntary Move

A coalition of national and local unions agreed with OPM's contention in the proposed rule,[254] as recognized in Supreme Court precedent, that in light of congressional enactments creating various prerequisites to a removal for employees who meet specified conditions, employees can earn a property interest in their positions once they satisfy their probationary/trial period or their durational requirement of current continuous service under 5 U.S.C. 7511 and retain those rights upon an involuntary move from the competitive service to the excepted service or within the excepted service. *See* Comments 41.

Commenters supportive of the rule argued that the President cannot take away a vested property right through an executive order. The same coalition of national and local labor unions wrote that no President, through an ''Executive Order or other action can override the Constitution or Chapter 75'' and remove the property interest that certain career employees accrue in their continued federal employment. *See* Comment 41. A former federal official argued that OPM's rulemaking regarding part 752 would help protect career civil servants against ''arbitrary adverse actions while serving in their positions'' and would help preserve those employees' protections even when a competitive service position is moved into the excepted service. *See* Comment 2816. Commenter continued that this rule would reduce the risk of misapplying the civil service statutes by using rescheduling to bypass civil service protections. OPM agrees with the contention regarding property rights and the expected benefits of this rule.

A commenter opposed to the rule argued that the President can use rescheduling to eliminate civil service protections. Comment 4097 conceded that OPM accurately explains in the proposed rule that the Supreme Court has held that civil service protections give government employees a property interest in their job, and that those same cases also state that the government cannot constitutionally remove these property interests without due process. Commenter contended, nevertheless, that the government can eliminate civil service procedures and, in doing so, extinguish the underlying property interest previously created. The cases and examples commenter cited in support (*see* Comment 4097, fn. 8), however, involve state legislative action, not executive action, to alter or remove civil service protections. This appears to be in line with *Loudermill* which instructs that a ''legislature may elect not to confer a property interest in public employment, [but] it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.'' [255] Federal appellate courts have held that rights conferred on state employees by legislative action can be revoked, but that revocation also requires legislative action.[256] Also, it is unclear which, if any, cited cases removed protections from incumbents as opposed to unencumbered positions, which could run contrary to *Roth* and its progeny as explained above.

Commenter also argued that, in light of section 7511(b)(2), courts have held that federal agencies can declare positions policy-influencing and thereby eliminate civil service removal requirements that previously attached, citing *Stanley* v. *Department of Justice* [257] and *Stanley* v. *Gonzales*.[258] OPM disagrees with commenter's characterization of these two cases, in which the Federal and Ninth Circuits heard challenges to the removal of two U.S. Trustees who were serving five-year terms. The original text of the statutory provision concerning U.S. Trustees, 28 U.S.C. 581, provided that the Attorney General could remove a U.S. Trustee only for cause.[259] In 1986, however, Congress amended the statute to eliminate the ''for cause'' requirement.[260] At the time the trustees were initially appointed, no Attorney General had made a determination that the position should be considered confidential, policy-determining, policy-making, or policy-advocating. Later, however, Attorney General Janet Reno declared U.S. Trustee positions to be ''confidential, policy-determining, policy-making or policy-advocating'' in character, and therefore not subject to chapter 75's protections.[261] Several years later, Attorney General John Ashcroft fired the Trustees.[262] Commenter argued that the ''courts upheld these dismissals because the trustees now occupied policy-influencing positions; they no longer had MSPB appeal rights.'' But this glosses over the actual facts of these cases. As noted by Comment 2134, and as explained in *Stanley* v. *Department of Justice,* even though Attorney General Reno made this determination, the Department of Justice acknowledged in writing ''that Trustees appointed prior to the proclamation would not be affected—they would retain appeal rights—but that all those appointed after the proclamation were exempt from the due process provisions contained in Title 5.'' [263] And these appointments were subject to a term of five years. Accordingly, any rights in the original appointment would have ended at the end of that term. The initial five-year terms of these two Trustees later expired. When the individuals affected voluntarily accepted *new* appointments to subsequent five-year terms, those appointments were now subject to Attorney General Reno's intervening determination that the positions were confidential, policy-determining, policy-influencing, or policy-advocating. During the Trustees' second five-year term, a new presidential administration removed them. The Federal Circuit found that the intervening determination by Attorney General Reno, before their voluntary acceptance of a second term, deprived them of any entitlement to particular procedures before they could be terminated from the positions.

Thus, far from demonstrating that ''courts have held that federal agencies can declare positions policy-influencing and thereby eliminate civil service removal requirements that previously attached,'' *Stanley* v. *Department of Justice* demonstrates only that when Congress excepts a position from the competitive service by statute and confers authority on the agency head to remove without cause, and when the agency head thereafter determines that the position is policy-influencing, the subjects of new appointments *thereafter* will not be entitled to procedural or appeal rights under chapter 75 and 5 U.S.C. 7701.

Reliance upon the related *Stanley* v. *Gonzales* case also does not support commenter's position. In that case, the Ninth Circuit affirmed a holding by a

[254] *See* 88 FR 63862, 63865–66, 63877.

[255] 470 U.S. at 541.

[256] *See, e.g., id.; Correa-Ruiz* v. *Fortuno,* 573 F.3d 1, 14–15 (1st Cir. 2009); *Gattis* v. *Gavett,* 806 F.2d 778, 779–81 (8th Cir. 1986).

[257] 423 F.3d 1271 (Fed. Cir. 2005), *cert. denied,* 547 U.S. 1098 (2006).

[258] 476 F.3d 653 (9th Cir. 2007).

[259] 423 F.3d at 1273–74.

[260] *Id.*

[261] *Id.* at 1273.

[262] *Id.*

[263] *Id.*

Federal district court that that court lacked jurisdiction over Ms. Stanley's new constitutional claims arising from the same facts. Although Ms. Stanley argued that the CSRA did not preclude her from pursuing relief directly under the Constitution, the Ninth Circuit concluded that it could not even reach that question because she had failed to allege a colorable constitutional claim. More specifically, in concluding she could not state a cognizable property interest in her position, the Ninth Circuit focused on the key details that Stanley was on a time-limited second appointment and that, by statute (citing 28 U.S.C. 581), she could be removed without cause by the Attorney General.

There is nothing about these decisions that is inconsistent with OPM's position that a career employee's accrued rights cannot be stripped involuntarily.

A former political appointee opposed to the rule argued that OPM claimed it is acting in accordance with statutory text, legislative history for that text, and Congressional intent but there is nothing in the CSRA that states congressional intent to preserve rights upon a move. *See* Comment 45. Commenter argued that OPM's rulemaking is speculative with regard to the intent of the statutes, especially ''since neither 5 U.S.C. 7501 nor 5 U.S.C. 7511 clearly state their intents'' and ''neither statute talks about or insinuates 'congressional intent.' '' It is unclear what this commenter is attempting to convey. The language in chapter 75 does not provide an explicit definition for certain terms used therein. OPM notes, however, that congressional intent is not always spelled out in statutory text, especially in a comprehensive statute that deals with many discrete topics. In that situation, courts, regulated entities, and others seeking to interpret statutory language may look to traditional tools of statutory interpretation, including structure, statutory and legislative history and other indicia of intent, as well as relevant precedents. As explained throughout this final rule, these statutes have extensive statutory and legislative history and there are precedents that support OPM's rulemaking. The extensive history discussed in Comment 2134, for example, supports OPM's rule regarding the retention of status and rights upon an involuntary move.

A nonprofit organization opposed to the rule commented that 5 U.S.C. 7501 and 7511 refer to current continuous service in a same or similar position, but do not contemplate a move from the competitive service to the excepted service. *See* Comment 1811. The organization asserted that OPM offers no case law ''relevant to this specific instance'' and because ''the current regulations do not address this particular situation,'' commenter believes rulemaking ''is not the proper way for OPM to address this concern.'' Instead, ''Congress ought to clarify worker protection here.'' The reference to current continuous service relates to how rights are accrued in the first place. Once an employee has accrued the requisite service, different considerations apply with respect to the consequences of an involuntary move of a position or person from the competitive to the excepted service. A different advocacy nonprofit organization stated that ''OPM does not have the authority to permanently attach removal protections.'' *See* Comment 1958. Moreover, commenter argued that ''worker classifications exist to tie different levels of protection to different types of jobs.'' Allowing a worker to carry over a protection to a new classification ''undercuts the purpose of worker classifications.'' Commenter argued that this ''provision is a significant change in law, not a mere clarification[.]''

OPM will make no revisions based upon these comments. As explained previously, *Roth* held that once a Federal employee has accrued civil service status and procedural rights, the employee retains the status and rights even if the employee's position is later moved to an excepted service schedule that would otherwise lack such status and rights. *Roth* was consistent with the cases that followed, such as *Loudermill* and its progeny, which OPM describes here and in the proposed rulemaking. In the absence of specific examples, we are unaware what commenter means by ''different levels of protection'' for ''different types of jobs.'' An ''employee'' as defined in section 7511, who has met the requisite service requirement, is entitled to the procedures specified in section 7513, whether the employee is in the competitive service or the career excepted service.

A nonprofit organization opposed to the rule commented that employees moved from the competitive service to the excepted service should not as a matter of policy retain their accrued rights. Comment 1811. Commenter asserted that the changes to part 752 would make terminations harder for agencies by strengthening civil service protections. OPM notes that these revisions largely clarify the status quo so they would not make it more difficult to remove employees for the efficiency of the service or pursuant to the optional procedures in chapter 43 for action based on unacceptable performance. Section 212.401(b) of this part, promulgated in 1968, already provides that ''[a]n employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position.'' As noted in the proposed rule,[264] this regulation was intended to preserve civil service protections and adverse action rights when positions are moved. Comment 1811 then argued that ''[w]hen employees move from the Competitive Service to the Excepted Service, it is not logical that their accrued worker protections should follow them. They will report to new supervisors, have new work, and different responsibilities.'' For the reasons described above regarding Comment 2134 and its analysis of *Roth* and its progeny, OPM disagrees that such retention of rights is illogical. On the contrary, it is well grounded in decades of civil service precedent and practice. Without these protections, an agency might try to defeat accrued rights by reassigning individuals to new positions in another service or schedule. Although we believe the case law would already make such an attempt futile, we have chosen to clarify our regulations by addressing the consequences of such a move explicitly in this final rule. Moreover, there is nothing to support the contention that moving an employee to the excepted service would necessarily result in new supervisors, new work, or different responsibilities.

Comments Regarding the Regulatory Changes and Creation of ''New Rights''

Two commenters opposed to this rule argued that it grants new rights that are contrary to statute. One former political appointee argued that ''Congress has distinguished between the competitive service and exempted [sic] service'' in that they are different classifications with different hiring processes, responsibilities, and protections. Comment 45. Commenter continued that it ''is unfair that civil servants who have worked in the exempted [sic] service for years would not have protections, while those who had just been moved from the competitive service would have protections, solely by virtue of their previous classification.'' We assume, for purposes of responding to this comment, that commenter meant to refer to the excepted service, as there is no

[264] *See* 88 FR 63862, 63869.

''exempted service'' category.[265] Commenter appears to suggest that excepted service employees do not have civil service protections. Excepted service positions may accrue the same adverse action rights as competitive service employees once they satisfactorily complete their probationary/trial period or satisfy their durational requirement. *See* 5 U.S.C. 7511. Following a decade of experience under the CSRA, Congress *expanded* the scope of employees covered by adverse action procedures in the 1990 Amendments by conferring such rights on employees who had been appointed to career excepted service positions and had accrued 2 years of continuous service in the same or a similar position.[266] The main exception to this, as discussed throughout this rule, are those excluded under 5 U.S.C. 7511(b), including political appointments requiring senate confirmation, Schedule C political appointees, and presidential appointments. Also, as explained previously, for almost 60 years, executive action, legal precedent, and regulations have recognized that civil servants moved involuntarily from the competitive service to the excepted service keep their rights.

Another commenter argued that 5 U.S.C. 7511(b) categorically exempts policy-influencing excepted service positions from chapter 75's adverse action procedures and OPM has no authority to extend civil service removal restrictions to employees in such positions. Comment 4097.[267] This misstates this final rule. OPM is not extending civil service protections to employees excluded by section 7511(b). OPM's regulatory amendments elaborate upon and clarify the retention of rights upon an involuntary move and further define the exception in 5 U.S.C. 7511(b)(2), as explained further in Section IV(B), based on its longstanding interpretation of the statute, elucidated by legislative and statutory history, additional indicia of intent, and precedent. Commenter then contended that OPM fails to cite any cases holding that employees retain removal restrictions after their positions are determined to be policy-influencing and instead OPM cited two cases ''that deal with an entirely different issue.'' (referring to footnote 117 of the proposed rule, which cites *McCormick* v. *Department of the Air Force* (2002) and *Greene* v. *Defense Intelligence Agency* (2005)). *See* Comment 4097. OPM did not cite either of those cases for this proposition. They were cited in this rulemaking because OPM is making conforming regulatory changes based on the precedent, holding that once an employee satisfactorily completes their probationary/trial period *or* durational requirement under 5 U.S.C. 7511, they are entitled to adverse action rights. Footnote 117 from the proposed rule states, ''[t]hese proposed regulatory changes are consistent with how similar statutory rights have been interpreted by Federal courts and MSPB when employees change jobs by moving to a different Federal agency.'' [268] That is precisely the reason these two cases were cited. Also, as previously explained, longstanding precedent shows that employees retain adverse action protections if moved to or within the excepted service. *See also* Comment 2134, (detailing precedent, starting with *Roth* and including the *Stanley* cases, which explain that incumbent employees can retain rights even after their position is found to be policy-influencing).

Finally, some commenters opposed to the rule argued that pay and privileges should flow with the position, not the person. One professor emeritus commented that a basic principle of the civil service has been that pay and privileges flow to the position and it would be inconsistent for individuals to permanently carry with them the attributes and protections that applied to their previous positions. Comment 3953, *see also* Comment 4097 (''Nothing in title 5 says or implies those restrictions follow individual employees.''). Comment 3953 continued that it would be unreasonable to expect that individuals who move from ''career to noncareer positions'' would, or could, permanently carry with them the protections they once enjoyed. But federal workers become ''employees'' entitled to rights under chapter 75 based on their ability to complete a probationary/trial period and continuous service in a position or similar position.[269] Once those rights are earned, employees retain that status even if they are moved to an excepted service schedule or within the excepted service, so long as the move was involuntary. A move from ''career to noncareer positions'' would only retain adverse action rights, as explained above, if such a move was involuntary. For instance, a voluntary movement from the competitive service to Schedule C would require an acknowledgment from the employee that adverse action rights would be waived.[270] A contrary rule would allow Federal workers to be reclassified at the whim of an agency without regard to how the civil service system has operated for decades, despite longstanding reliance on these protections by the Federal workforce.

OPM is promulgating the following changes to 5 CFR parts 212 and 752:

Part 212—Competitive Service and Competitive Status

Subpart D—Effect of Competitive Status on Position

Section 212.401 Effect of Competitive Status on Position

Part 212 addresses competitive service and competitive status and this final rule revises the regulations in 5 CFR 212.401(b) regarding the effect of an employee's competitive status on the employee's position. This final rule establishes that a competitive service employee whose position is first listed under Schedule A, B, C, or any future excepted service schedule remains in the competitive service for the purposes of status and protections, while the employee continues to occupy the position or any other positions to which the employee is moved involuntarily.

As described throughout this final rule, OPM's longstanding view is that Federal employees maintain the civil service status and protections that they have accrued. Since 1968, civil service regulations have provided that an employee with competitive service

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[265] The confusion may arise from section 302.101(c) of this part, which lists a small set of positions in the excepted service that are also exempt from the part 302 procedures that would normally apply to the hiring of employees into the excepted service. As noted above, section 3320 of title 5, U.S. Code, requires appointing authorities hiring individuals into the excepted service to use the same procedures described in sections 3308 to 3318 of title 5 to effectuate veterans' preference. OPM's regulations at part 302 are intended to provide the means for an agency to meet that requirement. Part 302 provides for limited exemptions where compliance is essentially impossible (*e.g.,* attorney positions, for which Congress has forbidden examination in annual appropriation provisions). For those discrete positions, veterans' preference must still be applied as far as administratively feasible. 5 CFR 302.101(c).

[266] *See* Civil Service Due Process Amendments Act, 101 Public Law 376 (Aug. 17, 1990).

[267] We also note that section 7511(b)(2) does not *automatically* exempt policy-influencing General Schedule positions from chapter 75 protections. The position must be placed in the excepted service by the President, OPM, or Congress, and a determination must be made, by the appropriate person or entity, as described in more detailed subparagraphs under subparagraph (b)(2), that the position is of a confidential, policy-determining, policy-making, or policy-advocating character. The provision is not self-executing, as the *Stanley* cases demonstrate. In the absence of a determination by the appropriate party, and communicated at the time of appointment, section 7511(b)(2) would not limit adverse action rights.

[268] *See* 88 FR 63862, 63871.

[269] *See* 5 U.S.C. 7501, 7511.

[270] *See* 5 CFR 302.102 (regarding processes for voluntary movements).

status (*i.e.,* in the competitive service), at the time the employee's position is first listed (*i.e.,* moved) under Schedule A, B, or C of the excepted service, remains in the competitive service as long as the employee continues to occupy the position.[271] OPM is updating 5 CFR 212.401(b) consistent with this final rule to establish that a competitive service employee whose position is first listed involuntarily under any future excepted service schedule remains in the competitive service. OPM is updating to account for the possibility of new excepted service schedules which may be established after promulgation of this rule or other efforts to involuntarily move positions to or within the excepted service.

Comments Regarding Amendments to 5 CFR 212.401

One commenter opposed to the rule expressed a view that OPM believes is a misreading of the regulatory change. Comment 3190, a law school clinic, argued that the rulemaking creates ''a new pathway for burrowing'' because it would amend 5 CFR 212.401(b) to allow that an ''employee in the competitive service at the time his position is first listed under Schedule A, B, or C, or whose position is otherwise moved from the competitive service and listed under a schedule created subsequent to'' the effective date of final rule, to remain in the competitive service.[272] Commenter argued that, under such a provision, an outgoing administration could burrow personnel by promoting ideologically aligned competitive service civil servants to Schedule C positions. A president would then be stuck with individuals who oppose his agenda, even though Schedule C positions are ''policy determining'' positions that often ''involve a close and confidential working relationship with the head of an agency or other key appointed officials.'' [273] OPM believes this concern is misplaced. The portion of the regulation that commenter identifies, relating to Schedules A, B, and C, is not a ''new'' revision in this final rule. That language already existed in 5 CFR 212.401(b) prior to this rule's amendment and dates to 1968.[274] The final rule adds the language, ''or whose position is otherwise moved from the competitive service and listed under a schedule created subsequent to [effective date of final rule],'' to establish that a competitive service employee whose position is first listed under any future excepted service schedule remains in the competitive service as long as the employee continues to occupy the position, or any other positions, in sequence to which the employee is moved involuntarily, as has been the case for almost 60 years.

As explained above and in Comment 2134, the original language in 5 CFR 212.401(b) was added during the Johnson Administration to track judicial decisions finding that employees retained accrued status and civil service protection upon an involuntary movement to excepted service positions. Regarding Schedule C, specifically, the CSC in 1955 noted the difference between an employee's voluntary and involuntary movement to that schedule. Regarding a voluntary move, the CSC explained that competitive service employees would lose adverse action rights. It stated, ''a vacant Schedule C job may not be filled by the appointment of an employee serving in the competitive service until the employee has been given notice in writing that acceptance of the position will result in his leaving the competitive service. Leaving the competitive service would result in his giving up the job-removal protections of the Lloyd La Follette Act.'' Conversely, in the case of an involuntary movement, the CSC noted that a competitive service employee would retain their rights, explaining, ''if an occupied job in the competitive civil service is moved to Schedule C, an incumbent who has civil-service status continues to have the removal protection of the Lloyd-La Follette Act during his occupancy of the position.'' *See* Comment 2134.[275] OPM also issued an advisory during the Reagan Administration that explained, ''[t]he only Schedule C employees covered by statutory appeal procedures [under 5 U.S.C. 7513] and who, therefore, may appeal removal actions to the Merit Systems Protection Board (MSPB) are those who were serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who still serve in those positions (*i.e.,* have status in the position—cf. *Roth* v. *Brownell,* 215 F.2d 500 (D.C. Cir. 1954)).'' *See* Comment 2134 (brackets in original). In that advisory, OPM continued, ''[a]n employee who was serving in a position in the competitive service when OPM authorized its conversion to Schedule C and is still serving in that position may be removed from that position 'for such cause as will promote the efficiency of the service.' Moreover, the action must be taken in accordance with the procedures established by 5 U.S.C. 7511 *et seq.* and part 752 of OPM's regulations. These procedures provide for the right: (1) to a 30-day advance written notice which states the reasons for the proposed removal specifically and in detail; (2) to reply personally and in writing; (3) to be represented; (4) to have the reply considered; and (5) to a written decision stating the reasons for the action. The employee may appeal the action to MSPB.'' For these reasons, OPM disagrees with Comment 3190 and the conclusions that this provision regarding Schedules A, B, and C is new or problematic.

Other commenters were generally supportive of this regulatory change. Comment 2134, a joint comment by a nonprofit organization and former federal official, was supportive but suggested that § 212.401(b) be revised to clarify that competitive status is defined in § 212.301. OPM will adopt this suggestion and revise § 212.401(b) to specifically reference an employee in the competitive service who had competitive status as defined in § 212.301. This revision reduces the risk of inconsistent interpretation or application of the regulations by referring to competitive status with uniform language.

This comment also suggested that OPM revise § 212.401(b) to address the movement of employees and not only the movement of positions. The comment also suggested that OPM revise the rule to make explicit that employees who otherwise meet the conditions of § 212.401 retain their competitive status regardless of the number of times the position or employee is moved involuntarily (so long as the sequence is not broken by a voluntary decision to apply for and accept a different position, in which case, different rules may apply). OPM will revise the language to clarify, based on the context and history described above, that once status and rights are accrued, the key to determining whether they are retained upon a move is whether the move was voluntary or involuntary. The number of times the employee is moved is immaterial to this analysis if all such movements are involuntary. OPM will therefore revise the end of § 212.401(b) accordingly.

[271] 33 FR 12402, 12408 (Sept. 4, 1968).

[272] 88 FR, 63862, 63882.

[273] *Id.* at 63872.

[274] Citing Revision of Regulations, Civil Serv. Comm'n Final Reg. 5 CFR ch. I, subch. B (other than pt. 213), 33 FR 12402–08 (Sep. 4, 1968) (''An employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position.''), *https://archives.federalregister.gov/issue_slice/1968/9/4/12396-12526.pdf#page=23.* Fifty-five years later, this regulation remains unchanged. 5 CFR 212.401(b).

[275] Citing Press Release, U.S. Civil Serv. Comm'n, p. 3 (May 12, 1955).

Part 752—Adverse Actions

Part 752 addresses the procedural requirements for suspensions of 14 days or less, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less for covered employees.

General Comments Regarding Amendments to 5 CFR Part 752

One management association offered strong support for OPM's proposed changes. Comment 2849. It stated, with respect to the part 752 amendments, that ''[i]f an administration can bypass the civil service framework established by Congress in the CSRA by moving employees to a new excepted service, it would undermine the intention of the CSRA and make its extensive employee protections obsolete.'' Another management association said that, with respect to part 752, OPM's rule provides sufficient protections and clarity. Comment 763.

A national union stated the proposed language for part 752 ''would effectively deter moving a federal employee's position to the excepted service for the purpose of retaliation, circumvention of due process, or discriminatory action against any federal employee.'' Comment 3278. A different national union stated that one reason for their support of the amendments to part 752 was because ''employees will not feel safe reporting fraud, waste, and abuse unless they have the ability to challenge arbitrary, unfounded, and/or unreasonable disciplinary actions.'' Comment 2640.

A local union stated that OPM's proposed language to amend 5 CFR part 752 ''ensures that employees moved into excepted positions retain their critical rights and should be enacted as proposed.'' Comment 1042. The local union maintained that adverse action procedures and appeal rights ensure that Federal employees are retained based on merit and are protected from retaliation and discrimination, including due to their political affiliation. This commenter further asserted that the rights accrued in a prior Federal position should not be lost solely because the employee has been moved involuntarily, as such an approach would encourage retaliation and limit agencies' ability to recruit top candidates due to applicants' fears that they could eventually lose protections they earned in that federal position by administrative reassignment.

Another organization said that they ''particularly support'' the amendments to part 752 to clarify that employees who are moved from the competitive service or from one excepted service schedule to another retain the protections they had already accrued. Comment 1904.

As stated above, other commenters expressed general disapproval of OPM's regulatory amendments to part 752. OPM is not persuaded to make any revisions based on those comments for the reasons stated above, namely the comments are at odds with existing protections in chapter 75 that OPM's final rule clarifies, and the statutory text, legislative history, and legal precedents construing it.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees. Chapter 75 of title 5, U.S. Code, provides a straightforward process for agencies to use in adverse actions involving suspensions of this duration. The changes conform this subpart with statutory language to clarify which employees are covered by subpart B when an agency takes an action for such cause as will promote the efficiency of the service.

Section 752.201 Coverage

This section describes when an employee has or retains coverage under the procedures of this subpart. Paragraphs (b)(1) through (b)(6) of 5 CFR 752.201 enumerate the conditions under which an individual would qualify for coverage. OPM's revision to 5 CFR 752.201(b)(1) prescribes that, even if an agency intends to suspend for 14 days or less an employee in the competitive service who is serving a probationary or trial period, the employee is entitled to the procedural rights provided under 5 U.S.C. 7503 if the individual has completed 1 year of current service in the same or similar position under other than a temporary appointment limited to 1 year or less.

As set forth in the proposed rule,[276] OPM is revising subpart B of part 752 to conform to the Federal Circuit decisions in *Van Wersch* v. *Department of Health & Human Services*[277] and *McCormick* v. *Department of the Air Force.*[278] These cases now guide the way the MSPB applies 5 U.S.C. 7511(a)(1), which defines employees who have the right to appeal major adverse actions, such as removals, to the MSPB. *Van Wersch* addressed the definition of ''employee'' for purposes of nonpreference eligibles in the excepted service and, a few years later, *McCormick* addressed the meaning of ''employee'' for purposes of the competitive service. As explained *supra,* section 7511(a)(1) states that ''employees'' include individuals who meet specified conditions relating to the duration of their service or, for nonpreference eligibles, relating to their probationary or trial period status. The Federal Circuit explained that the word ''or,'' here, refers to alternatives: some individuals who traditionally had been considered probationers with limited rights are actually entitled to the same appeal rights afforded to non-probationers if the individuals meet the other requirements of section 7511(a)(1), namely (1) their prior service is ''current continuous service,'' (2) the current continuous service is in the ''same or similar positions'' for purposes of nonpreference eligibles in the excepted service, and (3) the total amount of such service meets a 1 or 2-year requirement, and was not in a temporary appointment limited to 1 or 2 years, depending on the service.[279]

In a prior rulemaking,[280] OPM modified its regulations for appealable adverse actions in 5 CFR part 752, subpart D, to align with *Van Wersch* and *McCormick* and statutory language. OPM has consistently advised agencies construing 5 U.S.C. 7501 to do so in light of the Federal Circuit's interpretation of similar statutory language in 5 U.S.C. 7511. In this rule, OPM modifies language in 5 CFR 752.201(b)(1) to conform to that understanding (and thus with the statutory language in 5 U.S.C. 7501, as construed by the Federal Circuit in a precedential decision). OPM's revision to section 752.201(b)(1) prescribes that, even if an employee in the competitive service who has been suspended for 14 days or less is serving a probationary or trial period, the employee retains the procedural rights provided under 5 U.S.C. 7503 if the individual has completed 1 year of current continuous service in the same or similar position under other than a temporary appointment limited to 1 year or less.

Comments Regarding Amendments to 5 CFR 752.201

Some commenters discussed OPM's changes to conform regulations to Federal Circuit precedent in *Van Wersch* and *McCormick* and most were supportive. A coalition of national and local unions expressed support for

[276] 88 FR 63862, 63871, 63881.

[277] 197 F.3d 1144 (Fed. Cir. 1999).

[278] 307 F.3d 1339 (Fed. Cir. 2002).

[279] *See McCormick,* 307 F.3d at 1341–43; *Van Wersch,* 197 F.3d at 1151–52.

[280] U.S. Off. of Pers. Mgmt., ''Career and Career-Conditional Employment and Adverse Actions,'' 73 FR 7187 (Feb. 7, 2008).

aligning the language of section 752.201(b)(1) for suspensions of less than 14 days ''with the language of 5 U.S.C. 7501 and its interpreting jurisprudence.'' Comment 41. An organization emphasized its support of OPM's change to section 752.201 regarding the employees eligible for grievance rights for suspensions. Comment 1904.

One former political appointee opposed to the rule questioned how an individual meets the criterion for ''continuous service'' in this regulatory change. Comment 45. Commenter asked how ''continuous service'' applies to individuals who are teleworking or ''not turning on their government computers given certain data from the Government Accountability Office about the 'massive increase in telework and underutilization of office buildings.''' OPM is unclear whether this is a serious inquiry, but notes that the term ''current continuous employment'' is defined in 5 CFR 752.201(d) for suspensions of 14 days or less as ''a period of employment or service immediately preceding a suspension action without a break in Federal civilian employment of a workday,'' and does not turn on whether the employee is exercising flexibilities such as remote work or telework. Although commenter raised concerns about ''continuous service'' with respect to section 752.201, OPM also notes that the language is present in subpart D of part 752 as it applies to regulatory requirements for removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs for 30 days or less. In section 752.402, the term ''current continuous employment'' is defined as ''a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.'' This rulemaking does not amend these definitions. Apart from the fact that these definitions are unrelated to an individual's use of telework or occupancy in government office buildings, we note that, during a lengthy period starting in March 2020 and extending into the beginning of the Biden Administration, Federal office buildings were closed to all but a few employees whose work required their physical presence, making it unavoidable that most employees were working from alternative locations.[281] Accordingly, the need to monitor whether employees are actually working when not in the agency's brick-and-mortar workplace is not a new consideration and can be addressed, as always, through traditional performance management tools. OPM has already issued extensive guidance on this topic.[282]

In addition, the amended regulations section 752.201(b)(1) through (b)(6) explain that individuals retain their status as covered employees if they are moved involuntarily from the competitive service to the excepted service, unless specifically prohibited by law.

One joint comment by a nonprofit organization and former federal official supportive of the rule argued that OPM's proposed language for section 752.201(b)(1), (b)(2), and (b)(6) provides coverage if the employee is moved involuntarily and ''still occupies that position or a similar position[.]'' Comment 2134. Likewise, commenter noted that section 752.201(b)(4) applies only if the employee still occupies that position. Commenter stated that these provisions collectively may be too narrow to achieve OPM's purpose and that the ''number of involuntary moves should not be relevant to the coverage of this subsection.'' Commenter noted that an agency might deliberately move an employee to a dissimilar position for the purpose of stripping the employee of their rights. For these reasons, the organization ''suggest[s] that OPM end these paragraphs with the following language: 'that position or another position to which the employee is moved involuntarily.'''

OPM agrees with commenter that the revision suggested would better meet and strengthen the policy that OPM is advancing with the final rule, and we will revise these provisions accordingly. OPM's proposed rule was based the procedural rights in section 752.201(b)(1), (b)(2), and (b)(6) in Subchapter I of chapter 75, title 5, U.S. Code. The definitions for that subchapter are codified at 5 U.S.C. 7501, which defines an employee as ''an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the *same or similar positions* under other than a temporary appointment limited to 1 year or less.'' (emphasis added). OPM agrees with commenter, though, that the ''same or similar positions'' language used in chapter 75 relates to how rights are accrued in the first instance. Based on the precedent described above, the key factor to whether accrued status and rights are retained following a move to or within the excepted service is whether the move was voluntary or involuntary. The position to which an employee is involuntarily moved need not be the ''same or similar'' for the employee who has already accrued rights to continue to retain such rights. OPM will therefore revise the provisions in paragraphs 5 CFR 752.201(b)(1), (b)(2), and- (b)(6) by clarifying that the provision applies where the employee is moved involuntarily and continues to occupy that position or any other position to which the employee is moved involuntarily. In addition, based on the precedent explained above, OPM will revise 5 CFR 752.201(b)(3) through (5) to apply the same language.

The final rule also establishes a new 5 CFR 752.201(c)(7) to make clear that employees in positions determined to be of a confidential, policy-determining, policy-making, or policy-advocating character as defined in 5 CFR 210.102 are excluded from coverage under subpart B of part 752, consistent with congressional intent and as described more fully below.[283]

An agency commented that the ''inclusions/exclusions in 5 CFR 752.201 appear to conflict.'' Comment 2766. The agency explained that the subsection of the proposed regulation addressing employees included at § 752.201(b) indicates that in many cases, ''an employee will be covered if the employee is moved involuntarily into the excepted service (or [into a] different schedule[ ]of the excepted service) and still occupies this position.'' The agency noted, however, that the subsection addressing employees excluded at § 752.201(c) would preclude coverage of individuals whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character. The agency noted that subsection (c) does not specify that the exclusion would apply only if the individual lacked the accrued rights referenced in paragraph (b). The agency then recommended a change to § 752.201(c)(7) to address the perceived conflict.

Based on this agency's comment, OPM is persuaded that a change is necessary to effectuate the policy advanced by this final rule consistent with statutory text, legislative history, and legal precedents. As Comment 2134

[281] *See, e.g.,* U.S. Off. of Mgmt. and Budget, M–20–15 (Mar. 15, 2020); M–20–16 (Mar. 17, 2020); M–20–23 (April 20, 2020).

[282] *See* U.S. Off. of Pers. Mgmt., ''2021 Guide to Telework and Remote Work in the Federal Government,'' *https://www.opm.gov/telework/documents-for-telework/2021-guide-to-telework-and-remote-work.pdf.*

[283] Please see also the discussion in Section IV(B) regarding the definition of the phrases ''confidential, policy-determining, policy-making or policy-advocating'' and ''confidential or policy-determining.''

noted, under *Roth* and other precedents, it is well-established that when an employee with accrued rights is involuntarily moved from the competitive service to an excepted service schedule without such rights, the employee retains the accrued rights while the employee remains in that position or any subsequent position to which the employee is involuntarily moved. OPM will accept the agency's recommendation to revise the exclusion at § 752.201(c)(7) by clarifying that the exclusion does not apply if the incumbent was moved involuntarily to such a position after accruing rights as delineated in § 752.201(b).

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less for covered employees. This includes, but is not limited to, adverse actions based on misconduct or unacceptable performance. The changes are intended to reinforce the civil service protections that apply when an agency pursues certain adverse actions for the efficiency of the service under chapter 75.

Section 752.401 Coverage

The changes add language to provide that an ''employee'' (*i.e.,* for purposes of this part, an individual who has accrued adverse action rights by completing probation or a current continuous service requirement) who occupies a position that is moved from the competitive service into the excepted service, or from one excepted service schedule to another, is covered by the regulatory requirements for removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less.

The changes to § 752.401 reflect the impact of statutory requirements—namely, that once an employee meets certain conditions, the individual gains certain statutory procedural rights and civil service protections which cannot be taken away from the individual by moving the employee's position involuntarily into the excepted service, or within the excepted service. These regulatory changes are consistent with how similar statutory rights have been interpreted by Federal courts and the MSPB when employees change jobs by moving to a different Federal agency.[284]

Paragraph (c) of 5 CFR 752.401 enumerates the conditions under which an individual would qualify for coverage. The amended regulation explains that those individuals retain their status if moved involuntarily unless specifically prohibited by law.

Consistent with the proposed rule,[285] OPM's final rule revises § 752.401(c) to clarify that employees in the competitive and excepted services who have fulfilled their probationary or trial period requirement or the durational requirements under 5 U.S.C. 7511 will retain the rights conferred by subchapter II if moved involuntarily from the competitive service to the excepted service or within the excepted service to a new excepted service schedule, except in the case where an employee relinquishes such rights or status by voluntarily seeking, accepting, and encumbering a position that explicitly results in a loss of, or different, rights.

Comments Regarding Amendments to 5 CFR 752.401

One former political appointee opposed to the rule cited language in the proposed rule regarding the retention of rights on an *involuntary* move or the relinquishment of rights on a *voluntary* move and characterized it as OPM wanting ''employees being transferred to have the authority to determine if they relinquish their pay/benefits/protections'' which would be, commenter argued, the ''equivalent of placing someone on paid leave but allowing them to decide how much pay to receive while they are gone.'' Comment 45. OPM disagrees with this assessment. This section of OPM's proposed rule addressed rights following the movement of an employee and differentiated between voluntary and involuntary movements.[286] It is not, as Commenter seems to suggest, similar to leave following a disciplinary action. As explained in the proposed rule and this final rule, absent a voluntary movement, accrued rights are established in statute, as confirmed by case law construing the statute, and cannot be taken from employees by involuntarily moving them. Commenter's comparison of the retention of rights following a move to an employee's rights following a disciplinary action is therefore inapt.

As with 5 CFR 752.201, Comment 2134, which strongly supported the proposed amendments, requested modifications to ensure that if ''an agency moves an employee involuntarily more than once, the employee'' would ''retain any applicable status and civil service protections.'' Comment 2134. Commenter contended that an agency might deliberately move an employee multiple times to a dissimilar position for the purpose of stripping the employee of rights. Commenter noted that OPM's proposed language for § 752.401(c)(3), (4), (5), and (7) provides coverage if the employee is moved involuntarily and ''still occupies that position or a similar position[.]'' Commenter recommended ''replacing language that refers to a subsequent movement to a 'similar position' with language that refers to any position to which an employee is moved involuntarily.'' For these reasons, commenter recommended adding the language, ''or another position to which the employee is moved involuntarily'' directly after ''and still occupies that position'' in each of these paragraphs.

OPM is persuaded that this concern is well-founded and that the change would strengthen the policy that the final rule advances. OPM will revise these provisions accordingly. Section 752.401(c)(3) covers an ''employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission[.]'' Section 752.401(c)(4) covers certain individuals in the Postal Service, and § 752.401(c)(5) covers certain nonpreference eligibles in the excepted service. OPM's proposed rule focused on the fact that all such individuals derive their rights and protections from 5 U.S.C. 7511(a)(1)(B) or (a)(1)(C), both of which require the work to have been performed ''in the same or similar positions[.]'' With respect to § 752.401(c)(7), the language covers an employee who previously ''was'' in the competitive service with competitive status and is currently in the excepted service. As explained above, OPM agrees with commenter that the ''same or similar positions'' language used in chapter 75 relates to how rights are accrued in the first instance and the key factor in determining whether accrued status and rights are retained following a move to or within the excepted service is whether the move was voluntary or involuntary. OPM will therefore revise the provisions in 5 CFR 752.401(c)(3), (c)(4), and (c)(5) to replace the words ''a

[284] *See, e.g., McCormick,* 307 F.3d at 1341–43; *Greene* v. *Def. Intel. Agency,* 100 M.S.P.R. 447 (2005).

[285] 88 FR 63862, 63871.

[286] *See* 5 CFR 302.102 (regarding processes for voluntary movements).

similar position'' with the words ''any other position to which the employee is moved involuntarily.'' In addition, OPM will revise 5 CFR 752.401(c)(6) and (c)(8) to apply the same language. In 5 CFR 752.401(c)(7), OPM will replace ''a similar position'' with the words ''any other position to which the employee is moved involuntarily.'' OPM will also correct a typographical error by changing the period at the end of 5 CFR 752.401(d)(2)(iii) to a semicolon.

In addition, the final rule modifies 5 CFR 752.401(d)(2) to make clear that employees in positions determined to be of a confidential, policy-determining, policy-making, or policy-advocating character as defined in 5 CFR 210.102 are excluded from coverage under subpart D of part 752. In this final rule, OPM defines these terms as descriptors for the positions held by noncareer political appointees, as discussed in Section IV(B).

As with 5 CFR 752.201, an agency asserted that the ''inclusions/exclusions in 5 CFR 752.401 appear to conflict.'' Comment 2766. The agency expressed that the subsection addressing employees excluded at section 752.401(d) would preclude coverage of individuals whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character but does not specify that the exclusion would apply only if the individual lacked the accrued rights referenced in paragraph (c). The agency then recommended a change to 5 CFR 752.401(d)(2) to address the perceived conflict. Based on this agency's comment, OPM is persuaded that a change is necessary for the same reasons explained above relating to 5 CFR 752.201. OPM will revise the exclusion at § 752.401(d)(2) by clarifying that the exclusion does not apply if the incumbent was moved involuntarily to such a position after accruing rights as delineated in § 752.401(c).''

Finally, this final rule revises 5 CFR 752.401(c)(2)(ii) to reflect the repeal of 10 U.S.C. 1599e, effective December 31, 2022, by the National Defense Authorization Act for Fiscal Year 2022.[287] The repeal restores a 1-year probationary period for covered Department of Defense employees (and also reduces the alternative continuous service prong to 1 year). With respect to OPM's amendment to reflect the repeal of the 2-year probationary period in the Department of Defense, an individual disagreed with OPM's chosen language, stating that the proposed regulation would ''codify an erroneous reading of the clear language'' of sections 7501 and 7511 of title 5, U.S. Code. Comment 474. Commenter expressed concern that under OPM's proposed regulation, individuals who were in a 2-year probationary period at the time of their appointment (due to the now-repealed law) would not benefit from the conforming amendment that modified 5 U.S.C. 7511 to remove references to the now-repealed 2-year period. Commenter discussed both Department of Defense guidance and multiple canons of statutory construction. Commenter stated that the provision in 5 CFR 752.401(c)(2)(ii) in the proposed rule should be deleted in the final rule to reflect the language of 5 U.S.C. 7501(1) and 7511(a)(1)(A)(ii).

OPM will not adopt commenter's suggested revision but will make a clarification. Section 1106 of Public Law 117–81 had two sections, (a) and (b). Section (a) repealed a 2-year probationary period in the Department of Defense. Section (b) provided the ''Technical and Conforming Amendments.'' Section (a) states that the modifications of probationary periods created by the repeal ''shall only apply to an individual appointed as such an employee on or after the effective date specified'' by the statute.[288] The amendments to the U.S. Code that follow in section (b) are alterations intended to conform the code to the intent of the legislation, including the repeal of similar provisions in 5 U.S.C. 7501 and 5 U.S.C. 7511. OPM interprets Public Law 117–81 section 1106(a)(1) to mean that someone who was on a 2-year probationary period (or 2-year continuous service requirement) under section 1599e as of the effective date of the repeal, must still complete one of those 2-year periods notwithstanding the repeal. Anyone hired on or after the effective date, need only complete a 1-year period. The current regulatory text indicates that covered employee includes an employee ''[e]xcept as provided in section 1599e of title 10, United States Code, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.'' OPM will therefore revise this provision to clarify that the 2-year probationary period applies to individuals hired prior to December 31, 2022, the date that section was otherwise repealed by Public Law 117–81, section 1106.

Additional Comments Regarding Amendments to 5 CFR Part 752

A former federal official supportive of the rule suggested that OPM clarify that the changes proposed in 5 CFR part 752 include SES Positions. Comment 2816. Commenter included proposed language that would modify 5 CFR 752.601, which deals with regulatory requirements for taking adverse action relating to the SES. Commenter suggested adding ''including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position'' at the end of 5 CFR 752.601(c)(1)(i), (ii), (iii), and (2)(i). OPM agrees with the policy goal that SES employees maintain their adverse action protections, but we will not make any changes in response to this comment. As described further in Section IV(B), this rule addresses the competitive and excepted services, specifically the retention of status and rights upon an involuntary movement from the competitive service into or within the excepted service, the exclusion of adverse action rights for excepted service positions of a ''confidential, policy-determining, policy-making or policy-advocating character,'' and processes for moving employees and positions from the competitive service into or within the excepted service. As described above, the SES is its own separate service that it is not governed by provisions applicable to the competitive or excepted services. Any transfer of SES employees and positions would be governed by the SES statute and regulations. Importantly, the exception to adverse action rights under 5 U.S.C. 7511(b)(2) does also not apply to the SES. The career SES is governed by separate adverse action procedures that, unlike the rules governing the competitive and excepted services, make no mention of whether a position is of ''a confidential, policy-determining, policy-making or policy-advocating character.'' [289] For these reasons, as explained more fully below in Section IV(B), OPM will make no modifications to the rule based on this suggestion.

B. Positions of a Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character

Part 210 of title 5, Code of Federal Regulations, addresses basic concepts and definitions used throughout the Civil Service regulations in 5 CFR chapter I, subchapter B. This final rule

[287] *See* Public Law 117–81, 135 Stat. 1541, Sec. 1106(a)(1).

[288] *See* Public Law 117–81, Sec. 1106(a)(1).

[289] *See* 5 U.S.C. 7541–7543.

adds a definition for the phrases ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining.'' Positions of this character are excepted from the chapter 75 protections described above.

OPM defines these phrases to make explicit OPM's interpretation of this exception in 5 U.S.C. 7511(b)(2)—grounded in the statute, traditional tools of statutory interpretation, and longstanding policy—that Congress intended to except from chapter 75's civil service protections individuals in positions of a character exclusively associated with a noncareer political appointment that is both (a) identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the administration, and (b) that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

OPM is also defining these phrases as descriptors for the positions held by noncareer political appointees because the phrases are currently used in the regulations to describe, among other things, a ''position'' or the ''character'' of a position. OPM is conforming changes to 5 CFR 213.3301, 302.101, 432.101, 451.302, 752.201, and 752.401 to standardize the phrasing used to describe this type of position.

As explained in this section and in the proposed rule,[290] Congress has been careful to strike a balance between career employees—who are covered by civil service protections under chapter 75 because of the need for a professional civil service no matter whether they are in the competitive or excepted service—and political appointees who serve as confidential assistants and advisors to the President and other politically appointed officials who have direct responsibility for carrying out the Administration's political objectives. These political appointees are not required to compete for their positions in the same manner as career employees, serve at the pleasure of their superiors, and have no expectation of continued employment beyond the presidential administration during which their appointment occurred.

When Congress created the adverse action protections under chapter 75, it excluded, among others, employees appointed by the President, with or without Senate confirmation,[291] and employees in the excepted service ''whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character.'' [292] Likewise, Congress specifically excluded from the positions safeguarded against prohibited personnel practices under 5 U.S.C. 2302(a)(2)(B)(i) any position that is ''excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.''

Chapter 75 does not specifically define the phrase as used in the 5 U.S.C. 7511(b)(2) exception, but as described in the proposed rule—and as made further clear by public comments—this is a term of art and the history of the phrase and the exception have long meant political appointees.

Comments Regarding the Need To Clarify the Exception

Several commenters agreed with OPM that the phrase in this exception needs further clarification because of the risk it could be read, counter to the history of its usage, unreasonably broadly to strip rights from career civil servants. One commenter discussed the difficulty in identifying which employees have duties that are of a ''[c]onfidential, policy-determining, policy-making, or policy-advocating'' character if the phrase is interpreted not to mean, as has been broadly understood for decades, political appointees. Comment 6. Merely being in an office or position titled ''policy,'' ''policy analysis,'' ''policy implementation'' or such is not determinative. Likewise, some employees with a title such as ''policy analyst'' or in an office with a policy or planning-related title may be mid- or lower-level. And countless federal employees work on issues that relate to or touch upon policy. Thus, commenter argued, OPM's proposal to define these policy positions as used in 5 U.S.C. 7511(b)(2) to noncareer political appointees will be ''helpful in limiting the adverse impacts'' of politicization to policy roles. Another commenter argued that, without these changes, there is a risk of overbroad classification of positions as ''policy-making,'' potentially subjecting a substantial number of federal employees to unwarranted political interference. Comment 2516. Commenter argued that this interference could adversely impact employees' ability to perform their duties effectively and could potentially paralyze the essential functions of their agencies. Therefore, ''the need for clear delineation in the interpretation of these terms is paramount to prevent unintended consequences that could impede vital government services.'' *Id., see also* Comment 3491. A professor emeritus noted that the different potential interpretations of the exception are represented in the various estimates on the potential scope of Schedule F. *See* Comment 3953. Commenter showed that, in the early days of Schedule F, the estimates were ''in the thousands.'' Since then, the proponents have varyingly suggested that the number would be at least 50,000 and perhaps as many as 100,000.[293] In public discussions, some Schedule F supporters have made clear that their goal is for all 2.2 million federal employees to serve at the pleasure of the president. *Id.*

Conversely, a former political appointee argued that the statutory exception was clear and did not require further definition. *See* Comment 45. OPM believes that the phrase itself—''confidential, policy-making, policy-determining or policy-advocating''—may be, when viewed in isolation, capable of more than one interpretation. But employing the standard tools of statutory interpretation, including past practice, legislative history, intent, and legal precedents, provides that the best reading of the exception refers to noncareer political appointees typically listed in Schedule C.

Comment Regarding the History of the Exception

The same joint comment by a nonprofit organization and former federal official that extensively detailed the historical treatment of accrued status and civil service protections upon an involuntary move to an excepted service schedule, summarized in Section IV(A), also commented at length regarding the executive branch's historical understanding that the exception for ''confidential, policy-determining, policy-making or policy-advocating'' positions applies only to a small class of political appointee positions. *See* Comment 2134. This phrase and the related phrase, ''confidential or policy-determining,'' have ''been used with consistency for between seven and nine decades.'' This history is important because, as OPM recounts in its proposed rule and in this final rule, a common understanding of the terminology gave meaning to the

[290] 88 FR 63862, 63871–73.

[291] *See* 5 U.S.C. 7511(b)(1), (b)(3).

[292] *See* 5 U.S.C. 7511(b)(2).

[293] Citing, for example, Drew Friedman, ''Divide over Schedule F reveals deeper need for federal workforce reform, Partnership says,'' Federal News Network (July 3, 2023), *https://federalnewsnetwork.com/workforce/2023/07/divide-over-schedule-f-reveals-deeper-need-for-federal-workforce-reform-partnership-says/.*

language of 5 U.S.C. 7511(b) when Congress enacted the CSRA. Commenter concluded, after exhaustively detailing the relevant history, that OPM's proposed regulatory definition is fully consistent with the phrase's historical meaning.

Commenter also showed that the executive branch has consistently designated only around 1,500 positions as confidential or policy positions and has applied that definition to political appointees with no expectation of continued employment beyond the presidential administration during which the appointment occurred. *See* Comment 2134.

Because of the extensive citation to facts and history relevant to this regulatory change, OPM summarizes commenter's arguments here.

Commenter began with the legal context of the exception. While the phrase ''confidential, policy-determining, policy-making or policy-advocating'' is not further defined in chapter 75, commenter argued that other sections of the U.S. Code make clear that this phrase refers to political appointees. Commenter cited as examples four laws that directly state that incumbents of ''confidential, policy-determining, policy-making or policy-advocating'' positions are political appointees. One law applicable to the Department of Homeland Security declares plainly that ''the term 'political appointee' means any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.'' [294] Congress used similar language in laws applicable to the Department of Agriculture,[295] the National Aeronautics and Space Administration,[296] and the Department of Veterans Affairs.[297] Commenter also showed that Congress has enacted laws that apply restrictions to classes of political appointees that include incumbents of positions of a ''confidential, policy-determining, policy-making or policy-advocating'' character, including laws with government-wide applicability.[298]

Further illustrating the political nature of positions excluded under 5 U.S.C. 7511(b)(2), commenter cited a law applicable to the Social Security Administration that imposes an aggregate limit on the total number of noncareer (*i.e.,* political) SES positions and confidential or policy positions.[299]

In addition to pointing to Congress' understanding of the phrases, commenter also extensively detailed the history of these phrases through various administrations, beginning in 1936 with the Roosevelt Administration, and concluded that this context further supports OPM's definition in this rulemaking. The history confirms that these phrases have the same meaning, refer to political appointees, and cover only a small number of positions in the executive branch (roughly 1,500).

As commenter points out, at least as early as the Roosevelt Administration, the executive branch sought to treat confidential and policy positions differently than it treated career excepted and competitive service employees.[300] In 1937, President Roosevelt called for converting all positions other than ''policy-forming'' positions to the classified (*i.e.,* competitive) service, a position with which the CSC agreed.[301]

Further, as commenter noted, and as OPM explained in its proposed rulemaking, the Roosevelt Administration's Brownlow Committee, studying the executive branch organization, issued a report explaining that its conception of policy-determining positions was extremely narrow and such positions should be ''relatively few in number,'' consisting mainly of ''the heads of executive departments, under secretaries and assistant secretaries, the members of the regulatory commissions, the heads of a few of the large bureaus engaged in activities with important policy implications, the chief diplomatic posts, and a limited number of other key positions.'' [302]

Testifying before Congress, Louis Brownlow, the committee chair, explained the meaning of this policy-determining position exception: ''[P]olicy-determining officers should be political officers and, in my opinion, should change when the President changes.'' [303] Contemporaneous materials support this meaning of the term ''policy-determining.'' [304]

President Roosevelt then pursued the Committee's recommendation and issued Executive Order 7916,[305] adopting the term ''policy-determining'' in lieu of the term ''policy-forming'' which his Administration had initially used. The order created a framework for giving employees in excepted service positions, other than those in ''policy-determining'' positions, competitive status.

Two commissions led by former President Herbert Hoover agreed with the same reading of this exception. During the Truman Administration, the first Hoover Commission recommended a civil service exception for ''policy-making'' positions, saying that ''[t]op policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of the decentralized civil service system recommended in this report.'' [306] Later,

[294] Citing 6 U.S.C. 349(d)(3) (''For purposes of paragraph (1)—(A) the term 'career employee' means any employee (as such term is defined in section 2105 of title 5), but does not include a political appointee; and (B) the term 'political appointee' means any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.'').

[295] Citing 7 U.S.C. 6992(e)(2).

[296] Citing 5 U.S.C. 9803(c)(2).

[297] Citing U.S. Dep't of Veterans Affairs, ''VA's Administrations,'' *https://www.ruralhealth.va.gov/aboutus/structure.asp#:~:text=VA%20is%20the%20federal%20government's,Veterans%2C%20their%20families%20and%20survivors.*

[298] Citing 5 U.S.C. 4107(b)(3), 5753(a)(2), 5754, 5758, 10104(d), *see also* 12 U.S.C. 4511, 5584; 22 U.S.C. 3983(d)(3); 38 U.S.C. 308(d)(2).

[299] Citing 42 U.S.C. 904(c), *see also* 5 U.S.C. 1215(b) (Office of Special Counsel statute that requires that office to notify the President of a Hatch Act violation by ''an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate,'' which reinforces political meaning of the phrase), 2 U.S.C. 1601 (Lobbying Disclosure Act listing ''confidential, policy-determining, policy-making, policy-advocating'' with other political appointees and executive and military officers).

[300] Citing Democratic Party Platform of 1936 (June 23, 1936) (''For the protection of government itself and promotion of its efficiency, we pledge the immediate extension of the merit system through the classified civil service . . . to all non-policy-making positions in the Federal service.''), *https://www.presidency.ucsb.edu/documents/1936-democratic-party-platform.*

[301] Citing Task Force on Pers. & Civil Serv., Report on Personnel and Civil Service, 6 (1955) *https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC;* U.S. Civil Serv. Comm'n, Fifty-Fourth Report, 2 (1937), *https://babel.hathitrust.org/cgi/pt?id=hvd.hl29qu&seq=10&q1=policy&format=plaintext.*

[302] Citing ''Hearings on Reorganization of the Executive Departments, before Joint Comm. on Gov't Org.,'' 75th Cong., 112 (1937) (testimony of Louis Brownlow), *https://babel.hathitrust.org/cgi/pt?id=mdp.39015022777190&seq=124&q1=policy&format=plaintext.*

[303] *Id.*

[304] Citing ''Civil Service Aide Defends Federal Plan, Cites Administration's increase in Employes Under System,'' Cincinnati Post (May 11 1936); Nat'l Civil Service Reform League, ''The Civil Service in Modern Government, A Study of the Merit System,'' p. 19 (1937), *https://babel.hathitrust.org/cgi/pt?id=mdp.39015005609923&seq=27.*

[305] Citing E.O. 7916 (June 24, 1938), *https://www.presidency.ucsb.edu/documents/executive-order-7916-extending-the-competitive-classified-civil-service.*

[306] Citing U.S. Dep't of Justice, ''Hiring Procedures for Attorneys,'' 3 Op. O.L.C. 140, 145, n.7 (1979) (''[Attorneys] were, pursuant to Exec.

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a second Hoover commission determined the term ''policy-determining'' was ''used to describe positions which should properly be reserved for political executives, and hence not be converted to classified status.'' [307]

The Eisenhower Administration maintained this same distinction between career positions and political positions. In March 1953, the White House issued a press release describing ''types of positions that do not belong in the Civil Service System'' which included (1) those positions that received a delegation to shape the policies of the Government and (2) those where the duties required a close personal and confidential relationship.[308] As commenter noted, the focus of this press release was Schedule A because, at the time, career positions had been comingled with political positions under that schedule. Later that month, President Eisenhower created a new home for political positions through Executive Order 10440, which established Schedule C for both types of positions described in the press release. The order combined these types of positions, referring to them as ''positions of a confidential or policy-determining character.'' [309]

The CSC explained that Schedule C aimed ''to enable the Administration to make appointments directly to those positions involving the determination of major executive policies'' and identified the purpose of the new schedule for positions of a confidential or policy-determining character: ''This action was taken in order to make a clear distinction between jobs which belong in the career service and those which should be subject to change with a change in administration.'' [310]

As commenter asserts, the Eisenhower Administration recognized that the universe of political positions was small and showed restraint in redesignating or creating Schedule C positions. By mid-1954, there were only 1,086 Schedule C positions.[311] This understanding about the limited nature of this Schedule and corresponding restraint has endured to this day.

The precedent from 1936–1960 gave meaning to the phrase ''confidential or policy-determining'' by recognizing that it applied to political appointees and only a small number of positions. As commenter showed, Presidents Kennedy, Johnson, Nixon, Ford, and Carter solidified that meaning by continuing to recognize the appropriate scope of the phrase ''confidential or policy-determining.'' Under those five presidents, the number of confidential and policy-determining positions remained consistent, never exceeding 1,590 positions.[312]

By the time Congress enacted the CSRA in 1978, the meaning of ''confidential or policy-determining'' was firmly established as referring only to a small class of political positions. In enacting the CSRA, Congress opted for the slightly longer and more descriptive phrase ''confidential, policy-determining, policy-making or policy-advocating.'' But as commenter showed, the two phrases have always meant the same thing.

Congressional deliberations over the CSRA exception for ''confidential, policy-determining, policy-making or policy-advocating'' positions reflected a contemporaneous understanding that the legislature's longer phrase referred to the same thing as the executive branch's shorter phrase.[313] During hearings on the bill that would become the CSRA, participants used the terms ''policy-determining,'' ''policy-making'' and ''policy-advocating'' interchangeably. Floor debate in the Senate, for example, discussed reports of the two Hoover Commissions,[314] demonstrating that Congress was aware of the history of the terms when it enacted the CSRA. The House Committee on the Post Office and Civil Service issued a report in 1978 that showed congressional understanding and approval of the historical use of the ''confidential or policy-determining'' exception, stating ''[a]n employee whose position is of a confidential or policy determining character, generally political appointees, would not be entitled to the benefits of this legislation.'' [315] The House Committee continued that the CSC ''issues regulations to define positions which are of a policy or confidential nature, and the committee believes the current regulatory definitions for these positions are adequate.''

Commenter showed that the House of Representatives committee responsible for the CSRA explicitly indicated in its 1978 report that it meant for the new language, ''confidential, policy-determining, policy-making or policy-advocating,'' to cover only the types of positions that the executive branch had already included in Schedule C or designated as noncareer (*i.e.,* politically appointed) executive positions.[316]

This limitation, confining the language to political appointees, was well understood after the CSRA's enactment as well. In 1990, when Congress amended 5 U.S.C. 7511 to grant nonpreference eligible employees a right to appeal removals and other major adverse actions to the MSPB, the relevant congressional committee was again clear in describing confidential and policy positions as political appointees.[317]

Order No. 8743, in the competitive service.''), *https://www.justice.gov/d9/olc/opinions/1979/04/31/op-olc-v003-p0140_0.pdf.*

[307] Citing Task Force on Pers. and Civil Serv., Report on Personnel and Civil service, p. 6 (1955) (emphasis added)), *https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC.*

[308] Citing Press Release, The White House, p. 1 (Mar. 5, 1953) (signed by James C. Hagerty, Press Sec'y to the President).

[309] Citing E.O. 10440 (Mar. 31, 1953), *https://www.presidency.ucsb.edu/documents/executive-order-10440-amendment-civil-service-rule-vi.*

[310] Citing Memo. From Philip Young, Chairman, CSC, to Heads of Dep'ts and Indep. Estabs. (Apr. 1, 1953); CSC, 70th Annual Report, p. 2 (Nov. 16, 1953), *https://babel.hathitrust.org/cgi/pt?id=uiug.30112069434923&seq=532&q1=policy-determining&format=plaintext.*

[311] Citing Press Release, U.S. Civil Serv. Comm'n, p. 2 (Aug. 6, 1954); U.S. Civil Serv. Comm'n, Schedule C Approvals and Disapprovals by Agency Based Upon Civil Service Commission Decisions (Jul. 23, 1954).

[312] Citing Mike Causey, ''Reagan's Plum Book Plumper Than Carters,'' Wash. Post (May 11, 1984), *https://www.washingtonpost.com/archive/local/1984/05/11/reagans-plum-book-plumper-than-carters/4b45ea11-5f41-4b0b-a3c3-f0e4b5774543/;* Attachment to Memo. from Raymond Jacobson, Exec. Dir., U.S. Civil Serv. Comm'n, to Dirs. Of Pers., at p. 5 (Nov. 10, 1976), *https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf;* H. Comm. On Post Off. And Civil Serv., 94th Cong., the Merit System in the United States Civil Service, p. 22 n.1 (Comm. Print 94–10 1975) (monograph by Bernard Rosen), *https://babel.hathitrust.org/cgi/pt?id=mdp.39015078700211&view=1up&seq=1&q1=%22schedule+c%22.*

[313] Citing ''Hearings on H.R. 12080, Civil Service Amendments of 1976, Before the Subcomm. on Manpower and Civil Serv., H. Comm. on Post Off. and Civil Serv.,'' Serial No. 94–67, 29 (1976), *https://babel.hathitrust.org/cgi/pt?id=pur1.32754078079963&seq=33&q1=advocating&format=plaintext.*

[314] Citing 124 Cong. Rec. (Senate) 27540 (Aug. 24, 1978) (remarks of Senator Charles Percy (R–IL)) (''The Hoover Commission believed that in a true career service, the employee could go as far as his ability and initiative and qualifications indicated, excepting only decisionmaking or confidential posts. It held: [']Top policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of (the civil service system).[']''), *https://www.govinfo.gov/content/pkg/GPO-CRECB-1978-pt20/pdf/GPO-CRECB-1978-pt20-7-1.pdf.*

[315] Citing H.R. Rep. No. 95–1207, at 5 (1978), *https://babel.hathitrust.org/cgi/pt?id=mdp.39015087614379&seq=1053&q1=policy-determining.*

[316] Citing H. Comm. on Post Off. and Civil Serv., Legislative History of the Civil Service Reform Act of 1978, vol. II, 242 (Comm. Print 96–2 1979), *https://babel.hathitrust.org/cgi/pt?id=uc1.b4177360&seq=242&q1=policy-determining&format=plaintext.*

[317] H.R. Rep. 101–328, 5, 1990 U.S.C.C.A.N. 695, 699 (''Schedule C, positions of a confidential or policy-determining character. These are political appointees who are specifically excluded from

In 1992, a bipartisan group of senators and congressional representatives filed an amicus brief emphasizing that ''the effective synonym for confidential policy positions is 'political appointees.' '' [318] Their brief cited an MSPB decision that had said the phrase was, ''after all, only a shorthand way of describing positions to be filled by so-called 'political appointees.' ''

Comment 2134 also showed that, in 1994, the Senate Select Committee on Ethics reaffirmed this common understanding. Following the enactment of the Hatch Act Reform Amendments, the committee issued guidance on a new prohibition applicable to members of Congress regarding personnel action recommendations or statements for ''all non-political Federal employment.'' This meant that the prohibition did not apply to political appointments. The committee specifically noted that the prohibition did not apply to recommendations for presidential appointments or for positions determined to be of a ''confidential, policy-determining, policy-making, or policy-advocating character.'' [319] The committee understood the term of art to mean political positions.

Finally, commenter noted that OPM further affirmed the common understanding of this phrase when it responded to questions posed by Senator Christopher Shays (R–CT) during a hearing in 1996. Illustrating the consistency of OPM's position on the meaning of the phrase it now defines, OPM wrote: ''OPM has authority to except positions from the competitive service on the basis that they are of a confidential or policy-making, policy-determining, or policy-advocating character ('political' positions).'' [320]

Commenter concluded, correctly, that this extensive history shows that the ''terms mean precisely what OPM's proposed definition says they mean. They describe positions meant to be filled by political appointees who have no expectation of continuing beyond the terms of either the president who appointed them or the term-limited presidential appointees they support.'' The history also reveals there are few such positions. The number has remained steady at around 1,500 positions and has never exceeded 1,800 positions.

Other Comments Regarding the History of the Exception

Several other comments supportive of the rule concurred with OPM's understanding that Congress intended the phrase ''confidential, policy-determining, policy-making or policy-advocating'' to mean political appointees. A labor union expressed that the clarification is consistent with the general understanding that the exception was intended to only cover political appointees and was not intended to extend to all federal employees whose jobs touch on policy in some way, which, if read broadly, could encompass a substantial portion of the federal civil service. Comment 40. The potential for turning the exception into one that ''eats the rule'' is clear and the rule is a sensible approach to prevent such future abuses. *Id.* A coalition of national and local unions agreed with OPM's contention that there has been a long, consistent understanding that this exception should encompass only a category of political appointees. Comment 41.

Comments Opposing this Regulatory Change

An advocacy nonprofit organization opposed to the rule argued that the legislative history for this exception merely confirms that it covers Schedule C political appointees. Comment 4097. But commenter contended that the legislative history does not state that the policy influencing exception covers only political appointments and excludes career employees. OPM disagrees with this position for the reasons detailed in the proposed rule, this final rule, and Comment 2134. Since at least 1936, this phrase and the resulting exception in 5 U.S.C. 7511(b)(2) have been understood to mean political appointees. Commenter cites nothing that counters this extensive record. Even if there were some uncertainty regarding the scope of section 7511(b)(2), OPM would adopt the same definition because it is the best reading of the statute, reflects the understanding articulated by Congress in enacting the CSRA and, as discussed throughout this preamble, reasonably reinforces and clarifies longstanding civil service protections and merit system principles.

The same commenter opposed to the rule argued that OPM's clarification of the longtime understanding of this exception would be unconstitutional. Comment 4097 argued that OPM ''does not appear to have considered the implications of its interpretation: accepting this construction would render many inferior officers' civil service protections unconstitutional.'' For this, commenter again cited *Free Enterprise Fund.* For the reasons explained above in Sections III.(E), (F), OPM does not agree with this conclusion or that *Free Enterprise Fund* supports commenter's position. That case dealt with an independent agency with multiple layers of removal protections for their inferior officers (which generally do not exist in agencies where the President can remove a Secretary, Director, or other agency head at will). In *Free Enterprise Fund,* the second layer of protection was also ''significant and unusual'' [321] and the Court specifically said that other civil servants, like members of the SES, did not have such rigorous protections even when they worked in independent agencies, and further noted that many such employees would not qualify as constitutional officers. *Free Enterprise Fund* casts no doubt on the constitutionality of the civil service within independent agencies and that decision provides no support to commenter's assertion that lower-ranking employees in all agencies must lose civil service rights if they work on policy or that somehow confirming their rights is unconstitutional. And commenter made no showing that career civil servants working on policy matters, especially below the ranks of the SES—those to which this definition would apply—are always, or by definition, inferior officers, nor is OPM aware of any judicial decisions holding so.

coverage under section 7511(b) of title 5. H.R. 3086 does not change the fact that these individuals do not have appeal rights.'').

[318] Citing Amicus Curiae Brief of Sens. Charles Grassley and David Pryor and Reps. Connie Morella, Patricia Schroeder, and Gerry Sikorski, reprinted in ''Hearing on S. 1981 To Extend Authorization of Appropriations for the U.S. Office of Special Counsel, and for Other Purposes before S. Comm. on Govt'l Affairs, Subcomm. on Fed. Servs., Post Off., and Civil Serv.,'' 102d Cong., 101–10 (1992), *https://babel.hathitrust.org/cgi/pt?id=pst.000022216847&seq=59&q1=policy-determining&format=plaintext.*

[319] Citing ''Dear Colleague'' Letter from the Senate Select Committee on Ethics to United States Senators, 1 (Mar. 2, 1994), reprinted in the 1996 Senate Ethics Manual, 1996 Ed., 238, *https://babel.hathitrust.org/cgi/pt?id=mdp.39015038182369&seq=256&q1=advocating; see also* U.S. Off. of Pers. Mgmt., ''The status of the Senior Executive Service,'' p. 12 (1994) (''Executive branch agencies are barred from accepting or considering prohibited political recommendations and are required to return any prohibited recommendations to the sender, marked as in violation of the law. Presidential appointees and employees in confidential, policy-making or policy-advocating positions are exempted from the regulations.'').

[320] Citing ''Hearing before the S. Comm. on Govt'l Affairs,'' 104th Cong, S. Hrg. 104–483, 20, 92 (Feb. 7, 1996) (responses of Off. of Pers. Mgmt. to Questions for the Record by Rep. C. Shays (Mar. 21, 1996) as read into the record by Chairman Ted Stevens (R–AK)), *https://babel.hathitrust.org/cgi/pt?id=uc1.b5141898&seq=1&q1=policy-determining.*

[321] 561 U.S. at 506.

One former political appointee appears to have argued that 5 U.S.C. 7511(b)(3) [322] already exempts presidential appointees from adverse action protections, so OPM's definition applicable to the exception in 7511(b)(2) would be superfluous. *See* Comment 45. But subsections 7511(b)(1)–(3) exclude three distinct types of political appointments from the definition of ''employee,'' and by extension, from adverse action rights.[323] The first excludes high-level presidential appointees requiring Senate confirmation (PAS).[324] The third excludes other presidential appointees who do not require Senate confirmation.[325] The middle category, and the subject of this regulatory change, excludes those in positions determined to be of a ''confidential, policy-determining, policy-making or policy-advocating character''—traditionally understood to refer, in the main, to Schedule C political appointees.[326] The creation of such a position is approved in advance by OPM. Although the appointments are approved by the Presidential Personnel Office, the individuals selected are actually appointed by the head of the agency (or a designee) where the individual will be assigned. Section 7511(b)(2) was enacted as part of the Civil Service Due Process Amendments Act of 1990,[327] where Congress sought, *inter alia,* to eliminate the general exclusion of nonpreference eligible excepted-service employees from ''independent [MSPB] review.'' [328] Accordingly, unlike the presidential appointees discussed in (b)(1) and (b)(3), which are automatically excluded from the adverse action procedures in chapter 75, some person or entity must make an affirmative determination whether a position in the excepted service is of a ''confidential, policy-determining, policy-making, or policy-advocating'' character, a description which, as we have noted above, was consistent with Congress' understanding of the unique set of excepted service positions comprising Schedule C. Subparagraph (A) of section 7511(b)(2) specifies that any such determination must be made by the President, for a position that the President has excepted from the competitive service; subparagraph (B) specifies that any such determination must be made by OPM, for a position that OPM has excepted from the competitive service; and subparagraph (C) specifies that any such determination must be made by the President or the agency head for a position that Congress itself has excepted from the competitive service. As noted above, Congress explained that ''the key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government.'' Congress stated that the bill that would become the Civil Service Due Process Amendments Act of 1990 ''explicitly denies procedural protections'' to these types of political appointees—''presidential appointees, individuals in Schedule C positions [which are positions of a confidential or policy-making character] and individuals appointed by the President and confirmed by the Senate,'' and that ''[e]mployees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed'' because they ''explicitly serve at the pleasure of the President or the presidential appointee who appointed them.'' [329] By enacting section 7511(b)(3), therefore, Congress intended to exclude from the procedural and appeal rights of 5 U.S.C. chapter 75 a discrete group of political appointees separate from those described in section 7511(b)(2), namely those individuals appointed directly by the President [330] but who do not require Senate confirmation.

Some commenters opposed to the rule argued that career civil servants, not just political appointees, can be ''policymakers'' and excluded from the definition of ''employee'' and stripped of rights under 5 U.S.C. 7511(b)(2). One former political appointee contended that career civil servants significantly impact policy in agencies across the Federal Government and that it makes little sense to say they are not policymakers. *See* Comment 45. Comment 4097, an advocacy nonprofit organization, argued that the CSRA expressly applies the terms ''policy-determining'' and ''policy-making'' to career positions. To support this point, commenter points to 5 U.S.C. 3132, which relates to the duties of both career and noncareer SES and states that SES members exercise ''important policy-making, policy-determining, or other executive functions.'' 5 U.S.C. 3132(2)(E). Commenter concludes similar phrasing in 5 U.S.C. 7511(b)(2) must also apply to career members of the competitive and excepted services. OPM disagrees, for multiple reasons.

As an initial matter, the terminology and the structure of 5 U.S.C. 7511(b) are different from 5 U.S.C. 3132. As explained extensively throughout this final rule, the phrase ''confidential, policy-determining, policy-making or policy-advocating,'' as Congress used it in 5 U.S.C. 7511(b)(2), is a term of art with a clear history and a consistent usage. By contrast, Congress, in enacting the provisions establishing the SES, was writing on a clean slate and used a different statutory structure and language. Section 3132(2)(E) describes the SES as exercising ''*important* policy-making, policy-determining, *or other executive functions*'' (emphasis supplied), a new formulation of characteristics. Congress, in creating the SES, also established a different mechanism to provide flexibility for hiring a certain number of noncareer appointees, while limiting such appointments pursuant to a numerical formula.[331]

Further, Comment 4097's comparison to language in the SES cuts against its larger argument—that Congress contemplated that career civil servants, by the function of having confidential or policy responsibilities, can and should lose adverse action rights. As commenter points out, the law acknowledges that all SES positions, career and noncareer, ''exercise[ ] important policy-making, policy-determining, or other executive

[322] Commenter argued ''Chapter 75 § 7511(c) says that all Presidential appointees are exempt. However, other subsections enumerate other categories for exemption. Chapter 75 § 7511 (b)(2) outlines exemptions for policymaking employees. If Congress had intended that ONLY political appointees be exempt, they would not have outlined under what circumstances other employees would have been exempt for policymaking reasons. Therefore, Congressional intent was for there to be members of the civil service who are considered 'policymaking.' '' Comment 45. Commenter cited 5 U.S.C. 7511(c) but appears to mean 7511(b)(3). Also, OPM never argues that only political appointees are excepted from adverse action rights. It is defining the exception in 5 U.S.C. 7511(b)(2) to mean political appointees.

[323] *See supra* note 138 (detailing the different types and numbers of political appointments).

[324] *See* 5 U.S.C. 7511(b)(1).

[325] *See* 5 U.S.C. 7511(b)(3).

[326] *See* 5 U.S.C. 7511(b)(2). Paragraph (b)(2) also specifies who may make the determination for positions that Congress itself excepts from the competitive service. *See* 5 U.S.C. 7511(b)(2)(C). An example of such a position is the U.S. Trustee position discussed in *Stanley* v. *Dep't of Justice,* 423 F.3d 1271 (Fed. Cir. 2005).

[327] Public Law 101–376, 2, 104 Stat. 461, 461–62.

[328] H.R. Rep. No. 101–328, at 3, as reprinted in 1990 U.S.C.C.A.N. 695, 697.

[329] H.R. Rep. No. 101–328, at pp. 4–5, as reprinted in 1990 U.S.C.C.A.N. at 698–99.

[330] *See, e.g.,* 5 CFR 213.3102(c); U.S. Off. of Pers. Mgmt., ''Frequently Asked Questions: Political Appointees and Career Civil Service Positions FAQ'' (listing various types of political appointments), *https://www.opm.gov/frequently-asked-questions/political-appointees-and-career-civil-service-positions-faq/general/which-types-of-political-appointments-are-subject-to-opmrsquos-pre-hiring-approval/.*

[331] *See* 5 U.S.C. 3133.

functions,'' yet the *career* SES appointees under these positions are entitled to adverse action protections.[332] And these protections do not include any exception for career SES officials, similar to 5 U.S.C. 7511(b)(2), for positions of a ''confidential, policy-determining, policy-making or policy-advocating'' character.[333] To the contrary, all career SES officials who have completed a probationary period—again, officials who, by statute, ''exercise important policy-making'' and ''policy-determining'' functions—receive adverse action protections.[334] It does not follow that Congress would create a statutory scheme where the SES could have policy responsibilities and adverse action rights but a lower-ranking strata of career civil servants—managed by that SES—could lose adverse action rights the moment they worked on policy.

A professor emeritus opposed to this rule made a related argument that, in practice, career civil servants perform policy roles. *See* Comment 3953. Commenter argued that OPM's definition of the statutory exception fails to recognize that there is a significant number of career employees who exercise ''confidential, policy-determining, policy-making, or policy-advocating'' roles within the government. The rulemaking, commenter argued, therefore presumes a separation of policymaking and policy implementation and between political appointees and career officials that does not exist. As explained above, however, this final rule does not say that only political appointees should or do work on policy. Instead, it clarifies the longtime understanding of the exception in 5 U.S.C. 7511(b)(2) as political appointees.

Comment 4097 further argued that a 1994 amendment to 5 U.S.C. 2302, relating to prohibited personnel practices, shows that career incumbents ''can lose statutory protections if their positions are declared policy-influencing.'' Section 2302(a)(2)(B) defines ''covered position'' with respect to any personnel action, but excludes from coverage any position which is, ''*prior to the personnel action* . . . excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.'' 5 U.S.C. 2302(a)(2)(B) (emphasis added). Commenter suggests that the 1994 amendment added ''prior to the personnel action'' to this clause, and this means that Congress contemplated the designation of a position as confidential, policy-making, policy-determining, or policy-advocating and the subsequent removal of those positions as ''covered'' under section 2302. That career incumbent, according to commenter, would then lose the corresponding protections from prohibited personnel practices *after* the position's move to the excepted service. Section 2302(a)(2)(B) clarifies that the status of the underlying position at the time of the personnel action determines whether the incumbent can pursue relief pursuant to section 2302. OPM notes that this final rule deals with adverse action rights under 5 U.S.C. chapter 75 and corresponding regulations, but not prohibited personnel practices. Adverse action protections and the ability to seek corrective action in response to a prohibited personnel practice are two separate types of rights with distinct processes. Nothing about the 1994 amendments change the meaning of the exclusion in section 7511(b)(2) as explained above. OPM, moreover, agrees that a select few employees have been moved from the competitive service to Schedule C because conditions of good administration warranted such a move, or have been placed in the excepted service by Congress, via a statute creating unique appointment and removal provisions, as in the *Stanley* cases.[335] But as these cases show, when it comes to adverse action rights, even the incumbents of confidential, policy-determining, policy-making, or policy-advocating positions, when moved to Schedule C, retain previously accrued adverse action rights if the move was involuntary.

Comments Regarding the MSPB's Interpretation of This Exception

Other commenters supporting the rule contended that the MSPB has interpreted the phrase to mean political appointees. A coalition of national and local labor unions noted, as did OPM in its proposed rule,[336] that the MSPB has construed this phrase for decades. Comment 41. The Board has explained that the phrase ''confidential, policy-determining, policy-making or policy-advocating'' is ''only a shorthand way of describing positions to be filled by so-called 'political appointees.' '' [337]

One commenter opposed to the rule argued that MSPB decisions have ''little relevance here'' since chapter 75 gives the President, OPM, and agency heads responsibility for determining that positions are policy-influencing. Comment 4097. Commenter argued that MSPB case law does not and cannot determine the scope of these exceptions. The MSPB is authorized to hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board.[338] Subject to otherwise applicable provisions of law, it may take final action on any such matter.[339] It may order any Federal agency or employee to comply with any order or decision it issues and enforce compliance with any such order.[340] It is true that the MSPB cannot compel the Federal Circuit or the Supreme Court to adopt a different position, but MSPB's interpretations of title 5's terms are nevertheless significant. Where possible, it is prudent to interpret statutes harmoniously and in a manner that will not expose agencies to unwarranted liability. Also, as Comment 2134 described, Congress itself has relied on the MSPB decisions and viewed them as persuasive in defining terms in title 5. In 1992, a bipartisan group of senators and congressional representatives filed an amicus brief emphasizing that ''the effective synonym for confidential policy positions is 'political appointees.' '' *See* Comment 2134. Their brief cited an MSPB decision that said the phrase was, ''after all, only a shorthand way of describing positions to be filled by so-called 'political appointees.' '' *Id.* OPM is not simply deferring to existing MSPB decisions, but rather has considered those decisions and finds their reasoning to be compelling and in accord with our own. The fact that multiple agencies within the Executive Branch with authority to interpret and apply title 5 have reached the same determination about what this title 5

[332] *See* 5 U.S.C. 7541–7543.

[333] As explained, the exception at 5 U.S.C. 7511(b)(2) does not apply to the SES. That exception applies to the excepted service and whether those civil servants have adverse action rights. But the excepted service does not include the SES. *See* 5 U.S.C. 2103(a) (defining ''excepted service,'' and stating, ''[f]or the purpose of this title, the 'excepted service' consists of those civil service positions which are not in the competitive service or the Senior Executive Service.'').

[334] The Subchapter on adverse actions establishes the at-will status of noncareer SES by simply defining ''employee'' for purposes of that Subchapter as career employees, at section 7541(1)). Thus, there was no need, in crafting, sections 7541–7543, to make an exception similar to 5 U.S.C. 7511(b)(2), for positions of a ''confidential, policy-determining, policy-making or policy-advocating'' character.''

[335] *See also* 5 CFR 6.8(c) (moving USDA Agriculture Stabilization and Conservation state executive directors and Farmers Home Administration state directors into Schedule C).

[336] *See* 88 FR 63862, 63872.

[337] Citing *Special Counsel* v. *Peace Corps,* 31 M.S.P.R. 225, 231 (1986).

[338] 5 U.S.C. 1204(a)(1).

[339] *Id.*

[340] 5 U.S.C. 1204(a)(1)(2).

term of art means only underscores the persuasiveness of that conclusion.

Finally, a former political appointee argued that ''policy-making'' under 5 U.S.C. 7511(b)(2) is not determined by how employees are hired—as a political appointee or career civil servant—but rather, it is determined based on holding an excepted position. Comment 45. Under 5 U.S.C. 3302, however, excepted service positions can be created for a variety of reasons when conditions of good administration warrant. The President has delegated to OPM—and, before that, to its predecessor, the CSC—concurrent authority to except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable. Merely holding an excepted service position does not make someone a policy-making employee nor does working on policy necessitate being in an excepted service.

As Congress described during the 1990 Amendments, the ''key to the distinction'' between those civil servants on whom appeal rights are conferred and those to whom such rights are not conferred is the ''expectation of continuing employment with the Federal Government.'' Some commenters opposed to this rule ignore this distinction. Comment 4097 argued that certain employees would not enjoy adverse action rights but would keep their jobs if they ''faithfully advanced the President's agenda.'' Such a scheme would be directly contrary to this ''key'' distinction that Congress identified as animating the adverse action exceptions.

Improperly applying the phrase ''confidential, policy-determining, policy-making, or policy-advocating'' to describe positions held by career employees, who have an expectation of continuing employment beyond the presidential administration during which they were appointed, and to strip them of civil service protections, even when the Senior Executives to whom such individuals report retain protections, would be inconsistent with the statute. OPM's rule, on the contrary, is the best reading of the statute—as confirmed by the statutory scheme, congressional intent, legislative history, and decades of applicable case law and practice. Congress carefully balanced the need for long-term employees who have knowledge of the history, mission, and operations of their agencies with the need of the President for individuals in certain positions who will ensure that the specific policies of the Administration will be pursued. The phrase has long been interpreted as ''a shorthand way of describing positions to be filled by political appointees,'' including any appointment required or authorized to be made by the President, or by an agency head when there are ''indications that the appointment was intended to be, or in fact was, made with any political considerations in mind.'' [341] In this final rule, therefore, OPM is making explicit this longtime, consistent understanding.

OPM is promulgating the following changes to 5 CFR parts 210, 213, 432, 451, and 752:

Part 210—Basic Concepts and Definitions (General)

Subpart A—Applicability of Regulations; Definitions

Section 210.102 Definitions

The final rule amends 5 CFR 210.102 to add a definition for the phrase ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining'' to describe positions generally excepted from chapter 75's protections to reinforce the longstanding interpretation that, in creating this exception to 5 U.S.C. 7511(b), Congress intended to except noncareer political appointments from the civil service protections, which are identified by their close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the administration, and that carry no expectation of continued employment beyond the presidential administration during which the appointment occurred. OPM defines the phrase as descriptors for the positions held by noncareer political employees because the phrase is currently used in the regulations to describe, among other things, a ''position'' or the ''character'' of a position.

OPM also conforms changes to 5 CFR 213.3301, 302.101, 432.101, 451.302, 752.201, and 752.401 to standardize the phrasing used to describe this type of position. Additional comments related to this definition are addressed here.

Comments Regarding Amendments to 5 CFR 210.102

An oversight nonprofit organization supportive of this rule suggested that it would be improved if OPM provided a list of the positions that do not meet the definition of ''confidential, policy-determining, policy-making, or policy-advocating.'' Comment 3894. This commenter was especially concerned that OPM enumerate the non-confidential, policy-determining, policy-making, and policy-advocating positions involving national security, public health, emergency management, whistleblower protection, government ethics, audits, legal and regulatory interpretation, budget development and execution, medical and scientific research, and data collection and analysis. Commenter suggested that an explicit enumeration is necessary to ensure that the appropriate positions in critical areas are not mistakenly categorized as confidential, policy-determining, policy-making, or policy-advocating. OPM will not make revisions based on this comment. OPM has adequately and thoroughly clarified the exception in 5 U.S.C. 7511(b)(2) by explaining that it applies to noncareer political appointees. It would be impracticable for OPM to effectively enumerate all such political positions, especially since new positions may be created over time. OPM also notes that a (necessarily partial) list of positions that do *not* meet the definition may be misunderstood as an attempt at an exhaustive list, generating confusion rather than clarity.

Several commenters requested that OPM clarify how the definition of ''confidential, policy-determining, policy-making, or policy-advocating'' in this final rule applies, if at all, to the members of the SES.[342] Comments 44, a public service nonprofit organization, and 3687, a science advocacy organization, asked that OPM clarify how this definition affects SES employees. Comment 763, a management association, expressed concern that OPM's clarification of these types of positions will lead to SES employees getting cut out of their current policy supporting roles. They recommended that OPM define ''policy determining, making, and advocating'' as covering issues that rise to a level needing decisions by Presidential appointees. They further recommended that OPM address how our proposed amendments to 5 CFR part 210 interact with the statutes and regulations governing the SES and other senior career leaders that make clear that career SES are involved in many policy-related activities, explicitly including support for policy advocacy. Comments 2442 and 3428 (submitted by the same individual) request further clarification in light of the provisions of 5 U.S.C.

[341] *O'Brien* v. *Off. of Indep. Counsel,* 74 M.S.P.R. 192, 206 (1997) (quoting *Special Counsel,* 31 M.S.P.R. at 231).

[342] The extension of all parts of this rule to the SES was a common request and theme in the comments. *See* Comments 2193, 2222, 2260, 2796, 2816, 2822, 3049, 3095, 3149, 3687, 3973.

3132, which states career members of the SES exercise ''important policymaking, policy-determining, or other executive functions.'' As described above and further below, no changes to the proposed rule are necessary, as the SES is governed by a separate statutory structure that protects the career SES in different ways from the framework governing the competitive and excepted services.

As explained in Section III(D), the Federal civil service created by the CSRA consists of three ''services'': the competitive service, the excepted service, and the SES.[343] This regulation addresses the competitive and excepted services, which are governed by the statutory and regulatory provisions cited in the proposed rule and this final rule, including, specifically, the adverse action rules set forth at 5 U.S.C. 7501–7515. Congress established the SES as a separate service ''to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality for executive-level Federal employees.'' [344] The SES has a different system for hiring executives, managing them, and compensating them.[345] It provides for both career and noncareer positions and sets its own limitations on the appointment of noncareer positions. Career SES employees are governed by separate adverse action procedures. Because, pursuant to the definitions in 5 U.S.C. 7541, those adverse actions are limited to ''career'' employees, there was no need, unlike with the rules governing adverse actions for employees in the General Schedule, to call out and exclude positions of ''a confidential, policy-determining, policy-making or policy-advocating character,'' and thus there is no reference to such positions in the provisions at section 7541–7543.

Instead, chapter 75's adverse action procedures for the SES, codified at 5 U.S.C. 7543, indisputably apply to any career appointee in the SES who has completed the relevant probationary period in the SES or had accrued adverse action protections while serving in the competitive or excepted services prior to joining the SES.[346] Accordingly, even though SES employees engage in important policy-related work, the phrase ''confidential, policy-determining, policy-making or policy-advocating character,'' as used to describe positions that are excepted from chapter 75's adverse action protections, does not apply to the SES.

Further, in addition to providing explicit adverse action protections for career SES, Congress also sought to protect and preserve a career SES free from undue partisan political influence in other ways, including by setting strict limits on the number of SES positions that could be designated as ''noncareer'' (*i.e.,* political).[347] The rules are clear: the number of noncareer SES in any agency is to be determined annually by OPM, not by the agency; ''the total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies''; and the number of noncareer SES in any single agency may not be more than ''25 percent of the total number of Senior Executive Service positions in the agency'' or ''the number of [certain executive and Executive Schedule] positions in the agency which were filled on the date of the enactment of'' the CSRA.[348] There are also limits on the number of emergency and limited-term SES appointments. The governmentwide total may not exceed 5 percent of the governmentwide total of all SES.[349]

As discussed above, any suggestion that Congress provided more protections for SES employees who work on policy than it did for competitive and excepted service employees who work on policy would make little sense within the statutory scheme. Members of the SES make up the most senior ranks of the civil service beneath the presidential appointment level. They work most directly with the President's political appointees. They have managerial authority over employees in the competitive and excepted services. This includes the ability to direct their work and hold them accountable for poor performance or misconduct. A system that provided greater protections to its senior executives than it does to its rank-and-file employees would be ineffective and impractical.

Another commenter expressed concern that the proposed definition would lead to a reduction in the responsibilities of current positions, and a reclassification of those positions into the excepted service. Comment 2445 (an individual), *see also* Comment 763 (management association, expressing concern about career staff who support the policy development process through their work but do not have confidential, policy-determining, policy-making, or policy-advocating positions). Comment 2445 suggested that OPM clarify that some confidential, policy-determining, policy-making, or policy-advocating work may be delegated without changing the character of the delegee's position. The comment also suggested that OPM clarify that duties typically performed by those in competitive service positions are not confidential, policy-determining, policy-making, or policy-advocating. OPM will not make revisions based on these comments. OPM will clarify though, as described above, that OPM acknowledges and understands that career employees across government touch, support, and otherwise work on policy. This final rule in no way suggests that only political appointees do or should work on policy. Instead, the purpose of this rule is much more specific—to clarify the meaning of the exception to adverse action rights in section 7511(b)(2)—which, as explained, is a term of art that has long meant political appointees.

Finally, one individual encouraged OPM to define positions of a ''confidential, policy-determining, policy-making, or policy-advocating'' character as narrowly as possible. Comment 920. OPM will not make revisions based on this comment. OPM notes that the definition adopted accords with Congressional intent, legislative history, and past practices and is the best reading of the statute. The comment also suggested that OPM add additional protections to prevent positions from being moved into Schedule C and to prevent the creation of a new schedule of political appointees. OPM will not make revisions based on this comment. The President has the authority to create excepted service schedules and except positions where necessary and if conditions of good administrations warrant such exceptions. What this rule is addressing is the retention of accrued status and rights following an involuntary move to or within the excepted service and a clarification of when the exception of 5 U.S.C. 7511(b)(2) applies.

Part 213—Excepted Service

Part 213 sets forth provisions for positions and appointments in the excepted service. OPM is amending 5 CFR 213.3301 to conform to the revised 5 CFR 210.102.

OPM received no comments specifically about the regulatory changes to 5 CFR part 213, sees no

[343] There are also a small number of officials, typically those appointed by the President with or without consent of the Senate, who are paid on the Executive Schedule and not considered part of any of these services.

[344] 5 U.S.C. 3131.

[345] *See* 5 U.S.C. 5131–5136.

[346] 5 U.S.C. 7541.

[347] *See* 5 U.S.C. 3134.

[348] *See id.*

[349] *See* 5 U.S.C. 3134(e).

reason to amend the proposal, and will finalize the language as proposed.

Part 432—Performance Based Reduction in Grade and Removal Actions

Section 432.102 Coverage

Part 432 sets forth the procedures to be followed if an agency opts to pursue a performance-based action against an employee under chapter 43 of title 5, U.S. Code. As with the adverse action rules in part 752, the rules applicable to performance-based actions apply broadly to employees in the competitive and excepted services, with specific exceptions that include political appointees. The final rule amends 5 CFR 432.102 to make clear that employees in positions determined to be of a confidential policy-determining, policy-making, or policy-advocating character as defined in 5 CFR 210.102 are excluded from coverage under part 432, consistent with congressional intent.

Comments Regarding Changes to 5 CFR 432.102

An agency expressed the view that part 752 would provide ''coverage to employees who are involuntarily moved into roles in the excepted service that have confidential, policy-determining, policy-making, or policy-advocating character,'' as described in Section IV(A) and then requested that part 432 be treated similarly by revising the exclusion at 5 CFR 432.102(f)(10). *See* Comment 2766. OPM will accept the agency's recommendation for the same reasons it adopted similar suggested revisions to part 752 and will revise section 432.102(f)(10) by adding ''unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (e) of this section.''

Part 451—Awards

Section 451.302 Ranks for Senior Career Employees

Part 451 applies to awards and 5 CFR 451.302 addresses ranks for senior career employees. OPM is amending 5 CFR 451.302 to conform to the revised 5 CFR 210.102. This amendment standardizes the phrasing used to describe this type of position.

OPM received no comments specifically about the regulatory changes to 5 CFR 451.302, sees no reason to amend the proposal, and will finalize the language as proposed.

C. Agency Procedures for Moving Employees

OPM revises 5 CFR part 302 (Employment in the Excepted Service) to require that Federal agencies follow specific procedures upon moving positions from the competitive service to the excepted service or, if the position is already in the excepted service, to a different excepted service schedule following a direction from the President, Congress, OPM, or their designees (hereinafter, ''a directive'').[350] This final rule sets the procedures an agency must follow before taking these actions, outlines the notice requirements that apply when the positions are encumbered, and provides a right of appeal to the MSPB to the extent any such move is involuntary and characterized as stripping individuals of any previously accrued civil service status and protections. OPM discusses the public comments related to these provisions in turn.

1. Procedures for Moving Positions

In enacting the CSRA, Congress made certain findings relevant to the changes discussed here. It noted that the merit system principles, many of which have existed since 1883,[351] ''shall govern in the competitive service'' and that these principles and the prohibited personnel practices should be ''expressly stated'' in statute to ''furnish guidance to Federal agencies.'' [352] As explained previously, Congress then proceeded to divide functions previously performed by the CSC among OPM, the MSPB, and OSC. It found that the function of filling positions in the Executive Branch should be delegated to agencies ''in appropriate cases'' but that OPM should maintain control and oversight ''to protect against prohibited personnel practices and the use of unsound management practices by the agencies.'' [353]

OPM has concluded that imposing additional safeguards when agencies move positions from one service to another, or one excepted service schedule to another, will help OPM determine whether appointments to the competitive service are ''not practicable,'' [354] protect against prohibited personnel practices, secure appropriate enforcement of the laws governing the civil service, and avoid unsound management practices with respect to the civil service. It is important to the effective administration of the civil service that exceptions from the competitive service norm be enforced within the terms of the specific authority creating them and that employees who are said to have voluntarily accepted positions that affect their rights share the same understanding as their agencies and are aware of the potential consequences of those moves.

Some background demonstrates why these changes are important. Positions in the Federal Government are, by default, placed in the competitive service. As noted by the D.C. Circuit, 5 U.S.C. 3301 and 3302 ''make it clear . . . that 'competitive service [is] the norm rather than the exception.' '' [355] The President, however, is authorized by Congress to provide for ''necessary exceptions of positions from the competitive service'' whenever warranted by ''conditions of good administration.'' [356] The President, in turn, has delegated to OPM the authority to except positions from the competitive service, which means either the President or OPM may except positions, as situations warrant.[357] It has been a longstanding practice under these authorities for the President, and for OPM exercising its delegated authority, to permit positions that would otherwise be in the competitive service to be filled through excepted service appointments where conditions of good administration warrant exceptions from competitive examining procedures (*e.g.,* for people with disabilities and students). In some cases, positions have been placed in the excepted service because it is not practicable to examine for the position. For example, a perennial rider to OPM appropriations prohibits OPM—and before that, its predecessor CSC—from examining for attorney positions.[358]

[350] There are only three possible sources of a direction to move a position from the competitive service to the excepted service or from one schedule of the excepted service to another. The direction may come from the President, 5 U.S.C. 3302; from OPM, *id.; see* 5 CFR part 6.1(a); or from Congress, via an enactment that creates an exception to the default rules established under 5 U.S.C. 3301 and 3302. If an agency purported to act at its own initiative, that effort would be unauthorized and thus contrary to law.

[351] *See supra* note 53.

[352] Public Law 95–454, sec. 3.2.

[353] *Id.* at sec. 3.5

[354] 5 CFR 6.1.

[355] *Nat'l Treasury Employees Union* v. *Horner,* 854 F.2d 490, 493 (D.C. Cir. 1988); *accord, Dean* v. *Off. of Pers. Mgmt.,* 115 M.S.P.R. 157, ¶ 15 (2010); *see also supra* note 149.

[356] 5 U.S.C. 3302.

[357] 5 CFR 6.1(a).

[358] *See, e.g.,* Treasury, Postal Service and General Appropriation Act, 1982, H.R. 4121, 97th Cong., 1st Sess. (1981); *Fiorentino* v. *United States,* 607 F.2d 963, 965–66 (Ct. Cl. 1979) (''It has long been known . . . that the Congress has been always opposed to Civil Service Commission (CSC) testing and examining of attorney positions in the Executive branch under the competitive system. . . . Defendant cites as the enacted expression of this [opposition] the annual prohibition against appropriated funds of the CSC being used for the Commission's Legal Examining Unit. An unbroken series of such clauses runs from the Act of June 26, 1943, Pub. L. 90, 57 Stat. 169, 173, to the Act of

This appropriations bar makes examinations not practicable, and attorney positions have been placed in Schedule A of the excepted service since at least 1947.[359] *See* Comment 2134 (detailing history of federal attorneys in the competitive service and Congress' bar of attorney examinations resulting in Schedule A). In all these cases, OPM is subject to the standard that any departure must be compelled by conditions of good administration.[360]

Traditionally, the President has exercised his authority to except General Schedule positions from the competitive service through executive orders.[361] OPM has also authorized excepted service hiring to address urgent needs of agencies,[362] such as the need to bring on staff quickly to respond to the COVID–19 pandemic.[363] When OPM exercises such authority, it determines that the characteristics of the position make it impracticable to use the processes associated with conducting a competitive examination.[364] For example, it may be that the qualification requirements established for competitive service positions cannot be used because the series has been newly created. In other instances, OPM determines that open competition is not conducive to filling certain positions quickly because the applicant pool is narrow.

Sometimes, excepted service determinations are prescriptive, and agencies need only execute the operational tasks necessary to implement the direction of the President or OPM (for example, Schedule A attorneys, Schedule E administrative law judges, or any number of other positions specifically identified for excepted service status, such as through Executive Orders 5560 and 6655). In other circumstances, either the President or OPM establishes standards and conditions for agencies to apply in deciding which positions should be moved—either temporarily or permanently into the excepted service (for example, Schedule D appointments for students and recent graduates and Schedule A appointments related to the COVID–19 pandemic). In the latter category, the determination of whether to place a position in the excepted service has typically occurred prior to the position being filled. In other words, with the notable exceptions of Schedule E, established by Executive Order 13843,[365] and of the prior Schedule F, established by the now-revoked Executive Order 13957, these are intended to be used as hiring authorities. It is notable that, in the case of the creation of Schedule E, the President remarked that the exigency presented by pending litigation was one of the motivations, and expressly provided that incumbents who were in the competitive service as of the date of enactment would remain in the competitive service as long as they remained in their current positions.[366]

When the President or OPM has chosen to establish standards for agencies to apply in creating new positions or moving existing positions into the excepted service (rather than specifically directing that certain positions be excepted service positions), they have also routinely required agencies to follow certain procedures subject to OPM oversight.

The Pathways programs, originally established by President Barack Obama in Executive Order 13562, is a good example. Under 5 CFR part 362, agencies seeking to use the Pathways programs to hire students and recent graduates into excepted service positions must adhere to various policies and procedures. There are rules governing how agencies must use the Pathways programs as part of a larger workforce planning effort, specifying procedures that are conditions of the agency's use of the programs, identifying how Pathways positions are to be announced, and setting parameters for eligibility for the programs.[367] OPM has the authority to cap Pathways hiring [368] and can even shut down an agency's ability to use Pathways altogether.[369]

Based on this history and experience, OPM proposed and is now establishing appropriate safeguards—*i.e.,* a floor of procedures—that would apply whenever an agency is executing discretion to move any position or positions from the competitive service to the excepted service, or from one excepted service schedule to another, under authority exercised by the President, Congress, OPM, or their designees. In each instance, the agency would have to adhere to the following procedures:

1. Identify the types, numbers, and locations of the employee(s) or position(s) that the agency proposes to move into or within the excepted service;

2. Document the basis for its determination that movement of the employee(s) or position(s) is consistent with the standards set forth by the President, Congress, OPM, or their designees, as applicable;

3. Obtain certification from the agency's Chief Human Capital Officer (CHCO) [370] that the documentation is sufficient and movement of the employee(s) or position(s) is both consistent with the standards set forth by the President, Congress, OPM, or their designees, as applicable, and advances sound merit system principles;

4. Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of the employee(s) or position(s)) in advance of using the excepted service authority;

5. Use the excepted service authority only after obtaining written approval from the OPM Director to do so; and

October 10, 1978, Pub. L. 95–429, 92 Stat. 1001, 1007. The President had set up a Board of Legal Examiners (Legal Examining Unit), by E.O. 9358, July 1, 1943. By E.O. 9830, 12 FR 1259 (1947), the President in s 6.1 provided that positions in Schedule A and B should be excepted from the competitive service. Section 6.4 is Schedule A. Item IV therein is 'attorneys.' Whether the legislative intent is obvious to 'outsiders,' it certainly has been to the Executive branch, which has never, since May 1, 1947, put attorney positions anywhere but in the excepted service.'').

[359] *Fiorentino,* 607 F.2d at 965–66.

[360] *See* 5 U.S.C. 3302; *see also Nat'l Treasury Employees Union* v. *Horner, supra* note 149.

[361] *See, e.g.,* E.O. 13562, 75 FR 82583 (Dec. 30, 2010) (establishing Schedule D for the Pathways programs); E.O. 13843, 83 FR 32755 (July 10, 2018) (establishing Schedule E for administrative law judges).

[362] 5 CFR part 213.

[363] *See* U.S. Off. of Pers. Mgmt. Memo., ''Coronavirus (COVID–19) Schedule A Hiring Authority,'' (March 20, 2020).

[364] Even in those cases, however, OPM has provided that ''the principle of veteran preference'' must be followed ''as far as administratively feasible.'' 5 CFR 302.101(c). In practice, this standard has been held to be satisfied by using veterans' preference as a plus factor, and thus a tie-breaker, in comparing candidates at similar levels of knowledge, skills, and abilities. *See Patterson* v. *Dep't of Interior,* 424 F.3d 1151 (Fed. Cir. 2005).

[365] 83 FR 32755 (July 10, 2018).

[366] 83 FR 32755, 32756.

[367] *See, e.g.,* 5 CFR 362.105 (Pathways workforce planning requirements) and 362.303 (Recent Graduate announcements).

[368] *See* 5 CFR 362.108.

[369] *See* 5 CFR 362.104(b).

[370] The Chief Human Capital Officers Act of 2002, enacted as part of the Homeland Security Act of 2002, established the role of the CHCO in the Federal Government. CHCOs advise and assist in carrying out agencies' responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles. *See* 5 U.S.C. 1401–1402. They are also responsible for ''implement[ing] the rules and regulations of the President, the Office of Personnel Management (OPM), and the laws governing the civil service within an agency.'' 5 CFR 250.202. OPM has delegated various responsibilities directly to CHCOs. *See, e.g.,* U.S. Off. of Pers. Mgmt., ''Personnel Management in Agencies'' 81 FR 89357 (Dec. 12, 2016) (tasking CHCOs with developing a Human Capital Operating Plan); U.S. Off. of Pers. Mgmt, ''Human Resources Management in Agencies,'' 73 FR 23012 (Apr. 28, 2008) (implementing regulations for agencies and CHCOs regarding the strategic management of the Federal workforce); 5 CFR 337.201 (giving CHCOs the ability to request direct-hire authority when OPM determines there is a hiring need).

6. Initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the **Federal Register**, to include the types, numbers, and locations of the positions moved to the excepted service.

Comments Regarding the Implications of This Regulatory Change

Most of the comments regarding these changes were supportive, but some, including a former political appointee, argued that creating further procedures impedes the President's ability to act with his constitutionally vested authority over the Executive Branch and its functions. *See* Comment 45. Commenter also argued that ''Congress has granted the President the authority to move Federal employees. This rule seeks to impede this authority.'' As noted in Section III(F), the CSRA, as codified, imposed upon OPM both authority and an obligation to, among other things, ''execut[e], administer[ ], and enforce[ ] . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service.'' [371]

We will not make any changes as a result of this comment. The President, pursuant to his own authorities under the CSRA, as codified at 5 U.S.C. 3301 and 3302, has also delegated a variety of these authorities to OPM concerning execution, administration, and enforcement of the competitive and excepted services. Among other things, the President has authorized OPM to ''promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in title 5, United States Code, the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office,'' [372] and to collect information and records regarding matters falling within the civil service laws, rules, and regulations.[373] OPM has acted pursuant to these authorities to create government-wide rules for Federal employees regarding a broad range of topics, such as hiring, promotion, performance assessment, pay, leave, political activity, retirement, and health benefits. Both the President and OPM also establish standards and conditions for agencies to apply in deciding which positions should be moved from the competitive into the excepted service. This rule is squarely within these authorities.

Also, while the President can create excepted service schedules and move positions into the excepted service, that ability is not unqualified. For instance, Congress has mandated that exceptions occur only when ''necessary'' and warranted by ''conditions of good administration.'' [374] Although the Administrative Procedure Act (APA) does not apply to the President, it is applicable to OPM and the agencies that implement directions from the President or OPM. The D.C. Circuit has determined, for purposes of challenges under the APA, that ''several provisions of title 5 of the U.S. Code, viewed together, provide a meaningful—not a rigorous, but neither a meaningless—standard against which to judge'' a decision to except positions from the competitive service, when it is OPM that creates the exception.[375] If determinations by agencies or OPM that certain positions belong in a newly-created excepted service schedule would similarly be reviewable, it is prudent for OPM to establish procedural regularity into this process.

Finally, this rule does not restrict the President's authorities. These procedures, which establish uniform processes when agencies move positions or people, will help OPM determine whether appointments to the competitive service are ''not practicable,'' protect against prohibited personnel practices, secure appropriate enforcement of the law governing the civil service, and avoid unsound management practices with respect to the civil service.

OPM is promulgating the following changes to 5 CFR part 302:

Part 302—Employment in the Excepted Service

Part 302 governs employment in the excepted service, including the procedures an agency must follow when an employee serving under a nontemporary appointment is selected for an excepted appointment. The authority citation provided in the proposed rule did not reflect changes made by the Fair Chance to Compete for Jobs final rule published on September 1, 2023 (88 FR 60317). The updated authority citation is reflected in this final rule.

Section 302.101 Positions Covered by Regulations

This section describes positions covered by part 302. OPM is amending 5 CFR 302.101 to conform to the revised 5 CFR 210.102, which adds a definition to the phrases ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining.'' [376]

Subpart F—Moving Employees and Positions Into and Within the Excepted Service

OPM adds subpart F titled, ''Moving Employees and Positions Into and Within the Excepted Service.'' In the event of a directive by the President, Congress, OPM, or their designees, to move employee(s) or position(s) from the competitive service to the excepted service, or from one excepted service schedule to another, this new subpart describes the processes and procedures an agency must follow to carry out such a move.

Section 302.601 ''Scope''

This subsection describes the scope of the positions that would be subject to the new procedures in subpart F.

Comments Regarding Amendments to 5 CFR 302.601

Comment 2134, a joint comment by a nonprofit organization and former federal official, supported the rule but suggested that 5 CFR 302.601 be revised for clarity. Commenter noted that the proposed rule clearly covered the movement of positions into an excepted service schedule but was unclear about the involuntary movement of employees from their current positions to other positions in an excepted service schedule. Commenter suggested a revision to make clear that the movement of employees, not just positions, falls within the scope of Subpart F. OPM agrees with this comment and has revised this provision accordingly.

One intended purpose of Subpart F is to regulate the movement of positions to and within the excepted service. But covering the movement of employees is an important feature of the subpart. For instance, section 302.602(c) requires that agencies that seek to move an encumbered position into or within the excepted service notify affected employees of the movement and relevant rights. Covering both employees and positions in this regulatory scheme is important because, once a position is filled by an incumbent, that incumbent gains certain rights and status over time as detailed in 5 U.S.C. 7511(a) and as explained in Section IV(A). And once those rights and status accrue, the employee retains those rights upon a move to or within the excepted service so long as the moves, however many they may be or into whichever positions they may be,

[371] 5 U.S.C. 1103(a)(5).

[372] 5 CFR 5.1, 6.1, 6.2.

[373] 5 CFR 5.4.

[374] 5 U.S.C. 3302; 5 CFR 6.1.

[375] *Horner, supra* note 149, 854 F.2d at 495.

[376] *See* Section IV(B).

are involuntary. In this way, both positions and employees are covered by this regulatory amendment.

OPM will modify the regulatory language to clarify this point. The revised language at 5 CFR 302.601 will state that the subpart applies to any situation where an agency moves—(1) a position from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive order, or an OPM issuance, to the extent that this subpart is not inconsistent with applicable statutory provisions; or (2) an employee who has accrued status and civil service protections under 5 U.S.C. chapter 75,[377] subchapter II, involuntarily to any position that is not covered by that chapter or subchapter. It will also explain that the subpart applies in situations where a position previously governed by title 5, U.S. Code, will be governed by another title of the U.S. Code going forward, unless the statute governing the exception provides otherwise.

Another commenter, a former federal official, suggested that OPM revise Subpart F to include movement of positions from the career-reserved SES into the excepted service. *See* Comment 2816. For the reasons described in the previous sections, OPM will not adopt these suggestions. The SES, as noted above, is not in the excepted service and is governed by a separate statutory structure that addresses access to adverse action protections by type of appointment. The statute expressly provides for ''career'' and ''noncareer'' positions. But an ''employee,'' for purposes of the SES adverse action provisions, is defined as a ''career'' employee. Accordingly, the adverse action provisions, which apply only to career employees, contain no explicit exclusions, akin to section 7511(b)(2), based upon the character of the position. Moreover, the provisions governing the SES directly address reassignments and transfers of career senior executives,[378] removal of a career employee from the SES into a civil service position outside of the SES during probation or as a result of less than fully successful executive performance,[379] and the circumstances in which there may be guaranteed placement in other personnel systems for a senior executive who has been removed from the SES.[380]

Section 302.602(a) ''Basic Requirements''

This section requires an agency to take certain steps after a directive from the President, Congress, OPM or their designees to move a position or positions from the competitive service to the excepted service, or from one excepted service schedule to another. This final rule establishes additional procedural requirements that apply when one or more of the positions the agency seeks to move is encumbered by an employee.

Section 302.602(a)(1) states that, if the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that directive, and their location within the organization and provide the list to OPM.

Section 302.602(a)(2) states that, if the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must provide OPM with a list of the positions to be moved in accordance with those criteria, those positions' location in the organization, and, upon request from OPM, an explanation of how the positions met those criteria.

Section 302.602(a)(3) states that, if the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move, then the agency must, in addition to supplying a list, supply OPM with the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant.

Section 302.602(b) describes the steps agency management must take, independent of the impacted employees, with respect to such moves.

Section 302.602(b)(1) requires an agency to identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

Section 302.602(b)(2) requires the agency to document the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

Section 302.602(b)(3) requires the agency to obtain certification from the agency's CHCO that the documentation is sufficient and movement of the positions is both consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable, and with merit system principles.

Section 302.602(b)(4) requires the agency to submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority.

Section 302.602(b)(5) specifies that OPM shall then review the CHCO certification and supporting documentation, and the agency shall be able to use the excepted service authority only after obtaining written approval from the OPM Director to do so.

Section 302.602(b)(6) specifies that OPM shall publish any such authorizations in the **Federal Register**, to include the types, numbers, and locations of the positions moved to the excepted service and that the agency is not permitted to initiate any hiring actions under the excepted service authority until such publication occurs.

Comments Regarding Amendments to 5 CFR 302.602(a) and (b)

Comment 2134 proposed several changes to OPM's proposed addition of section 302.602. Commenter correctly noted that in paragraph (a)(1), the second instance of the word ''list'' (following ''in accordance with that'') is a mistake. OPM meant to write ''directive'' instead and will adopt this suggestion. Paragraphs (a)(2) and (a)(3) require that agencies provide a list or lists of the positions to be moved, the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant. Commenter is correct that the list or lists should be provided to OPM. and OPM will make that clear in the final regulatory language. Paragraphs (b)(1) and (b)(2) require agencies to ''Identify'' and ''Document'' certain information, respectively. Commenter asserted it is not clear how agencies are to accomplish the identification and documentation and suggested adding ''in a report to OPM'' after the words ''Identify'' and ''Document'' in these paragraphs. OPM will not adopt this suggestion. OPM believes the reporting is implicit in the certification by the CHCO and the accompanying data and

[377] Commenter also suggests that we include regulatory language addressing accrued civil service protections under 5 U.S.C. chapter 23, relating to merit system principles and prohibited personnel practices, in addition to those accrued under chapter 75. As explained above, this final rule deals with adverse action rights under chapter 75 and corresponding regulations, but not prohibited personnel practices. Adverse action protections and the ability to seek corrective action in response to a prohibited personnel practices are two separate types of rights with distinct processes. Also, OPM notes that 5 U.S.C. 2302 addresses certain prohibited personnel actions with respect to ''covered'' positions, rather than rights ''accrued'' by individuals over time.

[378] 5 U.S.C. 3395.

[379] 5 U.S.C. 3592.

[380] 5 U.S.C. 3594.

lists. OPM will consider providing further instructions about the forms this information should take in guidance and will also consider providing templates. For the reasons discussed above regarding suggested revisions to section 302.601, commenter also suggested expanding the coverage of section 302.602 to include not only the movement of positions but also the movement of individual employees by adding a new subsection (d) that reads: ''In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees who have accrued status or civil service protections under 5 U.S.C. [ ] chapter 75, subchapter II, to positions that are not covered by such chapter or subchapter.'' OPM will adopt this suggestion for the same reasons it adopted the similar suggestion regarding section 302.601.[381] OPM will modify this suggestion so that subsection (d) reads: ''In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees with respect to any earned competitive status, any accrued procedural rights, or depending on the action involved, any appeal rights under chapter 75, subchapter II, or section 4303 of title 5, United States Code, even when moved to the new positions.''

Commenter then suggested that OPM consider increasing transparency by ensuring that the public has access to the information discussed in section 302.602. To enforce any such transparency requirement, commenter suggested that OPM provide that personnel actions implementing the movement of positions or employees will be ineffective until 90 days after the release of this information to the public. This period, commenter argued, would also provide Congress an opportunity to conduct meaningful oversight in the event of a major upheaval of civil service processes and protections. OPM believes that the processes in this final rule already strike the appropriate balance among a variety of factors, including transparency, the preservation of merit, and good governance while also allowing for the efficiency and flexibility to conduct normal government operations governed by statute, which can include reorganizations or moving positions to or within the excepted service if necessary and warranted by conditions of good administration. Further, the presentation of information as described in this subpart may lead to communications between OPM and an agency that would generally be protected by the privilege afforded to the deliberative process. OPM will not adopt these suggestions.

Finally, this commenter suggested that because section 302.602 refers to the movement of ''positions'' and uses other plural words, this section might be construed to be inapplicable in the case of the movement of only one employee or position. OPM agrees and will add a new subsection (e) that reads: Notwithstanding the use of the plural words ''positions,'' ''employees,'' and ''personnel actions,'' this section also applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

Another commenter supportive of the rule suggested that OPM shift documentation and other duties under section 302.602(b)(3) from agency human resources to Department-level human resources or OPM. Comment 6. OPM will not make revisions based on this comment. A CHCO is well positioned to certify the sufficiency of an agency's documentation pursuant to section 302.602(b). By law, CHCOs advise and assist in carrying out agencies' responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles.[382] They are responsible for ''implement[ing] the rules and regulations of the President, the Office of Personnel Management (OPM), and the laws governing the civil service within an agency.'' [383] They are also experienced with these types of duties because OPM has delegated various similar responsibilities directly to CHCOs in the past. Commenter also suggested that the rule require agencies, Departments, and OPM to consult with bargaining units and unions concerning the effects of the movement of a position on bargaining unit employees, prior to moving a position. OPM will not make revisions based on this comment. Collective bargaining obligations can arise with any new policies which impact bargaining unit employees. This includes implementation of policies found in any new or revised government-wide regulation, such as the final rule, so no new consultation process is required. The proposed rule did not purport to address new labor relations provisions and such matters are already subject to requirements in the Federal Service Labor-Management Relations Statute of 1978.

Another commenter, an individual, suggested that these regulatory amendments should be broadened to require that agencies disclose the underlying reasons for the movement. Comment 407. Comment 3894, an oversight nonprofit organization, also suggested that section 302.602(b)(6), regarding OPM publishing any such authorizations to move positions in the **Federal Register**, should be revised to require a solicitation for public comment. As stated above, OPM believes these amendments already strike the appropriate balance between being protective of rights and merit system principles and allowing for the efficiency and flexibility of normal government operations, so OPM does not believe that further process is necessary. Regarding Comment 407, there may be many underlying reasons for a move and a precise underlying reason, while potentially probative, does not get to the central inquiry for the retention of rights and status, which is whether the move was voluntary or involuntary. Still, those general reasons are implicit in 5 CFR 302.602(b)(2), which requires that an agency ''[d]ocument the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.'' OPM does not believe that further requirements on this point are necessary. Regarding Comment 3894, the purpose of publishing this information in the **Federal Register** is to increase transparency. OPM believes that publishing this information is sufficient and that public comment would add little further value. It would also risk the process becoming unduly burdensome. For these reasons, OPM will not adopt these suggestions.

Finally, Comment 2816, by a former federal official, again suggests that OPM clarify that the changes proposed within 5 CFR 302.602 include SES Positions. OPM will not adopt this suggestion for the same reasons it did not adopt a similar suggestion regarding section 302.601. The SES is not in the excepted service and is governed by a separate statutory structure that protects the career SES in different ways from the framework governing the competitive and excepted services.

2. Notice Rights for Encumbered Positions

OPM is promulgating additional requirements, under 5 CFR 302.602(c),

[381] Commenter also suggests that we include regulatory language addressing accrued civil service protections under 5 U.S.C. chapter 23, but for the reasons discussed in note 377, we decline to do so.

[382] *See* 5 U.S.C. 1401–1402.

[383] 5 CFR 250.202.

that would apply when one or more of the positions the agency wishes to move is encumbered by an employee. It describes the information an agency must provide an employee whose position is being moved from the competitive service and placed in the excepted service, other than in Schedules D or E, or with an excepted service employee whose position is moved to another excepted service schedule, other than Schedules D or E.[384] In that case, under section 302.602(c)(1)(i), no less than 30 days prior to moving the position, the agency must provide written notification to the employee of the intent to move the position. Under section 302.602(c)(1)(ii), if the move is involuntary, the notice must inform the employee that the employee maintains their civil service status and protections, if any, notwithstanding the movement of the position.

Employees who are in the competitive service—and who the agency is not planning to move—may wish to apply for a new position in the excepted service and potentially relinquish accrued rights (such as a voluntary move from a competitive service position to a position as a Schedule C political appointee). In that situation, agencies must continue to comply with longstanding rules—codified at 5 CFR 302.102(b)—providing that employees be given notice that they are leaving the competitive service and requiring that employees acknowledge they understand that they are voluntarily leaving the competitive service to accept an appointment in the excepted service.[385]

OPM did not receive comments specifically relating to 5 CFR 302.602(c). In this final rule, though, OPM is clarifying that a notice under section 302.602(c)(1)(ii), informing the employee that the employee maintains their civil service status and protections notwithstanding the movement of the position, applies where the move is involuntary.

3. Appeal Rights for Encumbered Positions

OPM further amends 5 CFR part 302 to establish that a competitive service employee whose position is moved involuntarily into the excepted service, or an excepted service employee whose position is moved involuntarily into a different schedule of the excepted service, may directly appeal to the MSPB if, contrary to these regulations, the entity perpetuating the move asserts that the move will strip the individual of any status and civil service protections they had already accrued. This rulemaking would not apply to situations where the employee applies for, is selected for, and accepts a new position with fewer or different civil service protections, since acceptance of that new position voluntarily relinquishes the protections the employee had already accrued.

As explained previously in Section III(F), under 5 U.S.C. 1103(a)(5), a variety of other provisions governing specific topics under title 5, and delegations from the President, OPM has broad authority to execute, administer, and enforce civil service rules and regulations. Exercising these authorities, OPM has previously conferred rights of appeal to the MSPB with respect to a variety of personnel determinations, including, for example, final suitability determinations.[386] The Federal Circuit has repeatedly sustained this practice and ruled that where an appeal is solely by regulation, the regulation circumscribes the scope of the appeal.[387] Title 5 explicitly provides that an employee may appeal a personnel action made appealable by regulation.[388] The MSPB, in turn, has the responsibility to ''hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under . . . law, rule or regulation.[389]

Section 302.603 ''Appeals''

In these final regulations, OPM is prescribing an MSPB appeal right for an employee whose position in the competitive service is moved to the excepted service involuntarily, or whose position in the excepted service is moved into a different schedule of the excepted service involuntarily, and when an entity effectuating such a move, contrary to these regulations, asserts that the individual loses any status and civil service protections they had already accrued. This provision would not apply when the employee voluntarily relinquishes such rights by applying for and accepting a new position with different rights. Such an appeal right would, however, cover an employee's allegation that an agency coerced the employee to ''voluntarily'' move to a new position that would require the employee to relinquish their competitive status or any civil service protections. OPM notes that an individual may choose to assert in any appeal to the MSPB that the agency committed procedural error, if applicable, by failing to act in accordance with the procedural requirements of section 302.602 while effecting any placement from the competitive service into the excepted service or from the excepted service to a different schedule of the excepted service. In cases where an individual asserts procedural error by the agency, OPM expects the MSPB would typically determine whether the procedural error was harmful as a pre-requisite for any reversal of the agency's action. The MSPB will find that an agency error is harmful only when the record shows that it was likely to have caused the

[384] OPM is omitting Schedules D and E from this regulatory change because these schedules, for the Pathways programs participants and Administrative Law Judges (ALJs), *see* 5 CFR 6.2, respectively, have specific and unique requirements regarding eligibility and entrance into these positions. In particular, the Pathways programs, which were created by the President, not OPM, already have highly reticulated schemes for conversion of the appointee from the excepted service to the competitive service following the successful conclusion of the initial excepted service appointment. It is unlikely that the initial time-limited appointments to the excepted service would be appropriate vehicles for conversion to a different excepted service position, and, in any event, the incumbent would likely not yet have accrued adverse action rights in the excepted service positions they encumbered. Even if such rights had accrued, these appointees would enjoy such rights only for the balance of the original time-limited appointment. ALJ appointments were changed in light of ALJs' significant responsibilities in ''taking testimony,'' ''conducting trials,'' ''enforcing compliance with their orders,'' and in some cases issuing ''the final word [for] the agencies they serve.'' *See* E.O. 13843. Those specific duties, carried out with ''significant discretion,'' combined with a desire to eliminate any constitutional concerns regarding the method of ALJ appointments, were the reasons that ALJs were placed in the excepted service by the President as a matter of ''sound policy,'' which allowed agencies to ''assess critical qualities in ALJs candidates'' to ''meet the particular needs of the agency,'' such as subject matter expertise relevant to the agency's work. *Id.* In addition, special chapter 75 procedures apply to incumbent ALJs, and they can be removed from ALJ positions only by the employing agency at the conclusion of a specified proceeding at the MSPB.

[385] Under 5 CFR 302.102(b), when an employee serving under a temporary appointment in the competitive service is selected for an excepted appointment, the agency must:

1. Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service while he/she occupies the position; and

2. Obtain from the employee a written statement that he/she understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.

[386] 88 FR 63862, 63876–77 (citing to 5 CFR part 731, subpart E and identifying twelve instances in which OPM has provided in regulation a basis for an appeal to the MSPB).

[387] *See Roberto* v. *Dep't of the Navy,* 440 F.3d 1341, 1350 (Fed. Cir. 2006); *Folio* v. *Dep't of Homeland Sec.,* 402 F.3d 1350, 1355 (Fed. Cir. 2005); *Dowd* v. *United States,* 713 F.2d 720, 722–23 (Fed. Cir. 1983); *see also Gaxiola* v. *Dep't of the Air Force,* 6 M.S.P.R. 515, 519 (1981).

[388] 5 U.S.C. 7701(a).

[389] 5 U.S.C. 1204(a)(1).

agency to reach a different conclusion.[390]

Comments Regarding Amendments to 5 CFR 302.603

Comment 2134 is supportive of the rule and the conferral of a regulatory appeal right premised specifically on the movement of an employee but suggested that OPM explain that, ''in creating this appeal right, OPM is not taking a position as to whether employees would otherwise lack appeal rights in all cases involving an involuntary move.'' OPM agrees and is not in this rule addressing whether employees would otherwise lack appeal rights in all cases involving an involuntary move.

Commenter also suggested a revision regarding the proposed language in section 302.603, which would allow employees to appeal to have their rights ''reinstated.'' Commenter contended that the proposed text of the rule implied that rights were lost upon the move but could then be ''restored'' by a successful appeal. Commenter also noted this regulatory language does not specify a time in which an aggrieved employee must file an appeal and expressed concern that this ''might not fully achieve OPM's aims.'' Commenter expressed that, as proposed, the language could suggest that an agency could strip an employee of civil service status and protections in a manner contrary to this final rule and put the onus on the employee to rectify such an action before the MSPB. Or an agency might use silence or take a chance that an employee will not timely appeal, but that outcome would be unjust. Commenter therefore proposed a 180-day period for the employee to appeal, which commenter offered would allow sufficient time for the employee to gather information necessary for that appeal. OPM does not believe the final rule should specify a time period; the timing procedures should instead follow the normal processes associated with appeals to the MSPB. But OPM agrees that it should add a clause to this section specifying that the appeal rights conferred in part 302 are in addition to, and not in derogation of, any right the employee would otherwise have to appeal a subsequent personnel action undertaken without following appropriate chapter 75 or chapter 43 procedures. The appeal right created by this rule merely provides an additional avenue for immediate correction if the agency asserts that accrued status or rights will no longer apply or fails to provide notice of the impact on accrued status or rights. To better capture OPM's intent, OPM will revise 5 CFR 302.603(a) to read: (a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved involuntarily to the excepted service, or an excepted service employee whose position is placed into a different schedule of the excepted service or who is otherwise involuntarily moved to a position in a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b), (c), and (d) of this section. The appeal rights conferred in this section are in addition to, and not in derogation of, any right the individual would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under chapter 75, subchapter II, or section 4303 of title 5, United States Code.

Commenter also suggested that the right in section 302.603(b) to appeal moves which ''purportedly'' strip protections is too narrow. Commenter contended that it is possible that agencies will remain silent on an employee's civil service status and protections, and thereby could avoid an appeal because the agency has not ''purported'' to have any effect on employee status and protections. Commenter also contended that subsection (b) addresses only the movement of a position. In contrast, subsections (a) and (c) of section 302.603 also cover the movement of an employee to a new position. OPM will revise this language to clarify that agencies cannot circumvent this final rule by moving an individual instead of a position. To better capture OPM's intent in this final rule, OPM will revise 5 CFR 302.602(b) to read: (b) Where the agency, notwithstanding the requirements of section 302.602 of this part, asserts that the move of the original position or any subsequent position to which the individual is involuntarily moved thereafter, will eliminate competitive status or any procedural and appeal rights that had previously accrued, the affected individual may appeal from that determination and request an order directing the agency (A) to correct the notice to provide that any previously accrued status or procedural and appeal rights under those provisions continue to apply, and (B) to comply with the requirements of either chapter 75, subchapter II or section 4303 of title 5, United States Code, in pursuing any action available under those provisions, except to the extent that any such order would be inconsistent with an applicable statute.

To address the concern that an agency could remain silent regarding an employee's status and rights upon a move, OPM will modify section 302.603(c) to read that: Where the agency fails to comply with § 302.602(c)(1) of this part, and fails to provide an individual with the requisite notice, the affected individual may appeal and request an order directing the agency to comply with that provision.

Finally, this commenter suggested that OPM modify section 302.603 to also allow for appeals based on involuntary though not necessarily coercive movements. OPM will adopt this suggestion. Employees retain their civil service status and protections during involuntary movement into or within the excepted service, regardless of whether the movement was coerced or performed by other involuntary means. OPM will add a 5 CFR 302.603(d) to read: (d) An individual may appeal under this part on the basis that (A) a facially voluntary move was coerced or otherwise involuntary for purposes of this section or (B) a facially voluntary move to a new position would require the individual to relinquish their competitive status or any civil service protections and was coerced or was otherwise involuntary.

Another comment from an employment lawyers association supportive of the rule suggested that OPM revise the rule to bring section 302.603 appeals under 5 U.S.C. 7701, so that successful appellants are not burdened with attorney's fees or the costs of litigation. Comment 40. OPM appreciates this suggestion but will not add regulatory language to this effect as it goes beyond the scope contemplated in the proposed rule. If experience with such appeals indicates further changes might be warranted, OPM can pursue regulatory options then.

Comment 920, an individual, was supportive of the rule but expressed concern that it would not be sufficiently protective in cases of ''wholesale reclassification.'' The comment questioned whether individual appeals would be effective if an agency

[390] *See* 5 CFR 1201.3 (Appellate Jurisdiction); 1201.4(r) (Definitions, MSPB Practices and Procedures), 1205 (Powers and functions of the Merit Systems Protection Board); *Ramey* v. *U.S. Postal Serv.,* 70 M.S.P.R. 463, 467 (1996) (''An [MSPB] administrative judge's adjudication of an action not only embraces the provisions of law giving the Board jurisdiction over the action, but includes review of any other relevant provision of law, regulation or negotiated procedures as circumstances warrant.''); *Adakai* v. *Dep't of Interior,* 20 M.S.P.R. 196, 201 (1984) (''There is no question that an agency is obligated to conform to procedures and regulations it adopts, and the Board is required to enforce such procedures.'').

attempted to involuntarily move a majority of its workforce all at once while purportedly stripping them of civil service status and protections. The President and OPM have the authority to reschedule positions but, as explained in this rule, there are ways to do so without infringing on this authority that are protective of the civil service and merit system principles as envisioned by Congress. Further, to the extent ''wholesale reclassification'' is unlawful, there exist other avenues to challenge such a move besides the processes in this final rule.[391]

A few commenters supportive of the rule queried what happens when, by deliberative or inadvertent act, the MSPB is without a quorum. *See* Comments 44, 2442, 3687. As explained above, the appeals described in 5 CFR 302.603 should be treated like all other appeals to the MSPB. Therefore, OPM does not believe that it should revise this final rule to account for the possibility of a lack of a MSPB quorum. Even without a quorum, OPM notes, administrative judges (AJs) can issue initial decisions. If neither party to a case files a petition for review, the AJ's initial decision becomes the final decision of the Board. Appellants could then choose to exercise their judicial review rights.[392] If either party files a petition for review to the MSPB, a Board decision could not be issued until a quorum of at least two Board members is restored but the Clerk of the Board can still exercise delegated authority to ''grant a withdrawal of a petition for review when requested by a petitioner.'' [393]

Finally, Comment 2816, from a former federal official, again suggests that OPM clarify that the changes proposed within 5 CFR 302.603 include SES Positions. OPM will not adopt it for the same reasons it did not adopt a similar suggestion regarding sections 302.601 and 302.602.

V. Regulatory Analysis and Related Comments

A. Statement of Need

On December 12, 2022, OPM received a petition from the National Treasury Employees Union (NTEU), which represents Federal workers in 34 agencies and departments,[394] to amend OPM regulations in a manner that would ensure compliance with civil service protections and merit system principles for competitive service positions moved to the excepted service.[395] NTEU contends in its petition that Congress has established protections for ''employees'' under chapter 75 in the competitive service and these protections create a constitutionally protected property interest in continued Federal employment. NTEU argued that no President can take away these rights, once accrued, without due process.

On May 23, 2023, the Federal Workers Alliance, a coalition of 13 labor unions representing over 550,000 Federal and postal workers, wrote OPM in support of the rulemaking changes proposed by NTEU. On May 26, 2023, the American Federation of Government Employees, AFL–CIO, the largest union of Federal employees representing more than 750,000 Federal and District of Columbia workers, did the same. For the reasons described in the proposed rule and this final rule, OPM determined it was prudent to consider the points raised.

By operation of law, certain Federal employees accrue a property interest in their continued employment and are entitled to adverse action rights under chapter 75 before they may be removed from career positions. Agencies are statutorily obligated to extend the specific protections codified at chapter 75 to eligible employees as defined in 5 U.S.C. 7511. OPM notes that this section precludes noncareer political appointees and other statutorily specified categories of employees from accruing these procedural rights, but OPM does not interpret chapter 75 as allowing the President, OPM, or an agency to waive the statutory rights that covered employees have accrued. These final rules are to clarify and reinforce that point.

The now-revoked Executive Order 13957 introduced a new conception of the phrase ''confidential, policy-determining, policy-making or policy-advocating character,'' as used in the adverse action exception in 5 U.S.C. 7511(b)(2), and sought to employ that conception to expand the category of employees excluded from adverse action procedural rights.[396] This phrase is a term of art with a long history. It has been broadly understood, based upon context, history, and practice, to mean political appointees. Using that language as the former President used it in Executive Order 13957—to remove rights from career civil servants—departed from this established understanding. OPM has determined that a regulation interpreting and clarifying this provision, pursuant to OPM's statutory authority to prescribe regulations to carry out the purpose of subchapter II of chapter 75, is warranted.[397]

The CSRA and merit system principles have informed OPM's regulations regarding the competitive and excepted services, and employee movement between them. One of those principles is that the creation of new positions in—and movement of existing positions into—the excepted service is meant to be an exception to the normal procedure for filling competitive service positions and maintaining the positions in that service thereafter. Accordingly, OPM has maintained for decades several safeguards and transparency measures associated with any such movements. These safeguards and measures may include agency reporting to OPM,[398] such as where positions are placed temporarily in the excepted service for the purpose of a trial period leading to a permanent appointment in the

[391] For example, in *Blalock* v. *Dep't of Agric.,* 28 M.S.P.R. 17, 20 (1985), *aff'd sub nom., Huber* v. *MSPB,* 793 F.2d 284 (Fed. Cir. 1986) the MSPB rejected an agency's claim that it had removed employees from their Schedule A positions by RIF procedures and appointed them to new Schedule C positions. It found that this RIF was improper, there was no reclassification warranting a RIF, and the redesignation was not a ''reorganization.'' Therefore, the agency could not have conducted a RIF and the agency's abolishment of their Schedule A positions constituted individual adverse actions against the incumbents. The MSPB directed the agency to reinstate the employees whom it had separated without adhering to applicable adverse action procedures.

[392] *See* 5 U.S.C. 7703.

[393] *See* U.S. Merit Sys. Prot. Bd., ''Frequently Asked Questions about the Lack of a Quorum Period and Restoration of the Full Board, Updated: February 27, 2023,'' *https://www.mspb.gov/New_FAQ_Lack_of_Quorum_Period_and_Restoration_of_the_full_board.pdf.*

[394] *See* Nat'l Treasury Employees Union, ''Our Agencies,'' *https://www.nteu.org/who-we-are/our-agencies.*

[395] *See* Nat'l Treasury Employees Union, Petition for Regulations to Ensure Compliance with Civil Service Protections and Merit System Principles for Excepted Service Positions, (Dec. 12. 2022), *https://www.nteu.org/~/media/Files/nteu/docs/public/opm/nteu-petition.pdf?la=en.*

[396] 85 FR 67361–62.

[397] 5 U.S.C. 7514.

[398] *See* 5 CFR 5.1 (''The Director, Office of Personnel Management, shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in title 5, United States Code, the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office.''); 5 CFR 5.4 (''When required by the Office, the Merit Systems Protection Board, or the Special Counsel of the Merit Systems Protection Board, or by authorized representatives of these bodies, agencies shall make available to them, or to their authorized representatives, employees to testify in regard to matters inquired of under the civil service laws, rules, and regulations, and records pertinent to these matters''); 5 CFR 10.2 (OPM authority to set up accountability systems); 5 CFR 10.3 (OPM authority to review agency personnel management programs and practices).

competitive service;[399] OPM authorization to create certain new positions in—or move certain existing positions into—the excepted service;[400] publication in the **Federal Register**;[401] and an acknowledgment of the consent of affected employees when an existing employee obtains a different position in another service or schedule.[402] The now-revoked directions to agencies contained in Executive Order 13957, for implementing the now-defunct Schedule F, called into question the continued vitality of these longstanding principles with respect to employees who had accrued adverse action rights. We seek to confirm these principles through this final rule.

OPM received numerous comments relating to the need for this rule. Most of the comments were supportive.

Comments Regarding the Need for This Final Rule

Several comments agreed with OPM that this rule would protect the nonpartisan career civil service and merit system principles. Comment 684, an individual, contended that ''[t]he rule will help preserve the autonomy of the civil service, allowing its professionals to complete their work without arbitrary fear or favor of current elected office holders and making it possible for the government of the United States to serve its people consistently and evenhandedly across administrations.'' *See also* Comments 9 (arguing that the government ''cannot properly function if civil servants are forced to curry political favor rather than carry out the work laid out for them by law,''), 1310 (explaining that the rule will help preserve the many benefits of the civil service), 3687 (same). Comment 1691, an individual, contended that ''[b]y ensuring that federal employees retain their civil service protections and status during transitions between the competitive and excepted services, the rule enhances job security and employee rights.'' Also, the rule ''clarifies the definitions of roles exempt from these protections, bringing greater transparency and adherence to legislative intent. Importantly, the introduction of procedural safeguards and the right to appeal to the Merit Systems Protection Board empowers employees, fostering a fairer and more accountable federal workforce.'' Commenter concluded that ''[t]his rule change is not just a regulatory update; it's a reaffirmation of our commitment to a merit-based, transparent, and equitable civil service.'' *See also* Comment 949 (an individual, expressing concern that ambiguities in the civil service statutes, addressed by this rule, could allow for mass firings based on political favor).

Regarding the rule's protection of merit system principles, an individual wrote, ''[i]n a time when preserving the merit-based and non-partisan principles of the federal workforce is of paramount importance, this proposed rule stands as a beacon of clarity and fairness.'' Comment 3800. It is ''essential to safeguard the rights and protections of federal employees while also maintaining flexibility for necessary personnel movements. It is my firm belief that implementing this rule will promote good administration, uphold merit system principles, and provide federal employees with the confidence that their careers and rights are protected.'' *Id.* Commenter concluded that the rule ''ensures that decisions related to the movement of positions are made judiciously, with adherence to the rule of law and congressional intent.''

Some commenters opposed to this rule argued that civil service procedures cause hiring, performance management, and misconduct challenges and this rule would only exacerbate those challenges and hurt accountability. Comment 4097 stated, ''Chapters 43 and 75 have proven to be longstanding and entrenched barriers to effectively addressing performance and conduct issues. . . . The reality is that they give federal employees 'a de facto form of life tenure, akin to that of Article III judges . . . What's more, federal employees know it—and they take full-throated advantage of it.' ''[403]

As noted in prior sections, OPM does not agree with commenter's characterizations of the futility of chapters 43 and 75 or that career civil servants are broadly ''taking advantage'' of those protections to some inappropriate end. Under commenter's theory, Federal employment should be at-will. As discussed above and in the following Section V.(B), the civil service has sufficient and longstanding tools to deal with actual misconduct or unacceptable performance. If a Federal employee refuses to implement lawful direction from leadership, there are appropriate vehicles for agencies to respond through discipline and, ultimately, removal under chapter 75 or, alternatively, if performance related, chapter 43 and other authorities. More importantly, if commenter believes that the current performance management system, as reflected in chapters 43 and 75, is inadequate, then the appropriate solution is to try to convince Congress of that proposition and suggest corresponding changes to the statutory scheme. In contrast, distorting existing provisions to have a meaning untethered to long-settled understandings and removing adverse action rights from thousands of employees whom Congress intended to protect is not an appropriate means of addressing the putative problem with the statutory scheme.

Commenter 4097 also argued that this rule, and its removal restrictions, are unnecessary to protect merit. Commenter wrote ''the merit system operated for eight decades with federal employees generally unable to appeal dismissals; the Lloyd-La Follette Act expressly provided that no trial or hearing would be required to effectuate removals. Many state governments currently operate at will. Nonpartisan, merit-based civil services can, do, and did operate effectively at will. Schedule F's elimination of those restrictions is fully consistent with an effective merit service.'' Commenter then added ''[n]onetheless, OPM's confusion on these points is understandable'' because ''federal unions prompted this rulemaking'' and ''have long used the specter of the spoils system to oppose civil service reforms.''

While a labor union petitioned OPM to promulgate regulations regarding civil service protections, OPM is fully capable of analyzing these issues on its own, and is promulgating measured amendments, using its own expertise, and based squarely within statutory and regulatory authority, legal precedent, and history, to reinforce and clarify these longstanding civil service protections and merit system principles.

Also, as noted above, other commenters (*see* Comment 2822) take issue with Comment 4097's interpretation of history and law in support of Schedule F. Since the Pendleton Act, Congress has barred terminations based on political grounds to preserve merit-system principles. A few years later President McKinley required just cause and written charges prior to removal—requirements which were codified in the Lloyd La Follette Act to establish that covered Federal employees were to be both hired and removed based on merit. Comment 2816, a former federal official, cited studies showing the negative impacts of at-will employment on states and several other state employees commented how these reforms have been harmful. OPM therefore does not

[399] *See, e.g.,* 5 CFR part 362.

[400] 5 CFR 6.1.

[401] *Id.*

[402] 5 CFR 302.102(b).

[403] Citing *Feds for Med. Freedom* v. *Biden,* 63 F. 4th 366 (5th Cir. 2023) (J. Ho concurrence).

agree that the elimination of civil service protections is ''fully consistent with an effective merit service.''

Several individuals supportive of the rule argued that it would effectively protect civil servants from politicization. Comment 11 wrote that the ''proposed rule is a necessary and timely response'' to efforts that could ''undermine the civil service system and politicize it for partisan purposes.'' Comment 371 stated that the rulemaking would protect the civil service from ''employment decisions based on anything but job performance and qualifications.'' *See also* Comments 704 (arguing that the rule ''acts as a necessary buffer against the potential upheaval and erosion of our institutions, and would help to ensure stability of essential government agencies.''), 711, 3751. A professor contended the rule ''provides appropriate protection against these negative effects'' of politicization. Comment 1971.

A coalition of national and local unions, including the union that submitted the petition for rulemaking referenced above, expressed their support for this rule. They stated, ''OPM would make important clarifications regarding the rights of federal employees whose positions might be shifted from the competitive service to the excepted service or from one excepted service schedule to another. We urge OPM to finalize the rule promptly.'' Comment 41.

Commenters opposed to this rule argued that the civil service needs performance management, and this rule will have a negative effect on the stated intent, resulting in government inefficiency and waste. Comment 2866, a legal organization, argued that ''American taxpayers should not be forced to fund lazy, incompetent, or insubordinate federal employees who fail to complete their work, seek to undermine the democratic process by failing to carry out the President's agenda, or both.'' Comment 4097 argued ''OPM's proposed rule would instead make dismissing employees in senior policy-influencing positions for poor performance or intransigence considerably more difficult. This would 'seal up' poor performers in the bureaucracy. . . . [C]hapter 43 and 75 procedures are insufficient to combat these 'levers of resistance.' ''

For the reasons stated above, OPM disagrees with commenters' views as to the sufficiency of performance management tools. These tools are also addressed further in Section V.(B). Moreover, this rule tracks the status quo, so it would not make performance management more difficult. The amendments to parts 210, 212, 432, and 752 clarify longstanding civil service law and agency procedures. Nor do commenters explain how the changes to part 302 and resulting procedures would impact performance management. They are instead directed at potential movements of positions or employees from the competitive to the excepted service or between schedules in the excepted service, and added for the purposes of good administration, to enhance transparency, and to provide employees with a right of appeal to the MSPB to protect against potential abuses. In essence, they provide an avenue of relief to an employee in the event the employing agency fails to inform the employee of the impact of the move on the employee's rights or the employee is concerned that the move is an attempt to strip the employee of civil service status and protections.

Further, actual resistance to supervisory direction would generally be expected to produce unacceptable performance that could be demonstrated on the record under either chapters 43 or 75.

Comment 4097, from an advocacy nonprofit organization, also argued that this rule would increase politicization. *See also* Comment 3156 (the same commenter, arguing that ''political appointees rationally respond to intransigent career staff by cutting them out of the policy process.''). Comment 4097 argued that this rule would ''discourage vetting prospective policies with career staff'' because ''the practical consequence of insulating career staff from accountability is political appointees cut them out of the loop to avoid leaks.'' Commenter added ''[i]f career officials feared leaking draft policies could end their careers, political appointees would have more freedom to seek their input.'' As an example, commenter states, ''OPM career staff were entirely cut out of the development of Schedule F. The White House realized sharing policy proposals with OPM career staff was tantamount to sending them to federal unions and other reform opponents.''

Generations of civil servants have worked with administrations and political appointees of both parties to advance their policies. For instance, as explained above, Comments 2822, a legal nonprofit organization, and 3038, a former civil servant, observe that the Reagan, Bush, and Trump Administrations succeeded in advancing many of their policy efforts even if, as Commenter 4097 contends, federal employees lean liberal.

Commenter adds ''[i]f there were no restrictions on removing policy-influencing career staff political appointees could simply dismiss employees they knew *or strongly suspected* leaked deliberative policy documents.'' (emphasis added). This comment suggests that, under its preferred scheme, suspicion of leaking, without proof, would be a basis for removal. OPM believes such an environment would chill employees broadly and interfere with their willingness to present objective analyses and frank views in carrying out their duties, thus diminishing the reasoned consideration of policy options. Moreover, by instilling fear of reprisal and loss of employment, it would damage retention and recruitment efforts, as explored in the following section, thus further fracturing the successful functioning of government and our democracy.

Individuals opposed to this rule also added that it is a means for the ''bureaucracy'' to ''protect itself from any disruption or risk to its continued employment.'' Comment 20, *see also* Comment 3130. Comment 45, a former political appointee, stated this rule ''is a truly clear demonstration of bureaucrats in full self-protection mode, operating as an independent, unaccountable, deep state fourth branch of government, outside the United States Constitution'' and its ''goal is simply to expand more protections to as many of the current administrative state's lackeys as possible.'' Comment 31 adds ''[t]here is probably no private business that allows its 'employees' to first make up & approve their own policy, salary, benefits, performance etc. and then to 'manage' and 'interpret' their duties to the general public.''

OPM is headed by a presidentially appointed and Senate-confirmed Director, who is accountable to the current President. It has both career staff and political appointees. Accordingly, this rule is not the work product of unaccountable bureaucrats. OPM also does not, through this rule or any rule, ''make up'' the ''bureaucracy's'' adverse action rights—those rights have been granted to incumbents of various positions in the civil service by Congress after vigorous and careful debate. In that way, and many other ways, the civil service is also unlike employees in private businesses in the same way that government agencies, though mindful of sound business practices where they appropriately apply, are not and cannot be identical to a business. Congress decided, long ago, to create a civil service based upon merit system principles (and has added,

over time, various protections for career employees) to protect against politicization, build competencies, enhance the ability to transmit knowledge during transitions, and generally advance the public interest. OPM is tasked by statute with the authority to execute, administer, and enforce all civil service rules and regulations as well as the laws governing the civil service.[404] All of its rules give effect to Congress' intentions under title 5, including civil service protections and merit system principles. This rule is a standard exercise of the delegated authority Congress provided to OPM.

Several commenters expressed support for the rule, in part, because it is being promulgated through notice and comment in accordance with the APA. This is contrasted with Executive Order 13957 establishing Schedule F, which a professor argued ''was developed in secret, with no consultation of public management researchers or experts who could provide evidence to inform its adoption.'' Comment 50. It ''sought no consultation of researchers or experts in public management, so the Executive Order is free of any peer-reviewed evidence to support its adoption.'' Comment 2594 (an individual), *see also* Comment 3213 (an individual). The rule, commenters argued, ''is thoroughly researched, and invites public comment,'' demonstrating a high degree of public engagement. Comments 50, *see also* Comments 1677 (an individual), 1780 (same). OPM takes no position as to the executive processes leading to Executive Order 13957 but does acknowledge this rulemaking process resulted from OPM's own research, informed by 60 days of public comment, and now reflects the review and consideration of the thousands of comments received. This final rule, moreover, furthers the objectives of Executive Order 14003. In the findings underpinning that Executive order, President Biden observed that the foundations of the civil service and its merit system principles were essential to the Pendleton Act's repudiation of the spoils system.[405] The President further noted that revoking Schedule F was necessary ''to enhance the efficiency of the civil service and to promote good administration and systematic application of merit system principles.''[406] The amendments in this final rule support the civil service and merit system principles for career Federal employees.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation. OPM has determined this is not a viable option. The risks of not issuing this final rulemaking are many and include both fiscal as well as non-fiscal consequences. As noted in the preamble, this rulemaking is important for preserving the integrity of the Federal career workforce as an independent entity selected in a manner that is free of political influence, and free of personal loyalties to political leaders, consistent with merit system principles. Promulgating measures that help ensure that career employees maintain any status and procedural rights they have accrued under law is a means of preserving the integrity of the Federal career workforce. It preserves and promotes employee morale and settled expectations, minimizes workforce disruptions by preventing potential losses of seasoned or experienced personnel, and contributes to a positive impact on agencies' ability to meet mission requirements. Finally, and importantly, these changes will promote compliance with statutory enactments.

The option of not regulating in this area carries with it fiscal costs as well. These costs include that of recruiting and replacing staff who separate before or after their positions are moved to the excepted service in a manner that purportedly strips them of their civil service protections, as well as the loss of or delay in services, benefits, and entitlements owed to many of our nation's citizens. Many of the citizens receiving these entitlements depend on them to meet their basic living expenses.

Many commenters discussing regulatory alternatives focused on the potential impact of this final rule on performance management and the ability to recruit, hire, and retain talent.

Comments Regarding Performance Management

Commenters opposed to the rule commented that career civil servants have too many poor performance issues and therefore fewer, not more, protections are needed to allow for their removal. *See, e.g.,* Comment 1802 (an advocacy organization). Comment 90, a form comment, points to a 2020 Federal Employee Viewpoint Survey (FEVS) to say, generally, that ''the existing system . . . already faces challenges in addressing poor performance.'' Comment 45, a former political appointee in favor in Schedule F, similarly cited the 2020 FEVS results[407] showing that 42% of employees agreed with the question: ''In my work unit, steps are taken to deal with a poor performer who cannot or will not improve.'' Commenter then cited a different question in that FEVS which asked, ''In my organization, *senior leaders* generate high levels of motivation and commitment in the workforce.'' (emphasis added). Commenter argued that ''[a]cross five years from 2016 to 2020, we see worryingly low rates of workers responding in the affirmative, with only 51% of workers doing so in 2020 and it being lower in all previous years surveyed.'' Commenter concluded that this ''not only signals a demoralizing effect on those workers who do strive for efficiency and satisfactory performance but is also a cause of poor performance itself.''

OPM disagrees with commenter's analysis and conclusions. ''Senior leaders'' in the FEVS are defined as the heads of departments/agencies and their immediate leadership team responsible for directing the policies and priorities of the department/agency.[408] These can be career employees but are most often political appointees. It is unclear how the motivation and commitment question relating to *senior leaders* ties to performance management, as commenter concluded, especially since immediate supervisors—the personnel most likely to handle performance management—scored higher than senior leaders in relevant metrics in that same 2020 FEVS. For instance, 78% of respondents said their immediate supervisor was doing a ''good job'' overall and 87% said their supervisor treated them with respect. Regarding their close colleagues, 82% of respondents said their work unit had the ''job-relevant knowledge and skills necessary to accomplish organizational goals'' and 84% said the people they worked with ''cooperate to get the job done.''

Comment 4097 and others also argued that FEVS data shows ''[a]gencies fail to address poor performers effectively,''

[404] *See* 5 U.S.C. 1103(a)(5)(A).

[405] E.O 14003, sec. 2.

[406] *Id.*

[407] U.S. Off. of Pers. Mgmt., 2020 Federal Employee Viewpoint Survey, *https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf.*

[408] U.S. Off. of Pers. Mgmt., ''Federal Employee Viewpoint Survey,'' *https://www.opm.gov/fevs/, see also* U.S. Off. of Pers. Mgmt., ''2022 Federal Employee Viewpoint Survey Results: Technical Report,'' (defining ''Senior Leader''), *https://www.opm.gov/fevs/reports/technical-reports/technical-report/technical-report/2022/2022-technical-report.pdf.*

citing 2021–2023 FEVS data and the same question as above, this time showing approximately 40% of respondents agreeing that ''their agency had taken steps to deal with a poor performer who cannot or will not improve.'' *See also* Comments 1811, 3190, 3892. A few also argued (or cited surveys that they allege show) that public trust in government is low. *See* Comments 1811, 1958. Comment 4097 adds that ''[m]isconduct—including policy resistance—occurs at unacceptably high levels. The federal hiring process is also widely recognized as broken. The federal workforce needs reform.''

As explained above, under the law, a mere difference of opinion with leadership does not qualify as misconduct or unacceptable performance or otherwise implicate the efficiency of the service in a manner that would warrant an adverse action. The FEVS data that commenters argued shows there are too many poor performers in government does not, in fact, show a numerical prevalence of poor performers. There is an important difference between (a) data showing a belief by respondents that poor performers exist and the agency has not adequately addressed their performance and (b) the existence of too many poor performers. For example, if a work unit contains one employee with performance issues out of a 100, then 99 might have one example of a poor performer who has not yet been removed or demoted, but that does not necessarily mean the work unit has a prevalence of poor performers. Also, unless the respondents are in the supervisory chain of an employee with performance issues, they would have little way of knowing what ''steps are being taken to deal with a poor performer who cannot or will not improve,'' which is the FEVS question repeatedly cited in these comments. For privacy reasons, supervisors would not normally share information about a particular employee's performance or behavior with other employees, nor would the supervisor be likely to disclose what actions had been taken in response. Commenters have not shown that there are significant numbers of poor performers in government. OPM notes that a 2016 GAO report showed ''99 percent of all permanent, non-SES employees received a rating at or above 'fully successful' in calendar year 2013. Of these, approximately 61 percent were rated as either 'outstanding' or 'exceeds fully successful.' '' In any event, even if it could be demonstrated that there was a high proportion of unacceptable performance or misconduct among employees, OPM is not free to remove adverse action rights from large swathes of career civil servants. That is an action that may be taken only by congressional enactment.

A few individuals opposed to the rule argued that career civil servants are inefficient and/or provide poor service to the American public. *See* Comments 18, 29. A nonprofit organization claimed the civil service was ineffective and blamed it on the lack of competition ''that makes the private sector efficient.'' Comment 1811. Commenter argued that once an employee accrues worker protections, ''they have little incentive to improve their work.'' And should an agency allege poor performance, ''the federal worker has ample time to improve their performance and challenge the claims of the agency.'' Comment 4097 concurred with this notion, arguing that ''[i]n addition to sheltering poor performers, removal restrictions directly make federal employees less productive. Economists consistently find that giving employees removal protections reduces their productivity.'' OPM notes that commenter cited Ichino and Riphahn (2005); Martins (2009); Riphahn (2004); Scoppa (2010); Scoppa and Vuri (2014) for this proposition. These studies all concern European workers with European-style labor protections. Four exclusively consider private industry and three are further restricted to the impact of a single statute on Italian labor markets. None are about the American civil service. Also, these papers do not purport to and could not show that removing American civil service protections would make career civil servants more efficient. A loss of protections, instead, would likely lead to a loss of motivation to invest in and hone their skills.

With respect to the claim that, should an agency allege poor performance, ''the federal worker has ample time to improve their performance and challenge the claims of the agency,'' we note that many supervisors can and do use chapter 75, rather than chapter 43, to suspend, demote, or remove an employee with a history of unacceptable performance. Although it is true that the statutory scheme provides for a notice period and an opportunity to respond, in a chapter 75 adverse action proceeding, the supervisor need only disclose the grounds for proposing the action (which can be unacceptable performance), provide evidence to support the charge, and demonstrate that the action proposed will promote the efficiency of the service. There is no requirement to let the employee try to improve their performance.

One form comment argued, without evidence, that career civil servants do not deserve protections because they are captured by industry. *See* Comment 14, 26. The comment contended that, once a career federal employee has lost independence of decision making to ''the patronage of a corporation,'' the employee is no longer applying their merit to their employment function, thus their ''merit score would be rendered 'zero.' '' The comment argued the employee would then be subject to employment termination. Commenter provided no evidence for this assertion. Whether some civil servants are influenced improperly by outside corporations in the way they conduct their official duties is outside the scope of this rule. But OPM notes that such demonstrable influence, to the extent it exists, could be a violation of federal ethics laws and, in any event, could readily be addressed by existing performance management mechanisms. We reiterate, as well, that whether or not civil servants ''deserve'' adverse action protections, Congress has provided for them by law, and OPM is not free to eliminate the protections merely because it would allow agencies to more easily remove employees.

Conversely, several commenters in support of the rule agreed with OPM and argued that the civil service already has sufficient tools to deal with performance issues. A public service nonprofit organization commented that ''[c]ritics often claim that it is impossible to fire poor performing federal employees, but data shows that over 10,000 federal employees are terminated or removed due to discipline or performance issues each year (a trend that goes back to at least 2005).'' [409] Comment 44. It continued, ''[d]espite many misconceptions about the prevalence of poor performers in government, there are reasonable approaches to ensuring managers are trained in using disciplinary and removal procedures and have the necessary tools to manage their workforce, including a streamlined adjudicatory and appeals process.'' Comment 1228, an individual, argued that ''[t]hough some may argue that the current system is incapable of removing bad employees, a.) there is little evidence that such incapacity exists, it seems like there are not only good agencies doing good work but also the need to fully staff those same offices,

[409] Citing statistics on federal employees drawn from Office of Personnel Management FedScope data on the federal workforce.

and b.) the benefits of removing low performing employees more easily is drastically outweighed by the risk of an administration creating massively unpredictable alterations to government functioning based on the whims of an incoming administration.'' Comment 4016, an individual who worked for the Federal Government for 30 years, added that ''[p]oliticization only leads to incompetence in the federal workforce. It's not easy but a manager can remove poor performers. It can be done as I've witnessed and have done many times.'' OPM agrees that the civil service contains tools to address misconduct or performance issues.

Comments Regarding the Effect of the Rule on the Recruitment, Hiring, and Retention of Talent

In addition to comments about performance management, OPM received many comments about the rule's impact on recruitment, hiring, and retention efforts. This rulemaking is expected to create an incentive for such efforts. It will enhance agencies' ability to fulfill important merit system principles, that recruitment should be from qualified individuals in an endeavor to achieve a workforce from all segments of society, and that selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.[410] It also promotes compliance with the congressional policy to confer a preference on eligible veterans or family members entitled to derived preference. In a more pragmatic sense, diminishing or eliminating civil service protections from entire categories of career employees would destabilize the civil service—potentially repeatedly, each time there is a change in administration—and eliminate a competitive advantage Federal agencies have long enjoyed when competing with other sectors for needed talent: stable, fair, merit-based employment.

Failure to protect adverse action rights and other civil service protections risks a loss of experienced staff, leading to a disruption, if not interruption, of agency mission operations. This is an especially important consideration given the many challenges facing our nation that require a response by the Executive branch. These challenges include threats to our nation's economy writ large, as well as problems impacting small businesses and emerging markets and technologies. There are challenges associated with public health, climate (including impacts on both private property and businesses impacted by droughts, floods, wildfires, etc.), data security, and pressing international and geopolitical matters, among others.

Many commenters were concerned that not issuing this rule would allow politicization (or even the threat of politicization) to increase in the career civil service, which would hurt government recruitment, hiring, and retention efforts.

OPM received several comments concerning politicization that noted, as a baseline concept, that the civil service, unlike much employment in the private sector, is spurred by mission-driven work. Comment 3022 contended ''[o]pponents of the Civil Service often voice two objections: 'Government should be run like a business' and 'The boss has the right to hire and fire at will.' '' Commenter argued that government is not a business because the purpose of a business is to turn a profit whereas the purpose of government, as ''stated in the first paragraph of the Constitution'' is to ''form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.''

This desire for mission-driven work helps explain why politicization in the civil service impacts job satisfaction and morale, argued commenters. Comment 2660, a science advocacy nonprofit organization, cited evidence suggesting that when federal scientists perceive that their workplaces are free from political interference, there are positive knock-on effects, such as making that federal agency more attractive when recruiting other federal scientists and increasing retention. Comment 2816, a former federal official, showed that ''[e]mployees in highly politicized agencies evince 'less general satisfaction in the workplace and federal workers in more politicized agencies are less likely to believe their agency compares favorably with other organizations and to recommend their job as a good place to work.' '' [411]

Other commenters in support of this rule argued that it would help recruitment. Comment 2059, an individual, expressed that ''[a]s someone considering joining the civil service, this is the type of clarification and improvement I would need to see before moving forward.'' *See also* Comments 84 (an individual, commenting about the difficulty to recruit and retain competent and dedicated employees to the civil service if they knew that they might lose their jobs at any moment for political reasons), 3038 (a former civil servant arguing that increased politicization diminishes the attraction of government jobs ''to excellent workers with the temperament to be truly dedicated public officials''). Comment 2193, a women's health nonprofit organization, argued that ''[m]erit system protections are important for attracting highly qualified individuals to fill open positions and retaining employees who have developed valuable expertise in their topic areas.'' Comment 2004, an individual, added that ''[e]roding [civil service] protections would also damage the federal government's ability to attract good people, as job security and a sense of purpose are two attractive features of many federal jobs which attract talent that could easily make more money working somewhere else.'' Commenter continues, ''[i]f these employees have to worry that every election could mean the end of their federal careers, we'll have a tough time attracting and retaining good people, meaning we'll have severely damaged the government's ability to effectively serve the country and implement the policies and programs of any President or Congress.'' As examples of politicization's potential impact on government recruitment, Comment 1904, a national parks advocacy organization, pointed to the National Park Service, saying ''[t]he NPS is already struggling with recruiting and retaining employees and the risk of political retribution or misguided politically-driven decisions would only create further challenges.'' Comment 857, an individual, gives, as an example, the Environmental Protection Agency, saying ''[t]he EPA and other agencies will not be able to attract and retain the best professional staff if they are subject to at will firing. U.S. citizens will not be as safe as a result.''

Comment 407, an individual, detailed how this rule directly impacts OPM's recruitment and human capital management goals. The rule would ''help to maintain the progress of the past two decades on strategic human capital management.'' Since 2001, commenter noted, GAO has placed strategic human capital on its biennial high-risk list. In the past two decades, ''OPM has reported addressing government-wide skill gaps for certain positions, such as auditors and

[410] *See* 5 U.S.C. 2301(b)(1).

[411] Citing David E. Lewis, ''Politicization and Performance: The Larger Pattern, in The Politics of Presidential Appointments: Political Control and Bureaucratic Performance,'' pp. 172, 191 (2008).

economists, while gaps persist for other specialties like acquisition or cybersecurity.'' Commenter continued ''[t]o ensure continued progress, it is imperative that the civil service remain an employer that is professional, apolitical, merit-based, and stable.'' Conversely, ''inaction or weakened protections for career civil servants may reverse the progress of the last two decades with strategic human capital management and resolving skills gaps.'' As an example, commenter stated ''auditors and economists may not apply for or remain in federal positions in the face of political interference or retaliation that slants their analysis and work to meet political ends.'' The prospect of instability with each change in administration would ''undermine the government's ability to recruit and retain such key positions.'' Commenter concluded, ''it would be difficult to keep highly sought and potentially high paid experts in federal employment if they do not think that they will have a job in another 4 or 8 years when the administration changes.''

OPM notes that agencies have specifically raised concerns around attrition rates for scientific and technical positions as well as an inability to hire quickly enough to meet demands. Regarding these types of positions, Comments 3687, a science advocacy organization, and 3973, an anti-poverty nonprofit organization, added that ''[i]ncreased politicization of roles also makes public service less attractive and can result in higher turnover and fewer incentives to develop expertise. Managing federal science and technology programs requires a steady cadre of subject area experts, including working with program partners and grantees and balancing competing operational, legal, and political needs. Federal agencies already face challenges hiring and retaining employees in positions that require highly-specialized technical expertise, and failure to insulate the civil service from politicization introduces additional instability and exacerbates this issue.'' Similarly, Comment 2660, another science advocacy organization, argued that ''[f]ailing to ensure that federal scientists' jobs are based on merit and other civil service protections is more likely to push federal scientists to consider leaving federal agencies for workplaces that better fit the demands and norms of their scientific profession.'' Comment 3409, a former civil servant, contended that ''researchers and evaluators who wish to conduct unbiased analyses and present an honest representation of results may avoid civil service positions under such conditions. The quality of the federal workforce would decline as a result.'' Comment 2001 added ''[a]s a trained engineer with extensive software, data analysis, and data science experience, I have long considered working for the federal government a dream of mine that I would love to pursue should the opportunity arise. The reason for that is that the United States' strong tradition of an apolitical, well-protected civil service that is hired and rewarded based on merit, rather than political connections, makes it something that I couldn't help but aspire to. This tradition must be protected.''

One commenter opposed to the rule argued it will hurt the ability to hire, but that seems to be based largely on their concerns about the time and resources necessary to hire into the competitive service. Comment 4097 stated ''the competitive hiring process is broken. There is widespread consensus that the federal hiring process needs reform. It takes agencies an average of about 100 days—more than three months—to fill vacant positions in the competitive service.'' Commenter argued that private employers do not have to use these procedures and can hire qualified applicants much more expeditiously. The Comment fails to acknowledge, however, that the rules governing the competitive hiring process were established, largely, by Congress. Congress' objective was to filter a merit system principle—that selection and advancement of candidates be determined on the basis of relative levels of knowledge, skills, and abilities—through rules enacted to confer a defined advantage, in the process of rating and selection, on individuals eligible for veterans' preference.[412]

Comment 4097 concluded that OPM's recruitment concerns regarding efforts to strip career employees of civil service protections are misplaced. Commenter argued that, ''[Executive Order 13957] prohibited patronage and stipulated that Schedule F positions would last beyond a presidential term. . . . Contrary to OPM's concerns, Schedule F employees would keep their jobs so long as they performed well and faithfully advanced the President's agenda.'' As explained previously, however, if career civil servants become at-will employees, thereby subjecting them to removal without any cause, we do not understand the basis for commenter's view that such employees ''would keep their jobs.'' They may keep their jobs—but they also would be removable at will for any number of reasons.

Comment 4097 stated that ''OPM's recruitment concerns have not materialized in states with at-will workforces.'' Commenter again cited snippets of a report concluding that at-will employment ''makes the HR function more efficient.'' Whether states can more efficiently fill these positions proves nothing about the applicant pool or the quality of the candidates ultimately selected. *See* Comment 2816 (regarding the effect on state civil servants of at-will laws). At any rate, as Commenter 4097 concedes, these state systems operate under statutory provisions that differ meaningfully from those of title 5.

Comments Outside the Scope of This Rulemaking and/or OPM's Regulatory Authority

Commenters also suggested a variety of other changes. These included requests to curb burrowing in, limit large scale movements of employees (including capping the number of Schedule C appointments), scrutinize the appointments and functions of the SES, review hiring preferences and agencies' uses of preferences, add whistleblower protections, modify assignment rights applicable to RIF, clarify how agencies should better use probationary periods, reform chapters 43 and 75, streamline performance and accountability processes, and consider whether policies promoted by the rule could be included in collective bargaining agreements. *See* Comments 6, 33, 38, 44, 2442, 2849, 3049, 3227, 3428, 3687, 3894. OPM appreciates these suggestions but found they were either outside the scope of this rulemaking, outside of OPM's regulatory authority, or both.

As described above, commenters proposed revisions to some of OPM's regulatory changes to 5 CFR parts 210, 212, 213, 302, 432, 451, and 752. For the reasons described above and summarized below, they were adopted or rejected in whole or in part.

Regarding 5 CFR part 752, OPM's changes to the regulations for adverse actions are consistent with statute and cannot be further simplified. OPM conforms part 752 with Federal Circuit precedent[413] and statutory language.[414] In addition, OPM makes plain that an employee who is moved involuntarily from the competitive service to a position in the excepted service, or from

[412] *See* 5 U.S.C. 2301(b)(1), 3301, 3304; *see also* 5 U.S.C. 3319, 3320.

[413] *See Van Wersch,* 197 F.3d at 1151–52; *McCormick,* 307 F.3d at 1341–43.

[414] *See* 5 U.S.C. 7501.

one excepted service schedule to another excepted service schedule, retains the status and civil service protections the employee had already accrued.

One regulatory alternative to conforming part 752 was to forgo changes to the regulation and allow Federal agencies to continue relying upon 5 U.S.C. 7501 and 7511 for a more complete understanding of eligibility for procedural and appeal rights. However, as the MSPB observed in urging OPM to update 5 CFR 752.401:

Retaining out-of-date information in a Government regulation can confuse agencies, managers, and employees and produce unintended outcomes. Human resources specialists or managers who are not experts in employee discipline may inadvertently rely on these particular regulations. Agencies may fail to use proper procedures and fail to notify employees of appeal rights. Terminations may be reversed.[415]

OPM agrees that current regulations need updating and does so through this rulemaking.

OPM is amending the coverage-related provisions in part 752 to close the gap between current regulations and relevant precedent interpreting the underlying statute, thus adding clarity. In addition, OPM provides guidance on implementing the statute. Having regulations that are congruent to the underlying statute, as interpreted in binding precedent, should mitigate potential errors in cases where an agency might mistakenly believe it is free to terminate employment without following adverse action procedures. Failure to align the regulations with applicable precedents could produce improper terminations. These terminations might then be overturned at the MSPB, resulting in wasted resources and frustration for agency supervisors. It could also mean the continued employment of a poorly performing employee, until a proceeding under chapter 75 or chapter 43 could be undertaken and sustained. Revising this regulation thus promotes efficiency in removing or disciplining employees and addresses complaints that the Federal removal process is too cumbersome. Through this rulemaking, OPM is conforming the regulation to essential statutory requirements that have not been previously reflected in OPM's regulations.

OPM is issuing these regulations in the least burdensome way possible. Fundamentally, the amendments to part 752 do not impose new requirements on agencies that are not already in place through existing statutes, regulations, and case law. This includes the provisions that an employee retains accrued rights when the employee is moved involuntarily from the competitive service to the excepted service or placed in a new schedule within the excepted service.

With respect to 5 CFR part 210, OPM considered not defining ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining'' positions but, as stated in the proposed rule and here, doing so adds important clarity. This final rule more explicitly defines the employees and positions that are excluded from civil service protections to align with relevant statutory text, congressional intent, legislative history, legal precedent, and OPM's longstanding practice. Accordingly, OPM adds a definition for these terms of art to clarify that they mean a noncareer political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are directly responsible for furthering the goals and policies of the President and the administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

Finally, OPM's addition of 5 CFR 302.602 establishes minimum requirements for moving employees and positions into and within the excepted service and creates new guardrails to protect existing rights and reinforce merit system principles. OPM also confers in 5 CFR 302.603 a narrow MSPB appeal right to an employee whose position is placed involuntarily into the excepted service, or an excepted service employee whose position is placed involuntarily into a different schedule of the excepted service, and when, in any such move, in violation of these regulations, an agency asserts that the employee loses status or any civil service protections they had already accrued.

OPM weighed the alternative of not conferring a right of appeal to the MSPB. As stated in 5 CFR 1201.3, the MSPB's ''appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation.'' Currently, for personnel actions for which there is no MSPB appellate coverage, an aggrieved Federal employee may have multiple other options for contesting a personnel decision, including filing an Equal Employment Opportunity (EEO) complaint, an OSC complaint, an administrative grievance, or if applicable, a grievance under a negotiated grievance procedure. However, with regard to an allegation that an agency has asserted that the employee loses status or any civil service protections the employee has already accrued, or that an agency coerced the employee to move in a manner that was facially voluntary to a new position that would require the employee to relinquish their status or any civil service protections, OPM concluded that the current scheme of avenues for redress is less complete than preferable to safeguard against actions brought against employees for reasons stated above. Such actions would have an adverse impact on employee morale across Federal agencies and a corrosive effect on the American public's confidence in equitable administrative processes of Federal civilian service.

Currently, if an employee alleges that an agency has committed a prohibited personnel practice, the employee can file a complaint with OSC, or if the employee is contesting an otherwise appealable action, the employee can file an MSPB appeal of the personnel action and claim as an affirmative defense that the agency committed a prohibited personnel practice. OPM's selected option—the addition of 5 CFR 302.603—provides an earlier recourse to employees, following an involuntary movement, or at a later point, if a personnel action is undertaken without following appropriate procedures, as detailed in section 302.603. This enables employees to protect their status and rights and reinforces that affected employees are deserving of fair and equitable treatment in all aspects of their employment as it relates to movement to and within the excepted service.

C. Impact

These revisions clarify and reinforce existing employee protections and add procedures that agencies must follow to further advance merit system principles. Congress enacted procedural rules to provide an adequate opportunity to hear from the tenured employee and appropriately explore the underlying facts and law before adverse actions are taken and thus help ensure that such actions are taken for proper cause.[416]

[415] U.S. Merit Sys. Prot. Bd., ''Navigating the Probationary Period After *Van Wersch* and *McCormick*,'' (Sept. 2006), *https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf*.

[416] U.S. Merit Sys. Prot. Bd., ''What is Due Process in Federal Civil Service,'' pp. ii, 4 (May 2015), *https://www.mspb.gov/studies/studies/*

The procedural protections enacted by Congress are for all tenured employees, not only for the few employees who will inevitably present problems in a workforce of more than two million individuals. And procedural protections exist for ''the whistleblower, the employee who belongs to the 'wrong' political party, the reservist whose periods of military service are inconvenient to . . . [superiors], the scapegoat, and the person who has been misjudged based on faulty information.'' [417]

Where Congress has created a property interest in a position for tenured employees, due process considerations protect employees from an unlawful deprivation of that interest.[418] Procedural protections are a small price to pay to deliver to the American people a merit-based civil service rather than a system based on political patronage.[419]

For the reasons stated in the proposed rule and in Section IV(A–C) of this final rule—including OPM's responses to comments therein—these rules will reinforce protections and procedural requirements that exist already for most Federal employees. OPM believes that those portions of the rules will not change any existing requirements for agencies covered by the rules and the impact on agencies is expected to be negligible.

The procedural requirements for moving an employee from the competitive service to the excepted service or within the excepted service are no more rigorous than the many other regulations promulgated by OPM for the administration of the civil service, especially those reticulated regulations related to the excepted service under schedules D and E (as described above). The reporting requirements relating to excepted service positions align with those with which OPM already must comply.

D. Costs

This final rule requires agencies to update internal policies and procedures to ensure compliance with the final regulations at 5 CFR 210.102(b), 212.401, 213.3301, 302.101, 302.602, 302.603, 451.302 and with the regulatory amendments to parts 432 and 752 as well as resolve any appeals that may arise from contested moves covered by part 302. Regarding the procedural requirements for moving positions, the rule will affect the operations of approximately 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. OPM cannot estimate these costs with great specificity because they will vary depending on the specific number of positions an agency would seek to move.

The cost analysis to update policies and procedures and resolve appeals assumes an average salary rate of Federal employees performing this work at the 2024 rate for a GS–14, step 5, from the Washington, DC, locality pay table ($157,982 annual locality rate and $75.70 hourly locality rate). We assume the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $151.40 per hour.

We estimate that the cost to comply with updating policies and procedures in the first year would require an average of 40 hours of work by employees with an average hourly cost of $151.40 per hour. Upon publication of the final rule, this would result in first-year estimated costs of about $6,056 per agency, and about $484,480 governmentwide. There are ongoing costs associated with routinely reviewing and updating internal policies and procedures, but not necessarily a measurable increase in costs for agencies.

To comply with the regulatory requirements in this final rule, affected agencies would need to resolve any appeals that may arise pursuant to section 302.603. We estimate that, in the first year following publication of a final rule, this would require an average of 120 hours of work by employees with an average hourly cost of $151.40 per hour. This would result in estimated costs in that first year of implementation of about $18,168 per agency, and about $1.45 million governmentwide. In subsequent years, we assume a decreased need for appeal resolution as agencies further refine their processes under section 302.603, resulting in less staff time. Accordingly, in subsequent years, we estimate an average of 80 hours of work by employees with an average hourly cost of $151.40 per hour. This would result in estimated costs of about $12,112 per agency annually, and about $968,960 governmentwide annually in the years after the first year of implementation.

OPM did not receive comments related to the financial costs of this rulemaking, which were presented in the proposed rule.[420] OPM adheres to its view in the proposed rule and will adopt the estimates as set forth here. In sum, OPM estimates the first-year cost to be approximately $24,224 per agency, and about $1.94 million governmentwide. For subsequent years, we estimate annual costs to be $12,112 for agencies, and about $968,960 governmentwide.

E. Benefits

These final regulations clarify the Federal civil service protections that are critical to balancing an effective, experienced, and objective bureaucracy with Executive branch control. These regulations benefit the American people not only by shoring up longstanding civil service protections, but also by promoting good government. As stated in Executive Order 14003, it is this Administration's policy to ''protect, empower, and rebuild the career Federal workforce.'' This rulemaking benefits the career Federal workforce by reinforcing that it is deserving of the trust and confidence of the American people.

OPM stated in its Fiscal Year 2019 Human Capital Review Summary Report that ''Agencies face different challenges depending on their mission and the current state of their organizations; but there is little debate that effectively managing human capital is at the forefront of leadership's greatest priorities.'' [421] Among the top trends that surfaced during OPM's review were (1) identifying and closing skills gaps and (2) recruiting and retaining employees. For example, agencies raised concerns around attrition rates for scientific and technical positions as well as an inability to hire fast enough to meet demands. The ongoing challenge with recruitment and retention for IT and cyber positions is due to the ever-changing landscape, competition with the private sector and other Federal agencies, and difficulty retaining talent.

This final rule has several important benefits. It supports the retention of Federal career professionals who provide the continuity of institutional knowledge and subject-matter expertise necessary for the critical functioning of the Federal Government.[422] ''A vast body of research'' shows ''public service motivation as a central factor in public

What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf.

[417] *Id.,* at cover letter.

[418] *See Loudermill,* 470 U.S. at 541.

[419] U.S. Merit Sys. Prot. Bd., *supra* note 32 at pp. ii–iii.

[420] 88 FR 63862, 63880.

[421] U.S. Off. of Pers. Mgmt., ''Fiscal Year 2019 Human Capital Reviews Report,'' p. 1 (Mar. 2020), *https://www.chcoc.gov/sites/default/files/2019%20Human%20Capital%20Review%20Summary%20Report.pdf.*

[422] Donald P. Moynihan, ''Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service,'' Pub. Admin. Rev., p. 174, 177 (Jan.–Feb. 2022).

employment'' and that civil servants ''invest effort and develop expertise precisely because a stable public job provides an environment where they can pursue their motivation to make a difference.'' [423] The rights and protections afforded to career Federal employees offer a more stable alternative to comparable private and non-government sector positions.[424] These professionals play an integral role in transferring knowledge, not just as part of their official duties, but also by training and mentoring newer and less experienced Federal employees, interns, contractors, etc.

A related benefit of this rulemaking is that it will mitigate costs associated with recruitment of personnel needed to replace staff who leave or are subsequently removed following placement in the excepted service or a new schedule in the excepted service. ''Instability and politicization makes public service less attractive, leading to higher turnover of experienced civil servants and giving public officials less reason to develop expertise.'' [425] OPM cannot estimate the exact value of this benefit to taxpayers because it would depend on the number of positions moved by an agency. Nevertheless, the final rule will protect agencies' abilities to meet mission requirements by mitigating disruptions caused by upheavals within an agency's workforce, the result of which could have a negative impact on an agency's ability to meet mission requirements and use its resources (including taxpayer funds) in a timely and efficient manner.

Comments Regarding the Benefits of This Final Rule

The benefits of civil service protections, which this rule would uphold, have been widely recognized by Congress, civil servants, and the American public for 140 years. Comment 2816, a former federal official, argued that ''[t]he notion of a competitively selected civil service is far from a modern creation; the justification for competitive selection stretches more than a century and a half. Throughout that period, Congress has grappled with the same concerns—whether and how to insulate civil servants from political forces, how to ensure the civil service is staffed by experienced professionals, how to promote trust that the government acts in the public interest—that are at stake in contemporary debates about civil service protections.''

For these reasons, OPM believes that civil service protections and merit system principles provide significant benefits both to civil servants and the American people. This final rule will reduce the risks associated with misapplying the CSRA, depriving civil service protections to those who have rightfully earned them, and needlessly politicizing our nation's nonpartisan career civil service.

As several commenters noted, there is little evidence that supports the notion that a more politicized civil service would increase governmental performance.[426] A professor noted that opponents of this rule have cited a paper by Spenkuch, Teso and Xu, which argues that political misalignment between political appointees and career agency officials can lead to cost overruns and delays in procurement contracts.[427] Comment 50. The paper reaches this conclusion by looking at voter registration data for civil servants, but especially for procurement officers, and then examines the performance of contracts the procurement officers oversaw, including any cost overruns, ex post modifications, or delays. But Comment 50 argued that the paper actually shows the risks of politicization. The professor argued that, ''[w]hile there are certainly key decisions where political appointees should shape policy, specific procurement outcomes is not one. There is no Democratic or Republican ideological approach to procurement that should alter how existing legal processes are implemented.'' Commenter continued that politicizing procurement through political alignment would risk ''temporary partisan employees redirecting procurement processes to satisfy politically favored contractors'' and that ''peer-reviewed research in the top-ranked *American Journal of Political Science*'' demonstrates this point.[428] A review of federal procurement processes between 2003–2015 shows that greater politicization is associated with more non-competitive contracts and greater cost overruns. The authors of the study that Comment 50 cites conclude that ''agency designs that limit appointee representation in procurement decisions reduce political favoritism.'' [429] Another professor argued that there is ''no equivalent body of peer reviewed evidence'' supporting the idea that removing career civil servants from office improves government performance or responsiveness. Studies show that the opposite is true. Comment 1927.

Finally, agency counsel and employee relations practitioners will benefit from the clarifications in this final rule that address current inconsistencies between OPM regulations and statute. After the MSPB recommended that OPM update its regulations to reflect the Federal Circuit's decisions in *Van Wersch* and *McCormick*,[430] OPM revised 5 CFR part 752, subpart D to conform to the court's interpretation of 5 U.S.C. 7511 as it pertains to appealable suspensions, removals, and furloughs. However, OPM elected at that time not to update subpart B of part 752 for suspensions of 14 days or less. In addition to closing regulatory gaps in part 752 by conforming the regulations to case law and statute, OPM clarifies that an employee moved to or within the excepted service retains accrued procedural and appeal rights. The cumulative effect of these changes will be a comprehensive and robust regulatory framework on which agency practitioners can rely for understanding and applying the protections available to Federal employees appropriately.

[423] *Id.*

[424] *Id.*

[425] *Id.*

[426] *See id.; see also* Donald P. Moynihan, ''Populism and the Deep State: the Attack on Public Service under Trump,'' Liberal-Democratic Backsliding and Pub. Admin., (May 21, 2020), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607309* (''If political appointees offer responsiveness to elected officials through their loyalty, this responsiveness comes at a cost. The best evidence we have is that appointees generate poorer organizational performance relative to career officials.'') (citation omitted); David E. Lewis, ''Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?'' The Journal of Pol., Vol. 69, No. 4 (Nov. 2007), *https://www.jstor.org/stable/10.1111/j.1468-2508.2007.00608.x* (''This analysis demonstrates that appointees get systematically lower performance grades than careerists. Previous bureau experience and longer tenure in management positions explain why careerist-run programs get higher grades. . . . These results add weight to what civil service reformers like George Pendleton believed, namely that a merit-based civil service system would lead to lower turnover in the Federal workforce and the cultivation of useful administrative expertise.'').

[427] Citing Jörg L. Spenkuch, Edoardo Teso, and Guo Xu. ''Ideology and Performance in Public Organizations.'' Econometrica, 91, no. 4, pp. 1171–1203 (2023), *https://doi.org/10.3982/ecta20355.*

[428] Citing Carl Dahlström, Mihály Fazekas, and David E. Lewis, ''Partisan procurement: Contracting with the United States Federal Government, 2003–2015,'' Am. Journal of Pol. Sci., 65, no. 3 (2021), *https://doi.org/10.1111/ajps.12574.*

[429] OPM is also not persuaded to change its analysis based on this paper because it does not address the likely resource costs of politicization on the civil service described in this rule, such as increased attrition and the need to hire new employees with likely less experience and expertise.

[430] U.S. Merit Sys. Prot. Bd., *supra* note 30.

VI. Procedural Issues and Regulatory Review

A. Severability

If any of the provisions of this final rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. For example, if a court were to invalidate any portions of this final rule imposing procedural requirements on agencies before moving positions from the competitive service to the excepted service, the other portions of the rule—including the portions providing that employees in the competitive service maintain their protections even if their positions are moved to the excepted service if moved involuntarily—would independently remain workable and valuable. Similarly, the portions of this final rule defining ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential and policy-determining'' can and would function independently of any of the other portions of this final rule. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

B. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule will apply only to Federal agencies and employees.

C. Regulatory Review

OPM has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993), 13563 (Jan. 18, 2011), and 14094 (Apr. 6, 2023), which 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). A regulatory impact analysis must be prepared for certain rules with effects of $200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as supplemented by Executive Orders 13563 and 14094.

D. Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), it is determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E. Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 (Feb. 7, 1996).

F. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

G. Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

H. Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

VII. Regulatory Amendments

List of Subjects

5 CFR Parts 210 and 212

Government employees.

5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

5 CFR Parts 302 and 432

Government employees.

5 CFR Part 451

Decorations, Government employees.

5 CFR Part 752

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 210, 212, 213, 302, 432, 451, and 752 as follows:

PART 210—BASIC CONCEPTS AND DEFINITIONS (GENERAL)

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Subpart A—Applicability of Regulations; Definitions

■ 2. Amend § 210.102 by:
■ a. Redesignating paragraphs (b)(3) through (18) as paragraphs (b)(5) through (20); and
■ b. Adding new paragraphs (b)(3) and (4).

The additions read as follows:

§ 210.102 Definitions.

* * * * *

(b) * * *

(3) *Confidential, policy-determining, policy-making, or policy-advocating* means of a character exclusively associated with a noncareer political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

(4) *Confidential or policy determining* means of a character exclusively associated with a noncareer political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

* * * * *

PART 212—COMPETITIVE SERVICE AND COMPETITIVE STATUS

■ 3. The authority citation for part 212 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Subpart D—Effect of Competitive Status on Promotion

■ 4. Amend § 212.401 by revising paragraph (b) to read as follows:

§ 212.401 Effect of competitive status on position.

* * * * *

(b) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time:

(1) The employee's position was first listed under Schedule A, B, or C, or whose position was otherwise moved from the competitive service and listed under a schedule created subsequent to May 9, 2024; or

(2) The employee was moved involuntarily to a position in the excepted service; remains in the competitive service for the purposes of status and any accrued adverse action protections, while the employee occupies that position or any another position to which the employee is moved involuntarily.

PART 213—EXCEPTED SERVICE

■ 5. The authority citation for part 213 continues to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.;* Pub. L. 105–339, 112 Stat. 3182–83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; 38 U.S.C. 4301 *et seq.;* and Pub. L. 105–339, 112 Stat. 3182–83.

Subpart C—Excepted Schedules

■ 6. Amend § 213.3301 by revising the section heading and paragraph (a) to read as follows:

§ 213.3301 Positions of a confidential or policy-determining character.

(a) Upon specific authorization by OPM, agencies may make appointments under this section to positions that are of a confidential or policy determining character as defined in § 210.102 of this chapter. Positions filled under this authority are excepted from the competitive service and constitute Schedule C. Each position will be assigned a number from §§ 213.3302 through 213.3999, or other appropriate number, to be used by the agency in recording appointments made under that authorization.

* * * * *

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 7. The authority citation for part 302 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.* § 302.107 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1).

Subpart A—General Provisions

■ 8. Amend § 302.101 by revising paragraph (c)(7) to read as follows:

§ 302.101 Positions covered by regulations.

* * * * *

(c) * * *

(7) Positions included in Schedule C (see subpart C of part 213 of this chapter) and positions excepted by statute which are of a confidential, policy-determining, policy-making, or policy-advocating character;

* * * * *

■ 9. Add subpart F consisting of §§ 302.601 through 302.603, to read as follows.

Subpart F—Moving Employees and Positions into and Within the Excepted Service

Sec.

§ 302.601 Scope.

(a) This subpart applies to any situation where an agency moves:

(1) A position from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive Order, or an OPM issuance, to the extent that this subpart is not inconsistent with applicable statutory provisions; or

(2) An employee who has accrued status and civil service protections under 5 U.S.C. chapter 75, subchapter II, involuntarily to any position that is not covered by that chapter or subchapter.

(b) This subpart also applies in situations where a position previously governed by title 5, United States Code will be governed by another title of the United States Code going forward, unless the statute governing the exception provides otherwise.

§ 302.602 Basic requirements.

(a) In the event the President, Congress, OPM, or their designees direct agencies to move positions from the competitive service into the excepted service under Schedule A, B, or C, or any schedule in the excepted service created after May 9, 2024, or to move positions from a schedule in the excepted service to a different schedule in the excepted service, the following requirements must be met, as relevant:

(1) If the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that directive, and their location within the organization and provide the list to OPM.

(2) If the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must provide OPM with a list of the positions to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes the positions met those criteria.

(3) If the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move, then the agency must, in addition to supplying a list of the identified positions or specific slots of particular types of position, supply OPM with the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant.

(b) An agency is also required to—

(1) Identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

(2) Document the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

(3) Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the positions is both consistent with the standards set forth by the directive, as applicable, and with merit system principles.

(4) Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority, which OPM will then review.

(5) For exceptions effectuated by the President or OPM, list positions to the

appropriate schedule of the excepted service only after obtaining written approval from the OPM Director to do so. For exceptions effectuated by Congress, inform OPM of the positions excepted either before the effective date of the provision, if the statutory provisions are not immediately effective, or within 30 days thereafter.

(6) For exceptions created by the President or OPM, initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the **Federal Register**, to include the types, numbers, and locations of the positions moved to the excepted service.

(c) In accordance with the requirements provided in paragraphs (a) and (b) of this section—

(1) An agency that seeks to move an encumbered position from the competitive service to the excepted service, or from one excepted service schedule to another, must—

(i) Provide written notification to the incumbent employee of the intent to move the position 30 days prior to the effective date of the position being moved.

(ii) In the written notification required by paragraph (c)(1)(i) of this section, if the movement was involuntary, inform the employee that the employee retains any competitive status or procedural and appeal rights previously accrued under chapter 75, subchapter II, or section 4303 of title 5, United States Code, notwithstanding the movement of the position, and inform the employee of appeal rights conferred under § 302.603 and the timing for exercising such appeal rights.

(d) In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees with respect to any earned competitive status, any accrued procedural rights, or depending on the action involved, any appeal rights under chapter 75, subchapter II, or section 4303 of title 5, United States Code, even when moved to the new positions.

(e) Notwithstanding the use of the plural words ''positions,'' ''employees,'' ''individuals,'' and ''personnel actions,'' this section also applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

§ 302.603 Appeals.

(a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved involuntarily to the excepted service, or an excepted service employee whose position is placed into a different schedule of the excepted service or who is otherwise involuntarily moved to a position in a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b), (c), and (d) of this section. The appeal rights conferred in this section are in addition to, and not in derogation of, any right the individual would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under chapter 75, subchapter II, or section 4303 of title 5, United States Code.

(b) Where the agency, notwithstanding the requirements of section 302.602 of this part, asserts that the move of the original position or any subsequent position to which the individual is involuntarily moved thereafter will eliminate competitive status or any procedural and appeal rights that had previously accrued, the affected individual may appeal from that determination and request an order directing the agency:

(1) To correct the notice to provide that any previously accrued status or procedural and appeal rights under those provisions continue to apply; and

(2) To comply with the requirements of either chapter 75, subchapter II or section 4303, title 5, United States Code, in pursuing any action available under those provisions, except to the extent that any such order would be inconsistent with an applicable statute.

(c) Where the agency fails to comply with § 302.602(c)(1) of this part and fails to provide the individual with the requisite notice, the affected individual may appeal the failure to provide the requisite notice and request an order directing the agency to comply with that provision.

(d) An individual may appeal under this part on the basis that:

(1) A facially voluntary move was coerced or otherwise involuntary; or

(2) A facially voluntary move to a new position would require the individual to relinquish their competitive status or any civil service protections and the move was coerced or otherwise involuntary.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 10. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

■ 11. Amend § 432.102 by revising paragraph (f)(10) to read as follows:

§ 432.102 Coverage.

* * * * *

(f) * * *

(10) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this chapter by—

(i) The President for a position that the President has excepted from the competitive service;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute, unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (e) of this section.

* * * * *

PART 451—AWARDS

■ 12. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966–1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart C—Presidential Rank Awards

■ 13. Amend § 451.302 by revising paragraph (b)(3)(ii) to read as follows:

§ 451.302 Coverage.

* * * * *

(b) * * *

(3) * * *

(ii) To positions that are excepted from the competitive service because of their confidential or policy-determining character.

* * * * *

PART 752—ADVERSE ACTIONS

■ 14. The authority citation for part 752 continues to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91, 131 Stat. 1283, and Pub. L. 114–328, 130 Stat. 2000.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

■ 15. Amend § 752.201 by revising paragraphs (b), (c)(5) and (6), and adding paragraph (c)(7) to read as follows:

§ 752.201 Coverage.

* * * * *

(b) *Employees covered.* This subpart covers:

(1) An employee in the competitive service who has completed a

probationary or trial period, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(4) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed involuntarily under any schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(5) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily; and

(6) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily.

(c) * * *

(5) Of a National Guard Technician;

(6) Taken under 5 U.S.C. 7515; or

(7) Of an employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this subchapter by—

(i) The President for a position that the President has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section.

* * * * *

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

■ 16. Amend § 752.401 by revising paragraphs (c) and (d)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(c) *Employees covered.* This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period, including such an employee who is moved involuntarily into the excepted service;

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment, including such an employee who is moved involuntarily into the excepted service; or

(ii) Except as provided in the former section 1599e of title 10, for individuals hired prior to December 31, 2022 (the date that section was otherwise repealed by Public Law 117–81, section 1106), who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(4) A Postal Service employee covered by Public Law 100–90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at 5 U.S.C. 105, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter, including such an employee whose position is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(7) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed involuntarily under any schedule of the excepted service and who still occupies that position or occupies any other position to which the employee is moved involuntarily;

(8) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily; and

(9) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service.

(d) * * *

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this chapter by—

(i) The President for a position that the President has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

* * * * *

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Part IV

Department of Transportation

Federal Railroad Administration

49 CFR Part 218

Train Crew Size Safety Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[Docket No. FRA–2021–0032, Notice No. 5]

RIN 2130–AC88

Train Crew Size Safety Requirements

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is establishing minimum safety requirements for the size of train crews depending on the type of operation. This final rule requires railroad operations to have a minimum of two crewmembers except for certain identified one-person train crew operations that do not pose significant safety risks to railroad employees, the public, or the environment. This final rule includes requirements for railroads seeking to continue certain existing one-person train crew operations and a special approval process for railroads seeking to initiate certain new one-person train crew operations. This final rule also requires each railroad receiving special approval for a one-person train crew operation to submit to FRA an annual report summarizing the safety of the operation.

DATES: This regulation is effective June 10, 2024.

ADDRESSES: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time.

FOR FURTHER INFORMATION CONTACT: Christian Holt, Staff Director, Operating Practices Division, Office of Railroad Safety, Federal Railroad Administration, at telephone (202) 366–0978 or by email at *Christian.Holt@dot.gov;* or Alan Nagler, Senior Attorney, U.S. Department of Transportation, Federal Railroad Administration, at telephone (202) 493–6038 or by email at *alan.nagler@dot.gov.*

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AAR—Association of American Railroads
ACI—American Consumer Institute
AII—Alliance for Innovation and Infrastructure
APTA—American Public Transportation Association
ASLRRA—American Short Line and Regional Railroad Association
ATDA—American Train Dispatchers Association
BLET—Brotherhood of Locomotive Engineers and Trainmen
BMWED—Brotherhood of Maintenance of Way Employes Division
BNSF—BNSF Railway Company
CARS–TC—Citizens Acting for Rail Safety—Twin Cities
CFZ—Critical focus zones
CLF—California Labor Federation
CN—Canadian National Railway Company
Conrail—Consolidated Rail Corporation
CPUC—California Public Utilities Commission
CRC—Commuter Rail Coalition
CTC—Centralized traffic control system
CVR—Cimarron Valley Railroad
Denver RTD—Denver Regional Transportation District
DOT—Department of Transportation
FEC—Florida East Coast Railway
FRA—Federal Railroad Administration
FRFA—Final Regulatory Flexibility Analysis
FTA—Federal Transit Administration
GAO—U.S. Government Accountability Office
GCOR—General Code of Operating Rules
G&U—Grafton and Upton Railroad
INRD—Indiana Rail Road Company
mph—miles per hour
MU—Multiple-unit
NS—Norfolk Southern Railway Company
NPRM—Notice of proposed rulemaking
NPSC—Nebraska Public Service Commission
OMB—Office of Management and Budget
PTC—Positive train control
RCL—Remotely controlled locomotive
RGPC—Rio Grande Pacific Corporation
RIA—Regulatory Impact Analysis
RIN—Regulatory Identification Number
RSAC—Railroad Safety Advisory Committee
RSSM—Rail-security sensitive materials
RWU—Railroad Workers United
SBA—Small Business Administration
SBA-Advocacy—Small Business Administration's Office of Advocacy
Secretary—Secretary of Transportation
SMART–TD—International Association of Sheet Metal, Air, Rail and Transportation Workers Transportation Division
SSO Agency—State Safety Oversight Agency
TFI—The Fertilizer Institute
TSA—Transportation Security Administration
TTD—Transportation Trades Department, AFL–CIO
TWU—Transport Workers Union of America
T&N—Texas and Northern Railway
UP—Union Pacific Railroad Company
UTA—Utah Transit Authority

Table of Contents for Supplementary Information

I. Executive Summary

Purpose of the Regulatory Action

FRA is issuing this final rule to ensure that trains are adequately staffed for their intended operation and railroads have appropriate safeguards in place for safe train operations whenever using a one-person train crew. The final rule establishes minimum crew size safety standards for all trains, including a risk assessment requirement to evaluate hazards and ensure risk mitigation for those railroads looking to initiate one-person train crew operations in the most complex operating environments nationwide, that will reduce the likelihood of future accidents proactively. As FRA explained in the notice of proposed rulemaking (NPRM), FRA has qualitatively discussed the benefits because it does not have sufficient data to monetize those benefits. However, those benefits have the potential to reduce the likelihood of at least one type of foreseeable accident that is more likely to occur with a one-person train crew than a two-person train crew if a locomotive is not equipped with a safety device that will stop the train when the locomotive engineer is physically unresponsive—even if the type of accident foreseen has not yet occurred. Other qualitative benefits include ensuring that railroads are adequately protecting the safety of a one-person train crewmember or members of the public under various foreseeable circumstances so that employees and communities are not left

in an inferior safety position compared to when a train is staffed with two crewmembers. Without this final rule, FRA has a limited ability to address the totality of potential safety issues related to a reduction of crew staffing levels. Currently, FRA can exercise its authority in discrete instances through the agency's emergency order authority (potentially after a serious accident) or as it reviews a passenger operation's emergency preparedness plan under 49 CFR part 239. Also, no other FRA regulatory effort focuses on the specific hazards and risks associated with a one-person train crew operation, and there is no industry-wide approach to mitigate any such hazards or risks.

Consistent with the purpose of existing requirements for the transportation of hazardous materials by rail,[1] FRA is mandating that each train be assigned a minimum of two crewmembers when transporting certain quantities and types of hazardous materials that have been determined to pose the highest risk in transportation from both a safety and security perspective, with some exceptions to ensure FRA's awareness of the existing operation and/or require an FRA approval, after an opportunity for public input. This final crew size rule is necessary for FRA to proactively protect railroad employees, the public, and the environment during train operations with a one-person train crew, including trains transporting hazardous materials.

This final rule allows FRA to identify and evaluate each railroad that will be operating a freight train with a one-person train crew. By collecting more information about one-person train crew operations, FRA will be better informed to respond to questions about how to maintain the safety of such an operation and be better positioned to take actions that ensure future safety improvements.

This final rule also requires railroads with certain types of one-person train crew operations to notify FRA that they are using such an operation, provide a detailed description of the operation and, in some circumstances, submit a risk assessment and request FRA's approval to continue or initiate an operation. When FRA's approval is necessary, this final rule allows FRA to prohibit the initiation of any proposed one-person train crew operations that would not be as safe or safer than a two-person minimum train crew operation. In addition to the safety benefits from establishing minimum operational requirements, the notification and approval procedures required by the final rule will provide FRA with information and data that could be used in future rulemakings, enforcement actions including emergency or compliance orders/agreements, and safety analyses generally.

Further, the final rule is necessary to establish a process for the public, including rail employees and their labor organization representatives, to comment before FRA decides whether to grant special approval on any railroad's petition to operate a train with a one-person train crew. The public's participation is warranted because any reduction of crew staffing from a two-person train crew could raise numerous general and operational safety concerns.[2] Further exacerbating the safety concerns regarding any reduction in crew size is that the average length of a Class I freight train has grown substantially in recent years, to nearly 3 miles in some cases, as train length and tonnage add to the complexity and safety challenges of these operations.[3]

In issuing this final rule, FRA will ensure that laws, regulations, and orders ''related to railroad safety'' with respect to train crew size are nationally uniform [4] by preventing varying State laws regulating crew size from creating a patchwork of potentially inconsistent rules governing train operations across the country. Without this rule, railroads could be subjected to a different crew staffing law in every State in which they operate, as there would be no assurance that State laws governing crew size would be based on an analysis or determination concerning impacts on railroad safety. The lack of a uniform standard would likely result in additional costs and operational inefficiencies.

Lastly, this final rule is necessary because the latest annual rail safety data reflects some troubling trends that point toward a need for heightened caution and awareness in railroad safety and operational planning. For instance, a second crewmember provides the opportunity to secure a train with hand brakes, as a one-person train crew could not do so without violating railroad air brake and train handling requirements necessary to comply with FRA's regulations requiring that ''railroads shall develop and implement a process or procedure to verify that the applied hand brakes will sufficiently hold the equipment with the air brakes released [and] that a train's air brake shall not be depended upon to hold equipment standing unattended.'' [5] The rate for all human factor caused accidents increased from 0.95 accidents per million train miles to 1.34 between 2013 and 2022, a 41.1 percent increase, and from 1.18 accidents per million train miles to 1.34 between 2021 and 2022, a 13.6 percent increase.[6] The percentage of train accidents attributed solely to human factors (as reflected in FRA's accident reporting cause codes) increased from 38.5 percent to 45.6 percent between 2013 and 2022. The number of main track train handling and make-up accidents attributed to human factor cause codes has increased from 28 in 2013 to a range between 36 and 77 (reflecting occurrences between 2018 and 2022), a 28.6 to 75 percent increase. When normalizing this data by the number of train miles, it shows a rate increase from 0.04 in 2013 to 0.07 in 2022, reaching as high as 0.10 and 0.13 during this period, a range that increased 25 to 225 percent over the five-year period between 2018 and 2022.

[1] The proposed rule contains extensive background explaining that the Federal government recognizes how essential hazardous materials are to the U.S. economy and the well-being of its people, and the various Federal requirements for the training of rail employees and other safeguards to help ensure that these materials will be shipped and arrive safely at their destinations. 87 FR 45564, 45576 (July 28, 2022).

[2] FRA's rules of practice generally encourage participation by interested persons. 49 CFR 211.3. For example, public participation is encouraged when FRA considers a waiver petition, and the dockets for those petitions are publicly available. 49 CFR part 211, subpart C. Some of FRA's rail safety regulations also require a railroad to notify a labor organization's president of the submission to FRA of a railroad safety program, such as a training or certification program to ensure that the relevant representatives for employees have an opportunity to participate in the process. *See e.g.,* 49 CFR 240.103(b), 242.103(c), and 243.109(d). Because FRA has similarly determined in this instance that employees and communities have an interest in a railroad's operation relative to the issue of train crew size safety, the final rule ensures the participation of interested members of the public, including rail employees and their labor organization representatives.

[3] ''Rail Safety: Freight Trains Are Getting Longer, and Additional Information is Needed to Assess Their Impact,'' U.S. Government Accountability Office (GAO) (May 2019). *https://www.gao.gov/products/gao-19-443.*

[4] 49 U.S.C. 20106(a)(1).

[5] 49 CFR 232.103(n)(1) and (2). In the event that an uncontrolled train movement causes an accident or derailment, the presence of a second crewmember who failed to apply sufficient hand brakes does not negate the need for a second crewmember. Contributing causes to such derailments and other preventable accidents could include improper railroad rules or training, or a failure of the second crewmember to comply with such requirements. In contrast, the absence of the second crewmember restricts the options immediately available and potentially leaves the one-person train crewmember vulnerable, without viable mitigation measures available until assistance can arrive. This dilemma can largely be avoided with a proper risk assessment.

[6] The data described in this paragraph is available or derived from data publicly available on FRA's website. *https://data.transportation.gov/stories/s/FRA-Safety-Data/dakf-i7zd.*

Summary of Major Provisions

In § 218.123, the final rule requires railroads to staff every train operation with a minimum of two crewmembers (including a locomotive engineer and an additional crewmember who will typically be a conductor) that travel with the train and can directly communicate with each other even if one crewmember is not in the locomotive cab, with certain one-person train crew exceptions permitted under specified circumstances.

Sections 218.125 through 218.131 of this final rule provide criteria for instituting one-person train crew operations in certain circumstances through exceptions to the two-crewmember mandate, conditional exceptions based on the type of operation, or a special approval process option. These avenues of relief address operations by small businesses, which for purposes of this rulemaking are primarily short lines and regional railroads. The final rule will give small businesses greater flexibility without sacrificing safety, since the operations of railroads that qualify as small businesses are generally less complex than the operations of Class I railroads.

Sections 218.129 and 218.131 of this final rule require each railroad with certain types of one-person train crew operations to abide by minimum requirements notably to: (1) prevent uncontrolled train movements if a one-person train crew were to become incapacitated; (2) maintain communication between a railroad employee, typically a dispatcher, a supervisor or manager, or an intermittently assisting crewmember, and the one-person train crewmember to convey operational instructions and ensure the one-person crewmember's personal safety; (3) track the location of a train operated by a one-person crew in case communication is lost and a rescue operation needs to be initiated; and (4) establish protocols that ensure rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations, such as an accidental or non-accidental release of any hazardous material, with the one-person train crew operation.

Section 218.129 of this final rule, which contains conditional exceptions based on the type of operation, requires the lead locomotive of certain operations with a one-person crew be equipped with an alerter[7] and that the crewmember must test the alerter to confirm it is working before departure. Without a working alerter on the controlling locomotive, if a one-person train crew becomes incapacitated while the train is moving, the train would continue to operate down the track out of control without another crewmember on-board who could apply the emergency brake. In contrast, with an alerter, the train would be stopped with an emergency brake application after a designated period of inactivity by the crewmember.[8]

In addition to an alerter requirement for certain one-person train crew operations in § 218.129, the final rule establishes other minimum safety requirements depending on the type of one-person train crew operation, such as for Class II and III legacy freight train operations (*i.e.,* currently existing one-person crew operations established for at least two years before the effective date of the final rule), certain other Class II and III freight railroad train operations, work train operations, helper service train operations, and lite locomotive train operations. For instance, the final rule requires that each railroad with these types of operations, excepted from the final rule's two-crewmember mandate, must adopt and comply with operating rules that provide for regular and effective communication with a one-person train crew to ensure the safety of the train and that one-person train crewmember's safety. Short lines do not always use dispatchers, and short line trains may not have a working radio or other working wireless communications in the cab of a controlling locomotive, so the requirement to provide for regular and effective communication is an important safeguard.[9] Further, the final rule requires that each railroad with these types of one-person train crew operations adopt and comply with operating rules providing for mitigation measures that are as safe or safer than a two-person minimum train crew operation to ensure the railroad will address certain situations where a second crewmember would typically assist with mitigation, such as when responding to accidents, derailments, releases of hazardous materials, and requests from an emergency responder to unblock a highway-rail grade crossing in response to a potentially life-threatening situation. The final rule requires that each Class II and III freight railroad that (a) plans to initiate a one-person train crew operation after the final rule's effective date and (b) will not be transporting certain types or quantities of hazardous materials determined to pose the highest risk in transportation, must provide FRA with written notification of the operation before commencing the operation, in addition to complying with the alerter, communication, and mitigation measures requirements.

The final rule establishes an implementation schedule in § 218.129 that phases in compliance for certain specified one-person train crew operations, such as for each Class II and III railroad with a legacy one-person train crew freight train operation, that provides FRA with written notice of the operation, and for any railroad with a one-person train crew work train operation, helper service train operation, or lite locomotive train operation. The implementation schedule requires these specified exceptions to the two-crewmember mandate to be governed by operating rules addressing the communication requirements and mitigation measures requirements no later than 90 days from the effective date of this final rule, and the working alerter requirement to be met no later than two years from the effective date of this final rule. FRA encourages each railroad with one or more of these types of one-person train crew operations to implement the requirements sooner than the implementation schedule requires but finds that the schedule will provide each railroad with sufficient time either to comply with the alerter, communication, and mitigation measures requirements or provide for a second crewmember.

To ensure that each railroad adequately identifies hazards and mitigates risks when initiating or continuing certain new one-person train crew operations, § 218.131 of this final rule requires a railroad's petition for special approval of a one-person train crew operation to include a risk

[7] 49 CFR 229.5 (defining alerter as a device or system installed in the locomotive cab to promote continuous, active locomotive engineer attentiveness by monitoring select locomotive engineer-induced control activities. If fluctuation of a monitored locomotive engineer-induced control activity is not detected within a predetermined time, a sequence of audible and visual alarms is activated to progressively prompt a response by the locomotive engineer. Failure by the locomotive engineer to institute a change of state in a monitored control, or acknowledge the alerter alarm activity through a manual reset provision, results in a penalty brake application that brings the locomotive or train to a stop).

[8] *See id.* and *see e.g.,* 49 CFR 229.140 (requiring that an alerter warning timing cycle interval be based on a formula that includes a calculation of train speed and that for locomotives operating at speeds below 20 mph, the interval shall be between 110 seconds and 130 seconds).

[9] 49 CFR 220.9; 63 FR 47182, 47188 (Sept. 4, 1998) (explaining in the section-by-section analysis that ''[n]o communication equipment is required if a train does not transport passengers or hazardous material and does not engage in joint operations or operate at greater than 25 miles per hour'').

assessment. The purpose of a risk assessment is to evaluate risk in an objective manner by following a decision-making process designed to systematically identify hazards, assess the degree of risk associated with those hazards, and based on those assessed risks, identify and implement measures to minimize or mitigate the risks to an acceptable level. Except for certain one-person legacy operations,[10] FRA will require a risk assessment and a special approval process for most one-person train crew operations that will be transporting 20 or more car loads or intermodal portable tank loads of certain hazardous materials or one or more car loads of hazardous materials designated as rail-security sensitive materials (RSSM) as defined by the Department of Homeland Security. The requirements in the final rule focus on known safety and security risks associated with operating trains transporting large amounts of hazardous materials and with transporting the hazardous materials known to present the greatest safety and security risks. As explained in the NPRM, FRA considers: train crewmembers to be ''hazmat employees'' requiring specific types of training; that these training requirements are substantial; that these various types of training are required initially and recurrently at least once every three years; and that, in addition to FRA, there are Federal agencies that enforce requirements regarding the safety and security of hazardous materials shipments.[11] Thus, the transportation of hazardous materials raises various specific safety hazards, such as the potential for an accidental or non-accidental release of a hazardous material, that would typically create additional tasks for a train crew to communicate information about an immediate or developing safety situation and/or take immediate or other appropriate action to mitigate its consequences, when safe to do so. For these reasons, the presence of certain types or quantities of hazardous materials creates the potential for a greater negative consequence than when a train does not contain such materials. Without a properly completed risk assessment, FRA would be unable to accurately assess whether a railroad has taken appropriate measures to compensate for the removal of a second train crewmember. In the circumstance that a railroad wants to continue a one-person train crew operation that does not meet the legacy operation conditions, the final rule provides conditions under which a railroad may continue those operations while it drafts and submits a special approval petition and awaits FRA's decision on that petition.

As FRA explained in the NPRM, passenger and tourist train operations normally have a locomotive engineer located in the locomotive cab, and a passenger conductor, and potentially one or more assistant conductors, riding in the passenger cars with the passengers.[12] FRA makes clear that this common crew configuration is not considered a one-person train crew operation. In § 218.125, the final rule exempts from the two-crewmember mandate specific passenger and tourist train operations that do not pose significant safety risks to railroad employees, the public, or the environment, including tourist train operations that are not part of the general system of transportation. Passenger or tourist operations that do not fall within the § 218.125 exemptions must petition FRA for a special approval under the procedures provided in § 218.131.

In the context of this rulemaking, a risk assessment is the process of determining, either quantitatively or qualitatively, or both, the level of risk associated with a proposed train operation staffed with a one-person train crew, including mitigating the risks to an acceptable level. Section 218.133 of this final rule provides the minimum content that must be included in a railroad's risk assessment and the procedures for petitioning FRA to use an alternate methodology for assessing the risk of an operation utilizing a one-person train crew. This final rule adds appendix E to part 218 to provide guidance on how a railroad may prepare a risk-based hazard analysis, as part of its risk assessment, and compare the risks to determine if a proposed one-person train crew operation will be as safe or safer than a two-person minimum train crew operation, when all mitigations are in place.

In § 218.135, the final rule specifies how a railroad may petition FRA for special approval of a one-person train crew operation not covered by an exception. The special approval procedure requires FRA to publish a notice in the **Federal Register** soliciting public comment on each petition. All documents will be filed in a public docket and will be accessible through the internet. The special approval procedure permits FRA to reopen consideration of the petition for cause stated. When FRA decides a petition, or reopens consideration of a petition, it will send written notice of the decision to the petitioner, and the decision will be published in the docket. Further, a railroad making a material modification to an operation, previously approved by FRA, will be required to file both a description of the modification and either a new or updated risk assessment, at least 60 days before proposing to implement any such modification. FRA is requiring that a material modification not be implemented until approved. The requirement to seek special approval is not expected to delay action on any operation because each railroad would need an equivalent timeframe to plan for the process of reducing crew size in advance of implementation of that operation even in the absence of this rule.

Section 218.137 of this final rule includes an annual reporting requirement for railroads that receive special approval to conduct an operation with a one-person train crew under this subpart. The annual railroad responsibilities after receipt of special approval include a requirement to conduct a formal review and analysis of those operations. The annual reporting requirement ensures that each railroad will regularly review the safety of its operation and the accuracy of its risk assessment and will provide FRA with sufficient data to identify and analyze any safety trends in the approved operation. Further, the annual reporting requirement aligns with the general administration of FRA's safety program and fulfilment of its statutory requirements.[13]

Finally, as explained in greater detail in the discussion of comments and conclusions, the final rule clarifies and updates the NPRM in some respects based upon the comments received. For instance, as the NPRM did not define what FRA meant by the term ''one-person train crew'' and commenters

[10] Among other operations, § 218.129(a)(1) does not require a risk assessment or a special approval process for a Class II and III railroad's legacy one-person train crew freight operation, *i.e.,* an operation existing before the effective date of the final rule, that has been established for at least two years before the effective date of the final rule. However, such a freight railroad with a legacy one-person train crew operation must provide certain information about the operation in a written notification to FRA, and the railroad will be required to establish operating rules addressing the communication requirements and mitigation measures requirements no later than 90 days from the effective date of this final rule and to meet the working alerter requirement no later than two years from the effective date of this final rule.

[11] 87 FR 45576–78.

[12] 87 FR 45579–80.

[13] *See e.g.,* 49 U.S.C. 103(j) and (k) (requiring the FRA Administrator to develop long-range national rail plans, and performance goals and reports for those plans that are typically updated annually).

expressed confusion, FRA has clarified that a ''one-person train crew'' means: (1) only one person is assigned to the train as the train crew and that single, assigned person will be performing the duties of both the locomotive engineer and the conductor; or (2) two or more persons are assigned to a train as the train's crew, but only the locomotive engineer travels on the train when the train is moving because the remainder of the train crew, including the conductor if the locomotive engineer is not the assigned conductor, is assigned to intermittently assist the train's movements. The requirements in this final rule will not apply to a train operation controlled by a remote control operator, even if that remotely controlled train is operated by a one-person train crew, because of the protections already provided for remote control operations under existing requirements in FRA's railroad locomotive safety standards, including a harness with a breakaway safety feature, an operator alertness device, and an operator tilt feature with an automatic notification to the railroad to enable prompt attention in the event the tilt feature is activated.[14] There are two existing passenger train operations with one-person train crews for which FRA has already approved the operation's required passenger train emergency preparedness plans under existing regulatory requirements, making it unnecessary for those railroads to submit a special approval petition to FRA as proposed. The final rule does not include the proposed requirement for railroads seeking to implement automated operations to file a petition seeking FRA's special approval. Such a requirement is unnecessary because railroads would still need to seek waivers, regulatory changes, or other FRA approval if the technology for the automated operations does not comply with other rail safety requirements.

The final rule contains some clarifications and updates from the NPRM in how it treats freight railroads, especially Class II and III railroads that include the short line and regional railroads. For instance, the final rule will not prohibit all one-person train crew freight operations hauling certain types or quantities of hazardous materials, as the final rule provides for some exceptions for existing or initiating operations. Those Class II and III railroads with a legacy one-person train crew freight operation that is established at least two years before the effective date of this final rule will not need FRA's special approval to continue the operation as proposed but will need to provide FRA with a detailed written notice describing the parameters of the operation within 90 days of the effective date of the final rule. Similarly, the final rule does not include a requirement for Class II and III railroads initiating a new, non-legacy, one-person train crew freight operation not transporting hazardous materials of the types or quantities specified to petition FRA for special approval and, instead, permits such operations, under certain conditions—including when the railroad provides FRA with a detailed written notice describing the parameters of the operation before commencing the operation. The exceptions in the final rule for Class II and III railroads have made unnecessary the narrower, proposed small railroad exception, which would have applied only to small railroads with fewer than 400,000 annual employee work hours, and thus the final rule does not include that proposed exception. Although various proposed exceptions contained additional safety requirements, the final rule streamlined those additional requirements and has established a compliance schedule for implementing them rather than the proposal that would have required implementation on the effective date of the final rule.

The final rule requires additional safety conditions to be met for the proposed one-person crew helper service and lite locomotive(s) consist exceptions as those one-person crew train crew operations would pose the same safety concerns as other exceptions in the final rule that require additional safety conditions to be met. In addition, FRA has modified the risk assessment requirements, allowing a railroad to make its determination either quantitatively or qualitatively, or both, rather than only quantitatively as expressly proposed. Finally, FRA has changed the review standard for a special approval petition from determining that an operation is ''consistent with railroad safety'' to determining whether approving the operation described in the petition is ''as safe or safer'' than a two-person train crew operation, as it will more clearly allow each railroad to compare the operation to the baseline of a two-crewmember operation.

[14] *See* 49 CFR 229.15 (requiring design, operation, inspection, testing, and repair standards for remote control locomotives).

IMPLEMENTATION SCHEDULE FOR ONE-PERSON TRAIN CREW OPERATIONS [15]

Type of one-person operation	Notify FRA of one-person operation [16]	Petition for special approval with risk assessment for one-person operation [17]	Add operating rules to address safety of certain situations [18]	Add operating rules for one-person crew member's safety [19]	Add alerters to locomotives and add associated operating rules [20]	Annual review analysis report [21]
Class II/III legacy freight (existing 2 years) [22].	September 6, 2024	Not Applicable (N/A)	September 6, 2024	September 6, 2024	June 9, 2026	N/A.
Class II/III freight non-legacy or new, and no prohibited hazmat [23].	Yes, provide before commencing operation.	N/A	Yes, comply when commencing operation.	Yes, comply when commencing operation.	Yes, comply when commencing operation.	N/A.
Work trains not exceeding 4,000 trailing tons; [24] Helper service; [25] and, Lite locomotive(s) [26].	N/A	N/A	September 6, 2024	September 6, 2024	June 9, 2026	N/A.
Existing but non-legacy (existing, but less than 2 years) option to continue pending FRA-approval [27].	June 23, 2024 [28]	August 7, 2024	Yes, provide as part of special approval petition.	Yes, provide as part of special approval petition.	Yes, provide as part of special approval petition.	Yes, provide no later than March 31 of the following year.
Other new (freight with or without prohibited hazmat, passenger, or tourist) operations [29].	N/A	Yes	Yes, provide as part of special approval petition.	Yes, provide as part of special approval petition.	Yes, provide as part of special approval petition.	Yes, provide no later than March 31 of the following year.

Costs and Benefits

FRA has analyzed the economic impact of this final rule. FRA estimated the costs associated with alerters, operating rules, notification to FRA, risk assessments and special approvals, annual reporting after receipt of special approval, and Government administration. FRA qualitatively discusses the benefits but does not have sufficient data to quantify those benefits.

The following types of railroads with one-person train crew operations are required, based on a compliance date schedule, to: (1) notify FRA; (2) adopt and comply with operating rules necessary to ensure the one-person train crewmember's safety and that the railroad is prepared to take appropriate mitigation measures in response to certain safety-critical situations; and (3) equip a one-person train crew's controlling locomotive with an alerter:

- Class II and Class III freight railroads with a legacy one-person train crew operation established for at least two years before the effective date of the final rule.
- Class II and Class III freight railroads with a non-legacy one-person train crew operation that do not transport specific types and quantities of hazardous materials as specified in § 218.123(c).

The following types of railroads with a one-person train crew operation require special approval from FRA and must conduct a risk assessment:

- All Class I railroads and all one-person passenger railroad operations established after the effective date of the final rule.
- All Class II and III freight railroads with a non-legacy one-person train crew operation that transports certain types and quantities of hazardous materials as specified in § 218.123(c).

Work train operations, helper service, and lite locomotive operations are required, based on a compliance date schedule, to: (1) adopt and comply with operating rules necessary to ensure the one-person train crewmember's safety and that the railroad is prepared to take appropriate mitigation measures in response to certain safety-critical situations; and (2) equip a one-person train crew's controlling locomotive with an alerter.

FRA estimates the 10-year costs of the final rule to be approximately $6.6 million, discounted at 7 percent. The annualized costs will be approximately $0.9 million discounted at 7 percent. The following table shows the total costs of this final rule, over the 10-year analysis period.

TOTAL 10-YEAR DISCOUNTED COSTS

[2022 Dollars] [30]

Category	Total cost, 7 percent ($)	Total cost, 3 percent ($)	Annualized cost, 7 percent ($)	Annualized cost, 3 percent ($)
Alerters (Legacy Operations)	2,176,402	2,217,233	309,871	259,927
Alerters (New Operations)	2,251,306	2,483,470	320,535	291,138
Operating Rules (Existing Operations)	119,954	119,954	17,079	14,062
Operating Rules (New Operations)	280,824	308,591	39,983	36,176
Notification (Existing Operations)	185,114	185,114	26,356	21,701
Notification (New Operations)	111,133	122,593	15,823	14,372
Risk Assessment and Special Approval (Class I)	560,745	570,571	79,837	66,888
Risk Assessment and Special Approval (Class II and III)	162,446	164,506	23,129	19,285

[15] This implementation schedule summarizes the requirements and is not intended to substitute for an exact description of the complete requirements.

[16] § 218.129(b).

[17] § 218.131 through § 218.135.

[18] § 218.129(c)(1).

[19] § 218.129(c)(2).

[20] § 218.129(c)(3).

[21] § 218.137.

[22] § 218.129(a)(1).

[23] § 218.129(a)(2).

[24] § 218.129(a)(3).

[25] § 218.129(a)(4).

[26] § 218.129(a)(5).

[27] § 218.131(a)(2).

[28] § 218.131(a)(2)(i). Unlike the other notification requirements, this notification can be limited to a summary of the operation and the name, title, address, telephone number, and email address of the primary person(s) to be contacted regarding the written notice and the operation.

[29] § 218.131.

TOTAL 10-YEAR DISCOUNTED COSTS—Continued

[2022 Dollars] [30]

Category	Total cost, 7 percent ($)	Total cost, 3 percent ($)	Annualized cost, 7 percent ($)	Annualized cost, 3 percent ($)
Risk Assessment (Material Modifications)	93,031	111,178	13,246	13,033
Annual Reporting	182,821	221,284	26,030	25,941
Government Administrative Cost	513,100	579,523	73,054	67,938
Total Costs	6,636,876	7,084,016	944,942	830,463

The primary benefit of this rule is to ensure that each train is adequately staffed and has appropriate safeguards in place for safe train operations under all operating conditions. This final rule will also ensure that several significant operational safety issues with one-person train crew are addressed and allow FRA to collect information and data on one-person train crews. For instance, this final rule addresses a safety issue by requiring alerters for Class II and III railroads operating with a one-person train crew that do not already have these safety devices installed on their locomotives for that type of operation. Alerters will ensure that if a crewmember becomes physically unresponsive, the train will apply emergency brakes—a function typically left to a conductor or other second crewmember.

This final rule also ensures railroads address safety issues that may arise with one-person train crew operations by requiring operating rules that address the communication and safety of the one-person train crew.

To operate with one-person train crews, freight railroads transporting certain types and quantities of hazardous materials must identify, evaluate, and address safety concerns that may arise from such operations by submitting a risk assessment to FRA for approval unless the railroad is a Class II or III short line or regional railroad and has established a legacy operation under the exception.[31]

The loss of a second crewmember to perform safety functions creates new hazards and/or increases the risk of certain existing hazards unless mitigating actions are taken.[32] The safety requirements in this final rule will allow the rail industry to integrate technologies to facilitate operations with a one-person train crew, but under the condition that safety will not be degraded.

Legal Authority

FRA is establishing regulations concerning train crew size safety requirements based on the statutory general authority of the Secretary of Transportation (Secretary). The general authority states, in relevant part, that the Secretary ''as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.'' [33] The Secretary delegated this authority to the Federal Railroad Administrator.[34] Additionally, as described below, the Secretary has the specific statutory duty to prescribe regulations and issue orders for the certification of any train crewmembers who operate a locomotive or are assigned train conductors.

By statute, the Secretary is required to ''prescribe regulations and issue orders to establish a program requiring the licensing or certification . . . of any operator of a locomotive.'' [35] FRA fulfilled that statutory requirement in 1991 by issuing a regulation requiring each railroad to file a locomotive engineer certification program with FRA.[36] Each railroad's program must specify how the railroad plans to make the determinations necessary to certify each of its locomotive engineers, as well as ensure that the certified locomotive engineers of other railroads are qualified to operate safely on the controlling railroad's track.[37] A locomotive engineer's main task is to operate the train safely. Other important tasks central to safe operation include: ensuring that the locomotive mechanical requirements are met; coordinating with the conductor about operational details; and, under the conductor's supervision, interpreting train orders, signals, and operating rules.

FRA also administers and enforces statutorily mandated [38] conductor certification requirements.[39] FRA defines a conductor as the crewmember in charge of a train or yard crew,[40] and the conductor's job requires supervising train operations so they are safe and efficient. The conductor's responsibilities include: managing the train consist; coordinating with the locomotive engineer for safe and efficient en route operation; interacting with dispatchers, roadway workers, and others outside the locomotive cab; and dealing with unexpected situations (*e.g.,* mechanical problems).[41] In addition, as locomotive and train technologies have become more complex in recent years, a conductor (or second crewmember) can assist a locomotive engineer by responding to technology prompts or conveying information displayed so that the engineer can maintain focus on the train's controls and movement. The purpose of the conductor certification regulation is to ensure that only those persons meeting minimum Federal safety standards serve as conductors.

[30] Numbers in this table and subsequent tables may not sum due to rounding. As discussed further in section VI.I of the RIA, quantified costs do not include costs that could be incurred in order to mitigate risks associated with a reduction in the number of crewmembers. The costs for operating rules (existing operations) and notification (existing operations) will solely be incurred in year 1. Therefore, the discounted costs are the same for 7% and 3% (since values are not discounted in year 1). However, when annualizing costs over 10 years, the discounted costs at 7% and 3% are different because they are annualized with different discount rates.

[31] §§ 218.129(a)(1) and 218.131.

[32] As explained in the NPRM, ''the implementation of a one-person operation, without any off-setting measures, may render existing rail safety requirements either less effective or ineffective.'' 87 FR 45573.

[33] 49 U.S.C. 20103.

[34] 49 CFR 1.89(a); 49 U.S.C. 103(g).

[35] 49 U.S.C. 20135.

[36] 56 FR 28254 (June 19, 1991), 49 CFR part 240.

[37] 49 CFR part 240, subpart B—Component Elements of the Certification Process, and § 240.229 (requiring certain action on the part of a railroad controlling the conduct of joint operations with another railroad). Additional guidance was provided in an interpretation published August 29, 2008. 73 FR 50883.

[38] 49 U.S.C. 20163, ''Certification of train conductors.''

[39] 49 CFR part 242, ''Qualification and Certification of Conductors.''

[40] 49 CFR 242.7 (defining ''conductor'').

[41] Rosenhand, Hadar, Emilie Roth, and Jordan Multer, Cognitive and Collaborative Demands of Freight Conductor Activities: Results and Implications of a Cognitive Task Analysis, FRA (July 2012).

When FRA published the conductor certification final rule, the agency made clear that the rule should not be read as FRA's endorsement of any particular crew consist arrangement.[42] However, if only one railroad employee is assigned as a train crew, the conductor certification rule requires that the single assigned crewmember be certified as both a locomotive engineer and a conductor.[43] This final rule maintains that one-person train crew option but adds restrictions to ensure safety, based on the type of operation.

In this regard, the final rule is an element of FRA's holistic approach to address a range of hazards related to the operation of trains. As noted above, FRA is authorized by statute to prescribe regulations and issue orders for ''every area of railroad safety'' supplementing laws and regulations in effect on October 16, 1970, as well as to continue to administer and enforce specific statutory mandates, including locomotive engineer and conductor certification requirements.[44] Specifically, given FRA's mandate to ''consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation,'' [45] FRA finds issuance of this final rule on train crew size safety both inherent in its statutory authority and in fulfillment of its charge from Congress. However, FRA recognizes that certain provisions focus on unique factors. Therefore, FRA finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing FRA to continue to fulfill its congressionally authorized role.

II. Discussion of Comments and FRA's Conclusions

A. Overview of Comments

On July 28, 2022, FRA published the NPRM proposing train crew size safety requirements and provided commenters 60 days to file comments.[46] On September 22, 2022, FRA extended the comment period by an additional 67 days.[47] On October 27, 2022, FRA scheduled a public hearing for December 14, 2022, and extended the comment period to December 21, 2022, an additional 19 days, to provide the public with additional time to comment on the proposed rule or submit a response to views or information provided at the public hearing, or both.[48] A transcript of the public hearing is available in the docket.[49]

During the 146-day comment period, the docket recorded approximately 13,576 separate entries for written comments with about 13,441 of those comments filed by individuals in their own names. In other words, about 99 percent of the written comments submitted to the docket were from individual commenters who were not filing their comment officially on behalf of an organization, group, or business. Of those individual commenters, about 13,377 expressed support for the NPRM and 64 opposed it, meaning less than approximately a half percent of individual commenters expressed opposition to the proposed rule. FRA estimates that more than half of the comments filed by individual citizen commenters used a form letter created by a labor organization or other organized interest group. In general, commenters who signed form letters in support of a two-person train crew mandate expressed the same types of safety concerns FRA raised in the NPRM. This final rule addresses those safety concerns to ensure the safety of rail operations, one-person train crewmembers, and the public. When summarizing a form letter, a footnote will cite to a single example.

The docket's recorded number of comments does not include the comments received through oral testimony at the public hearing on December 14, 2022, and there are other reasons why the 13,576 count should be considered only an approximation. As some entries included multiple comments or were signed by multiple people, there were likely more commenters than the number of comments recorded by the docket. Further, FRA discovered that some commenters sent in multiple comments. Because the comment period was extended twice, some commenters sent in a shorter comment before any extensions were granted, and then may have sent in more information as they developed further input. Every comment received was considered by the agency in finalizing this rule.

The order of the topics or comments discussed in this document is not intended to reflect the significance of the comment raised or the standing of the commenter. Additionally, this summary of the comments is intended to provide both a general understanding of the overall scope and themes raised by the commenters, as well as give some specific descriptions to provide context. Not every comment is described in this summary and, whenever counts of comments are provided, the counts are approximate as some comments could not be easily grouped with others. Comments regarding the proposed Regulatory Impact Analysis (RIA) are addressed in the RIA to the final rule.

In addition to the following summary of the general comments here, FRA used computer-based data analysis to identify common elements among comments.[50] FRA's computer-based data analysis often provided confirmation of FRA's manual estimates and insight, and additional insight into the written comments that would have been particularly difficult to discern based on human review alone. For example, the computer-based analysis more accurately identified comments that were identical than a human could track manually.[51] The computer-based data analysis could also readily find comments that used the same key words to allow FRA to review those comments together.[52] There were also many short comments and the computer-based data analysis was able to pick out those shorter comments and display them all in a few pages that could be more easily accessed and read.[53] The computer-based approach used natural language processing, specifically topic modeling, to extract major themes for the comments received based on the most frequently used words and phrases, which then assisted FRA in identifying the central themes raised by the commenters.[54]

Based on the comments received, FRA is revising aspects of the approach reflected in the NPRM, which can be

[42] 76 FR 69802, 69825 (Nov. 9, 2011).

[43] 49 CFR 240.308(c) and 242.213(d).

[44] *See* 49 U.S.C. 103, 20103(a).

[45] *Id.* at 103(c).

[46] 87 FR 45564.

[47] 87 FR 57863.

[48] 87 FR 65021.

[49] *https://www.regulations.gov/document/FRA-2021-0032-13184.*

[50] The 23-page computer-based data analysis report of the written comments was placed in the docket, FRA–2021–0032, with the other agency documents under the ''Browse Documents'' tab.

[51] The computer-based data analysis found one particular comment duplicated 2,065 times and which cites FRA–2021–0032–1914 as an example.

[52] For example, on pages 9–10 of the computer-based data analysis report, the term ''cut crossings'' was found used in approximately 45 comments.

[53] For instance, the computer-based data analysis report displays comments with less than 75 characters on pages 11–14.

[54] On pages 15–21, the computer-based data analysis report includes examples of the 10 themes identified when top words, *i.e.,* commonly used words, were extracted through topic modeling. For instance, a select group of top words included: emergency, life medical, community, supply chain, death, derailments, and vulnerable.

summarized as follows: (1) the final rule removes the previously-proposed strict prohibition on the transportation of some hazardous materials with a one-person train crew; (2) comments on FRA's proposed RIA led FRA to consider additional information and refine its analysis; (3) comments requesting more time to comply with any new minimum requirements to allow for planning, operational changes, or hiring and training of additional crewmembers led FRA to extend those compliance dates; (4) comments regarding the complexity of, and data requirements for, the risk assessment, along with concerns regarding the analytical methods required, led FRA to simplify the requirement, change the review standard so that a railroad can compare the operation to the baseline of a two-crewmember operation, provide guidance in an appendix, and retain an option for railroads to request use of alternative risk assessment methodologies as part of the special approval procedure; (5) comments outlining anticipated difficulties in complying with the risk assessment proposed in the NPRM led FRA to remove the risk assessment requirement and substitute a notification requirement for Class II or III freight railroads under certain types of specified operations; (6) comments about the proposed requirements for remote control operations, in addition to FRA's analysis that existing regulations already provided for minimum safety protections, led FRA to remove the subject from the final rule; and (7) comments on the potential preemptive effect of a Federal rail safety regulation on currently existing State-by-State regulation relating to the subject matter of crew size safety requirements led FRA to clarify what the agency understands will be the legal impact of this final rule.

B. Preemption

In the NPRM, FRA included in the background a summary of prior crew staffing rulemaking efforts. The summary discussed the decision issued by the U.S. Court of Appeals for the Ninth Circuit vacating FRA's withdrawal of the 2016 NPRM, as well as FRA's preemption determination contained in that withdrawal, and remanding the rulemaking to FRA.[55] The NPRM also included discussion of FRA's legal authority to issue the regulation[56] and the statutory preemption provisions found at 49 U.S.C. 20106.[57] As noted in the NPRM, a final rule issued by FRA ''would cover the same subject matter as the State laws regulating crew size, and therefore FRA expects a final rule will have preemptive effect on those State laws that are Statewide in character and do not address narrow, local safety hazards.'' [58] The NPRM then requested comments on the issue of preemption.

The California Public Utilities Commission (CPUC) commented that the final rule should reflect or exceed ''the strongest state laws that currently exist.'' [59] For that reason, CPUC is opposed to the NPRM to the extent it could undermine California's law which has a more stringent two-person crew mandate than FRA's proposed rule with exemptions. CPUC requested that FRA ''provide a stronger role for State agencies, such as [CPUC, and suggested that] FRA could require a railroad to seek a [S]tate agency's concurrence prior to applying for an exemption.'' [60] CPUC commented that because ''a [S]tate will have unique information regarding specific hazards or environmental concerns within [the State's] borders . . . [a] petitioning railroad should solicit the [S]tate agency's input . . . and the petitioning railroad should include [that information] in its petition to the FRA . . . .'' [61] CPUC also requested that FRA ''establish a clearly defined role for [S]tate agencies to provide input and the ability to revoke [an exemption] if safety issues arise that make the exemption untenable.'' [62]

A one-page letter signed by 19 senators from the Washington State Legislature commented that Washington has a law regulating train crew size and urged FRA not to preempt train crew size laws already passed by States when those laws meet or exceed Federal crew size standards.[63] Similarly, the Washington State Legislative Board of the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART–TD) commented that ''while [it] strongly support[s] FRA's adopting a national minimum train crew size rule [it] oppose[s] any regulatory language that would preempt [S]tate laws and regulations that are equal to or more stringent than a [F]ederal'' requirement.[64]

Many individuals and labor organizations commented that they supported the NPRM but wanted FRA to consider a way to avoid preempting State laws that have more stringent requirements. For example, the Transportation Trades Department, AFL–CIO (TTD) would like FRA's regulation to establish minimum safety requirements but not preempt States from setting more stringent requirements.[65] SMART–TD's Kansas State Legislative Board, however, supported eliminating the existing patchwork of State laws regarding crew size and creating a nationwide standard.[66]

A comment in support of FRA's preemption position came from 54 Members of the U.S. House of Representatives, recognizing that the State laws mandating minimum crew size requirements have been overturned by courts finding that the Federal government has jurisdiction over this subject matter.[67] For this reason, these U.S. House Members commented that it is FRA's responsibility to address this safety issue, calling it urgent because of the drastic changes in the freight rail industry over the last several years.'' [68]

Norfolk Southern Railway Company (NS) commented that while it agrees that a national rule addressing crew size would be consistent with Congress' express goal that Federal laws and regulations relating to railroad safety create national uniformity, it opposes this rule for a variety of reasons,

[55] 87 FR at 45568–70 (citing *Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers* v. *FRA,* 988 F.3d 1170 (9th Cir. 2021).

[56] 87 FR at 45567 and 49 U.S.C. 20103 (citing, in relevant part, that the Secretary ''as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970'').

[57] 87 FR at 45570–71 (citing the statutory preemption provisions in 49 U.S.C. 20106 that mandate that laws, regulations, and orders ''related to railroad safety'' be nationally uniform, and that a Federal regulation or order covers the subject matter of a State law where ''the [F]ederal regulations substantially subsume the subject matter of the relevant [S]tate law'').

[58] 87 FR at 45571. As noted below, there is a narrow exception to the preemption provisions that allows non-Federal regulation of ''essentially local'' safety hazards. 49 U.S.C. 20106(a)(2).

[59] FRA–2021–0032–12258 at 2. CPUC's comment did not distinguish between exemptions and one-person train crew operations proposed for a special approval process, calling the portions of the NPRM that would allow for fewer than two train crewmembers an ''exemption process.''

[60] *Id.*

[61] *Id.*

[62] *Id. at 3.*

[63] FRA–2021–0032–12202.

[64] FRA–2021–0032–12917 at 1. The State of Washington's Utilities and Transportation Commission also commented in strong support of the NPRM, citing the importance to protect the public and the environment from potential disaster involving hazardous train derailments during a period in which railroads are using longer trains, without mentioning preemption of Washington State's laws. FRA–2021–0032–12746.

[65] FRA–2021–0032–12306 and FRA–2021–0032–13049.

[66] FRA–2021–0032–9397.

[67] FRA–2021–0032–12809 (a duplicate comment was filed at FRA–2021–0032–12971).

[68] *Id.* at 2.

including that the NPRM would be ''burdensome'' and that FRA neglected to mention in the NPRM that some States' laws have been invalidated.[69] NS stated that ''[p]reemption cannot justify FRA's imposition of this particular rule'' because of the harm the NPRM could cause the rail industry.[70]

SMART–TD's Illinois Legislative Board (SMART–TD ILB) commented in support of the NPRM and provided a supporting letter from Illinois Governor J.B. Pritzker.[71] The comment stated that a court had vacated an Illinois law requiring most freight trains operating in Illinois to have an operating crew of at least two individuals[72] and that SMART–TD ILB and Governor Pritzker support the NPRM as an alternative to the preempted Illinois law.

FRA's Response

As explained in the NPRM, FRA recognizes that, if the issue of crew size safety is left to be governed by a patchwork of State laws, logistically it may become impossible for a railroad to even consider operations with fewer than two crewmembers. Thus, this rulemaking is intended to set forth a nationwide rule for crew size safety, especially operations with a one-person train crew, based on FRA's expertise and experience in regulating safety and risks in rail operations. While courts may find that some of those State laws are preempted even without this rule, other State laws may not be challenged and found preempted, leaving an untenable inconsistency governing crew size. This final rule meets Congress' mandate that the laws, regulations, and orders related to railroad safety be nationally uniform.

While FRA intends this final rule to create a nationwide standard and anticipates that it will preempt State laws covering the same subject matter, FRA clarified in the NPRM that FRA's statutory preemption provision includes a ''narrow exception''[73] to FRA's broad authority to preempt State laws. This narrow exception allows non-Federal regulation of ''essentially local'' safety hazards.[74] An ''essentially local safety hazard'' is ''one which is not adequately encompassed within national uniform standards.''[75] As noted in the NPRM, some State laws governing crew size, such as those in California, Nevada, and Washington, do not, in FRA's view, address an ''essentially local'' hazard because they would apply statewide.[76] In support of this view, FRA explained in the NPRM that legislative history and subsequent judicial decisions indicate the narrow exception is intended to allow States to respond to local situations not capable of being adequately addressed in uniform national standards, but local safety hazards cannot be Statewide.[77]

In response to CPUC and other similar commenters who requested that FRA provide States with a clear role in FRA's exemption provision, this final rule provides that the public may comment on any special approval petition as FRA proposed in the NPRM. FRA encourages States and their regulatory agencies to comment on requests for one-crew operations and provide any safety information or data they believe would be useful to FRA in deciding whether to approve a special approval petition for a one-person train crew operation.

As an alternative to issuing a narrowly tailored State law to address any essentially local safety hazards, a State could bring any safety concerns about a particular rail operation to FRA's attention for discussion or possible investigation. For example, a State agency that participates in investigative and surveillance activities with FRA under 49 CFR part 212 can work with FRA to enforce this final rule.[78]

FRA disagrees with NS's comment that FRA is relying on preemption as a justification for the final rule. As explained above, FRA is issuing this final rule to ensure that trains are adequately staffed for their intended operation and railroads have appropriate safeguards in place for safe train operations, especially when using one-person train crews. Moreover, this final rule meets Congress' requirement that the laws, regulations, and orders related to railroad safety be nationally uniform.[79] Thus, FRA is not basing its justification for this final rule on preemption, but rather is noting that the national, uniform standard provided in this rule is expected to preempt State laws governing crew size.

C. Comments Supporting the NPRM

In the NPRM, FRA explained how the Ninth Circuit's decision to vacate and remand the 2019 withdrawal left FRA with some choices on a path forward, and FRA exercised its discretion to choose, through this rulemaking, to reconsider numerous safety issues that may be associated with or impacted by one-person train crew operations.[80] For instance, FRA revisited the lack of a Federal requirement for a systematic post-accident protocol for trains hauling freight.[81] The NPRM also raised several other potential safety issues to consider, including the context that many of the Federal rail safety regulations were written with the expectation that each train would have multiple crewmembers, the safety findings drawn from research on the cognitive and collaborative demands placed on train crewmembers while operating a train, and the ability of railroads to respond to a one-person train crewmember who may become incapacitated.[82]

Many commenters supported FRA's decision in the NPRM to reconsider the safety issues and propose minimum requirements for the size of train crews depending on the type of operation. These commenters are concerned, among other things, about the operational safety of a train operated by a one-person crew, the operational safeguards to protect that crewmember in various situations, and the impact of one-person train crew operations that travel through their communities as evidenced by the numerous comments received raising those concerns.

1. Labor Organizations

The Brotherhood of Locomotive Engineers and Trainmen (BLET) and SMART–TD filed a joint comment stating that their unions, which represent the vast majority of operating train crew workers across the nation, support the implementation of a two-person crew rule in the interest of public safety and request that the final

[69] FRA–2021–0032–13045.

[70] *Id.* at 6.

[71] FRA–2021–0032–10530.

[72] *Id.* at 2 (referring to, but not citing, *Ind. Rail Rd. Co.* v. *Ill. Commerce Comm'n,* 576 F. Supp. 3d 571 (N.D. Ill. 2021).

[73] 87 FR at 45570–71 (citing *Duluth, Winnipeg & Pac. Ry. Co.* v. *City of Orr,* 529 F.3d 794, 796 (8th Cir. 2008) in which the court found 49 U.S.C. 20106(a) ''creates a narrow exception to preemption through its savings clause'').

[74] 49 U.S.C. 20106(a)(2).

[75] *Union Pacific R. Co.* v. *California Pub. Utils. Comm'n,* 346 F.3d 851, 860 (9th Cir. 2003).

[76] 49 U.S.C. 20106(a)(2); H.R. Rep. No. 91–1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117 (''these local hazards would not be statewide in character''); *see also Norfolk & Western Ry. Co.* v. *Public Utilities Comm'n of Ohio,* 926 F.2d 567, 571 (6th Cir. 1991) and *National Ass'n of Regulatory Util. Comm'rs* v. *Coleman,* 542 F.2d 11, 14–15 (3d Cir. 1976) (both holding that the local hazard exception cannot be applied to uphold the application of a statewide rule).

[77] 87 FR at 45571 (citing H.R. Rep. No. 91–1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117).

[78] Part 212 establishes standards and procedures for State participation in investigative and surveillance activities under the Federal railroad safety laws and regulations.

[79] 49 U.S.C. 20106.

[80] 87 FR at 45571–76.

[81] 87 FR 45571.

[82] *See e.g.,* 49 CFR 218.99 (requiring point protection for shoving or pushing moves; 218.103–218.107 (operational requirements for hand-operated switches) and generally, 49 CFR part 239 (Passenger Train Emergency Preparedness requirements).

rule ''mandate that two-person crews are the standard as they have proven to be the safest and most efficient way to operate.'' [83] In addition, the International Brotherhood of Teamsters, which includes BLET as part of the Teamsters Rail Conference, commented that it supports FRA's efforts to promulgate the NPRM and endorsed BLET's comment.[84] The jointly filed written comment, and BLET and SMART–TD's oral testimony at FRA's public hearing, detailed their members' interest in this safety rulemaking. For example, BLET and SMART–TD are concerned with the multiple steps a one-person train crew approaching a roadway work zone would need to perform alone and the risks to rail employees working on or near the track if that single crewmember made a mistake. The unions' jointly filed comment also noted how many railroads embraced greater electronic device use, such as cellphone use, as a pivotal component of their plans to reduce crew size even though electronic device use is currently strictly regulated because of those devices' potential for distraction.[85] BLET and SMART–TD also described how trains are routinely slowed by unplanned events that require someone other than the locomotive engineer to troubleshoot the problem before the train can continue and how a conductor and a locomotive engineer work as a team during any necessary troubleshooting. Moreover, the labor organizations' jointly filed comment noted that a two-person train crew provides a backstop to human error, which is still useful with a positive train control (PTC) system, and that, even when there is a low incidence of rail accidents, the consequence of an accident can be high and thereby justify an additional fail-safe measure.

BLET and SMART–TD commented that their members who have experienced PTC implementation first-hand, expressed that they want PTC as a tool but recognize that PTC was not designed to do the job of a crewmember supplementing the engineer. Further, the unions jointly commented that PTC ''has introduced new complexities and levels of attention capture not seen prior to the implementation of PTC and has emphasized the need for a conductor on board due to the added level of distraction PTC has imposed upon the engineer.'' [86] BLET and SMART–TD commented that PTC and other technologies often involve after-market products bolted on, rather than integrated into, existing equipment which makes the locomotive cab feel crowded with technology and, in turn, can complicate the jobs of the train crewmembers. BLET and SMART–TD also commented that automated fuel-saving software programs currently are programmed without regard to bad weather or less-than-optimal conditions, potentially requiring a locomotive engineer to intervene manually. BLET and SMART–TD also commented that the industry's increased reliance on distributed power operations (*i.e.,* where an engineer must control two or more locomotives independently with the aid of computers) means that the locomotive engineer must direct significant attention to computer screens; in their view, the NPRM did not adequately consider the safety considerations of using a one-person train crew with a distributed power operation, which ''takes much of the engineer's attention away from the view forward.'' [87]

During the public hearing, BLET's National Legislative Representative, who described himself as a former freight locomotive engineer on a Class I railroad for 18 years, testified in overall support of the NPRM and included comments regarding BLET's concerns with some of the proposed exceptions to the two-person train crew mandate. BLET testified that a locomotive engineer is not a mobile member of the train crew because that person is responsible for the physical manipulation of the controls of the locomotive and the monitoring of on-board systems. BLET stated that for an engineer to leave the locomotive cab unattended as a one-person train crew, the engineer must complete a time-consuming series of steps that includes disabling the locomotive's controls, setting the train's air brakes, securing the locomotive and train with hand brakes, and following rules or procedures that confirm the train is properly secured. In explaining how PTC has made a train crew's job more difficult, BLET testified that PTC has introduced new complexities and can reduce a crewmember's situational awareness such as when a dispatcher references a mandatory directive over the radio and a locomotive engineer must toggle between display screens to understand the directive the dispatcher is referencing. BLET raised concern that railroads are reducing crew size to increase corporate profits while ignoring rules or cutting corners on safety. BLET's testimony also reiterated concern in BLET and SMART–TD's jointly filed written comment that FRA reconsider some of the proposed exceptions to a two-crewmember mandate as those operations may not as safe or simple as FRA suggested in the NPRM.

During FRA's public hearing, SMART–TD's President testified about the general dangers of railroad work and that safety cannot be expected to improve by reducing the number of train crewmembers when the workforce is already depleted and overworked. SMART–TD's President testified that ''the carriers regularly argue that there is no data to support a two-person crew being safer than a one-person crew . . . [and t]he irony . . . is that likewise there is no data to support that a one-person or autonomous operation is any safer than that of a two-person crew in freight operations.'' SMART–TD's President also described an incident when he was a locomotive engineer on a coal train and his conductor warned him of a young child on the track. SMART–TD's President testified that he blew the horn and rang the bell, but the boy did not move, and he credited the conductor for saving the child's life because the conductor ran out on the nose of the engine and waved in a manner that led the child to step out of the way. SMART–TD's President concluded that his experience demonstrates the effectiveness of two crewmembers working as a team as it is important to have the conductor make track observations when a locomotive engineer may be distracted by monitoring the controls or interacting with a computer screen. SMART–TD testified that, in addition to a backup observation role, a conductor can contribute knowledge and decision-making judgment, especially when responding to non-routine situations. SMART–TD testified about PTC's limitations and how a conductor can identify washouts, rockslides, fires, vehicles, and pedestrians, but PTC cannot. SMART–TD described how a one-person crew would be unlikely to assist anyone injured in a highway-rail grade crossing collision nor would the one-person crew be able to assist first responders as easily as a conductor or quickly assess damage from a derailment.

During FRA's public hearing, a member of SMART–TD who described himself as a conductor with 18 years of experience stated that the proposed crew size safety requirements are

[83] FRA–2021–0032–13038 at 1.

[84] FRA–2021–0032–13050.

[85] *See* 49 CFR part 220, subpart C (specifying its purpose ''is to reduce safety risks resulting from railroad operating employees being distracted by the inappropriate use of electronic devices, such as mobile telephones (cell phones or cellular phones) and laptop computers'').

[86] FRA–2021–0032–13038 at 2.

[87] FRA–2021–0032–13038 at 6.

important because the workforce is already strained and the recent doubling of one-and-a-half-mile-long trains would make a complex job unsafe with a one-person train crew.[88] This SMART–TD member described the importance of multi-person crews being able to mentor one another and provide backup. Specifically, he explained that a one-person crew will be physically and psychologically challenged because of the jobs' many demands, such as the need to look at three different computer screens in the locomotive cab while continuing to monitor conditions ahead, and due to working alone without human interaction or even the freedom to listen to music. He also stated that a person working alone will lose a layer of safety that is not fully replaced by PTC. Further, this SMART–TD member testified about an incident in which he was a train crewmember and the PTC system allowed his crew to operate the train with PTC enabled even though nobody entered the number of axles in the train, a potential safety concern in the way the PTC system would govern the train. This SMART–TD member also stated that, as a former U.S. Navy combat medic, he was trained to spot medical concerns and, in his rail work experience, it has been necessary for him to have fellow crewmembers removed for medical emergencies, illnesses, and fatigue. Thus, he noted that one-person train crews, who do not remove themselves from train operations when they are tired or sick, will pose a greater safety risk than two-person train crews where the second crewmember can mitigate the risk of a sick or tired crewmember.

TTD commented that it consists of 37 affiliated unions representing the totality of rail labor, including both passenger and freight rail workers, and specifically the locomotive engineer and conductor employees who will be most impacted by the NPRM.[89] TTD's President also presented oral testimony at FRA's public hearing. Overall, TTD commented that it supported the NPRM and urged FRA to adopt more stringent requirements than proposed by eliminating or changing the option for a railroad to use ''an alterative risk assessment process in lieu of the proposed risk assessment'' and by requiring that a second crewmember be a certified conductor.[90] TTD stated that FRA's NPRM recognized the ''fundamental truths [that] . . . crew size is directly correlated to the safe operation of trains [and that] . . . reducing the number of [crewmembers] creates substantial safety risks that need to be addressed . . . [because the] crewmembers have complementary[,] but distinct[,] responsibilities.'' [91] TTD commented that a Class I railroad's video shown at the public hearing to demonstrate operations using ground-based conductors described a scenario occurring ''under ideal circumstances in terms of [a ground-based conductor] being able to locate and access [a] site without any difficulty [as a person] arriving from off-site is likely going to be severely delayed.'' [92]

TTD also highlighted a comment from its affiliate, the International Association of Fire Fighters, that first responders on-scene rely on train crews to provide critical cargo information and services such as separating train cars, and with only one crewmember there is no redundancy and a much higher risk of first responders not receiving crucial information.[93]

Labor organizations, such as BLET, SMART–TD, and TTD, requested that FRA reconsider the remote control operations exception and asked whether additional regulations of remote control operations are needed to allow remote control operators to safely operate over any distance. These commenters do not seek FRA to regulate remote control operations through this rulemaking, as they viewed the proposed exception as allowing such operations without establishing other necessary safety requirements. These labor organization commenters took the position that FRA should, outside of this rulemaking, take action to review all remote control operation related accidents, regardless of whether the accidents occurred during train or switching operations, and then consider whether to seek input from FRA's Federal advisory committee, the Railroad Safety Advisory Committee (RSAC), or otherwise initiate a rulemaking covering comprehensive safety requirements for remote control operations.

The Brotherhood of Maintenance of Way Employes Division (BMWED), which represents employees who inspect, install, construct, repair, and maintain railroad track, roadbed, and related right-of-way infrastructure on all Class I railroads, advocated for a locomotive engineer and a conductor two-person train crew for every freight train operating over the general railroad system.[94] BMWED's comment stated that two-person crews provide necessary checks and balances for the operation of the train and its securement at terminal points, yards, and sidings.

The American Train Dispatchers Association (ATDA) commented in support of the proposed rule, emphasizing the safety need for a dispatcher to immediately communicate instructions or orders to a train en route.[95] ATDA is concerned that a one-person train crew might not always be able to receive communications, thereby creating a substantial hazard to rail employees and the public. Also, ATDA commented that railroad safety is improved by the regular crew communications to dispatchers and that it will be unrealistic for a one-person crew to accomplish all the crew's regular duties and continue to report other safety information, including the location of young children near the tracks, visible track- and structure-related defects or damage, and potential problems on trains passed such as shifted loads and equipment dragging.[96]

The Transport Workers Union of America (TWU), which represents a variety of rail employees, including those who inspect and repair equipment and track at several Class I railroads and some of the northeast's largest regional rail systems, commented in support of the rule, emphasizing the safety need for a second crewmember to assist carmen who are dispatched when a train develops mechanical problems en route.[97] TWU explained that a single carman is often dispatched to make such a mechanical repair and, on these occasions for safety reasons, it is necessary for a conductor to assist the carman in making the inspection and necessary repairs.

In addition, BLET Division 446 from Belen, New Mexico,[98] described how its members operate trains over remote landscapes that are not readily accessible by motor vehicle, and thus indicated that a two-person train crew is vital to survival in medical or other emergency situations.

Further, the California Labor Federation (CLF), AFL–CIO [99] noted a two-person train crew is better able to monitor events both inside and outside the locomotive cab than can a single crewmember, thereby providing greater

[88] This SMART–TD witness at the hearing is also the Secretary of SMART–TD's Maryland State Legislative Board as identified in that organization's comment. FRA–2021–0032–6937.

[89] FRA–2021–0032–12306 and FRA–2021–0032–13049.

[90] FRA–2021–0032–12306 and FRA–2021–0032–13049 at 2.

[91] FRA–2021–0032–12306 and FRA–2021–0032–13049 at 5.

[92] FRA–2021–0032–13049 at 13.

[93] FRA–2021–0032–5247.

[94] FRA–2021–0032–12213.

[95] FRA–2021–0032–13016.

[96] *Id.* at 3.

[97] FRA–2021–0032–12281.

[98] FRA–2021–0032–8741.

[99] FRA–2021–0032–10712.

situational awareness. CLF also explained how a second crewmember can fill in knowledge gaps and keep the locomotive engineer alert when that engineer is fatigued.[100]

2. Individual Commenters

A short form letter was used in approximately 3,658 comments to express opposition to one-person crews, asserting that ''[h]aving multiple crewmembers working at all times protects against medical emergencies and derailments.'' [101] The form letter also suggested an economic argument that railroads were motivated to reduce train crew size by ''Wall Street greed'' and that one-person train crews could be connected to future supply chain disruptions.

Further, approximately 469 commenters submitted a short form letter which stated that two pairs of eyes are better than one and compared a train crew to an airline crew, but suggested rail posed greater risks because freight trains transport hazardous or flammable materials and spent nuclear rods.[102]

Another form letter sent by approximately 29 individual commenters stated their shared concern that a lone crewmember would not be able to address train malfunctions or grade crossing incidents or assist emergency response personnel as quickly as a two-person crew could, leaving their community in harm's way.[103] For this reason, these commenters supported FRA's proposal to establish minimum requirements for the size of crews operating trains.

In a similar example of a form letter supporting a two-person crew mandate, FRA received nine identical comments mailed and docketed together as a single comment from individuals expressing concern that a lone crewmember would not be able to address train malfunctions or grade crossing incidents or assist emergency response personnel as quickly as a two-person crew could.[104]

During FRA's public hearing, a commenter identified herself as a conductor with ten years of experience for the Union Pacific Railroad Company (UP).[105] The commenter stated that she is concerned with an overreliance on technology that does not always work as intended. She also disagreed with UP's testimony that having a conductor in a truck would be a faster way of alleviating a mechanical repair to a train versus a conductor who travels with the train.

Numerous individual commenters provided first-hand accounts of close calls and lives saved by the action of two crewmembers working as a team. These commenters largely provided anecdotal information supporting why they thought trains staffed with fewer than two persons created unsafe conditions. Individual commenters sometimes used a form letter provided by an organizing association or union but added their personalized statement to make it unique. Because there are so many of these types of comments in the record, the following examples are provided as a sampling and not an exhaustive summary.

A short form letter comment supporting a two-person train crew mandate was used in approximately 2,574 comments and was written from the perspective of rail employees who are currently train crewmembers.[106] The form letter captured the person's support for FRA revisiting research described in the NPRM that scrutinizes the cognitive and collaborative demands placed on each crewmember, and how multiple crewmembers can work together as an effective, safe team. This form letter also raised concerns with technology and other job-related stressors and concluded that having a work partner helps get the job done.

A commenter who identified himself as having 22 years of experience as a conductor and several leadership roles in SMART–TD supported the NPRM, as he viewed a two-person train crew requirement as vital to safe freight operations largely because of the hazards related to trains hauling hazardous materials.[107] The commenter pointed to trends he has observed, stating that the length and weight of freight trains are increasing, thereby impacting the distance needed to stop the train in case of emergency and increasing the probability of an accident/incident. The commenter also stated that a derailment or accident involving a long train hauling mainly hazardous materials could pose a more widespread danger zone than a shorter train. His stated concerns included protecting communities and schools located near railroad tracks. The commenter also stated that communities impacted by stopped trains blocking crossings would be worse off because it would take significantly longer for a railroad to manually separate the train and unblock the crossing if a conductor is not on the train to assist. Further, the commenter raised the issue of how two crewmembers keep each other alert and on task, and that having an accountability partner is the number one tool used by crews to combat fatigue.

An individual commented that he was a conductor on a train that struck a delivery truck at a highway-rail grade crossing.[108] The commenter explained that while the locomotive engineer began the process of stopping the train, he immediately called the dispatcher to arrange for emergency first responders. According to the commenter's description, he was off the train before it stopped so that he could run back to the crossing and help a passerby pull the unconscious truck driver out and away from the truck before the truck was engulfed in flames. He was then available to assist first responders, to split or secure the train or answer any questions as needed. The commenter contrasted his accident description with how he believes the incident would have unfolded if the train had been operated by a one-person crew. Under the commenter's theoretical scenario, the locomotive engineer would make an emergency brake application, dial the emergency number, and provide the milepost location. The engineer would not be able to provide the dispatcher with the DOT grade crossing number until the train was stopped and the number could be safely found in reference materials. The commenter explained that with a one-person crew the dispatcher would call for emergency first responders, but the engineer could not leave the train to assist the driver because the engineer would have a duty to secure an unattended train with hand brakes first. According to the commenter, without a second crewmember, other factors would determine whether the driver would have been rescued in time, and the one-person crewmember would feel helpless as the crewmember would be required to remain on the train unable to help anyone injured or readily assist first responders. The commenter also stated that FRA's proposed rule was not stringent enough in that two-person train crews are necessary for all train movements to ensure safety.

A commenter described a situation when he was part of a freight train crew that had an emergency brake application in a town.[109] Because the train was blocking the town's highway-rail grade crossings for at least 15 minutes and

[100] A similar comment was received from the Oklahoma AFL–CIO. FRA–2021–0032–10355.

[101] FRA–2021–0032–2764.

[102] FRA–2021–0032–10974 is a representative example of this group of comments.

[103] FRA–2021–0032–11120.

[104] FRA–2021–0032–10465.

[105] FRA–2021–0032–13184.

[106] FRA–2021–0032–8789.

[107] FRA–2021–0032–9893.

[108] FRA–2021–0032–12240.

[109] FRA–2021–0032–0970.

preventing an ambulance from crossing the tracks, a dispatcher requested that the crew cut a crossing to allow the ambulance by. The commenter is concerned that without a second crewmember, situations like this would occur, and it is unclear how long it would take a railroad to open a crossing for local emergency responders.

A commenter expressed several safety concerns as a freight train conductor for over 19 years.[110] For instance, the commenter expressed frustration that railroads do not keep track of incidents in which trains with two crewmembers saved lives or prevented accidents. He explained that he has crewed trains involved in accidents at rail-highway grade crossings and derailments of cars transporting hazardous materials, and how two crewmembers can more easily prevent harm to the public by taking quick action or relaying information to emergency responders. He also expressed concerns with a one-person train crew suffering from fatigue.

A commenter described that he is both a locomotive engineer and conductor who has experienced firsthand why it is imperative to public safety that each train have a minimum of two crewmembers.[111] The commenter described an incident in which the train he was conducting crashed into a car at a highway-rail grade crossing during winter. The commenter explained that, with two crewmembers, he was free to help the driver of the motor vehicle that was in a ditch, while the engineer stayed with the locomotive to coordinate with local emergency responders, monitor the air brake system, and perform other duties necessary to maintain the safety of rail operations.

An individual commented that he has over twenty years experience as a conductor and engineer for a Class I freight railroad and raised many safety issues.[112] For instance, the commenter expressed concern that a one-person train crew that significantly relies on PTC and other technologies to safeguard and operate the train will encounter difficulties when one or more technologies fail or are unavailable as the person's ability to operate in manual mode could have deteriorated from disuse and that there are examples of this problem in the airline industry. The commenter also made a case for redundancy, noting that in the motor vehicle context, Federal law mandates cars be manufactured with seat belts and States enforce laws governing the use of seat belts even though air bags could have arguably replaced the seat belt. The commenter pointed out that, in his experience, railroads have largely held both crewmembers responsible for the safe operation of the train and compliance with operating rules and practices because doing so enhances safety.

Additionally, this same commenter stated that he disagreed with railroad commenters who suggested a conductor in a truck could substitute for a conductor on the train. He commented that he is familiar with a territory that would not be accessible by truck and, therefore, a conductor in a truck would be delayed getting to and fixing a problem involving the train. In addition, the commenter stated that a locomotive engineer can often determine the approximate location of a broken knuckle and a conductor can replace it with a new knuckle as a relatively routine repair. He stated that in his short experience, he has fixed three broken knuckles and took 30 to 45 minutes to make a replacement. He also described an incident where he changed a knuckle even though the railroad sent a carman out to do it, and he was done with the repair before the carman arrived about 90 minutes later.

This same commenter also described a situation with a one-person train that operates into a mile-long tunnel on the territory he works. According to the commenter, because the tunnel does not have any ventilation, if the train has any issues where it might have to stop in the tunnel, the crew is instructed to cut the crew's locomotives from the train and get out of the tunnel before the tunnel fills with carbon monoxide. During this tunnel operation, the commenter theorized that it would be impossible for a one-person crew to create enough pin slack to separate the locomotives from the rest of the train to escape the tunnel by operating the locomotives.

During FRA's public hearing, a commenter identified herself as a BLET National Auxiliary, Second Vice President, and Legislative Representative from Lakeside, Nebraska.[113] The commenter also identified herself as the concerned wife of a BNSF Railway Company (BNSF) locomotive engineer whom she does not want to operate trains alone, noting in particular a past medical event. She also expressed concern about a one-person train crewmember suffering from fatigue, isolation, and depression. Further, the commenter was concerned that training programs for one-person train crews will be inadequate, noting that when railroads removed the brakeman position to reduce train crew size to two crewmembers, the quality of the training was reduced to accommodate the large number of brakemen who were trained for conductor positions.

During FRA's public hearing, another commenter stated he was a locomotive engineer for UP for almost 20 years, and the idea of a one-person train crew is unsafe because it would take away half of the decision-making team.[114] The commenter described how a two-person crew goes through their paperwork together, discussing slow orders, train makeup, and temporary restrictions. He said that organizing the crew's paperwork and planning the shift's operation will not always be easy because, with so many documents, rules, and temporary rules, one person could overlook a safety concern and make a mistake the other crewmember could have otherwise caught. The commenter also raised concern that, although a one-person train crew may be able to perform certain tests and inspections alone or with a utility employee, a conductor assigned to the train provides a valuable oversight role, and ''it's just more cohesive to have that second person [remain with the train] for the entire trip.'' [115] Further, the commenter stated that toward the end of a tour of duty, when a train approaches a crew change, the crew has many responsibilities that are time-sensitive and would be difficult for a one-person crewmember to complete as quickly or efficiently.

A commenter, who described herself as the spouse of a railroad worker and a person with significant interest in the rulemaking largely because of her many work experiences in first responder positions including as a 911 dispatcher and working in an ambulance, fire truck, and police car stated that she has spoken publicly on the topic of blocked crossings and her opposition to one-person train crews.[116] The commenter stated that she has collected anonymous statements from railroaders regarding their experiences, describing accidents and possible scenarios that could cause delays or additional safety concerns if railroads use one-person train crews, including concerns about the limitations of PTC when traveling at restricted speed and having to visually verify switches, and the limitations of global positioning system software to detect which track the train will be operating over and how a second crewmember

[110] FRA–2021–0032–0594.

[111] FRA–2021–0032–0226.

[112] FRA–2021–0032–12808.

[113] FRA–2021–0032–13184.

[114] FRA–2021–0032–13184.

[115] FRA–2021–0032–13184.

[116] FRA–2021–0032–12819.

could provide backup in detecting if the train was lined to switch to the wrong track. The commenter also echoed many other concerns raised by individual commenters.

An individual commented in strong support of a national, minimum two-person train crew requirement as a proactive safety precaution.[117] This individual stated that she is concerned about public and environmental exposure to hazardous materials from accidents and non-accidental spills and is especially concerned about a one-person crew freight train transporting waste flowback from the fracking process that may have both known and unknown hazards.

A commenter noted railroad rules that impose critical focus zones (CFZ) in his comment in support of the NPRM.[118] The commenter pointed to the CFZ rule of the Canadian National Railway Company (CN), which he stated was in effect even with PTC, thereby showing a need for a two-person train crew even in PTC territory. The commenter stated that removing CFZ operating requirements and a two-person crew would certainly degrade safety given how a CFZ rule with a two-person crew greatly improves visibility and safety during train movements.

3. Federal Congressional Commenters

One comment signed by 54 House members stated their strong support for FRA's NPRM to enforce a minimum of two crewmembers in most passenger and freight rail operations, as they viewed the rule as necessary to ensure the safety of communities.[119] This comment urged FRA to act expeditiously in finalizing the strongest rule possible, finding crew size a fundamental safety issue. These commenters noted that commercial airlines and boats have at least two crewmembers, and that technology such as PTC cannot replace the expertise and quick-thinking nature of human beings acting together as a team to operate trains and respond to unanticipated events. These 54 House members also supported a two-person train crew mandate out of concern that ''some freight railroads are operating trains that are extremely heavy and miles-long, which impact safe handling, increase wear and tear, and cause blocked crossings which in turn impede motorists' travel and encourage dangerous pedestrian behavior.'' These commenters also stated that ''railroads successfully sued in court to overturn . . . [S]tates' laws'' mandating minimum crew size requirements, and courts found that ''the [F]ederal government has jurisdiction over crew size requirements.'' This group of lawmakers also concluded that the public needs ''the safety benefits and uniform protection that [a rule] on minimum train crew size [safety] would provide.''

Two of these House members, Rep. Donald M. Payne, Jr. and Rep. Dina Titus, also co-signed a second comment that expressed strong support for the proposed rule, especially raising concerns with freight trains that they note have grown in both length and weight, which adds to the complexity of safe handling of those trains and contributes to greater maintenance needs.[120] This jointly filed comment also raised concerns about anticipated delays in resolving train problems when there is only one crewmember. These congressional members stated their concern that local first responders are negatively impacted by a one-person train crew because of delays in unblocking crossings. This comment echoed FRA's description in the NPRM of the safety benefits that two crewmembers can provide for both operating the train and responding to any unanticipated events, including those that PTC was not designed to prevent.

Another of these 54 House members, Sharice L. Davids, filed a second comment to emphasize her support for the proposed rule and her concern that having one person responsible for a massive train hauling hazardous materials jeopardizes the safety of crews and the public at large.[121] Rep. Davids also commented that a national two-person crew requirement is important to secure some of the nation's most critical supply chain routes at a time when there is increased pressure on the supply chain.

FRA received at least two individually filed comments from House members who represent New Jersey districts and expressed support for the proposed requirements in the NPRM. Rep. Jefferson Van Drew wrote that he supported FRA's proposed rule because of his understanding that ''[r]ail transportation is safer when workers have a co-worker available to watch their back and assist them with difficult or dangerous tasks.'' [122] Rep. Van Drew emphasized that the final rule should also include passenger rail operations, and he urged FRA to strengthen the requirements to ensure the safest environment for rail workers. Similarly, Rep. Christopher Smith commented that he is strongly supportive of all trains in New Jersey having at least two crewmembers to ensure public safety and proper operation of critical infrastructure.[123] Rep. Smith stated that research indicates a two-person train crew team would have a greater ability to notice and correct errors or problem-solve during an emergency than would a one-person train crew. He raised safety concerns with a one-person train crew operating a long train that is transporting hazardous material through densely populated areas and concluded that a two-person requirement would best protect the public, preserve confidence in rail transportation, and safeguard communities.

4. State and Local Governmental Commenters

Several State and local government officials and organizations commented in support of the NPRM. For example, the National League of Cities, a nonpartisan organization comprised of city, town, and village leaders that are focused on improving the quality of life for their constituents, commented that it believes the presence and training of railroad crew is a matter of safety.[124] This organization supported the NPRM and stated the hazard of reduced crews undermines the safe and efficient movement of trains and puts local first responders in unsafe situations during rail incidents and accidents.

Michigan State Representative John Cherry commented that having a second crewmember could be the difference between life and death for the crew and the community.[125] Representative Cherry's comment stated a second crewmember is needed to help with situational awareness, prevent fatigue, and relay critical information to emergency responders if one crewmember is incapacitated. Similar comments were made by other Michigan State Representatives including Alex Garza,[126] David LaGrand,[127] and Padma

[117] FRA–2021–0032–13111.

[118] FRA–2021–0032–12333. FRA notes that there are no Federal requirements that a railroad establish operating rules or practices for a CFZ but that some railroads voluntarily establish them in certain territories to reduce distractions, especially for the locomotive engineer. For example, a crewmember other than the locomotive engineer may be required to make all radio communications in the CFZ, and any crew communications are required to be limited to duties related to the train's immediate operation.

[119] FRA–2021–0032–12809 (duplicate comment filed at FRA–2021–0032–12971).

[120] FRA–2021–0032–11185.

[121] FRA–2021–0032–10917.

[122] FRA–2021–0032–10347.

[123] FRA–2021–0032–13188.

[124] FRA–2021–0032–10696.

[125] FRA–2021–0032–9545.

[126] FRA–2021–0032–11021.

[127] FRA–2021–0032–10993.

Kuppa,[128] and Michigan State Senators Rosemary Bayer [129] and Erika Geiss.[130]

Dinah Sykes, Kansas Senate Minority Leader, commented in strong support of the NPRM because it will establish a consistent, nationwide standard that will reduce safety risks.[131]

Patrick Diegnan, Jr., New Jersey State Senator and Transportation Chair, stated that he is concerned with the safety of both freight and passenger trains that operate with great frequency through densely populated areas.[132] Senator Diegnan also attributed New Jersey's positive safety record in recent years to trains operating with no fewer than two crewmembers.

Aimee Winder Newton and Arlyn Bradshaw, two members of the Salt Lake County Council in Salt Lake City, Utah, commented in support of the NPRM because advancements in technology, such as PTC, improve safety but are not a substitute for a train's on-board crewmembers.[133]

Sonoma-Marin Area Rail Transit District (Sonoma-Marin), a State of California publicly-owned, 95-mile railroad, commented that it currently operates both passenger and freight rail service with two-person train crews and hosts tourist railroads that operate with at least a two-person train crew.[134] Sonoma-Marin stated that it supports FRA's efforts to create the safest operating environment for communities, railroad personnel, and customers. Each of the railroad's freight train crewmembers is qualified as both a locomotive engineer and a conductor, and the same combination is used for passenger operations, although periodically the second crewmember is only qualified as a conductor. In passenger service, Sonoma-Marin uses a PTC-equipped diesel multiple-unit fleet with two- and three-car consists. Sonoma-Marin also stated that it currently uses a 24-hour dispatch center and that crewmembers can directly communicate with one another.

Transportation for America, an advocacy organization for local, regional, and State leaders, supported FRA's action to require at least two crewmembers on most trains but expressed concern that the NPRM did not go far enough. Transportation for America advocated for requiring passenger operations to have three or four crewmembers and requiring a two-person crew minimum for any of the proposed exceptions for passenger and freight operations that operate over highway-rail grade crossings.[135]

Citizens Acting for Rail Safety—Twin Cities (CARS–TC), a community-based organization that is a regional chapter of Citizens Acting for Rail Safety, commented that the size of train crews is a public safety matter and opined that high hazard freight trains require a four-person train crew.[136]

FRA's Response

The vast range of commenters supporting the NPRM, including Federal, State, and local representatives, and organizations that represent communities and employees, reflects the interest that the public has in FRA regulating the safety issues regarding train crew size. The comments supporting the NPRM largely corroborated FRA's background in the NPRM describing the issues and why additional safety requirements are necessary. In FRA's experience with regulating and inspecting the rail industry, and as described by research and reports of incidents in the NPRM, conductors and other crewmembers not assigned to operate the locomotive or train play an active role in maintaining the safe operation of the train and safeguarding their fellow employees and the public. The comments supporting the NPRM help provide context for the safety issues described in the NPRM concerning the significant role of a conductor or second crewmember; the need to have technology installed to stop a train when a one-person train crewmember becomes incapacitated; and the need to establish minimum communication and other requirements to mitigate hazards arising from both routine operations and unplanned incidents such as derailments, accidents, and mechanical breakdowns. The many anecdotal comments from individuals supplement the research and reports as important source information for the contributions of a two-person train crew team.[137]

In addition, FRA agrees with these commenters that this rule is needed because PTC is not a solution by itself. As of September 2023, PTC technology is governing rail operations on approximately 58,787 route miles, representing approximately 42% of the rail network in the United States. Although this is a significant achievement, it means that most railroad route miles in the United States are currently not governed by a PTC system. Even on PTC-governed main lines, railroads experience unplanned outages and planned outages of their PTC systems. For example, in March 2023, BNSF and the National Railroad Passenger Corporation (Amtrak) experienced unplanned outages of their PTC systems, and NS experienced an unplanned outage of its PTC system in August 2023, impacting operations of both the host railroad and its tenant railroads. Also, during 2023, several Class I railroads, commuter railroads, and Amtrak temporarily disabled their PTC systems to facilitate planned infrastructure upgrades or capital projects. Finally, although railroads experiencing planned or unplanned outages of their PTC systems comply with certain safety requirements,[138] the NPRM clarified that ''while PTC is a safety overlay to help prevent certain accidents, FRA's PTC regulations do not include the requirements to perform crewmember job functions, which are essential to prevent or mitigate other accidents.'' [139]

D. Tourist Railroad and Railroad Museum Industry Comment That Asserted the NPRM Would Have No Impact

Heritage Rail Alliance, Inc., the primary trade organization for the tourist railroad and railroad museum industry, commented that the NPRM appears to impact minimally, if at all,

[128] FRA–2021–0032–9906.

[129] FRA–2021–0032–11005.

[130] FRA–2021–0032–10585.

[131] FRA–2021–0032–9816.

[132] FRA–2021–0032–10588.

[133] FRA–2021–0032–10287.

[134] FRA–2021–0032–11211. Sonoma Marin's trade name is SMART.

[135] FRA–2021–0032–11186.

[136] FRA–2021–0032–10731. Citizens Acting for Rail Safety describes itself as a regional, non-partisan, grassroots advocacy group that works with residents, legislators, and agency officials to improve rail safety to benefit the health, safety, and security of people, wildlife and the environment.

[137] Some labor organization commenters, such as TTD and SMART–TD, highlighted FRA's Confidential Close Call Reporting System (C3RS) as a program that might help to inform this rule but raised concerns about the low participation rate among railroads. C3RS is a voluntary program that provides employees of participating railroads the opportunity to report unsafe events and conditions confidentially. *See https://railroads.dot.gov/railroad-safety/divisions/safety-partnerships/c3rs/confidential-close-call-reporting-system-c3rs* (providing an overview, a list of participating railroads, a description of stakeholders, and answers to frequently asked questions including how railroads, labor organizations, and FRA use data collected through the program). While FRA agrees that C3RS could be informative, *e.g.,* because the program periodically issues confidential ''alert bulletins'' to stakeholders and issues non-confidential information through publicly available newsletters, FRA is unaware of any such alert or newsletter that identified an issue that directly relates to the safety of one-person train operations. Also, because FRA desires greater rates of participation in the program than the approximately 25–30 current or committed railroad participants, none of which include any Class I freight railroads, FRA is currently engaged in efforts to promote voluntary participation in C3RS through the RSAC process. *See https://rsac.fra.dot.gov/tasks,* RSAC Task 2022–03.

[138] *See, e.g.,* 49 CFR 236.1021(m), 236.1029(b).

[139] 87 FR 45581.

the operating practices of both non-general and general system tourist railroads.[140] The commenter's informal survey found that its member railroads are using two-person train crews and that FRA was correct to conclude that tourist railroads are unlikely to switch to one-person train crew operations.

FRA's Response

In the NPRM, FRA stated that the agency is unaware of any tourist train operation on the general railroad system of transportation that operates with a one-person train crew.[141] Heritage Rail Alliance, Inc.'s comment verified that the final rule will have minimal to no impact on non-general and general system tourist and museum train operations. FRA notes, however, this final rule provides an exception for tourist train operations that are not part of the general railroad system of transportation, which is contained in § 218.125.

E. Comments Opposing the NPRM

The NPRM included a background discussion of the state of current operations, including the existing Federal safety requirements and projected impact of the proposed crew size safety requirements on existing and future one-person train crew operations. The following summary describes comments received from entities and individuals including members of Congress, passenger train operators, short line and regional freight railroad commenters, and Class I freight railroad commenters. FRA did not identify any labor organizations, tourist railroads, or State or local governmental commenters that opposed the NPRM. In the summary of the comments from Class I freight railroads and similar rail industry commenters, FRA responded to several additional subjects that were addressed by these commenters. For instance, comments were received regarding alternative crewmember arrangements that the industry referred to as expeditors, ground-based crewmembers, or ground-based conductors. The Class I freight railroads and similar industry commenters also covered the subjects of train operations in other countries, new technology and automated operations, the transportation of hazardous materials, risk assessments and FRA's review standard, and remote control operations. FRA's responses reflect the agency's position on the comments and how FRA has responded in the final rule as compared to the NPRM.

1. Congressional Commenters

The two Congressional comments opposing the rule detailed their opposition and raised a variety of legal, policy, and safety concerns that overlapped with other comments. For example, U.S. Senator Roger F. Wicker, and Rep. Eric A. Crawford stated their concern that the proposed requirements would have a significant economic impact on a substantial number of small entities, a concern shared by short line and regional freight railroad commenters.[142] Senator Wicker commented that ''[t]he NPRM fail[ed] to acknowledge that changes to operations and infrastructure, may produce benefits, including safety benefits [and that u]nder the logic in the NPRM, the specter of risk is sufficient to prohibit preemptively any innovation.'' [143] Further, Senator Wicker commented that FRA has other ways to address safety concerns raised in the NPRM such as raising the random testing drug or alcohol testing rates, requiring inward facing cameras, or using other technological advances.

Rep. Crawford expressed his view that FRA failed to comply with the Administrative Procedure Act, because he sees the NPRM as lacking a rational basis, and the Regulatory Flexibility Act, because he views the NPRM as failing to determine whether the proposed rule would have a significant economic impact on a substantial number of small entities. Rep. Crawford commented that those legal concerns may be secondary to his perception that FRA may be lacking the authority to promulgate a rule based on case law limiting agency action under the ''major questions doctrine.'' Rep. Crawford commented that the NPRM failed to adequately identify a particular problem that needs to be addressed, in addition to taking an overly prescriptive approach that does not encourage innovation or growth or competition among regulated entities. Rep. Crawford explained that he did not find FRA's support for the rule persuasive and he suggested that FRA should have gotten more input from the industry before publishing the NPRM.

FRA's Response

In comment responses below, FRA addresses in detail specific issues raised by the Members of Congress, as many of these issues were also raised by certain industry commenters. Other issues raised are addressed in the RIA and below in Section IV.B, Regulatory Flexibility Act and Executive Order 13272. The legal authority discussion in the Executive Summary, above, describes FRA's authority to issue this rule. Regarding additional industry input, FRA points to the extensive history of engagement with industry on this matter, including the following: (1) FRA pursued a collaborative approach on this subject matter in 2013 and 2014, but was unable to obtain an industry recommendation; [144] (2) FRA extended the comment period to 146 days upon request, which is significantly longer than the 60-day period originally scheduled; and (3) FRA provided a public hearing, which was widely attended and at which all commenters who wished to testify were provided an opportunity to do so.

FRA disagrees with Senator Wicker's comment that the proposed rule failed to recognize the benefits of innovation, as his comment was directed to FRA's explanation for how the introduction of technology or operational changes may introduce new risks. As clarification, the NPRM explained that a risk assessment is useful as a formal process to identify, evaluate, and eliminate or reduce any hazards identified to within a range of acceptability.[145] The risk assessment process therefore provides the railroad with an objective way of qualitatively or quantitatively showing how the technology or operational change is a safety benefit.

2. Passenger Operations

The Utah Transit Authority (UTA), which operates the commuter rail service called ''FrontRunner,'' commented that FRA should consider a different, less stringent approach in the final rule for passenger legacy operations especially because UTA's FrontRunner service was established in 2008 and FRA last approved that operation's emergency preparedness plan on February 25, 2022.[146] UTA's comment reflected that it would prefer

[140] FRA–2021–0032–11017.

[141] A comment was received from the Strasburg Rail Road, which has both tourist and short line freight operations, but that comment is discussed under the heading ''Short Line and Regional Freight Railroads'' as the comment described one-person train operations concerning the railroad's freight operations or work trains, not its tourist operations.

[142] FRA–2021–0032–13052 and FRA–2021–0032–13018.

[143] FRA–2021–0032–13052 at 1.

[144] 81 FR 13918, 13935–39 (Mar. 15, 2016) (describing in an NPRM for a previous rulemaking on this same subject FRA's efforts to obtain a consensus recommendation from the Railroad Safety Advisory Committee, a forum for collaborative rulemaking and program development that included representatives from all the agency's major stakeholder groups).

[145] 87 FR 45582.

[146] FRA–2021–0032–10984.

an option that did not require it to file for special approval, and that it was concerned about the added expense and complexity of complying with training a second crewmember should its current one-person train crew operation be disapproved. UTA suggested that FRA should consider expanding the current definition of ''train or yard crew'' in § 218.5 to include a second person like UTA's train host. UTA's comment also included alternatives that would expedite the review process for existing passenger operations or otherwise reduce costs.

The Denver Regional Transportation District (Denver RTD) filed a comment describing its passenger operation and requesting FRA consider the information in drafting a possible final rule.[147] For instance, Denver RTD requested that FRA consider whether an additional review process as proposed is necessary, stating FRA's prior approvals and requirements imposed on Denver RTD's operation were sufficient to address any safety concerns. Denver RTD also questioned whether FRA was correct to characterize the Denver RTD operation as a one-person train crew legacy passenger operation in the NPRM as Denver RTD believes its second qualified person already meets FRA's requirements for a train or yard crewmember.

The American Public Transportation Association (APTA) filed a comment that raised two issues of concern for its passenger rail operation members.[148] First, APTA raised concerns regarding the proposed risk assessment requirements, which are addressed below in this discussion of comments and conclusions under the risk assessment heading. Second, APTA included a comment similar to UTA's concern about the qualifications of a second train crewmember who could perform duties under an emergency preparedness plan.

The Commuter Rail Coalition (CRC) also commented with some concerns but did not assert whether the association or its members supported or opposed the proposed rule.[149] CRC commented that all major commuter railroads operating today provide at least two qualified individuals who are trained to support the safe operation of passenger trains, but that the ''proposed rule would likely have a direct impact on at least two commuter railroads that operate with at least two employees on each train but would likely still require a special approval.'' [150] Like the other passenger operation commenters, CRC requested that FRA consider amending the definition of train crew or adding an exemption so that the rule accommodates as two-crewmember operations those passenger operations that use a second person who does not perform functions connected with the movement of the train. CRC's comment was also similar to APTA's in its approach to the risk assessment, and which FRA addresses below in this discussion of comments and conclusions under the risk assessment heading. Further, CRC requested that FRA consider providing railroads with additional time to comply with any new requirements, suggesting that operations may need up to a year to implement changes.

FRA's Response

In the NPRM, the background section discussed FRA's awareness of at least two passenger train operations in which the railroads do not use train crewmembers that meet the definition of ''train or yard crew'' in § 218.5, notably because the second person does not perform functions connected with the movement of the train and thus is not performing service subject to the Federal hours of service requirements during a tour of duty.[151] FRA stated that although such passenger train operations may satisfy the requirements of 49 CFR part 239,[152] railroads would need to seek FRA's special approval under proposed § 218.131 to continue such legacy train operation staffing arrangements.[153] As described above, FRA received comments from both of the passenger train operations identified, Denver RTD and UTA's FrontRunner. FRA agrees with those passenger train operators that such legacy one-person train operations have been determined to meet the safety requirements of FRA's passenger train emergency preparedness rule and reopening those inquiries could be unduly disruptive to those operations. Simply put, because the passenger train emergency preparedness requirements overlap with many of the same issues that are addressed by a special approval petition in this final rule, FRA does not find it necessary to require a risk assessment and the opportunity for public input in the approval process for these legacy passenger train operations that already have approved emergency preparedness plans. However, FRA is not willing to forgo the benefits of such requirements for the initiation of passenger railroad train operations staffed with a one-person train crew as required under § 218.131. Accordingly, the final rule, in § 218.125(e), provides an exception for each passenger one-person train operation established before the effective date of this final rule with an approved passenger train emergency preparedness plan under part 239. Further, his final rule does not require these legacy operations to provide FRA with written notification of the operation, as it has with legacy freight train operations staffed with a one-person train crew in § 218.129 of this final rule, because the existing filing requirement for emergency preparedness plan approval under part 239 of this chapter already provides FRA with sufficient notice. As always, FRA also invites these legacy operations to approach FRA with any specific questions concerning their responsibilities under either part 239 or this final rule.

However, FRA disagrees with the comments suggesting that FRA expand the current definition of ''train or yard crew'' in § 218.5 to include a second person like those used in the legacy one-person passenger train operations. In those passenger legacy operations, the second person is not typically doing work under the hours of service laws and is not involved with the train's movements. Thus, for purposes of safe rail operations, FRA does not consider that type of rail employee to be a member of the train crew and will not carve out what would result in a prospective exception to the two-crewmember requirement for existing passenger train operations in this final rule.

3. Short Line and Regional Freight Railroads

The American Short Line and Regional Railroad Association (ASLRRA), on behalf of its short line and regional railroad members, provided testimony at the public hearing and submitted a 143-page comment.[154] ASLRRA commented that it represents approximately 600 Class II and III railroads, which operate 47,500

[147] FRA–2021–0032–12177.

[148] FRA–2021–0032–12947.

[149] FRA–2021–0032–12172.

[150] *Id.* at 3.

[151] 87 FR at 45580, n. 162 (identifying the following known passenger train services operating with a one-person train crew: (1) Denver RTD/Denver Transit Operators; and (2) UTA's FrontRunner).

[152] 49 CFR 239.7 (defining ''crewmember,'' in part, to include ''a person, other than a passenger, who is assigned to perform . . . [o]n-board functions in a sleeping car or coach assigned to intercity service, other than food, beverage, or security service'', and 49 CFR 239.101(a)(2), addressing employee training and qualification of all ''on-board personnel,'' whether in intercity or commuter passenger train service).

[153] 87 FR at 45580.

[154] FRA–2021–0032–13033.

miles of track or approximately 29 percent of the national freight network, and employ approximately 18,000 people. ASLRRA raised a wide range of issues including legal, policy, economic, and factual concerns in opposition to the NPRM.

Like the comment filed by the U.S. Small Business Administration's Office of Advocacy [155] (SBA-Advocacy), described further in the Final Regulatory Flexibility Analysis below, ASLRRA contends that the NPRM underestimated the number of small railroads that would be impacted, omitted costs for small railroads to comply, and miscalculated the costs on small railroads to comply with the special approval process. To support this position, ASLRRA surveyed its members and provided a statistical extrapolation based on the results of the survey.[156] ASLRRA commented that the number of its member railroads that currently operate with some type of one-person train crew is approximately 420 railroads, a much greater number than the seven such short lines FRA identified. ASLRRA was also concerned that the NPRM treated small entities in the same way as Class I railroads when transporting certain types of hazardous materials because the small railroad exception would not apply under those circumstances.[157] ASLRRA commented that the NPRM ''also declines to provide regulatory relief or consider less burdensome alternatives for small businesses'' [158] that would benefit from ''a performance standard.'' ASLRRA also requested that FRA consider providing small railroads with more time to comply to allow for proper planning, operational changes, and hiring and training of additional crewmembers, if necessary. ASLRRA opposed the proposed prohibition on transporting certain types or quantities of hazardous materials with a one-person train crew. ASLRRA estimated that approximately 114 short lines currently operate a train with a one-person crew carrying quantities or types of hazardous materials that would require a minimum two-person crew under the proposal, including five railroads that had representatives testify at the public hearing.[159] ASLRRA commented that railroads, by statute, are under a common carrier obligation to provide transportation of goods on reasonable request and may not refuse to provide service merely because it would be inconvenient or unprofitable.[160] ASLRRA's comment suggested that FRA previously determined that an alerter was unnecessary for rail safety at speeds of 25 mph or less when the agency promulgated a final rule on locomotive safety standards in 2012 without distinguishing the risk between a two-person train crew and a one-person crew.[161] Further, ASLRRA commented that it costs approximately $20,000 to equip a locomotive with an alerter, approximately 83 railroads currently operate with one person in the locomotive cab using locomotives that are not equipped with an alerter, that it may not be possible to retrofit some older models of locomotives, and to meet the proposed requirements, these 83 railroads would need to equip at least half of their locomotives.[162]

Approximately 14 railroads or rail customers used a form letter in which they identified their company as a member of the ASLRRA and asked to incorporate the ASLRRA's comments as their comment. For example, the form letter was used by the Virginia Railroad Association that represents nine short line railroads, two Class I railroads, and 27 other rail-related business members.[163] Also, these form letters offer the same types of legal, economic, and policy comments that ASLRRA made in greater detail in its comment.[164] Each form letter was personalized by adding one or two unique paragraphs describing the submitter's existing one-person train crew operations, or plans to introduce a one-person train crew operation, or to otherwise explain why the commenter company opposed the NPRM. Ironhorse Resources, Inc., the parent company of at least eight railroads, commented that the NPRM would significantly impact their existing operations because they use an engineer on the locomotive and a conductor located in a vehicle.[165] Similarly, the Central Indiana & Western Railroad commented that it is a small, family-owned railroad with two full-time employees and two part-time employees and is concerned that the requirements, as proposed in the NPRM, would remove the railroad's option to utilize an engineer on the locomotive and a second crewmember in a utility vehicle.[166] The Sandersville Railroad also commented that the requirements, as proposed in the NPRM, would remove the railroad's option to utilize an engineer on the locomotive and a second crewmember in a utility vehicle. Further, this railroad explained that the small railroad operation exception, as proposed, would not be manageable for its operation, although in coming to that conclusion it misconstrued the proposed exception as only applying to railroads that employ train dispatchers.[167] The Ashtabula, Carson & Jefferson Railroad did not comment why it could not meet the small railroad operation exception as proposed but commented that it uses a one-person crew on its six-mile-long track with transloading operations at each end, operating at 10 miles per hour (mph), and a second crewmember to flag two unprotected highway-rail grade crossings and help with switching.[168] MG Rail commented that it is a short line switching railroad that uses remotely controlled locomotives (RCL) in its operations with a one-person crew and is concerned about the rule's potential impact on short lines generally but did not specifically explain how the NPRM might potentially impact its operations (as the NPRM did not propose requirements for trains during switching service and included a proposed one-person train crew exception for remote control operations).[169]

The Cimarron Valley Railroad (CVR) commented that it is a Class III short line that operates with both two-person and one-person crews and is concerned that the NPRM's small railroad exceptions would not apply to its one-person operation because the total length of its unit trains handled in interchange are greater than FRA's proposed limitation of 6,000 feet for the proposed small railroad operation exception.[170] CVR did not state how long these trains were nor explain why it could not file a special approval

[155] FRA–2021–0032–13007.

[156] FRA–2021–0032–13033, att. D (providing a summary and statistical analysis of the survey).

[157] FRA–2021–0032–13033 at 41.

[158] FRA–2021–0032–13033 at 10 and 13.

[159] FRA–2021–0032–13033.

[160] *Id.* citing 49 U.S.C. 11101(a) and offering the explanation that ''[w]hile the obligation applies only to regulated traffic (*e.g.,* coal, grain, chemicals, etc.), the Surface Transportation Board has historically stepped in to ensure that shippers are reasonably served even for exempt commodities.''

[161] FRA–2021–0032–1193 at 29–30 (citing 77 FR 21312).

[162] FRA–2021–0032–1193 at 30–31.

[163] FRA–2021–0032–12381.

[164] FRA–2021–0032–13033.

[165] FRA–2021–0032–11719 (Caney Fork & Western Railroad); FRA–2021–0032–11720 and duplicated in FRA–2021–0032–11722 (Sequatchie Valley Switching Company); FRA–2021–0032–11721 (Walking Horse Railroad); FRA–2021–0032–11723 (Rio Valley Switching Company; Gardendale Railroad; Santa Teresa Southern Railroad; San Pedro Valley Railroad; Southern Switching Company).

[166] FRA–2021–0032–12301.

[167] FRA–2021–0032–12394.

[168] FRA–2021–0032–12970.

[169] FRA–2021–0032–12261. The Finger Lakes Railroad (FGLK) filed a similar comment in that it is a Class III short line that has uses one-person remote control operations.

[170] FRA–2021–0032–12683.

petition for a legacy operation as proposed. Like other short line commenters, CVR did not request that FRA amend the exceptions or special approval process in the NPRM but instead requested that FRA withdraw the NPRM in its entirety or, alternatively, categorically exclude all Class II and III operations because, in its view, short lines already successfully operate today in this environment.

The Farmrail System, which owns two Class III short lines, Farmrail Corporation and Grainbelt Corporation, commented that it has used one-person crews by utilizing a truck-based employee to accompany freight trains between switching assignments and with remote control operations.[171] This commenter found the NPRM's proposed requirements complicated and did not believe the exemptions and special approval process provided adequate relief for short lines.

Patriot Rail commented that it is a holding company that owns 31 short lines with operations that use one crewmember in the locomotive and one crewmember in a motor vehicle providing safety, logistical, and customer support.[172] Overall, Patriot Rail opposes the rule for many of the same reasons articulated in ASLRRA's comment. Patriot Rail stated that it supports FRA's recognition that short line operations can be accomplished safely with a minimum of two crewmembers, but with only one person in the locomotive cab. Patriot Rail commented that some of the NPRM's requirements allowing for exceptions seemed arbitrary, such as limitations on train length and commodities, and for other proposed requirements for alerters, dispatching, and electronic communications devices. Additionally, Patriot Rail recognized the proposed special approval process as an option if an exception to the NPRM could not be met, but this short line holding company viewed the process as burdensome without clearly enumerated safety benefits.

The Strasburg Rail Road commented that it has tourist and short line freight operations that frequently permit its two crewmembers to leave the locomotive cab after securing the train, such as when a one-person crewmember joins a roadway work group on the ground after securing the train.[173] This railroad commented that it was concerned that the rule would prohibit that activity because FRA proposed that the one-person train crewmember must remain in the locomotive cab during normal operations. The Strasburg Rail Road also commented that it does not have locomotives equipped with alerters for its one-person work train operations.

Other such railroad commenters provided testimony at FRA's public hearing. For example, the Director of Safety, Training, and Regulatory Compliance for the Rio Grande Pacific Corporation (RGPC) testified that its four Class III short lines operate with an engineer in the locomotive and a certified conductor in a utility vehicle who maintains contact with the engineer by radio and is assigned as a train crewmember.[174] RGPC explained that this crew staffing arrangement is efficient for interaction with customers, preparing for the train's arrival at a customer's location, and protecting highway-rail grade crossings. RGPC is concerned that certain of the NPRM's proposed requirements would mean that RGPC's short lines would need to hire a third crewmember because their operations would be unable to qualify for the small railroad exception. For example, RGPC testified that its short lines operate trains longer than 6,000 feet, haul 20 or more loaded cars of hazardous materials, and do not have the means to conduct real-time monitoring of the train's location. RGPC also testified how it would be logistically difficult to move the certified conductor in the utility vehicle to the locomotive, and that it believed the proposed rule would lead RGPC's short lines to hire a third crewmember.

The Vice President of Human Resources and Safety at Florida East Coast Railway (FEC) testified that the railroad is currently using one-person operations for short distance intermodal trains, but the NPRM would prohibit some trains because of the proposed hazardous materials prohibition.[175] FEC stated that it has an extensive list of deployed safety technology, and it has main track equipped for up to 60-mph trains.

The General Manager of the Madison Railroad and incoming Vice Chair for the Railroads of Indiana group testified that the Madison Railroad is a short line with five full-time staff and has been operating a one-person train crew since 1978 on its 41 miles of track at 10 mph in southern Indiana. Five employees are responsible for train operations and track and signal inspection and maintenance on the Madison Railroad.[176] The testimony added to the Madison Railroad's written comment, which used the ASLRRA's form letter.[177] The Madison Railroad testified that it operates about a mile and a half on steep 5.89 percent grade near the Ohio River, which is mitigated by specific operating rules, brake system and locomotive equipment requirements, and additional training. According to the Madison Railroad, it has provided additional risk mitigation steps above FRA's minimum requirements. For instance, the Madison Railroad testified that it only operates one train at a time and the maximum train speed is limited to 10 mph with restricted speed in effect. The Madison Railroad is concerned that the NPRM would lead to an overall net decrease in safety as any increased costs to hire a minimum of two additional employees would mean that the railroad would need to divert resources from investing in physical infrastructure and equipment.

The Senior Vice President and General Manager of the Grafton and Upton Railroad (G&U) testified as to his diverse experiences in railroad operations as a conductor, a locomotive engineer, and a designated supervisor of locomotive engineers, and how he has operating experience on Amtrak's Northeast Corridor, CSX Transportation's mainline, and many short lines.[178] Based on this experience, G&U testified that one-person crews have, both currently and historically, operated safely, and how doing so is a more efficient use of a short line's limited resources. G&U stated it has a 25-mile-long system and transports many hazardous materials, including propane, typically with a one-person crew that is certified as both a conductor and a locomotive engineer and a second conductor crewmember in a motor vehicle. G&U testified that, in addition to the proposed prohibition on trains with hazardous materials, it would not meet the short line exception in the NPRM because it operates over heavy grade. G&U also noted its locomotives are not currently required to have alerters. Overall, G&U expressed concern that the NPRM would create significant capital and operational costs.

The Vice President of Operations at Transtar, LLC, testified that Transtar is a holding company operating five Class

[171] FRA–2021–0032–13042.

[172] FRA–2021–0032–13019.

[173] FRA–2021–0032–12550 (and a duplicate was filed at FRA–2021–0032–12670).

[174] FRA–2021–0032–13184 (hearing transcript).

[175] FRA–2021–0032–13184 (hearing transcript).

[176] FRA–2021–0032–13184 (hearing transcript). The Railroads of Indiana filed a separate comment opposing the NPRM's lack of regulatory certainty about the likelihood of a special approval petition being approved and raising concerns about costs on small railroads. FRA–2021–0032–10228.

[177] FRA–2021–0032–12221.

[178] FRA–2021–0032–13184 (hearing transcript).

III short lines and one contract switching carrier.[179] Transtar highlighted one of its short lines, the Texas and Northern Railway (T&N), which it described as seven miles of main track serving small customers with a one-person train crew and a conductor in a motor vehicle. Transtar testified that the T&N would not qualify for the NPRM's exceptions because it does not maintain the train's real-time progress or have a method of determining the proximate location if communication is lost with a one-person crew. Also, the T&N does not utilize a dispatcher, its locomotives are not equipped with alerters, and its track has heavy grade. Transtar also expressed concern that the proposed rule would force T&N, which it described as a ''low margin railroad,'' to increase costs and the railroad's ''customers would in turn either pass the increased costs onto their customers . . . or choose to ship [their] commodities via truck which is considerably less safe, and less environmentally friendly than shipping via rail.''

FRA's Response

In this final rule, FRA has carefully considered the track record of safety in these operations with the need to establish minimum requirements to address fundamental issues of rail safety regarding the operation of one-person train crews and the short line rail industry's claim that the proposed requirements in the NPRM would have introduced significant costs on approximately 63 percent of the industry through proposed requirements for special approvals, risk assessments, the installation of alerters, or the adoption of and compliance with new operating rules.[180] After reviewing these comments, including the testimony at the public hearing that included approximately five Class II and III freight railroad representatives and the ASLRRA's expert on how their survey was conducted,[181] FRA made the following general determinations: (1) although ASLRRA made a good faith effort to collect data from its short line and regional railroad members, the information submitted is insufficient to allow an independent validation of the survey results and differences between ASLRRA's and FRA's estimates may have resulted from a misunderstanding of the proposed rule's terminology; (2) in turn, while ASLRRA extrapolated data in good faith from the data collected from the responding short line and regional railroads, because of the potential terminology misunderstanding and the potential for bias in the way ASLRRA surveyed its member railroads, FRA cannot rely on ASLRRA's data extrapolations for purposes of the RIA's primary analysis; (3) FRA can address the short line and regional railroad industry's requests to treat Class II and III freight railroads differently from the Class I freight railroads, a departure from the NPRM, by eliminating the special approval process for some one-person train crew operations when certain safety requirements and notification requirements are met, and thereby provide greater regulatory certainty; (4) FRA can address the short line and regional railroad industry's concerns regarding the proposed prohibition on one-person operations carrying certain quantities or types of hazardous materials; (5) FRA can address the short line and regional railroad industry's requests to provide railroads with more time to comply with any new minimum requirements to allow for proper planning, operational changes, or hiring and training of additional crewmembers, another revision to the NPRM; and (6) despite FRA's concerns as to the accuracy of ASLRRA's survey results and data extrapolations, the RIA does show that, even when using ASLRRA's numbers, the cost of the final rule will not be substantially higher because of changes made in the final rule from the NPRM and, therefore, FRA would still proceed with this rule whether or not ASLRRA's survey and extrapolation numbers were validated. FRA agrees with ASLRRA's comment that it may not be possible to retrofit some older models of locomotives, although ASLRRA did not describe this concern as an issue preventing existing operations from continuing but instead commented that approximately half the locomotive fleet for those existing operations would need to be retrofitted with an alerter. Consequently, the final rule addresses safety concerns with various one-person train crew operations that were raised in the NPRM, while providing flexibility for certain one-person crew operations by short lines. The following paragraphs describe FRA's response in more detail.

ASLRRA's survey suggested that because 176 short lines responded that they deployed a one-person train crew operation, ASLRRA could use statistical analysis to extrapolate and find that approximately 420 short lines industry-wide were deploying such an operation. However, as noted above, FRA did not use ASLRRA's extrapolated numbers in its primary RIA estimate because of the potential misunderstanding of the proposed rule's terminology and the survey's analysis did not adequately address the potential for non-response bias.[182] Specifically, although it cannot be determined from the survey data submitted, it seems plausible that short lines that perceived themselves as not having any type of one-person train crew operation or need for an exception, or otherwise not impacted by the proposed requirements in the NPRM, might have chosen not to respond to ASLRRA's survey.[183] Thus, while FRA's

[179] FRA–2021–0032–13184 (hearing transcript).

[180] ASLRRA's comment estimated that 63% of the short line railroad population 'run some kind of 1-person operation.' FRA–2021–0032–13033.

[181] FRA–2021–0032–13184 (hearing transcript).

[182] The ASLRRA's survey was not based on a random sample of short line railroads and did not examine why approximately 60 percent of ASLRRA's short line members did not respond. The survey used three statistical concepts to address the missing data problem; however, each analysis was problematic:

(1) ASLRRA's Missing Completely at Random (MCAR) analysis asserted that a representative random sample (of the population) was available from the survey response. However, the entire population was surveyed and for unknown reasons some railroads did not respond. This would preclude MCAR analysis for the purpose of extrapolation.

(2) A proper Missing (Conditionally) at Random (MAR) analysis requires that the railroads selected for the survey be grouped by known factors, such as commodity, and that it can be shown that a specific commodity grouping would have no reason to respond to the survey. ASLRRA's MAR analysis claimed that several variables could be used to achieve this grouping such as revenue, geography, and miles, but the means to identify the relationship of these groupings and survey response were not provided or cited. For example, the geographic regions selected were defined as four abstract areas lacking specific boundaries. In the analysis, miles were described as a factor and it was unclear if ''train miles'' (publicly available data on FRA's Safety Data website) were used as ''route miles,'' conflating how the factor could be applied. Proprietary revenue data was used in the analysis which prevented FRA from being able to independently validate the relationship between operations and revenue. Under 49 CFR 209.11, ASLRRA could have established a means to provide FRA the data for analysis, but it did not do so.

(3) A Missing Not at Random (MNAR) analysis is the most complex analysis of the three and asserts that the reasoning for the missing data is unknown and thus more data is required to analyze. In an MNAR analysis, groupings may show a definitive relationship with response versus non-response; however, in this survey, there is no definitive evidence showing the reason for the non-response. To use an MNAR analysis, ASLRRA should have required more data showing a definitive relationship with non-response (*e.g.,* by conducting a follow-up survey specifically targeted to the non-responding railroads).

[183] This possible explanation is most relevant to the discussion regarding MNAR analysis in the previous footnote, and this explanation is also plausible based on FRA's understanding of rail operations nationwide. Also, ASLRRA's survey expert testified at the public hearing that the association conducted its survey before the expert was brought onboard and how the problem is ''you worry that the non-responders are in some way different systematically from the responders [and that m]aybe it's just a case that . . . those short lines that are affected are most likely to respond.'' FRA–2021–0032–13184 at 36.

primary analysis in the RIA uses FRA's estimates, FRA added a sensitivity analysis in the RIA to demonstrate the cost of the final rule using ASLRRA's survey numbers. The costs based on ASLRRA's numbers would not dissuade FRA from finalizing this crew size safety requirements rule.

Because the estimate of the potentially impacted entities resulting from ASLRRA's survey and comment so greatly differed from FRA's estimate of potentially impacted railroads, FRA sought to understand the reason for this discrepancy, rather than to minimize ASLRRA's survey results, even though those results could not be independently validated. For example, in response to ASLRRA's survey of its 696 short line members, 176 of the 280 short lines that responded reported that they deployed a one-person train crew operation—which stands in sharp contrast to the seven freight railroads FRA identified by name in the NPRM as known to operate a one-person train crew operation.[184] Meanwhile, comments filed in response to the NPRM by holding companies owning multiple short lines and individual short line commenters revealed that, of approximately 62 short lines that self-identified as having a one-person train crew operation: (1) 54 short lines stated that they used a second train crewmember in a motor vehicle that intermittently assists the train—which FRA identified as a small railroad operation exception in proposed § 218.129(c)(1)(ii); (2) two short lines stated that their one-person train crew operation was a remote control operation—which FRA identified as a small railroad operation exception in proposed § 218.129(c)(3); (3) one short line identified that it used a work train with a one-person train crew—which FRA identified as a specific freight train exception in proposed § 218.129(c)(2); and (4) five short lines did not identify the type of one-person train crew operations they used or exactly how they would be impacted by the NPRM's proposed requirements. In reviewing the short line and regional railroads' comments, it appears that these commenters were counting all one-person train crew operations, even if the special approval process did not apply, because some of the one-person train crew operations FRA proposed for exception could not be used without also complying with additional requirements. Thus, FRA determined that the NPRM's lack of a definition for a ''one-person train crew'' was creating confusion.

To ensure that FRA and the rail industry use the same terminology for the purposes of addressing one-person train crew requirements, the final rule includes definitions for the terms ''one-person train crew'' and ''one-person train crewmember.'' By defining these terms, the final rule clarifies that a one-person train crew includes: (1) a train operation with a single assigned railroad employee performing both the locomotive engineer's and conductor's duties; or (2) when a single assigned railroad employee is traveling on the train when the train is moving, and the remainder of the train crew, including the conductor if the locomotive engineer is not the assigned conductor, is assigned to intermittently assist the train's movements. The latter operation will therefore include what many short line commenters described as a one-person operation when they used a second assigned train crewmember that intermittently assists the train but primarily travels in a motor vehicle instead of traveling on the train when the train is moving.[185]

In the NPRM, FRA described the agency's understanding that fewer freight short line and regional railroads are using one-person train crew staffing arrangements than in 2016, as FRA identified fourteen Class II and III railroads operating single-person train operations in 2016 and only seven of those same freight railroads maintaining such operations in 2022.[186] FRA requested comments on any additional such railroads conducting one-person train crew operations and the interest of such railroads to conduct one-person train crew operations in the future.[187]

Based on the comments and the added definitions concerning one-person train crews, FRA has revised its estimate of the number of existing railroad operations impacted by each requirement in the RIA to this final rule. FRA estimates that there are 75 Class II and III railroad legacy freight one-person train crew operations, excluding those one-person train crew operations that would fall into one of the other exceptions covered in the final rule by § 218.125 through § 218.129. This estimate was based on the 62 commenters that described an existing one-person operation, even counting the eight commenters that did not describe an operation that definitively would fit into the one-person train crew operation as FRA is defining such an operation for this final rule. Further, this estimate includes the seven one-person train crew operations identified in the NPRM and the proposed rule's RIA. FRA's estimate includes at least 10–20 percent more one-person train crew operations than known through FRA identification and commenters' self-descriptions. Although some commenters were ambiguous in describing their operations, FRA included those operations in this conservative estimate that may overestimate the actual number of established one-person train crew operations.[188]

This final rule also addresses the short line rail industry's request that the final rule distinguish Class II and III freight railroad operations from those of the Class I freight railroads by utilizing the alternative regulatory approaches discussed in the NPRM's RIA.[189] Thus, rather than requiring a special approval petition for each proposed one-person train crew operation, the final rule allows certain one-person train crew operations to continue or be initiated without a special approval process. Instead of the proposed FRA review and approval requirements associated with a special approval petition for all legacy train operations staffed with a one-person train crew in proposed § 218.131 and for the initiation of all other train operations staffed with a one-person train crew in proposed § 218.133, the final rule, in § 218.129, requires written notification (in addition to certain operational requirements) only from railroads with established legacy one-person train crew freight operations as well as Class II and III freight railroads seeking to initiate a train operation staffed with a one-person train crew but not transporting hazardous materials of the types or quantities specified in § 218.123(c). This written notice replaces the approval process for these operations and provides greater

[184] 87 FR 45578–79, FN 155.

[185] As is later explained in greater detail in this discussion of comments and conclusions, FRA's current rail safety requirements distinguish between a train crewmember that is assigned a single train and a person that performs work as a utility employee or other worker that may perform work for multiple trains. FRA found ASLRRA's survey questions drafted imprecisely with regard to this issue. For instance, in ASLRRA's survey, *see* FRA–2021–0032–13033, attachment A, question 4 asks a railroad to check a box if it uses on its main line operations ''one person in the locomotive cab, supported by a conductor who is supporting multiple trains simultaneously,'' when FRA requires a conductor to be in charge of the crew and therefore a conductor cannot be in charge of more than one train simultaneously. *See* 49 CFR 242.7 (defining ''conductor'').

[186] 87 FR 45578.

[187] 87 FR 45579.

[188] In response to ASLRRA's survey of its 696 short line members, 176 of the 280 short lines that responded claimed that they deployed a one-person train crew operation.

[189] FRA–2021–0032–0368.

regulatory certainty while providing more flexibility to short lines as compared to the NPRM's proposed requirement of a petition filing and special approval process. The notification requirements in the final rule will still provide FRA with significant information regarding the locations and extent of, and hazards posed by, these one-person train crew operations.

FRA's decision to permit Class II and III legacy one-person train crew freight operations, including those transporting hazardous materials, to continue without a risk assessment or special approval was based on the final rule's imposition of minimum requirements on these legacy operations. For instance, the implementation schedule phasing in operating rules to protect the one-person train crewmember and to safeguard the public after an incident should ensure that railroads are prepared to take the appropriate mitigation measures to protect employees and the public. Similarly, the final rule's requirement for an alerter on any controlling locomotive operated by a one-person train crew and an operating rule that requires testing the alerter to confirm it is functioning before departure will provide an alternative that makes that aspect of the operation as safe or safer than a two-person minimum train crew operation where a second crewmember would be expected to make an emergency brake application if the locomotive engineer became incapacitated. Although not required in this final rule, FRA encourages railroads with legacy operations to examine any safety hazards that could be further mitigated to reduce risks with one-person train crew operations or any of their operations generally, such as track maintenance near waterways and densely populated areas or the railroad's operating rule requirements for a second crewmember who assists intermittently to ensure that this crewmember is contributing to the safety of the train's movement to the greatest extent possible. FRA will closely monitor this legacy exception and will scrutinize data or observations showing that the legacy operations may not be as safe as currently described.

FRA also removed the NPRM's proposed prohibition on one-person train crew operations transporting certain types or quantities of hazardous materials with respect to initiating new or existing, but non-legacy, operations. All railroads, including Class II and III railroads, seeking to initiate such an operation transporting hazardous materials of the types or quantities specified in § 218.123(c) will be required to conduct a risk assessment and obtain special approval for the operation under § 218.131. The revisions from the proposed rule's approach regarding the transportation of hazardous materials reflects FRA's consideration of ASLRRA's comment that the common carrier legal obligation prohibits a railroad from refusing service to a customer that provides a properly packaged hazardous material. The RIA acknowledges the potential costs of compliance with the final rule's requirements for a one-person train crew. Considering the known safety and security risks associated with operating trains transporting large amounts of hazardous materials, previously determined by FRA, the Transportation Security Administration (TSA), and the Pipeline and Hazardous Materials Safety Administration (PHMSA) to present the greatest safety and security risks, FRA finds that the final rule's requirements are justified to ensure the safety of trains. FRA is willing to work with the short line industry in developing a model risk assessment that could potentially reduce the paperwork burden on short lines and accelerate the petition process. FRA also supports ASLRRA and its members creating a template or model risk assessment to reduce the burden on individual Class II and III railroads. FRA has considered this in estimates used in the final rule's RIA.

The final rule also addresses the short line industry's comments that the proposed exceptions in the NPRM were too stringent in that they included limitations on speed, grade, or train length, by largely eliminating those proposed limitations within the exceptions and providing other criteria to govern those operations. For instance, in proposed § 218.129(c)(1), the exceptions identified specifically for ''small railroad operations'' were limited to a freight train operated on a railroad that would not exceed 25 mph and by an employee of a railroad with fewer than 400,000 total employee work hours annually. In the final rule, FRA did not include the proposed speed restriction for such a small railroad operation, thereby allowing the train to be operated at the maximum allowable track speed and not creating a disincentive to maintaining track to the highest standard a railroad chooses to sustain. The small railroad operations exception was also expanded in the final rule to include all Class II and III freight railroads.[190] In addition, the proposed track grade and train length limitations for the small railroad operations exception have not been adopted in the final rule. Moreover, in response to short line comments and after reviewing existing safety regulations, FRA has decided not to apply this final rule to a train operation controlled by a remote control operator because it has existing safety requirements for these operations and because there are other reasons mentioned later in this discussion of comments and conclusions.

Similarly, the final rule responds to certain short line commenters' concerns over a proposed requirement that certain one-person freight train operation exceptions in proposed § 218.129(c) must have an operating rule or practice requiring that the crewmember remain in the locomotive cab during normal operations and leave the locomotive cab only in case of an emergency affecting railroad operations.[191] The proposed requirement applied to the exceptions identified as small railroad operations, work train operations, and remote control operations. The Strasburg Rail Road explained that this proposed requirement would have precluded its current work train arrangement whereby the one-person crewmember is permitted to join a work group on the ground after securing the movement. Upon further consideration, the requirement FRA proposed in the NPRM has not been included in the final rule, as FRA finds its current securement requirements are sufficient to safeguard unattended trains.[192]

Additionally, in § 218.129 of the final rule, FRA has addressed the comments requesting that each railroad be provided more time to comply with any new requirements or, as necessary, hire or train a second crewmember for a one-person train crew operation by providing an implementation schedule that phases in the final rule's requirements for certain specified one-person train crew operations. That phased-in implementation schedule will apply to: (1) each Class II or III railroad with a legacy one-person freight train operation; (2) each railroad seeking to continue or initiate use of a work train operation staffed with a one-person train crew; (3) each railroad seeking to continue or initiate use of a helper service train operation staffed with a

[190] There are nine holding companies that own approximately 250 Class II and Class III railroads. Those holding companies are: Anacostia Rail Holdings, Genessee and Wyoming, Iowa Pacific Holdings, OmniTRAX, Pioneer Railcorp, Progressive Rail Inc., R.J. Corman Railroad Group, Patriot Rail, and Watco.

[191] 87 FR 45617 (citing proposed paragraph (b)(1) of § 218.129).

[192] 49 CFR 232.103(n).

one-person train crew; and (4) each railroad seeking to continue or initiate use of a lite locomotive train operation staffed with a one-person train crew, excluding a multiple unit (MU) locomotive passenger operation where the car carrying the passengers is also functioning as the locomotive.

The implementation schedule provides enough time for railroads to comply with the final rule's new requirements, and FRA encourages each railroad with a one-person train crew operation to act more quickly than required by the schedule when possible. For instance, FRA expects that each railroad should be able to adopt any necessary operating rules within a short period of time, potentially within a few weeks at most, even though the final rule's implementation schedule for excepted operations will provide up to 90 days from the effective date of the final rule. It is possible that ASLRRA or other groups will draft model operating rules that address the operating rule requirements in the final rule, and these model operating rules could be adopted secondarily to replace any quickly adopted rules that are used in the short term. Meanwhile, it can be expected that some railroads will quickly install any required alerters while others delay installation for various reasons; FRA urges each railroad not to delay alerter installation.[193]

For these reasons, the final rule largely provides the clarity and streamlined approach that ASLRRA and Class II and III freight railroads requested while establishing minimum requirements for the safety of one-person train crew operations. At the same time, the final rule increases safety for operations proposed as one-person train crews because an alerter or a second crewmember to stop the train in an emergency is a necessary precaution to prevent the potential for catastrophic harm due to an uncontrolled train movement; in reaching this conclusion, FRA reviewed its statements from 2012 in a locomotive safety standards rulemaking cited by ASLRRA and determined that the agency is not issuing conflicting statements.[194] The final rule's requirements regarding alerters in the controlling locomotive, safeguards to protect the one-person train crewmember, and procedures for minimizing the impact of situations that could endanger employees, the public, or environment reduce the risk of foreseeable hazards associated with one-person train crew operations.

4. Class I Freight Railroads

FRA received numerous comments opposing the NPRM from the Class I freight railroads and groups associated with those railroads. The following is a summary of, and response to, those comments.

a. Alternative Crewmember Arrangements Including Expeditors, Ground-Based Crewmembers, or Ground-Based Conductors

Numerous commenters offered that the NPRM would be disruptive to their current operations or plans to use one-person train crews in combination with other rail employees that, as described, might not be a part of a train crew as FRA defines that term in its current regulation,[195] or would not meet FRA's proposed requirements under the NPRM. In general, these commenters described train operations using a rail worker, traveling in a motor vehicle, that intermittently assists the train at key intervals such as to flag a highway-rail grade crossing, throw a hand-operated switch, or be available in case of emergencies or to diagnose and repair a mechanical problem if the train becomes disabled.

During the public hearing, UP's Vice President of Crew Management Services and Interline Operations testified regarding the railroad's expeditor pilot program and future plans, which included showing a video demonstrating the job of an expeditor.[196] UP's written comment also described its expeditor plan and stated that FRA's NPRM would disrupt the implementation of that plan.[197] UP described its expeditor plan as using one-person train crews with PTC and ground-based conductors replacing train-based conductors. In a written statement, UP described how its PTC system includes a parking brake feature that can set the train brakes for routine work on the ground near the train and can set a full-service brake application if movement is detected—a feature that is not mandated by FRA. UP envisioned expeditors to run on a subdivision basis, not a train-by-train basis, and for expeditors to be used for all commodities including all types and quantities of hazardous materials. UP stated that it expects some subdivisions or territories will require more than a single expeditor to handle the train density. The rationale UP gave for initiating its expeditor plan was that a conductor's job primarily consists of preparing a train for departure and occasionally addressing minor mechanical issues that occur en route, and that an expeditor's role can be designed to accomplish traditional conductor tasks in less time. Phase one of UP's expeditor plan is for implementation on territory that has a double mainline track with a state highway running along side it, albeit with a traditional conductor also on the train. UP described three additional phases, each adding layers of new complexities. UP commented that it believes a person working in an expeditor role is safer than a train-based conductor because the employee will not have to climb out of the locomotive cab and walk long distances aside the train in potentially challenging environments to repair a mechanical problem. UP stated that if FRA insisted on excluding one-person crews from operating trains carrying hazardous materials, UP would end its expeditor pilot program because the program is dependent on treating all trains passing through a particular area in the same way.

During the public hearing, the Vice President of Advanced Train Control for NS testified regarding the railroad's plan

[193] Not only does FRA require most locomotives to have a working alerter installed, FRA's current rail safety regulation in the same part as this final rule contains a strict prohibition against tampering with such devices that are installed to improve the safety of the operation of train movements. 49 CFR part 218, subpart D.

[194] ASLRRA's comment, FRA–2021–0032–1193 at 29–30, citing 77 FR 21312, did not explain that: (1) FRA's statements regarding the need to establish a minimum alerter requirement were based on multiple NTSB recommendations to do so; (2) that NTSB's recommendations were based on accidents that occurred at varying speeds; or (3) that NTSB's accident analysis was focused on the ''crewmembers'' without considering the possibility that railroads would be operating one-person trains. 77 FR 21320–21. Similarly, FRA's rationale for permitting operational flexibility by tailoring the alerter standard to a minimum operational speed did not address the possibility that railroads would be operating one-person trains. 77 FR 21329–30. NTSB's rationale for an alerter standard included an analysis of a head-on train collision on July 10, 2005, in which ''the NTSB determined that an alerter likely would have detected the lack of activity by the engineer and sounded an alarm that could have alerted one or both crewmembers [and h]ad the crew been incapacitated or not responded to the alarm, the alerter would have automatically applied the brakes and brought the train to a stop . . . [potentially] prevent[ing] the collision.'' 77 FR 21320–21. In FRA's view, because the agency understood the operational status quo at that time was a minimum of two train crewmembers, its decision in 2012 to provide some operational flexibility to ''freight railroads [that] only operate over small territories'' and move at lower speeds included the unwritten expectation that a second crewmember would be available to apply the emergency brake if the locomotive engineer was fatigued or incapacitated. 77 FR 21329–30.

[195] 49 CFR 218.5 (defining train or yard crew).

[196] FRA–2021–0032–13184 (hearing transcript); *https://www.youtube.com/watch?v=6hr15dtWwGU* (video).

[197] FRA–2021–0032–13012.

to deploy ground-based conductors.[198] NS's written comment also described its plan and stated that the NPRM failed to consider how the rail industry can use operational innovations or deploy readily available technology to address any safety concerns associated with the operation of a train with fewer than two crewmembers.[199] NS also stated it met with DOT officials about its plan to deploy ground-based conductors.[200]

NS commented that PTC is installed on 58,000 miles of track in the United States, and it believes PTC has supplanted the role of a conductor. NS views PTC as handling all the tasks of a traditional conductor including: (1) advising the locomotive engineer regarding certain notifications and actions; (2) communicating with certain individuals outside the locomotive cab; and (3) completing certain forms and maintaining records. NS stated that new or revised mandatory directives are conveyed through the PTC system. NS also stated that the PTC system uses locational and mandatory directive data to prompt the engineer to obtain permission from the designated roadway worker in charge before reaching a work zone, and then the PTC system requires the engineer to acknowledge that the train has acquired the permission, presumably by radio communication, before allowing the train to proceed into the work zone. NS commented how a ground-based conductor or other technologies could perform the tasks that PTC systems do not completely perform. In a written statement, NS also commented that the railroad can plan to have a second crewmember on a train when it leaves PTC territory where appropriate or when the PTC system fails en route. Further, NS explained how the PTC system was designed utilizing human factor engineering principles to convey critical information clearly and consistently, thereby aggregating train and route information in a way that reduces cognitive workload while operating the train.

CN commented against the rule for the reasons described by the Association of American Railroads (AAR) but also requested that any final rule include revisions that permit ground-based crewmembers.[201] CN commented that the NPRM's proposed requirements would stifle different approaches to crew staffing and would permanently remove any possibility of ground-based assistance. CN commented that it would prefer an option like one FRA proposed in the 2016 NPRM that allowed for a railroad with PTC-enabled lines to notify FRA of the operation and permit FRA subsequent review to evaluate whether the railroad was providing appropriate safety.[202]

BNSF also commented against the rule for the reasons described by AAR and commented that the NPRM would unnecessarily impede BNSF's ongoing efforts, through collective bargaining, to implement one-person crew operations that also deploy ground-based conductors.[203] BNSF commented that it was focused on making work schedules more predictable for conductors.

FRA's Response

FRA does not agree with CN's concern that the NPRM would stifle different approaches to crew staffing or use of ground-based assistance, as the NPRM proposed a special approval process designed to consider the safety implications of alternative approaches. For instance, if CN or any other railroad seeks to initiate a one-person train crew operation that was not otherwise excepted, the use of one or more ground-based employees to assist the train could be considered a way to mitigate the risks in a risk assessment filed under the special approval petition process. CN and other railroads could, for example, look to one of AAR's exhibits evaluating some risks involved with one-person train crew operations under four basic sets of accident scenarios as a reference in creating a risk analysis.[204] The combination of ground-based employees, PTC, and other mitigating actions taken in conjunction with the special approval petition and risk assessment, where required under this final rule, could support a showing that a one-person train crew operation, with the risk mitigations in place, is as safe or safer than a two-person train crew operation. As explained below, FRA notes there are various terms being used by different railroads to describe their ground-based employees. Although use of different terms may present some confusion or concern, FRA recognizes that these types of employees may be important parts of a one-person train crew operation under the special approval petition requirements of this final rule.

The comments regarding alternative crewmember arrangements introduced various terms to describe rail employees such as expeditor, ground-based crewmember, and ground-based conductor, which FRA does not use in its regulations, but the concepts of which are incorporated within current terminology and requirements regulating railroad operating practices such as ''utility employee,'' [205] ''train or yard crew,'' [206] and ''worker.'' [207] FRA's current regulations specify requirements for the safe protection of temporary crewmember and non-crewmember railroad employees engaged in the inspection, testing, repair, and servicing of rolling equipment as is expected of utility employees and workers.[208] For instance, a ground-based employee, who is not part of the train crew, may need help from a conductor or second crewmember to communicate with the locomotive engineer so that mechanical repairs may be made safely, in accordance with current Federal rail safety requirements. Meanwhile, neither a utility employee nor worker, as defined in FRA's existing requirements,

[198] FRA–2021–0032–13184 (hearing transcript).

[199] FRA–2021–0032–13045.

[200] FRA–2021–0032–13181.

[201] FRA–2021–0032–13144.

[202] 81 FR 13918, 13966 (Mar. 15, 2016) (citing option 2, proposed § 218.135).

[203] FRA–2021–0032–12996.

[204] FRA–2021–0032–13056, AAR's Exhibit 6, a report prepared by Oliver Wyman titled ''Evaluation of Single Crew Risks'' (Jan. 26, 2015) (conducting a comparative risk analysis for select accident causes under present day mainline operations with traditional two-person crews versus future mainline operations on Class I railroad lines when an FRA-compliant PTC system is fully implemented). This report contained the disclaimer that ''it does not consider all causes of accidents and is not a full comparison of accident frequencies with and without PTC.'' Certainly, a risk assessment would go further than this report to consider incidents not preventable by a PTC system—such as those accidents that a PTC system is not designed to prevent when a train is operated at restricted speed.

[205] 49 CFR 218.5 (defining ''utility employee'' as a railroad employee assigned to and functioning as a temporary member of a train or yard crew whose primary function is to assist the train or yard crew in the assembly, disassembly or classification of rail cars, or operation of trains subject to the conditions set forth in 49 CFR 218.22).

[206] 49 CFR 218.5 *(defining ''train or yard crew''* as one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of this chapter.

[207] 49 CFR 218.5 (defining ''worker'' as any railroad employee assigned to inspect, test, repair, or service railroad rolling equipment, or their components, including brake systems. Members of train and yard crews are excluded except when assigned such work on railroad rolling equipment that is not part of the train or yard movement they have been called to operate (or been assigned to as ''utility employees''). Utility employees assigned to and functioning as temporary members of a specific train or yard crew (subject to the conditions set forth in § 218.22 of this chapter), are excluded only when so assigned and functioning).

[208] 49 CFR part 218, subpart B—Blue Signal Protection of Workers.

would ride with the train, call out and verify signal indications, communicate by radio on behalf of the train crew, identify safety dangers along the right-of-way as the train progresses, remind the locomotive engineer of speed or other operating restrictions, provide guidance in an emergency or difficult operating environment based on experience, or monitor the locomotive engineer's alertness. Although a ground-based conductor that is part of the train crew or some technologies (or a combination of the two) might be able to assist with some of these functions, the descriptions of the Class I freight railroads' ground-based employee pilot programs indicate that the intent is to utilize rail personnel more efficiently by allowing the ground-based employee to service more than one train in a defined geographic area. Although the ground-based employee arrangement may be an efficient use of operations personnel, that arrangement alone does not offer an identical safety substitute for a traditional, second crewmember that travels on the train to each destination.

The use of terminology, not based in FRA' regulations, can obscure or minimize current safety requirements, and suggests that a railroad employee performing a non-crewmember role may be treated the same as a crewmember. A railroad is obligated to comply with FRA's current minimum safety requirements that protect these railroad employees from personal injury posed by any movement of such equipment regardless of the terminology used by the railroad. For instance, regardless of whether a railroad refers to a ground-based person assigned to assist more than one train as an expeditor, ground-based crewmember, or ground-based conductor, that person is not part of the train crew under FRA's definition of ''train or yard crew'' and must be provided with the Federally mandated safeguards when assisting a train.

Although UP has not yet initiated its expeditor plan, this Class I freight railroad made several comments justifying its plan to test the viability of one-person operations that are problematic, confirming a need for an FRA approval process. For instance, UP's rationale for initiating its expeditor plan oversimplified the conductor's roles and responsibilities. UP described a conductor's job as ''primarily consist[ing] of preparing a train for departure and occasionally addressing minor mechanical issues that occur en route.'' [209] UP's limited description of the conductor's job failed to address how a railroad would offset the significant safety backup and assistance role that conductors currently provide.

For instance, UP's description of the conductor's job neglected to address the railroad's operating rules and practices that hold a conductor accountable, along with the locomotive engineer, for the safe operation of the train and observance of the railroad's rules.[210] There are also numerous railroad rules that impose crewmember requirements such as the duty to communicate to each other the name of signals affecting their train as soon as the signals become visible or audible.[211] Similarly, there are numerous railroad rules that impose requirements on a conductor because the conductor is singled out for supervising the train operation, advising the engineer and train dispatcher of any restriction placed on equipment being handled, and reminding the engineer when the train is approaching certain area restrictions.[212] Similarly, UP and many other railroads have established ''cab red zone'' rules that require both crewmembers to minimize distractions during critical operating circumstances in an effort to enhance safety, but railroad commenters never raised alternative safety measures they would voluntarily adopt that offer a safety equivalent.[213]

Because conductors are accountable for safe train operations, a person holding a conductor certification can have that certification revoked.[214] Of course, the reason that UP and other railroads hold conductors accountable for safe train operations is that conductors are often completing safety tasks independently of a locomotive engineer, such as throwing hand-operated switches or directing shoving movements, or acting as an important backstop to the locomotive engineer when calling out signal indications, reviewing operating instructions, or obtaining track authorities or permissions. FRA is concerned that, without the type of Federal oversight required by this final rule, the commenting Class I railroads that have overstated the role of PTC or diminished the traditional role of a conductor will unreasonably rely on those same incorrect assumptions in making safety determinations when transitioning to a one-person train crew.[215]

It is also concerning that UP and other rail industry commenters largely asserted their safety case for ground-based employees by limiting their focus to circumstances when conductors are needed to fix mechanical problems and, in doing so, neglect the conductor's currently broad safety role. Although FRA shares the rail industry's concern that a train crewmember could get hurt in a slip, trip, or fall coming on or off on-track equipment or walking along the right-of-way, the industry's safety argument related to ground-based employees assisting the train seems largely limited to that one concern. UP also commented that expeditors ''will be less likely to suffer the effects of fatigue [because i]nstead of riding long miles on a train, the expeditor will be able to set out fresh from a home terminal every day'' [216] but did not address the issue of the locomotive engineer's fatigue by stating that UP would limit the one-person train crewmember to regular shifts as well. Many individual and labor organization comments stated how a second crewmember can help offset a locomotive engineer's fatigue, but UP and other Class I railroad commenters did not address this safety concern.

NS and other Class I freight railroad industry commenters stated that their plans to deploy ground-based employees and reduce crew size to one person would substantially rely on PTC systems. However, PTC systems were designed as overlay systems (*i.e.,* ''all of

[209] FRA–2021–0032–13012 (comment filed by UP).

[210] UP's General Code of Operating Rules (GCOR) describes the duties of crew members in rule 1.47 as generally ''responsible for the safety and protection of their train and observance of rules'' and includes a list and description of specific conductor responsibilities.

[211] UP's GCOR 1.47, C. All Crew Members' Responsibilities, 1. Crew Members in Control Compartment.

[212] UP's GCOR 1.47, A. Conductor Responsibilities.

[213] UP's GCOR 1.47.1: Cab Red Zone. For example, UP requires a cab red zone when operating at restricted speed and not switching, a situation where PTC, as designed, would not always stop a train as required by a restricted speed rule. In the cab red zone, UP requires that a crewmember handling radio communications must not be the locomotive engineer operating the controls.

Although a railroad may amend a railroad operating rule or practice without FRA's permission if the railroad's requirement is not a Federal requirement, each railroad adopts these self-imposed requirements to ensure that it implements safe operating practices and presumably would not intentionally introduce unsafe practices—which FRA could address through enforcement of existing requirements (such as those in 49 CFR part 217 regarding FRA review of a railroad's operating rules); by establishing new requirements; or by making recommendations in guidance.

[214] For instance, during the years 2021 and 2022, UP reported to FRA that it revoked certification for approximately 252 conductors for violations of operating rules and practices.

[215] Overall, FRA found AAR's Exhibit 1, a report prepared by Oliver Wyman titled ''Assessment of Conductor and Engineer In-Cab Work Activities'' (May 15, 2021), FRA–2021–0032–13056, informative, but FRA did not find it persuasive because of its failures by omission or making of assumptions that FRA did not agree with similar to those described in FRA's response to UP's comment.

[216] FRA–2021–0032–13184 at 79–80.

the safety features of the underlying operation to which PTC is added will be kept'') [217] to include the conductor. Indeed, FRA fully addressed this issue when requiring the onboard PTC apparatus to be arranged so each member of the crew assigned to perform duties in the locomotive can receive the same PTC information displayed in the same manner and execute any functions necessary to that crewmember's duties.[218] In the section-by-section analysis of a final rule on PTC systems, FRA stated that ''[f]or the conductor and engineer to fulfill the expectations of Congress, it is necessary for both crewmembers to have sufficient information to perform their duties,'' and FRA described how ''safety would be materially diminished if the conductor in freight operations were denied access to the same information in the same format as the engineer.'' [219] Also during that PTC rulemaking, FRA rejected AAR's comment that questioned the need for a conductor to have a PTC display and explained that ''PTC is currently an imperfect technology fed by databases that can be corrupted'' when the agency determined that the conductor or second crewmember must have the same PTC information displayed as the locomotive engineer.[220] For instance, during one of the PTC systems rulemakings, FRA responded to an AAR comment for a study showing that safety is jeopardized by assigning the engineer PTC-related duties by stating that ''FRA has directly observed engineers exceeding authorities while attempting to respond to PTC system requirements . . . and [how they were] plainly distracted from safety-critical duties.'' [221]

Thus, in response to this train crew size safety requirements rulemaking, AAR and other freight rail industry commenters are rehashing arguments FRA rejected in prior rulemakings, such as the argument that a locomotive engineer alone can acknowledge electronically transmitted mandatory directives by simply pressing a button when the train is in motion—an action that does not provide evidence of comprehension.[222] Removal of the conductor under these circumstances would mean that the Class I freight railroad industry commenters intend for the PTC systems to act as the sole backup for any operating mistakes committed by the locomotive engineer. Even when a PTC system works as intended, human error could occur if mandatory directive information is input incorrectly. In effect, a second crew member serves as a backup to validate the electronically transmitted mandatory directives are accurate.

As FRA noted in response to other comments, railroads continue to experience unplanned outages and planned outages of their PTC systems, in addition to various initialization failures, cut outs, and malfunctions. For example, in March 2023, BNSF and Amtrak experienced unplanned outages of their PTC systems, and NS experienced an unplanned outage of its PTC system in August 2023, impacting operations of both the host railroad and its tenant railroads. Also, during 2023, several Class I railroads, commuter railroads, and Amtrak temporarily disabled their PTC systems to facilitate planned infrastructure upgrades or capital projects. Even three years after the December 31, 2023, statutory deadline for full implementation of PTC systems, the railroad industry is continuing its efforts to improve the reliability and performance of PTC technology due, for example, to failures (including initialization failures, cut outs, and malfunctions, as defined in FRA's PTC regulations at 49 CFR 236.1003) and temporary planned and unplanned outages.

Moreover, the safety issues regarding the implementation of one-person train crew operations go beyond what the PTC system can do and include what additional duties will be shifted from a conductor to a one-person crew that have the potential to reduce the locomotive engineer's situational awareness. During the hearing, NS commented that it envisions the one-person crew will absorb the added duty of communications with other trains, such as communicating a defect observed on another train, while neglecting to address how the additional duty can be done safely, how realistic it is to expect a one-person crew to look for such defects while safely monitoring the progress of its own train, and whether any new hazards are created by the additional task that may need to be offset by some other action.

Although Class I freight railroad commenters pointed to the success of the Class II Indiana Rail Road Company (INRD) as their model for rolling out a one-person train operation, those railroad commenters did not explain or demonstrate to FRA that they took, or planned to take, any of the steps INRD took when it first implemented its one-person train crew operations nor did they explain how their operations are comparable to a regional railroad that largely serves local industries and provides connections between small railroads and major Class I railroads and that is operating on approximately 500 miles of track in two States.[223] For example, the Class I freight railroads' comments did not address whether: the communication requirements were reviewed and adapted for the one-person operation; or mitigation measures would be required to protect the one-person train crew, the public, or the environment, especially when a ground-based assistant would be unable to easily reach the train. Similarly, without a special approval process, a Class I freight railroad, with a more complex operation than a Class II or III freight railroad because it employs thousands of people in train operations and prioritizes long-haul transportation, would not be required to demonstrate that it considered all the hazards and mitigated the risks for a one-person train crew operation before initiating implementation, which FRA finds concerning given the ground-based employee plans described in comments do not include some hazards or show plans for mitigating risks that FRA identified in the NPRM. Thus, the INRD's Class II one-person train crew operation is not comparable to a potential Class I railroad operation unless a Class I railroad takes substantial steps to make them comparable.

b. Train Operations in Other Countries

AAR and other major freight rail industry commenters contend that FRA should not have a two-person train crew mandate because rail operations in other countries that use one-person crews provide sufficient data to support the

[217] 75 FR 2598, 2005 (Jan. 15, 2010).

[218] *See e.g.,* 49 CFR 236.1006(d). This requirement was moved from 49 CFR 236.1029(f), a section with requirements addressing PTC system use and en route failures, to its current location because it seemed a more intuitive location for a requirement related to equipping locomotives. 79 FR 49693, 49705 (Aug. 22, 2014).

[219] 75 FR 2668.

[220] 75 FR 2669–70.

[221] 75 FR 2670.

[222] 75 FR 2670–71. In rejecting AAR's argument under a PTC system final rule, FRA explained that the current practice of reading mandatory directives back to the dispatcher over the radio gives the crew an opportunity to read it and consider its relevance to the current situation.

[223] 87 FR 45568 (footnote 24 which listed the characteristics of INRD's one-person train operation that INRD claimed it voluntarily implemented to ensure the operation's safety). At FRA's public hearing for this rule, INRD stated that its implementation of a one-person train crew that started in 1997 ''required a lot of research, innovation and modern day technology.'' In addition, INRD clarified at the hearing that it used two types of one-person train crew operations, *i.e.,* terminal-to-terminal with a single-person crew and split crews with one person in a motor vehicle. FRA–2021–0032–13184 at 93.

safety of one-person train crew operations, and that data, when considered with the INRD's example, and the fact that ''passenger trains in the United States typically operate with one person in the cab,'' should be sufficient to support the safety of one-person train crew operations.[224] For instance, one of AAR's sponsored research documents compared the safety and characteristics of European and U.S. railways.[225] In summary, that 2021 study found that the operating complexity of the European rail network was based on high train density.[226] This AAR-sponsored study concluded that the defining factor in safety was not crew size; instead, lower accident rates were attributable to ''the kind of investments that mature economies make in infrastructure and technology—the same kind of investments that U.S. railroads have made and continue to make . . . each year.'' [227]

AAR also submitted a study it sponsored in 2015, which promoted train crew size reductions on trains operating on high-density lines from an economic view that would justify the expense and use of round-the-clock utility personnel.[228] This study described one-person train crew operations in North America, Europe, and in other countries in 2015 and the safety record of those international operations.

FRA's Response

FRA found the AAR-sponsored studies and major freight railroad comments on rail operations in other countries generally informative, but lacking persuasion that FRA should forgo regulating the subject matter of train crew size safety. In summary, FRA found one-person operations in other countries are either not comparable because of different operational factors that contrast with U.S. operations or because effective government regulation in other countries has established minimum safety standards in the same way this final rule will for U.S. operations.

For instance, in the NPRM, FRA addressed the subject of train operations in other countries by explaining that, for the most part, they are not comparable to U.S. train operations due to differences in train lengths, territory, and infrastructure.[229] AAR's comment included information supporting, or at least not refuting the accuracy of, FRA's position in the NPRM. For instance, AAR's comment included research supporting that Western European rail operations are significantly different in train length when compared to U.S. rail operations, as European freight trains are shorter to accommodate shorter block sizes and a greater number of interlockings.[230] The Class I comments also did not provide further information showing that FRA's statements in the NPRM were inaccurate regarding how foreign, one-person freight train operations do not carry out extensive interlining or switching with other railroads and that many foreign, one-person passenger train operations do not have to share track with freight operations or operate over highway-rail grade crossings.[231] It was for these reasons that FRA concluded in the NPRM that the safety hazards associated with those Western European rail operations are not comparable to those involving U.S. operations.

One significant element reflected in AAR's 2015 sponsored study undermining the Class I railroads' position is that railroads in other countries must sometimes abide by operational restrictions that regulating agencies have placed on one-person train crew operations. For example, this study explained how the Transportation Safety Board of Canada required the implementation of certain safety measures after the catastrophic accident at Lac-Mégantic, Quebec, that FRA described in the NPRM,[232] and that the measures range from better tracking of those trains to specific dispatcher training and fatigue mitigation measures.[233] Similarly, this same study found that the European Union imposed two preconditions on one-person train crew operations: (1) a working ''dead-man control system'' which is the equivalent of what FRA refers to as an ''alerter''; and (2) the equivalent of a U.S. centralized traffic control system (CTC).[234] The study described how in the United States there are three types of signaling control systems (excluding PTC) and, of those systems, CTC affords the highest level of control, automation, and integration of safety logic.[235] In the European signaling control system, dispatchers can remotely operate signals and switches to ensure that trains do not make conflicting movements,[236] but presumably also to limit when or how often a one-person crewmember would need to temporarily climb down from the locomotive to throw a switch. In contrast, not all U.S. railroads have dispatchers and not all dispatchers at U.S. railroads have the capability to operate all switches and fixed derails remotely or have a train crewmember operate such devices by radio. These are the types of safety issues that necessitate evaluation through a risk assessment, as required under the final rule. In Germany, devices are installed on locomotives to automatically adjust for high-speed braking on curves, and there are requirements for a second crewmember when a dead-man device fails or under other unusual circumstances.[237] Therefore, this final rule's requirements for a functioning alerter and related operating rules are consistent with the restrictions other countries have imposed for one-person train crew operations.

Another takeaway from the 2015 AAR study was that it focused on a limited number of accidents that were considered preventable with a multiple-person crew,[238] but the data analyzed

[224] FRA–2021–0032–13056, AAR's Comment at 3.

[225] FRA–2021–0032–13056, AAR's Exhibit 2, a report prepared by Oliver Wyman titled ''Crew-Related Safety and Characteristic Comparison of European and US Railways'' (Apr. 5, 2021). This report appears to be an update of AAR's Exhibit 4, another report prepared by Oliver Wyman titled ''Assessment of European Railways: Characteristics and Crew-Related Safety'' (June 15, 2016).

[226] FRA–2021–0032–13056, AAR's Exhibit 2 at 16.

[227] FRA–2021–0032–13056, AAR's Exhibit 2 at 66–67.

[228] FRA–2021–0032–13056, AAR's Exhibit 3, a report prepared by Oliver Wyman titled ''Analysis of North American Freight Rail Single-Person Crews: Safety and Economics.'' (Feb. 3, 2015).

[229] 87 FR 45580. As stated above, in response to the 2016 NPRM, AAR submitted studies it sponsored assessing European railway safety data with respect to train crew size and describing one-person train crew operations in other countries, including European countries. The 2019 withdrawal discussed but did not analyze these studies' conclusions. 84 FR 24737. For the reasons explained here, FRA finds these studies generally informative but unpersuasive on the matter of regulating train crew size safety, particularly when considered along with the totality of the information discussed and analyzed in the 2022 NPRM and here in the final rule.

[230] FRA–2021–0032–13056, AAR's Exhibit 2 at 4, 13, 66–67 (stating that 40 cars is the average length of European freight trains).

[231] FRA–2021–0032–13056, AAR's Exhibit 2 at 13 (stating that ''the majority of U.S. rail freight does not run on mixed lines with high-frequency passenger services, unlike in Europe'').

[232] 87 FR 45568–69.

[233] FRA–2021–0032–13056, AAR's Exhibit 3 at 8. BLET and SMART–TD's jointly filed comment noted that some railroad commenters pointed to European rail standards to support use of a one-person train crew while ignoring the Canadian safety standards, which BLET and SMART–TD stated are far more comparable to U.S. railroading but clearly do not support reduction in the size of train crews.

[234] FRA–2021–0032–13056, AAR's Exhibit 3 at 11.

[235] FRA–2021–0032–13056, AAR's Exhibit 3 at 4.

[236] FRA–2021–0032–13056, AAR's Exhibit 3 at 11.

[237] FRA–2021–0032–13056, AAR's Exhibit 3 at 12.

[238] FRA–2021–0032–13056, AAR's Exhibit 3 at 19 (explaining how the study limited what data it perceived as relevant to datasets in which the crew has some control and the size of the crew could arguably make a difference in the outcome of an incident).

did not include incidents involving close calls that likely go unrecorded or the potential for quicker response times to take mitigation measures that a multiple-person crew on the scene can take in the moments immediately following a variety of situations as compared with ground-based employees that would first need to be deployed to a scene before engaging in mitigating measures. It seems that the industry's argument focused on a narrower subset of situations where a second crewmember may be beneficial than FRA did in the NPRM. Similarly, the Alliance for Innovation and Infrastructure (AII) commented on the NPRM that a second crewmember has the potential to reduce damage only based on ''a host of assumptions that cannot be proven'' and that, ''hypothetical[ly], it is equally likely that all crewmembers die or are incapacitated, that the crew members are impacted by the bystander effect and do little or no mitigating activity, or that the main mitigation [is] by non-rail personnel.'' [239] FRA disagrees with AII's comment because the comment fails to acknowledge that FRA's central approach, *i.e.,* for each railroad to conduct a risk assessment, would produce an objective risk-based analysis that addresses such questions. This final rule will impose reasonable restrictions, collect data, and address the unique complexities of U.S. railroad operations through a review process. If data or analysis later suggests FRA should consider a different approach, any person could petition FRA for a new rulemaking, or FRA could initiate one.

FRA disagrees with AAR's comment that there is sufficient comparable data on one-person train crew operations to support that such operations are safe. For instance, AAR's comment that the data from passenger operations should be used is typically inaccurate as FRA explained in the NPRM that multiple train crewmembers are typically necessary to meet the requirements of FRA's passenger train emergency preparedness rule so that passenger operations' data is not comparable to a one-person train crew operation.[240] Class I railroad commenters pointed to the 250-mile, Class II, regional railroad INRD's one-person train crew operation as an example for them to follow even though their operations are drastically different because INRD, for instance, described its one-person train crew operations to FRA as hauling a single commodity that did not include hazardous materials.[241] In order to ensure safety in the future, the NPRM explained that the safety record of a few one-person Class II and III train crew operations would not necessarily be indicative of what the safety record might be on the major Class I freight railroads, which tend to operate longer trains, with higher tonnage, for longer distances, and at higher speeds than a short line or regional railroad operation.[242] Further, the analogy is the same when comparing Class I freight railroads to Western European rail operations; both may be complex operations, but the factors making them complex are different. And, as the NPRM proposed, the final rule will not prohibit all one-person train crew operations but allow some under specific conditions and others potentially after a petition is filed, a review process is followed, and an agency special approval is granted.

c. New Technology and Automated Operations

As noted in the NPRM, although current FRA regulations do not explicitly require the presence of a human operator, FRA's regulations were developed and drafted based on a general assumption that a train would be operated by a person, albeit with assistance from technology.[243] For that reason, the NPRM proposed a special approval petition process that would have required a risk assessment before initiating an operation, and the NPRM's background stated that FRA understands that the rail industry is anticipating future growth in automation and is concerned how a train crew staffing rule might impact the future of rail innovation and automation. Further the NPRM noted that a railroad, seeking to use rail automation technology that does not comply with FRA's existing rail safety regulations, may file a petition for rulemaking under FRA's regulations, or a petition for a waiver of FRA's safety rules.[244]

In response to FRA's proposal, some rail industry commenters asserted that the NPRM is anti-technology, that DOT has promoted automated operations for motor vehicles, including trucks, over railroads, and that the NPRM blocks incentives to innovate. For instance, AAR commented that the NPRM would cause a modal shift from railroads to trucks, directly impacting the railroad industry's competitiveness [245]—a position shared by ASLRRA.[246] To support its position, AAR provided a research paper it had commissioned that concluded the NPRM would have profound implications regarding the level and nature of freight competition between railroads and trucking companies, particularly in an era of increased vehicle automation.[247] Although AAR's sponsored research described truck platooning technology [248] as ''nascent,'' and thus just beginning to display signs of future potential, the research suggested substantial future cost savings in the mid-range figure of 29 percent for trucking companies, thereby impacting the ability of railroads to compete and profit.[249]

AAR's sponsored research suggested that a shift from rail to truck shipments may not be true ''where shipment characteristics favor rail transportation to the exclusion of truck [which] is particularly true of many liquid chemical and petroleum products, including plastics.'' [250] The research and other commenters compared existing safety statistics between the non-automated truck and rail industries, and concluded that rail is safer and should therefore be promoted. The AAR-sponsored research also suggested that ''[a]n unbalanced program of technological advancement will divert tens of millions of tons of freight from rail to truck and, in doing so, add measurably to the degradation of air

[239] FRA–2021–0032–12313 at 35. Although AII clearly opposed the NPRM, its analysis seemed conflicted when it concluded that ''[f]or [accident] mitigation, that [a] conductor being anywhere on the train would theoretically help reduce damage.'' *Id.* at 32.

[240] 87 FR 45579.

[241] 87 FR 45568. In the NPRM, FRA summarized INRD's public statements describing its operation that were made during FRA's 2016 train crew staffing rulemaking.

[242] 87 FR 45581. As the NPRM stated, train crews on major Class I freight railroads must generally contend with more complexities than typically found on a short line or regional railroad operation, such as more than one type of signal system, more than one set of railroad operating rules and practices that must be followed during the same tour of duty, or higher train traffic density.

[243] 87 FR 45567.

[244] 87 FR 45586.

[245] FRA–2021–0032–13056.

[246] FRA–2021–0032–13033.

[247] FRA–2021–0032–13056, AAR's Exhibit 9, a report prepared by Mark Burton, Research Associate Professor (Retired from The University of Tennessee), titled ''Rail-Truck Competition in an Era of Automation Technology'' (Dec. 2022).

[248] DOT's Federal Highway Administration describes truck platooning projects whereby a convoy of trucks are partially automated, meaning that the vehicles control the coordinated speeds and braking with the lead vehicles in the platoons, but the drivers maintain steering control and are expected to continuously monitor the driving situation to be ready to assume full control of the vehicles at any time. *https://highways.dot.gov/research/laboratories/saxton-transportation-operations-laboratory/Truck-Platooning.*

[249] FRA–2021–0032–13056, AAR's Exhibit 9 at 6–8.

[250] FRA–2021–0032–13056, AAR's Exhibit 9 at 13.

quality.'' [251] Thus, freight rail industry commenters projected that the NPRM proposing a two-person train crew mandate with exceptions had the potential to dramatically shift freight shipments from rail to truck, cause railroad revenues to fall, diminish public safety, increase fuel consumption, and lead to major increases in the demand for highway capacity.[252]

The American Consumer Institute (ACI), which is described as a non-partisan, educational, and public policy research organization that protects consumers' interests, stated that ''FRA should be following the lead of the trucking industry and to allow as much automation as possible'' to lower costs for consumers and take advantage of the Class I freight railroads' $760 billion investment in PTC since the 1980s.[253] ACI commented that the NPRM would increase costs for consumers and could also have a negative impact on the environment if companies shift from rail to truck shipments for their goods. A similar comment was filed jointly by 19 non-profit, policy think tanks.[254]

FRA's Response

In the NPRM's background, FRA explained how historically the roles of certain crewmembers were nullified by technology and contrasted those situations with the current one in which the rail industry has not made the same type of technological breakthrough case.[255] The comments and research provided by commenters are premised on the assumptions that labor-saving technologies are already developed and that these technologies advance both productivity and operational safety. However, the commenters' conclusions incorrectly assume that the labor-saving technologies are already developed, accepted, and implemented.

For instance, FRA disagrees with those commenters who pointed to the PTC systems as the automated technology they would use to justify removal of a second crewmember. FRA is certainly aware that the PTC systems are sometimes enhanced, through integration of other software that may act like an automobile's cruise control system; yet, to date, even those enhanced PTC systems do not perform all the necessary functions in all operating environments.[256] In addition, PTC technology is currently governing rail operations on approximately 42 percent of the rail network in the United States, and this rule addresses rail operations nationwide.

While FRA is aware that other rail systems, with various levels of autonomous features, are already available or are expected to be built,[257] freight rail industry commenters largely did not suggest that they would be relying on a system other than PTC. For these reasons, no U.S. railroad has yet to make a case that it is ready to implement a reliable system, suitable for the complexity of its operations, and with a high enough level of autonomy that would either: (1) negate the need for any crewmembers; or (2) negate the need for a single crewmember whose central operational duty would be to make an emergency brake application in case of an automated system error or otherwise perform duties normally associated with a conductor, but not be expected to operate the train.

The freight rail industry expressed concern with competition from the trucking industry, especially as automated or partially automated driving technologies such as truck platooning improve, but their concerns do not undermine the basis for this rulemaking which focuses on the rail safety hazards introduced by reducing crew size. The commenters also suggested that the cost of compliance with the rule as proposed would be high enough to shift freight from rail to truck, a potentially less safe form of transport. However, FRA's RIA shows that the final rule's costs are lower than the commenters' projections, which were based on the NPRM, and both FRA and DOT as a whole do not expect such cross-modal impacts under this final rule. DOT's mission statement is ''to deliver the world's leading transportation system, serving the American people and economy through the safe, efficient, sustainable, and equitable movement of people and goods.'' [258] DOT serves its mission consistent with the Federal government's national standards strategy for critical and emerging technology.[259] And while DOT has certainly funded research concerning automated motor vehicles and the trucking industry,[260] it is doing the same by funding research concerning automation in the rail industry, as described below.

FRA supports technological advancement through research and funding.[261] For instance, FRA's current list of approximately 128 projects includes research on: (1) how unmanned aerial vehicles known as drones would allow railroads to inspect larger sections of track at one time and speed up inspections; (2) developing and testing a modular, field-deployable system combining edge computing with advanced artificial intelligence processing to detect and classify track features from a moving platform in near-real-time; (3) developing an artificial-intelligence-aided machine vision for grade crossing safety that would provide real-time alerts for damaged gate arms, flashers, and other critical safety-related issues; (4) ensuring that an interoperable automated train operation system is defined to meet industry safety and automation objectives; and (5) improving rail safety and efficiency objectives when an RCL is used to perform switching operations on the line-of-road without crew presence in the cab of the controlling locomotive, an operation known as ''road RCL.'' [262] Further, FRA is sponsoring research on the human-automation interaction and teaming to affect the design,

[251] FRA–2021–0032–13056, AAR's Exhibit 9 at 17.

[252] FRA–2021–0032–13056, AAR's Exhibit 9 at 18.

[253] FRA–2021–0032–10337. The comment cited an AAR website for the amount of the investment, but incorrectly quoted $780 billion when the website stated $760 billion. *https://www.aar.org/campaigns/ptc/.*

[254] FRA–2021–0032–12300. Rio Grande Foundation; Washington Policy Center; Nevada Policy Research Institute; Bluegrass Institute for Public Policy Solutions; Roughrider Policy Center (North Dakota); John Locke Foundation (North Carolina); Maine Policy Institute; Thomas Jefferson Institute for Public Policy; Josiah Bartlett Center for Public Policy; Cardinal Institute for West Virginia Policy; Idaho Freedom Foundation; Alaska Policy Forum; Maryland Public Policy Institute; Yankee Institute; Mississippi Center for Public Policy; The John K. MacIver Institute for Public Policy; The Buckeye Institute; and the Garden State Initiative.

[255] 87 FR 45567–68.

[256] 83 FR 13583, 13584–85 (Mar. 29, 2018) (citing FRA's ''Request for Information: Automation in the Railroad Industry'' which included a description of two different methods for defining levels of automation).

[257] 83 FR 13584 (describing known rail technologies). It has been over five years since FRA formally recognized the existence of a fully autonomous freight railroad system in Australia operated by a mining company on an approximately 62-mile stretch of track in western Australia but no U.S. railroad has sought to implement that system.

[258] DOT's mission statement, *https://www.transportation.gov/about,* is based on its statutory authority. 49 U.S.C. 101.

[259] The U.S. government will focus standards development activities and outreach regarding the application of ''automated, connected, and electrified transportation, including automated and connected surface vehicles of many types.'' U.S. Government National Standards Strategy for Critical and Emerging Technology (May 2023) at 6–7. *https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-national-standards-strategy-for-critical-and-emerging-technology/?utm_source=link.*

[260] *https://highways.dot.gov/automation.*

[261] *https://railroads.dot.gov/research-development/research-development-and-technology.*

[262] *https://railroads.dot.gov/elibrary/fra-office-research-development-and-technology-current-projects-2023* at 11, 16, 51, 117, and 123.

certification, and implementation of automation and to ensure that safety is enhanced, not degraded, by new technology and automation.[263]

Similarly, FRA disagrees with commenters claiming that FRA failed to consider how the rail industry can use operational innovations or deploy readily available technology to address any safety concerns associated with the operation of a train with fewer than two crewmembers. FRA addressed this issue in the background section titled ''Automated Operations.'' [264] As stated in the NPRM, this rule is not intended to impede rail innovation nor does this rule regulate autonomous operations.[265] The rule simply requires a description of ''any technology that will be used to perform or support tasks typically performed by a second crewmember, or that will prevent or significantly mitigate the consequences of accidents or incidents'' in a petition for special approval.[266] Among other things, this information will allow FRA to ensure that the technology being used to support a one-person operation has gone through the proper waiver or regulatory processes, as necessary.[267]

If a railroad seeks to use technology that does not meet FRA's existing regulatory requirements, the railroad may petition FRA for a rulemaking that would revise FRA's regulations to permit the use of the technology to fulfill FRA's regulatory requirements. A rulemaking petition would need to comply with FRA's Rules of Practice [268] and would have to follow the Department's regulatory process in compliance with the Administrative Procedure Act.[269] Alternatively, a railroad could petition FRA for a waiver from any applicable regulations to use technology that does not meet FRA's existing regulatory requirements.[270] Similar to a petition for rulemaking, a waiver petition would also need to comply with FRA's Rules of Practice [271] and must include all required supporting information, including a safety justification. When petitioning for a rulemaking or a waiver to use technology that does not meet FRA's existing regulatory requirement, a railroad seeking to use an autonomous operation without a minimum of a one-person train crew would also be required to petition FRA for a waiver from this final rule, specifically the requirements in § 218.123.

d. Transportation of Hazardous Materials

AAR opposes the NPRM's proposed prohibition on one-person train crew operations transporting certain types or quantities of hazardous materials by commenting that there is no evidentiary basis for concluding that one-person operations are less safe than two-person operations and the NPRM did not explain why any increased risks posed by the transportation of hazardous materials could not be adequately addressed through the adoption of safety protocols tailored to those risks.[272]

FRA's Response

In the discussion of comments and conclusions above, FRA responded to comments from short line rail industry commenters about the proposed two-person train crew mandate with respect to the transportation of hazardous materials. Aside from individual citizen commenters who were generally concerned about the safety of hazardous materials being transported by a train with a one-person crew or potential delays to mitigation measures with only a one-person crew, few comments were received on this subject.

In summary, the NPRM proposed an overarching prohibition on fewer that two-crewmember operations of trains containing certain quantities and types of hazardous materials that have been determined to pose the highest risk in transportation from both a safety and security perspective (*i.e.,* trains transporting 20 or more car loads or intermodal portable tank loads of certain hazardous materials, or one or more car loads of hazardous materials designated as RSSM as defined by the Department of Homeland Security). FRA described in the NPRM how DOT must balance how hazardous materials are essential to the U.S. economy with the risks posed by accidental and non-accidental releases of those materials during transportation.[273] The NPRM explained how FRA coordinates with PHMSA to regulate and enforce the safe and secure transportation of hazardous materials by rail and how FRA also coordinates with the Department of Homeland Security and its TSA on rail transportation security issues.

Further, the NPRM explained that DOT considers train crewmembers as ''hazmat employees'' requiring specific types of training based on the dangers posed by hazardous materials generally and the additional dangers of a release in transit due to an accident, derailment, theft, or attack.[274] The background in the NPRM described the various types of training required for hazmat employees and how the training is required initially and recurrently at least once every three years. Also, the NPRM summarized how PHMSA defined ''high-hazard flammable trains,'' how certain safety and security factors must be considered in the risk analysis that would be used to determine routing requirements, and how PHMSA only indirectly addressed the human factors issues in its rulemaking because PHMSA understood that FRA initiated a separate, key regulatory safety initiative to address crew size safety.[275] For these reasons, FRA stated in the NPRM that the proposed train crew size safety requirements for trains carrying hazardous materials are complementary to existing DOT requirements that highlight the greater risks posed by certain types of shipments.

In response to various rail industry commenters, the final rule does not contain the proposed overarching prohibition on one-person train crew operations transporting certain quantities and types of hazardous materials. Instead, in the final rule, railroads that cannot meet any of the exceptions are permitted to petition for

[263] Id. at 130.

[264] 87 FR 45586.

[265] The 2019 withdrawal stated that a train crew staffing rule would unnecessarily impede rail innovation and automation, 84 FR 24740, without providing data to support that position. To the contrary, this final rule does not prohibit any specific type of one-person train crew operation or prohibit the use of technology to perform duties typically performed by a second crewmember. Rather, this final rule ensures that minimum safety measures are in place for one-person train crew operations and that, for certain more complex one-person train crew operations, the risk of foreseeable hazards is mitigated. As explained in the 2022 NPRM, in re-evaluating the information and safety issues concerning one-person train crew operations, FRA concluded that ''a train crew staffing rule would not necessarily halt rail innovation or automation [n]otwithstanding the statements made in the 2019 withdrawal [because] . . . a rule addressing crew size could effectively serve as a tool to ensure new technologies involving automation and other rail innovations are thoroughly reviewed and shown to be consistent with railroad safety before they are implemented.'' 87 FR 45571. This final rule provides such a process.

[266] § 218.131(b)(11), proposed as § 218.133(b)(11).

[267] *See* 49 CFR part 211, subparts C and E (providing FRA's rules of practice for waivers and miscellaneous safety-related proceedings and inquiries); and *see e.g.* 49 CFR 236.909 (reflecting the minimum performance standards for the introduction of new railroad products or changes to existing railroad products).

[268] Specifically, 49 CFR part 211, subparts A and B.

[269] 5 U.S.C. 551–559.

[270] *See* 49 CFR part 211, subpart C.

[271] Specifically, 49 CFR part 211, subparts A and C.

[272] FRA–2021–0032–13056.

[273] 87 FR 45576–78.

[274] 87 FR 45576, especially footnote 127.

[275] 87 FR 45577 (citing PHMSA's rule titled ''Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains'') at 80 FR 26644, 26654–55 (May 8, 2015).

special approval to initiate or continue one-person train crew freight operations transporting hazardous materials.[276] Moreover, as previously addressed in this discussion of comments and conclusions, the final rule provides Class II and III railroads with an exception to the special approval process to continue legacy one-person train crew freight operations that have been established for at least two years before the effective date of the final rule, including when the railroad has established a legacy operation in which it wants to continue transporting certain hazardous materials.

FRA expects that each railroad filing a petition for special approval will build upon that foundation of specified safety requirements and take further mitigation measures to address the hazards and reduce the risks involved in transporting hazardous materials by trains staffed with a one-person train crew. Further, the special approval procedure in § 218.135 will ensure that the public and rail employees are provided an opportunity to comment and provide FRA with an opportunity to review and approve the railroad's operational plans.

e. FRA Action on Regulating Crew Staffing

Class I freight railroad commenters stated that FRA failed to adequately explain its reconsideration of its previous positions on regulating the safety issues regarding train crew size. AAR asserted that FRA ''fail[ed] to adequately explain its total reversal in position in light of the views and conclusions it expressed in the 2019 Withdrawal Order,'' and that FRA ''does not adequately explain its changed position in light of the views it expressed in the 2016 NPRM.'' [277] AAR provided examples of statements from the 2016 NPRM on train crew staffing and the 2019 withdrawal that, according to AAR, the 2022 NPRM contradicts without sufficient explanation for the changed position. For example, AAR highlighted the 2019 withdrawal's determinations that ''issuing any regulation requiring a minimum number of train crewmembers would not be justified because such a regulation is unnecessary for a railroad operation to be conducted safely at this time,'' and that ''no regulation of train crew staffing is appropriate.'' [278] In addition, AAR pointed to FRA's statement in the 2016 NPRM that ''FRA cannot provide reliable or conclusive statistical data to suggest whether one-person crew operations are generally safer or less safe than multiple-person crew operations.'' [279] In its comment, BNSF stated that the 2019 withdrawal extensively catalogued data and other evidence and concluded that this available information ''did not establish that one-person crew operations are less safe than multi-person crews.'' [280] BNSF asserted that the 2022 NPRM dismisses the 2019 withdrawal's analysis without sufficient explanation or justification.

FRA's Response

After considering all the evidence before it, including comments and data post-dating the 2019 withdrawal that is discussed in the 2022 NPRM, FRA has reassessed its prior positions for two independent reasons.[281] First, as the NPRM states, the decision of the U.S. Court of Appeals for the Ninth Circuit to vacate and remand the 2019 withdrawal left FRA with various options on how, or whether, to address the matter of crew size safety. In deciding how to proceed, FRA reconsidered several of the safety issues discussed in the 2019 withdrawal. FRA determined that the 2019 withdrawal de-emphasized safety concerns raised by FRA-sponsored research on the cognitive and collaborate demands of crewmembers and by commenters on the 2016 NPRM. For example, as the 2022 NPRM explains, the research raises safety concerns regarding one-person train crews, such as the loss of a second crewmember to notice and correct errors.[282] FRA adheres to that reassessment. This final rule is justified based on FRA's reevaluation of those safety concerns and the threat they pose to public safety.

Second, in reassessing regulation of safety issues regarding train crew size, FRA also considered information not analyzed in the 2019 withdrawal, such as technological trends and operational changes on Class I freight railroads since 2019. Train accidents can impose enormous and sometimes incalculable costs on individuals, communities, and the environment, and recent industry changes, such as utilizing longer trains than the historical norm, introduce variables that may make it challenging for the industry to continue the past two decades general trend of improved safety in rail operations. As stated in the NPRM, freight train length has increased in recent years, and this trend may have cascading safety impacts unless mitigated by technology, training, or other processes.[283] And, as explained above, the latest rail safety data reflects some troubling industry trends that suggest heightened caution and awareness are needed in rail safety and operational planning. Although trains have a relatively strong safety record, the rate for all human factor caused accidents has increased in recent years, notably after the 2019 withdrawal.[284] While technological advances in the rail industry, such as PTC, may decrease those accidents in the future, uncertainty related to new operating technologies can affect train safety.[285] Furthermore, the research indicates that PTC implementation should not be presumed to lead to fewer crew tasks.[286] This point was further corroborated by extensive comments and testimony in this rulemaking from train crewmembers who work with PTC daily and by their representatives.[287]

In sum, FRA reconsidered information previously analyzed by FRA on crew size safety and considered additional relevant information, including safety data indicating potentially worsening trends since the 2019 withdrawal was issued. Based on this assessment, FRA determined that it needed to change its position from the 2019 withdrawal and concluded that the regulatory requirements in this final rule are necessary to ensure that trains are adequately staffed for their intended

[276] As explained in the discussion above of the short lines' comments, Class II and III railroads seeking to initiate a new one-person operation transporting hazardous materials of the types or quantities described in § 218.123(c) are required under the final rule to petition FRA for special approval and conduct a risk assessment. A special approval petition is also required for continuing an existing operation that has not been established for at least two years before the effective date of the final rule. To initiate other types of one-person crew operations, Class II and III railroads are only required to provide notification and comply with certain operational requirements. The final rule requires Class I railroads to petition for special approval and conduct a risk assessment to initiate any one-person train crew operation.

[277] FRA–2021–0032–13056 at 9–11.

[278] 84 FR 24741 (May 29, 2019), quoted by FRA–2021–0032–13056 at 10.

[279] 91 FR 13919 (Mar. 15, 2016), quoted by FRA–2021–0032–13056 at 10.

[280] FRA–2021–0032–12996 at 1–3.

[281] 87 FR 45564, 45571–76 (July 28, 2022) (section III.D of the NPRM, titled ''Reconsideration of the Safety Issues'').

[282] *See, e.g., id.* at 45572 (explaining in detail how FRA has ''revisit[ed] the research . . . to explain how the safety concerns the research raises helped in the development of the proposed requirements for this rulemaking'').

[283] 87 FR 45564, 45572.

[284] *See* Section I., Executive Summary, for a discussion of recent data.

[285] *See* 87 FR 45564 at 45572–45573 (citing Technology Implications of a Cognitive Task Analysis for Locomotive Engineers—Human Factors in Railroad Operations, Final Report, dated January 2009, DOT/FRA/ORD–09/03).

[286] Id. at 45572–73.

[287] *See, e.g.,* FRA–2021–0032–13038 at 2, FRA–2021–0032–13049 at 9 and 23, FRA–2021–0032–13133 at 2, and FRA–2021–0032–0711 at 1–2.

operation and railroads have appropriate safeguards in place for safe train operations whenever using a one-person train crew.

FRA further notes that the 2022 NPRM and this final rule differ in approach from the previous rulemakings addressing train crew size. Instead of broadly mandating two crew members, the NPRM proposed to require, and this final rule requires, two crew members for the most complex operations until a railroad analyzes an operation and persuasively demonstrates that risks associated with eliminating the second crew member are reasonably mitigated. By allowing railroads to petition for a one-person crew, this final rule accommodates the development of new technology while also ensuring the safety of crews and the public by requiring an analysis that shows that these innovations will not make trains less safe. FRA's incremental approach—that preserves the status quo while providing latitude for railroads to explore benefits from advances in technology—promotes FRA's statutory mandate to issue regulations ''as necessary'' for ''railroad safety.'' [288]

f. Risk Assessments and FRA's Review Standard

AAR asserted in its written comment and reiterated in oral testimony at the public hearing that the proposed risk assessment requirements are flawed.[289] In support of its comment, AAR provided several examples demonstrating how the proposed risk assessment might play out using recent accident/incident data and how Class I railroads could never expect a petition for special approval to be granted under the NPRM. AAR also suggested that because Class I railroads are required to have a risk-reduction program, FRA could have allowed these railroads to follow the risk-reduction approach set forth in their approved risk-reduction plans rather than the approach in this NPRM regarding crew size safety requirements.

APTA commented that its passenger rail operation members support risk-based approaches that allow railroads to identify, mitigate, and manage safety risks in a manner that reflects the scale and specifics of individual operations. However, APTA asked FRA to reconsider the proposed risk assessment requirements as unnecessary for railroads that already follow an established methodology under FRA's existing system safety program requirements.[290] APTA also had specific concerns about FRA's proposed risk assessment methodology and whether a minor event might be classified as catastrophic. Further, APTA's comment raised other policy concerns regarding the proposed risk assessment, including whether the proposed requirements could make information compiled or collected for that risk assessment public when, under the existing system safety program requirements, similar information would receive at least some legal protections.[291] CRC's comment was also similar to APTA's in its approach to the risk assessment, requesting that FRA leverage its existing system safety requirements. CRC was concerned with the risk assessment burden in the event an approved passenger operation wants to make material modifications to the operation.

TTD commented that it perceived the proposed alternative risk assessment as vague when compared to the detailed and specific proposed risk assessment.

FRA's Response

The NPRM provided background on the risk assessment requirement, how it is useful, and how a risk assessment must be conducted in an objective manner to be effective.[292] FRA explained why it proposed specific content and methodology requirements for conducting risk assessments and why it proposed an option to allow any railroad to seek FRA's approval to use an alternative risk assessment methodology.[293] The NPRM also included background regarding the expected impact of the rule on the safety of rail operations.[294] FRA considered all the comments regarding the proposed risk assessment, and the final rule's requirements are expected to address these comments in several overarching ways.

For instance, because FRA did not intend to propose requirements that might be viewed as nearly impossible to meet statistically, the final rule removed what commenters perceived as the proposed potential quantitative analysis obstacles. In addition to revisiting aspects of that quantitative risk-based hazard analysis, the final rule includes guidance, in Appendix E, on how a railroad may prepare a risk-based hazard analysis and compare the risks to determine if a proposed one-person train crew operation will be as safe or safer than a two-person minimum train crew operation when all mitigations are in place. FRA expects that some railroads will favor this objective approach when conducting a required risk assessment under this final rule.

In response to comments, the final rule also includes changes from the NPRM that provide consistency with existing requirements, specifically, consistency with both the System Safety Program requirements in part 270 and the Risk Reduction Program requirements in part 271. Parts 270 and 271 require covered railroads to have a systemwide and ongoing risk-based hazard management program that proactively identifies hazards and mitigates risks resulting from those hazards, using a risk-based hazard analysis. Accordingly, this final rule includes the minimum requirements for a risk-based hazard analysis that follows similar requirements in § 270.103(p) and (q), and § 271.103(b), allowing railroad to build upon existing analyses when preparing the required risk-based hazard analysis as part of a petition for a one-person crew.

To simplify the risk assessment process and address perceived potential quantitative analysis obstacles, the final rule includes the minimum performance standards used in § 236.909 for the introduction of new railroad signaling and train control components, products or systems, and this standard is also required to promote the safe design, operation, and maintenance of safety critical locomotive electronic control systems, subsystems, and components.[295] Specifically, the final rule makes clear that the introduction of a new product or change cannot result in risk that exceeds the previous condition.

With respect to commenters' information security concerns, FRA decided to retain the same approach as proposed. For reasons explained in the NPRM, FRA determines that exercising FRA's statutory discretion under 49 U.S.C. 20118 to protect certain risk analyses from public disclosure pursuant to Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), would not be consistent with the final rule's provisions that make petitions and the risk analyses they contain available for public comment.[296] Nevertheless, other FOIA exemptions may apply. For example, FRA reminds railroads that information

[288] 49 U.S.C. 20103(a).

[289] FRA–2021–0032–13056, AAR's comment at 39–45 and AAR's Exhibit 5, a comment prepared by ICF International titled ''Comments on Train Crew Size Safety Requirements.'' (Dec. 12, 2022).

[290] FRA–2021–0032–12947, referring to 49 CFR part 270.

[291] *See* 49 CFR 270.105.

[292] 87 FR 45582–84.

[293] 87 FR 45584.

[294] *Id.*

[295] 49 CFR part 229, subpart E (establishing minimum railroad locomotive safety standards for locomotive electronics).

[296] 87 FR 45585.

required to be submitted as part of the risk-based hazard analysis that a submitter deems to be trade secrets, or commercial or financial information that is privileged or confidential under Exemption 4 of FOIA 5 U.S.C. 552(b)(4), should be so labeled in accordance with the provisions of 49 CFR 209.11. FRA handles information labeled as such in accordance with the provisions of § 209.11.

Regarding the potential use of risk-based hazard analysis information in litigation, FRA decided not to include in the final rule information protections like those adopted in the system safety program and risk reduction program rules. Congress explicitly authorized setting forth specific information protection requirements for implementation of those rules, and FRA does not have a similar statutory authorization to do so here.[297] For further discussion on this issue, FRA refers readers to the NPRM's explanation of FRA's statutory authority to protect certain information from use in litigation.[298]

Lastly, in response to comments regarding the risk assessment, the final rule retains the NPRM's proposed alternative standard provision in § 218.133(b). That provision allows a railroad the option to submit a petition for FRA's approval of the use of alternative methodologies or procedures, or both, to assess the risk associated with a proposed operation. Again, this was an option that was proposed but seemingly missed by commenters that acknowledged the value in a risk assessment but requested flexibility in how to conduct it. FRA understands that some commenters, such as TTD, suggested that the alternative standard provision for a risk assessment is vague, but FRA does not agree because approval of alternative methodologies or procedures, or both, would be expected to be based on standards established by leading governmental or non-governmental standardization organizations.

g. Remote Control Operations

Several commenters raised concerns with the NPRM's specific freight train exception to the crew staffing requirements that applied to remote control operations in proposed § 218.129(c)(3). The following is a summary that is representative of the comments received.

ASLRRA and other short line rail industry commenters raised objections to FRA's proposed exception for a one-person train operation controlled by a remote control operator because they claimed it created new burdens that they do not currently comply with or that are unnecessary given equipment standards for these operations. ASLRRA's comment included a statement from the Texas and Northern Railway regarding how it would not qualify for the remote control operation exception because this short line: (1) does not maintain technology or protocols to monitor a train's real-time progress; (2) does not have a method of determining the train's approximate location when communication is lost with a one-person train crew; and (3) does not utilize a dispatcher.[299] Similarly aligned commenters pointed to the proposed requirement that the remote control operator must stay in the locomotive cab except in emergencies, a condition that the commenters suggested would be unnecessary for that person's safety, even on main track, given that the remote control operator can operate the train safely from the ground or other locations on the train. Also, commenters objected to a proposed requirement in the NPRM that a remote control operation be required to have an alerter when the remote control technology they use already has similar safety features.

FRA's Response

In proposing the crew size safety requirements as conditions for using a one-person train crew with a remote control operation, FRA started with the premise that most remote control train operations are peripheral to switching operations in a yard or at a customer's facility because the remote control technology was designed with a primary focus on making switching operations more efficient. Because an RCL is controlled by an operator with a remote control transmitter strapped to their chest, an operator does not need to stay in the locomotive cab and has versatility to do other safety-related tasks such as uncouple cars, throw hand-operated switches, and determine that track is clear for their train movement. Thus, when in switching or train service, a remote control operator may be on the ground, on the lead locomotive (although not necessarily in the locomotive cab), or on another car or locomotive.

Remote control operations are typically crewed by one operator, who fulfills the roles and responsibilities of both the locomotive engineer and conductor, or by two remote control operators, each with a remote control transmitter, so that they can alternate controlling the RCL. Although a remote control operation could have three or more train crewmembers, that would be atypical and would likely involve a third crewmember who is training to be a remote control operator. Although an RCL may remain in a particular rail yard for switching solely within that yard, it is common for a remote control operator to take an RCL from a rail yard to a customer's facility as a local train that can drop off or pick up rail cars at one or more customer's facilities.

In the NPRM, FRA explained how remote control operations that travel between yards or customers' facilities, with or without cars, were trains ''not in switching service'' and were thus potentially subject to the NPRM's proposed requirements if operated with a one-person train crew.[300] For this reason, FRA proposed an exception for RCL operations with the intention that the proposed general train crew staffing requirements would not apply but that other conditions would apply. In the NPRM, FRA proposed to address narrow safety concerns involving the use of an RCL by codifying long-standing agency guidance for the use of the remote control technology during non-switching service. These proposed requirements were intended to allow remote control operations with a one-person train crew as an exception if the operation was limited in complexity by weight, tonnage, grade, or other factors that reflected guidance previously accepted by industry stakeholders.[301]

The NPRM therefore proposed to codify FRA's guidance on accepted industry safe practices for remote control operations. However, upon further consideration, FRA has determined that addressing this issue in this rulemaking is unnecessary. In deciding not to adopt the proposed remote control operations exception, FRA determined that the requirements for remote control operations, proposed in the NPRM, would be unnecessary as duplicative of existing requirements. For instance, this final rule will not require an alerter on an RCL to address the incapacitated locomotive engineer scenario because FRA's existing locomotive safety standards establish minimum equipment standards for an RCL that include an operator alertness device and a tilt feature that together perform the same functions as an

[297] 49 U.S.C. 20119, 49 CFR 270.105 and 81 FR 53850, 53859 (Aug. 12, 2016), and 49 CFR 271.11 and 85 FR 9262, 9263 (Feb. 18, 2020).

[298] 87 FR 45585.

[299] FRA–2021–0032–13033, att. L (statement from Transtar LLC/Texas and Northern Railway).

[300] 87 FR 45594.

[301] 87 FR 45594–95.

alerter.[302] Likewise, there is no need to require enhanced communication or train tracking requirements for an RCL when FRA's existing locomotive safety standards establish a prohibition on the use of one-person operations with remote control locomotive systems that do not automatically notify the railroad in the event a remote control operator becomes incapacitated or the tilt feature is activated.[303]

However, based on a suggestion from some labor organizations, FRA may initiate a comprehensive review of every type and aspect of remote control operations to determine whether the safety of those operations could be improved through regulation or other actions.

F. Consideration of Requirements More Stringent Than Those Proposed

Some of the commenters supporting the NPRM stated that, in their view, the NPRM did not go far enough. Specifically, these commenters supported more stringent requirements that would permit fewer or no exceptions to a two-person train crew, or include a requirement that the second crewmember be a person who is a certified conductor under FRA's requirements in 49 CFR part 242.

TTD supported the proposed annual reporting requirements and recommended more stringent requirements that, instead of FRA granting special approval in perpetuity, would require each railroad to file a new petition for special approval after two years. Similarly, TTD supported a more stringent requirement to establish a process whereby FRA would periodically review the enumerated exceptions and seek public input whether to retain them.

SMART–TD's Kansas State Legislative Board commented that railroads should be required to maintain a two-person crew in the control compartment of the lead locomotive unit of each train, a more stringent requirement than what FRA proposed.[304] This comment raised safety concerns with trains being built too long for available sidings, risk of sabotage, and how a two-person team can combat fatigue.

SMART–TD's New Jersey State Legislative Board raised the concern that the NPRM's proposed process of granting exceptions to new and existing single-person crew operations was disconcerting as it seemed to place the efficiency of rail operations over safety.[305] The comment raised a variety of safety concerns as a basis for establishing a more stringent two-crewmember train crew requirement. For instance, this commenter stated that there is a great need for crewmembers to assist rail passengers in a variety of emergency situations. This local division of SMART–TD placed emphasis on two crewmembers assisting each other as a team to battle fatigue, provide backup to reduce mistakes, and improve situational awareness. The commenter raised a concern about hazardous materials traveling by rail through New Jersey's dense urban areas with only a one-person train crew and the potential for a catastrophic accident. The commenter stated that, with a one-person train crew, motor vehicle traffic could significantly slow a response by the railroad's utility employees responding to a train breakdown as well as local emergency personnel responding to other types of emergencies—situations where a second crewmember can more quickly assist because they are already present. The commenter also disagreed with FRA's proposed criteria for continuing legacy operations and initiating new operations and stated that railroads should not be allowed to assess their own risks in a risk assessment. This local division of SMART–TD recommended that risk assessments be conducted by the National Transportation Safety Board (NTSB) and that FRA should use a waiver alternative to the special approval process.

The Nebraska Public Service Commission (NPSC), which oversees railroad safety in Nebraska, advocated for FRA to adopt an absolute prohibition against train operations with fewer than two-person crews.[306] NPSC is concerned that the safety issues described in the NPRM would be present in the scenarios proposed as exceptions. NPSC stated that the railroad industry's opposition to the rule and need for exceptions for financial or other reasons should not be given greater weight than the need to maintain or improve the safety of the crew and the public.[307]

Railroad Workers United (RWU), a group representing railroad workers in North America that are not managers or supervisors, commented that FRA should prohibit all one-person train crew operations.[308] RWU commented that there is no safe way in the United States to run a train with a single crew member and that safety dictates never to allow a single point of failure.

FRA's Response

Although FRA did not adopt all proposals identified by commenters, the comments raised practical issues or problems with the proposed exceptions that led FRA to revise its approach in this final rule. For example, the commenters stated that certain one-person train crew operations that were proposed for exceptions in the NPRM would pose equivalent safety concerns to that of other one-person train crew operations FRA proposed to prohibit or regulate through the special approval process. FRA agrees with the comments pertaining to the proposed helper service and lite locomotive(s) consist exceptions, which were proposed without any conditions attached. Because FRA agrees with the commenters that those two types of one-person train crew operations pose the same safety concerns as the others that were proposed with conditions attached, FRA revisited those exceptions in § 218.129(a)(4) and (5) and decided to attach similar conditions. FRA's decision to revise these exceptions and impose requirements in the final rule that are more stringent than those previously proposed is based on several considerations. For instance, FRA considered that railroads with a need for helper service or that regularly move locomotives without cars are mostly Class I and II operations that have newer locomotives, placed into service on or after June 10, 2013, or that would permit the controlling locomotives to operate at speeds in excess of 25 mph [309] and, thus, likely have working alerters installed in their locomotives. These operations would then need to add operating rules addressing the communications and safety of the one-person train crew and addressing how the railroad will take mitigation measures to address certain situations that could pose hazards to rail employees or the public—a burden, but not a significant one. Because a Class III railroad would generally own fewer miles of track than a Class I or II railroad and operate fewer trains, these short line railroads typically would provide enough locomotive power to traverse the track and would not be expected to use helper service as a regular business practice. Similarly, a lite locomotive

[302] 49 CFR 229.15, in particular paragraph (a)(13).

[303] *Id.,* in particular paragraphs (a)(15) and (16).

[304] FRA–2021–0032–9397.

[305] FRA–2021–0032–10602.

[306] FRA–2021–0032–10121.

[307] The Chicago Federation of Labor, stating that it represents tens of thousands of railroad workers who support the need for at least two crewmembers on all trains. FRA–2021–0032–6837. A similar comment was made by the International Brotherhood of Electrical Workers Local Union 146, Decatur, IL. FRA–2021–0032–10465.

[308] FRA–2021–0032–8001.

[309] 49 CFR 229.140(a).

consist is typically used by Class I and II railroads to move locomotives from one yard to another to optimize their availability to move cars; in comparison, Class III railroads might not have more than one yard or such a complex business model that locomotives would regularly be moved without cars from one location to another. With regard to mine load out, plant dumping, and similar operations, FRA does not agree with the comments that these types of operation would always have duties requiring a second crewmember, and thus the final rule retains the exception for those operations as proposed.

FRA also did not agree with commenters who suggested that railroads should be required to maintain a two-person crew in the control compartment of the lead locomotive unit of each train, as that would apply a more stringent standard than a railroad meeting the current status quo of using two-person train crews. FRA is concerned that if it created such a stringent standard, railroads would be compelled to employ a three-person train crew to do the job that currently only takes two crewmembers. It could also create an impossible standard for certain passenger train operations in which the locomotive cab is not large enough to accommodate a second crewmember.

III. Section-by-Section Analysis

This section responds to public comments and identifies any changes made from the provisions as proposed in the NPRM. Provisions that received no comment, and are otherwise being finalized as proposed, are not discussed again here.[310]

Section 218.5 Definitions

This final rule adds 17 definitions to part 218—Railroad Operating Procedures. Part 218 prescribes minimum requirements for railroad operating rules and practices. The analysis in the NPRM is applicable for this section for the following terms which will have the same definitions as proposed: ''FTA,'' ''hazard,'' ''mishap,'' ''risk,'' ''tourist train operation,'' ''tourist train operation that is not part of the general railroad system of transportation,'' ''trailing tons,'' and ''train.'' [311] The remaining terms are described below.

The NPRM proposed a definition for ''Associate Administrator'' that was similar to the existing definition of ''Associate Administrator for Safety'' in § 218.93, a definition only applicable to part 218, subpart F. To prevent having two similar definitions to describe the same FRA official, this final rule removes the existing definition from subpart F and replaces it with the definition as proposed in the NPRM so that the term ''Associate Administrator for Safety'' has the same meaning throughout part 218.

This final rule includes two definitions not specifically proposed in the NPRM, but based on descriptions of two types of operations contained in proposed requirements. First, the final rule defines ''helper service train operation'' to mean a train that is ''a locomotive or group of locomotives being used to assist another train that has incurred mechanical failure or lacks sufficient tractive force necessary to traverse a particular section of track due to train tonnage and the grade of the terrain.'' This definition is similar to the NPRM's definition of ''helper service'' in proposed § 218.125(a) but additionally clarifies that it does not matter whether the train that the ''helper service operation'' is assisting is on ''difficult terrain.'' [312] ''Lite locomotive train operation'' is defined as meaning the train is a locomotive or a consist of locomotives not attached to any piece of equipment or attached only to a caboose. This definition is the same as FRA proposed in § 218.125(b) of the NPRM within the requirements for the ''lite locomotive'' exception.

The final rule includes a definition for ''locomotive, MU'' to refer to a type of locomotive that can transport passengers. An MU locomotive is a general term that includes a diesel- or electric-multiple-unit (DMU or EMU) operation, as proposed in the NPRM, and would also include other self-propelled rail rolling equipment regardless of the power source. The NPRM only used the terms DMU or EMU, which would not be as inclusive, as it would only cover diesel or electric power sources, while steam, liquified natural gas, hydrogen, or other power sources may be available.

Based on FRA's review of the comments, there appears to be some confusion about what FRA meant by a one-person train crew operation. To remove any ambiguity, in this final rule, FRA is adding two new definitions. First, FRA is adding a definition for the term ''one-person train crew.'' This term is intended to clarify that, for purposes of this final rule, there are two scenarios in which a railroad will be considered as operating with a one-person train crew. In the first scenario, there is only one person assigned to the train as the train crew and that single, assigned person will be performing the duties of both the locomotive engineer and the conductor. Accordingly, in this scenario, the sole person assigned as the train crew will need to be certified as both a locomotive engineer and a conductor so that person can perform the duties of both of those roles; this scenario would also include alternative arrangements in which other rail employees that are not assigned train crewmembers temporarily assist the train.

In the second scenario, two or more persons are assigned to a train as the train's crew, but only the locomotive engineer travels on the train when the train is moving because the remainder of the train crew, that would include the conductor if the locomotive engineer is not the assigned conductor, is assigned to intermittently assist the train's movements. In this second scenario, the remainder of the train crew is typically traveling in a motor vehicle and will be required to assist the train when switching cars in a yard or at a customer's facility, as well as assist the train when necessary to protect a crossing with flag protection, throw a switch or derail, or perform other duties associated with the train assigned. This second scenario clarifies that when only one crewmember is traveling with the train, even if there are additional crewmembers intermittently assisting and assigned to the train, the train will be considered a one-person train crew operation.

The second definition FRA is adding in this final rule is a definition for the term ''one-person train crewmember.'' This final rule defines ''one-person train crewmember'' to mean, in the context of a one-person train crew operation, the single assigned person who is responsible for performing the duty of the locomotive engineer and will be traveling in the operating cab of the controlling locomotive when the train is moving. If there is a second crewmember traveling in a motor vehicle, that second crewmember would not be the one-person train crewmember.

This final rule's definition for ''risk assessment'' differs slightly from the proposed definition in that the NPRM, which referred to operations with ''fewer than two crewmembers.'' FRA has not adopted that phrasing in the final rule. Instead, this final rule refers to risk assessments related to ''one-person train crews,'' as this rule applies to one-person train crew operations and

[310] 87 FR 45587–45605.

[311] 87 FR 45587.

[312] The statement in proposed § 218.125(a) that ''helper service includes traveling to or from a location where assistance is provided'' is located in § 218.129(a)(4) of this final rule.

does not apply to autonomous operations.

This final rule defines ''switching service or operation'' in the same way as the proposed definition did for ''switching service.'' The change in the term's name will harmonize it with its use throughout part 218. ''Switching service'' and ''switching operation'' are used interchangeably throughout part 218 and in this final rule.

In this final rule, FRA has added a definition for ''unit freight train.'' As used in this final rule, ''unit freight train'' means a freight train composed of cars carrying a single type of commodity. In the NPRM, FRA proposed an exception for a ''mine load out, plant dumping, or similar operation'' that included a definition of a unit freight train. FRA moved the proposed ''unit freight train'' definition into the definitions section, and the ''mine load out, plant dumping, or similar operation'' exception that was proposed in § 218.129(a) is in § 218.127(a) of this final rule.

Section 218.99 Shoving or Pushing Movements

This final rule amends this section to remove ambiguity and harmonize three current requirements with terms that that will apply to the entirety of part 218.

Paragraph (a)(2) is amended to change ''switching activities'' to ''switching service activities,'' which will thereby invoke the definition added in § 218.5 for ''switching service or operation.'' The amendment will not change the meaning of the section but may help clarify what is meant by switching service as that term will now be defined.

Paragraph (b)(3) will be amended to change ''a lite locomotive consist'' to ''a lite locomotive train with two or more locomotives that is operated from a single control stand.'' This revision will allow FRA to remove the definition of ''lite locomotive consist'' in § 218.93, as the term is not used elsewhere in part 218. This revision will also allow FRA to use the term ''lite locomotive train,'' which is defined in § 218.5. The amendment will not change the meaning of the section.

Paragraph (e)(2) will be amended to remove the term ''manned helper locomotives'' and replace it with ''helper service train operation'' which is defined in § 218.5. A helper service train operation has the same meaning as helper locomotives with a train crew. Thus, rather than using different terminology that has the same meaning within part 218, this final rule will amend this paragraph.

Section 218.121 Purpose and Scope

Generally, the purpose and scope of this final rule remain the same as proposed—to ensure trains are adequately staffed and have appropriate safeguards in place for safe train operations under all operating conditions. Accordingly, FRA is adopting paragraph (a) as proposed, making minor editorial revisions to paragraph (b), and adding a new paragraph (c) which essentially moves the proposed exception for remote control operations, previously found in proposed § 218.129(c)(3), to a new paragraph (c) of this section. FRA is modifying paragraph (b) of this section to replace the references to ''train crew staffs'' and ''crew staffing,'' with the terms ''train crews'' and ''crew size'' respectively. These revisions are for clarity and readability only. No substantive change is intended. Consistent with the NPRM, paragraph (b) further notes that: (1) the minimum crew size requirements in the final rule reflect the potential safety risks posed to railroad employees, the public, and the environment; (2) the final rule prescribes minimum requirements for the location of a second train crewmember on a moving train and promotes safe and effective teamwork; and (3) railroads may prescribe additional or more stringent requirements in operating rules, timetables, timetable special instructions, and other instructions.

Paragraph (c) of the final rule has been added based on comments received. In the discussion of comments and conclusions, FRA explained commenters' concerns with the exception for remote control operations as proposed in § 218.129(c)(3). For the reasons explained in FRA's response to those comments, FRA has not adopted the exception; instead, FRA has added paragraph (c) to clarify that the requirements in this subpart do not apply to a train operation controlled by a remote control operator as defined in § 229.5(a) of this chapter.

Section 218.123 General Train Crew Staffing Requirements

As proposed in the NPRM, this section sets forth the final rule's general requirement that trains be operated with a minimum of two crewmembers. This final rule substantially adopts paragraphs (a), (b), and (d) as proposed, but revises paragraph (c) to allow certain exceptions to the requirement for two crewmembers on trains transporting certain types and quantities of hazardous materials. Consistent with the edits made throughout this final rule, FRA is revising the reference to ''train crew staffing'' in the section heading and the heading for paragraph (b) to ''train crew size safety.'' These changes do not change the meaning and thus the analysis provided in the NPRM is applicable for paragraphs (a) and (b).

In the NPRM, paragraph (c) proposed to mandate, without exception or special approval eligibility, two crewmembers be assigned to trains transporting certain quantities and types of hazardous materials that have been determined to pose the highest risk for transportation from both a safety and security perspective. As explained in the discussion of comments and conclusions above, however, FRA determined that certain exceptions, including special approval eligibility, could be permitted while still allowing for safe operations. Those exceptions can be found in § 218.129(a)(1) and § 218.131(a)(2). The final rule retains the two-person requirements for trains transporting the same types and quantities of hazardous materials as was proposed in the NPRM when these exceptions do not apply. The final rule's requirements include a specific reference to a two-person train crew requirement for each high-hazard flammable train (HHFT) as defined in § 171.8 of this title when an exception does not apply. The requirement in paragraph (c)(2) of the final rule would cover HHFT as currently defined by PHMSA, and the requirement in (c)(1) will ensure HHFT will continue to be covered if PHMSA amends its current HHFT definition.

Section 218.125 Specific Passenger and Tourist Train Operation Exceptions to Crew Size Safety Requirements

This section, proposed as § 218.127 in the NPRM, addresses passenger and tourist train operations that are not subject to the rule's crew size safety requirements. Although this final rule adopts, in § 218.125, the general provisions of proposed § 218.127, FRA is making editorial revisions to the section heading and paragraph (a) along with adding a new paragraph (e) to this section addressing certain existing one-person train crew operations.

Specifically, consistent with the edits made throughout this final rule, FRA has revised the ''crew staffing'' reference in the section heading to ''crew size safety.'' FRA is also rephrasing paragraph (a) for ease of reading. As proposed, paragraph (a) identified passenger and tourist operations that would ''not require'' a minimum of two crewmembers. In this final rule, FRA is rephrasing paragraph (a) to affirmatively state that certain tourist and passenger

train operations ''may be'' operated with a one-person train crew. This change from the proposed rule is intended to remove any ambiguity regarding the type of operations that will be excepted through this section and does not change the section's meaning from that proposed. Thus, the analysis provided in the NPRM is applicable for paragraphs (a) through (d) of this section.[313]

A substantive change from the NPRM is the addition of paragraph (e), which provides an exception for existing passenger train operations with one-person train crews for which FRA has already approved the operation's required passenger train emergency preparedness plan under part 239.

Section 218.127 Specific Freight Train Exceptions to Crew Size Safety Requirements

Proposed as § 218.129 in the NPRM, this section addresses freight train exceptions to crew size safety requirements. Consistent with edits made elsewhere in this final rule, FRA has revised the section heading to refer to ''crew size safety,'' as opposed to ''crew staffing.'' FRA is also adding an introductory sentence to the section and moving the substance of proposed paragraph (b) to § 218.129.

As in the NPRM, paragraph (a) lists the requirements for an exception for a unit freight train when it is loading or unloading as part of a mine load-out, plant dumping, or similar operation. In this final rule, FRA is adopting paragraph (a) essentially as proposed, with the exception of removing the definition of ''unit freight train'' from the paragraph. As discussed above, in this final rule, the definition for that term is found in § 218.5. Further, because the proposed requirements for the ''mine load out'' exception in paragraph (a) were originally in one long paragraph, this final rule places equivalent requirements in a numbered list for ease of use (paragraphs (a)(1)–(5)). This formatting change does not affect the paragraph's meaning except for paragraph (a)(4), which does not contain the proposed requirement that a one-person train crewmember during mine load out, plant dumping, or similar operations must be prohibited from performing any duties that would require a second crewmember, as it instead specifies the duties that will be prohibited. Although the NPRM's analysis provided some examples of prohibited duties, FRA decided that greater clarity could be achieved by specifying the examples in the regulatory text, instead of mandating the more broadly stated proposed requirement. The prohibited duties are operation of a hand-operated switch, filling out paperwork, or calling out signal indications during the loading or unloading process. Otherwise, the analysis provided in the NPRM is applicable for this paragraph.[314]

FRA is not adopting paragraph (b) as proposed. Instead, FRA is reserving paragraph (b) of this section for future use and, as discussed in the analysis of § 218.129 below, has included some of the requirements and exceptions from proposed paragraph (b) in § 218.129.

Section 218.129 Conditional Exceptions Based on Compliance Dates for Class II and III Legacy Freight Train Operations, Certain Other Class II and III Freight Railroad Train Operations, Work Train Operations, Helper Service Train Operations, and Lite Locomotive Train Operations Staffed With a One-Person Train Crew

This section of the final rule consolidates various proposed requirements and exceptions to the two-person train crew mandate and, therefore, includes many of the same or similar requirements to those proposed in §§ 218.125, 218.129, and 218.131 of the NPRM. Consolidating these exceptions and requirements in this section makes the rule more concise, eliminating the need to repeat certain requirements shared by each of the exceptions as it did in the NPRM. However, because there were changes to the requirements for some of the proposed exceptions, FRA is not relying on the analysis in the NPRM for this section.

Paragraph (a) provides that a railroad is not required to comply with the requirements in this section for each one-person train crew operation that is governed by an exception in another section of this subpart. Thus, this section does not apply to the specific passenger and tourist train operation exceptions in § 218.125 or the specific freight train exceptions in § 218.127. The train operation exceptions described in this section that provide for a one-person train crew are listed in paragraph (a) along with the requirements that will apply depending on the exception, as discussed further below.

The purpose of paragraph (a)(1), which is based on the exception proposed in § 218.131 of the NPRM, is to provide a way for each Class II and III railroad to continue a legacy one-person train crew freight operation after the effective date of this final rule, while ensuring each railroad with such a legacy operation will have sufficient time to add any necessary, minimum safeguards to protect rail employees, the public, or the environment. FRA is defining a legacy one-person train crew freight operation as one that a railroad established at least two years before the effective date of this final rule. Pursuant to this exception, a legacy operation may continue transporting hazardous materials of the types or quantities specified in § 218.123(c) if the railroad can show it had such an established operation for at least two years before the effective date of the final rule. Although this notification requirement is not an approval process, compliance with the requirement is mandatory to use the legacy one-person train crew freight operation exception. In meeting the written notice requirements in paragraph (b) of this section, the railroad is required to provide the evidence necessary to establish the existence for at least two years of such a legacy one-person train crew freight operation. For example, in paragraph (b)(2), the final rule requires that the written notice include business records or other written documents supporting the legacy operation was established for at least two years before the rule's effective date. For a railroad to have an operation ''established at least two years before,'' FRA means that during that two-year period, an operation must have occurred at regular intervals under a set of defined procedures or conditions. It will be acceptable if a railroad's evidence for the one-person train crew operation shows that the railroad occasionally substituted a multi-person train crew; yet, FRA expects the evidence will show the railroad typically used the one-person train crew where circumstances allowed for the one-person operation. If a railroad did not conduct one-person train crew operations regularly, even where circumstances allowed, the existence of a legacy operation will likely not be considered established, and the railroad will need to consider whether another exception will be applicable or whether it will request special approval. Similarly, if a railroad cannot establish that its legacy one-person train crew freight operation was transporting hazardous materials of the types or quantities specified in § 218.123(c), it will not be permitted to initiate such an operation under this exception and must consider whether another exception will be applicable or whether it will request special approval.

[313] 87 FR 45590–91.

[314] 87 FR 45591–92.

Paragraph (a)(1)(i) prohibits a Class II or III railroad from continuing a legacy one-person train crew freight operation beyond 90 days after the effective date of this final rule if the railroad fails to provide FRA with written notice meeting the requirements in paragraph (b). Hence, each railroad that established a legacy one-person train crew freight operation for at least two years before the effective date of this final rule would need to decide whether it wants to continue the operation beyond 90 days after the effective date of this final rule; if it does, the railroad will be required to provide FRA with written notice meeting the requirements in paragraph (b), unless the operation is covered under one of the exceptions in §§ 218.125 or 218.127.

For those legacy one-person train crew freight operations that provide FRA with written notice meeting the requirements in paragraph (b), the railroad will be permitted to continue the operation beyond 90 days after the effective date of the final rule if the railroad also complies with the additional requirements in paragraphs (c)(1) and (2) of this section. For these legacy one-person train crew freight operations, FRA will permit a railroad to phase in the additional requirements in paragraph (c). A railroad with such a legacy operation that does not implement all the additional requirements by each deadline will not be permitted to continue the operation. Further, a railroad that allows its legacy operation to lapse at one of the deadlines will not be permitted to utilize this exception if it wants to restore that legacy operation at a later date.

Paragraph (a)(2) will permit each Class II and III freight railroad an opportunity to initiate a train operation with a one-person crew under certain conditions. The operations under this exception will be limited to a train that will not be transporting hazardous materials of the types or quantities specified in § 218.123(c). Under paragraph (a)(2)(i), this exception will require that a railroad, before commencing the operation, provide FRA with written notice that contains the information required by paragraph (b) of this section. Under paragraph (a)(2)(ii), this exception will require a railroad to comply with the additional requirements in paragraph (c) of this section without a phase-in of compliance dates for those additional requirements. FRA determined that the initiation of a new one-person train crew operation without an FRA review process should, at a minimum, have already implemented the additional requirements in paragraph (c) of this section, which will allow the railroad to begin the operation with significant safeguards already in place. In contrast, the other exceptions in paragraph (a) are largely directed for existing operations that are already in wide use and, thus, requiring immediate implementation upon the effective date of the final rule for those other exceptions would have the potential to be disruptive to normal railroad operations.

Thus, to meet the requirements of this exception in paragraph (a)(2), a railroad's one-person train crew operation will be required to use a locomotive equipped with alerters and comply with any required operating rules in paragraph (c) from the first day these operations are initiated. While this exception is based on the small railroad operations exception in proposed § 218.129(c)(1) for a freight railroad with fewer than 400,000 total employee work hours annually, the exception in this final rule has been expanded to include more railroads, and it does not include the speed, grade, and train length requirements proposed in the NPRM.

Paragraph (a)(3), which is based on proposed § 218.129(c)(2), specifies the requirements for a work train exception to the two-person train crew mandate. The exception applies to work train operations regardless of whether they are existing or new operations. Each railroad may use a work train with a one-person train crew, including when a work train is traveling to or from a work site, as long as the railroad complies with the additional requirements in paragraph (c) according to the implementation schedule specified. Paragraph (a)(3)(i) limits the work train operation exception to non-revenue service trains that do not exceed 4,000 trailing tons and are used for the administration and upkeep service of the railroad. This work train requirement, which is the same as the proposed requirement, is based on the definition used in 49 CFR 232.407(a)(4) concerning requiring end-of-train devices; and, as in that rule, the 4,000 trailing tons or less threshold will provide railroads operational flexibility, especially smaller railroads.[315] Work trains mainly haul materials and equipment used to build or maintain the right-of-way and signal systems. Work trains are unlikely to be hauling hazardous materials (unless extra fuel is needed to power machinery) and, because they operate under their own set of safety rules, typically at low speeds or restricted speed, they pose fewer risks than long-haul trains. They often travel at restricted speed, which is a slow speed at which the locomotive engineer must be prepared to stop before colliding with on-track equipment or running through misaligned switches. For one-person train crew work train operations, FRA will permit a railroad to phase in the additional requirements in paragraph (c) of this section based on the implementation schedule provided.

Paragraph (a)(4), which is based on proposed § 218.125(a), specifies the requirements for a helper service train operation exception to the two-person train crew mandate. The exception applies to helper service train operations regardless of whether they are existing or new operations. Each railroad will be able to consider using a helper service train with a one-person train crew, including when a helper service train is traveling to or from a work site, as long as certain requirements are met. The definition for a ''helper service train operation'' in the definitions section of this final rule, § 218.5, means the train is a locomotive or group of locomotives being used to assist another train that has incurred mechanical failure or lacks sufficient tractive force necessary to traverse a particular section of track due to train tonnage and the grade of the terrain. Helper service is a common service performed in the railroad industry as a one-person operation. It is typically not considered a complex operation, and FRA does not expect this type of operation will pose a significant risk to railroad employees, the public, or the environment. As with each of these exceptions, a railroad may decide that a certain helper service train operation is complex and that more than one crewmember should be assigned to the operation. Moreover, FRA notes that, while the helper locomotive itself may be operated with a one-person train crew, the train it is helping may be required to have a two-person crew, and the fact that a helper locomotive is assisting would not impact the number of crewmembers required for the train. For one-person train crew helper service operations, FRA will permit a railroad to phase in the additional requirements in paragraph (c) according to the implementation schedule specified.

Paragraph (a)(5), which is based on proposed § 218.125(b), provides an exception from the two-person crew requirement for an existing or new lite locomotive train operation. Similar to the safety rationale for the helper service exception, when a locomotive or a consist of locomotives is not attached to any piece of equipment, or attached only to a caboose, there is not a

[315] 62 FR 278, 282 (Jan. 2, 1997).

significant risk to railroad employees, the public, or the environment. Lite locomotive train operations are mainly used to move locomotives to a location where the locomotives can be better utilized for revenue trains that are taking or delivering rail cars to customers, or to other railroad yards where the locomotives can be used in switching operations. Additionally, lite locomotives may be operating as a train to take more than one locomotive to a repair shop for servicing. The definition of ''lite locomotive train operation'' is consistent with the definition of ''lite locomotive'' in 49 CFR 229.5 of FRA's Railroad Locomotive Safety Standards. However, the exception for a lite locomotive train operation in this final rule includes a further clarification that ''excludes an MU locomotive operation.'' The reason for this additional clarification is that an MU locomotive is both a locomotive and a car that can transport passengers, and this exception will not cover a passenger train operation containing either single or multiple MU locomotives. FRA has further clarified the MU locomotive exceptions for passenger trains in § 218.125(c). For one-person train crew lite locomotive train operations, FRA permits a railroad to phase in the additional requirements in paragraph (c) according to the implementation schedule specified.

Paragraph (b) contains a list of the minimum written notice requirements for those operational exceptions in paragraph (a) that require it, *i.e.,* the exceptions for a Class II or III railroad's legacy one-person train crew freight operation and for the Class II or III freight railroad that wants to initiate a train operation staffed with a one-person train crew that is not transporting hazardous materials of the types or quantities specified in § 218.123(c). This notice requirement is based on the proposed special approval petition requirements in the NPRM for requesting either the continuance of a legacy one-person train operation in proposed § 218.131(b) or for requesting the initiation of train operations with fewer than two crewmembers in proposed § 218.133(b). The written notice requirements in this final rule will require each railroad that will be using one of these exceptions to provide FRA, by email, with largely the same information as the NPRM proposed for these operations, while eliminating the proposed special approval process. While the written notice requirements, in lieu of a special approval requirement that includes a risk assessment, will substantially lessen a railroad's burden when compared to the NPRM's proposed requirements for a special approval, FRA notes that, for compliance, a railroad's written notice must provide complete and accurate information.

Paragraph (b)(1) requires information about the primary person at the railroad who can be contacted about the petition for a special approval. The remaining 13 numbered items listed under paragraph (b) require an accurate description of the operation, the hazards present, the mitigating measures taken to improve safety, and the railroad's description of how it determined the operation was safe to implement.

For a railroad required to meet the written notice requirements, paragraph (b)(2) requires the railroad to identify the location of the operation with as much specificity as can be provided as to the characteristics of the geographic area through which the trains will operate (*e.g.,* population density and proximity to environmentally sensitive areas), the terrain over which the trains will be operated, industries or communities served, and track segments, territories, divisions, or subdivisions operated over. In addition, each Class II or III railroad with a legacy one-person train crew freight operation will also need to include business records or other written documents as part of the written notice submission to show that the legacy operation was established for at least the two years before the effective date of this final rule. For example, documentation could show that a railroad established a legacy one-person train crew freight operation running 3 days per week for 5 years without incident. That kind of information would show the extent of the operation and the safety record. Further, such a legacy operation must identify the current parameters of the operation's location and should not expand the parameters based on plans for future expansion, as doing so would be initiating a new operation. FRA expects that a Class III railroad is likely to describe its legacy operation as covering the entire railroad but also expects some short lines to describe an operation covering only a portion of its railroad. In comparison, FRA would expect a larger Class II regional railroad to describe an operation that covers only a portion of the railroad as it might find only some aspects of their entire operation were conducive to one-person train crews. A railroad that cannot provide records kept in the normal course of business to support a legacy operation can consider submitting affidavits from the railroad's employees, supervisors or managers, or others, in support of the existence and extent of the one-person train crew operation.

Paragraphs (b)(3) through (7) and (10) are sufficiently descriptive that further analysis is generally unnecessary here. However, some information that was not proposed in the NPRM has been added to develop more fully the overall description of the one-person train crew operation. Notably, paragraph (b)(3) specifies that the description of track, signal and train control systems, and devices and appliances must also include a list of all active and passive highway-rail grade crossings, including crossing numbers. The addition of this list should be easy to provide as it should be available to train crews in timetables, track charts, or other easily reproduced documents. For paragraph (b)(7), in addition to any maximum number of cars and tonnage set for the operation, FRA included a requirement to provide the number and frequency of the trains involved to help fill out the description of the operation from both a historical perspective and a frequency of risk view. The information required in the written notice will permit FRA to identify these operations and evaluate how well each railroad has addressed the hazards and risk of the operation.

Paragraph (b)(8) will require a railroad to state in its written notice whether the one-person train crew operation hauls hazardous materials of any quantity or type, and the approximate percentage of carload traffic in the one-person train crew operation that involves hazardous materials. A one-person train crew operation that does not haul hazardous materials would present less risk than one that does, all else being equal. FRA will require a railroad to approximate the percentage of carload traffic in the one-person train crew operation that is hazardous materials in its written notice, as each railroad should be considering it as a factor in its business decision to deploy such an operation under the exceptions to a minimum two-person train crew mandate. Considering other issues related to the operation's size and scope and understanding the quantity and type of hazardous materials hauled will help FRA evaluate the risks posed by an excepted operation that is required to file written notice.

Paragraph (b)(9) will require each railroad that must file written notice to include information about whether the railroad places any limitations on a person operating as a one-person train crew. FRA expects that some railroads will limit a one-person train crew by establishing a maximum number of miles or hours the person may work during a single tour of duty. It is also

possible that a railroad will establish a fatigue mitigation plan voluntarily and other railroads will establish such a plan because a Federal requirement specifies that they do so.[316] Although this final rule does not require a fatigue mitigation plan, the written notice requirement will allow FRA to consider this additional information when evaluating how each railroad will implement strategies for reducing railroad worker fatigue, such as improving the predictability of schedules, considering the time of day the railroad permits one-person train crews to operate, and educating workers about fatigue and sleep disorders. This information may also permit FRA to revisit these types of concerns and compare mitigating actions across the industry.

Paragraph (b)(11) will require a detailed description of any technology that is used to perform tasks typically performed by a second crewmember or that prevents or mitigates the consequences of accidents or incidents. The technologies described must be already installed and operational, with all FRA approvals as necessary, so that the functionality and impact of the technology on the operation is understood and can be effectively communicated to FRA.

Paragraph (b)(12) will require that the railroad's mandatory notice include a copy of any railroad rule or practice that applies to the one-person train crew operation but does not apply to train crew operations with two or more crewmembers. Receiving this information will assist FRA in evaluating the safeguards each railroad has voluntarily implemented and to evaluate future effectiveness of these types of rules or practices.

Paragraph (b)(13) will require each Class II or III railroad, seeking to continue a legacy freight train operation staffed with a one-person train crew, to include with its written notice five (5) years of the accident and incident data required by part 225 of this chapter, for the operation identified and that the railroad can attribute to a one-person train crew operation. If the operation was established between two to five years before the effective date of the final rule, then the railroad will provide the accident and incident data for the operation from the date the operation was established. Although current regulations require the railroad to report certain ''accidents/incidents'' [317] to FRA, FRA cannot accurately determine from that reported information which, if any, reportable accidents/incidents are attributable to a railroad's one-person train crew operation. FRA expects that each railroad will have more information about its own accidents/incidents and can identify the data that applies to its legacy operation. The railroad must narrow the requested data to the location of the legacy operation that the railroad has identified in its written notice and only send additional accident/incident data that pertains to the legacy operation subject to the railroad's written notice.

Paragraph (b)(14) is a catch-all provision that permits a railroad filing a written notice to submit any other information describing protections that are or will be implemented to support the safety of the one-person train crew operation that the railroad wants to share with FRA to justify the safety of the operation. FRA expects that some railroads would have completed a risk assessment, a safety analysis, or compiled a safety data report before implementing a one-person train crew operation and that the railroad will share that information to show FRA how the hazards were, and will continue to be, mitigated, so that operation is as safe or safer than a two-person minimum train crew operation.

Paragraph (c) contains a list of requirements that apply to all five exceptions described in paragraph (a). FRA encourages each railroad to implement these additional requirements as quickly as possible, consistent with the implementation schedule in this final rule that phases in requirements for some of the operational exceptions to the two-person train crew mandate. Compliance with the adoption of operating rules that ensure mitigation measures for certain safety-critical situations specified, establish radio or wireless communications with a one-person train crew that is as safe or safer than a two-person train crew for train operations and crewmember safety, and require that a one-person train crew's controlling locomotive is equipped with a functioning and tested alerter will improve the immediate safety of the operation. The establishment of an implementation schedule for the four exceptions covering some existing operations will allow these operations time to, as necessary, install alerters, adopt operating rules, and/or hire and qualify additional train crewmembers.

Paragraph (c) permits FRA to enforce a violation of an operating rule required under this paragraph in the same way as if the person violated the requirements of this section directly. The paragraph clarifies that a ''person'' will not be limited to a railroad employee, and may include each railroad, railroad officer, or supervisor. Contractors that act in any of those capacities will also be considered a person subject to FRA's jurisdiction.

Paragraphs (c)(1) and (2) require each railroad with an applicable one-person train crew operation to adopt and comply with operating rules that cover certain safety concerns. These additional requirements for the adoption of minimum operating rules are mostly based on the proposed requirements in the NPRM for requesting either the continuance of a legacy one-person train operation in proposed § 218.131(b)(12) and (13) or the initiation of train operations with fewer than two crewmembers in proposed § 218.133(b)(12) and (13).[318]

Similar to the proposal in the NPRM, paragraph (c)(1)(i) requires a railroad with a one-person train crew operation to adopt and comply with operating rules that address: (A) a release of any hazardous material; (B) any accident/incident regardless of whether it is reportable to FRA under part 225; (C) a request from an emergency responder to unblock a highway-rail grade crossing in response to a potentially life-threatening situation; (D) a train or on-track equipment derailment; (E) a disabled train; and (F) an illness, injury, or other incapacitation of the one-person train crewmember. This requirement will ensure that each railroad with a one-person train crew operation has operating rules specifying how the railroad will respond to these types of events and therefore will be prepared to take mitigating measures knowing that a second crewmember will not be traveling on the train and available to assist in a response. Although similar to the proposal in the NPRM, the various operating rule requirements that applied only to the proposed continuance of legacy train operations staffed with a one-person crew or for the initiation of train operations staffed with fewer than two crewmembers raise broadly applicable safety concerns for almost all one-person train crew operations; therefore, FRA determined these requirements are necessary for all the exceptions permitted by this section, not only the ones similar to the requirements as proposed in the NPRM.

[316] 87 FR 35660 (June 13, 2022) (publishing a final rule on ''Fatigue Risk Management Programs for Certain Passenger and Freight Railroads'' effective July 13, 2022, and codified in 49 CFR part 270, subpart E and 49 CFR part 271, subpart G).

[317] 49 CFR 225.5 (defining four different types of accidents or incidents).

[318] 87 FR at 45617–19 (citing proposed exceptions under §§ 218.127 through 218.131).

The requirement that the operating rule address a disabled train does not depend on the cause, which could include a track washout or other severe weather event, mechanical breakdown, accident, or other circumstances that prevent the train from moving. In some circumstances, a significant operational issue could disable a one-person crew's train (*e.g.,* if the one crewmember's hours of service expired, and the railroad has not adequately prepared to retrieve and replace the crewmember).[319] A one-person train crew could also be considered disabled from an operational view if the railroad assigns a one-person crewmember that is unqualified to operate over the territory assigned and the crewmember is not provided with a qualified pilot. In that circumstance, the one-person train crewmember might not be able to move the train or might be operationally limited in how the train can be moved thereby equating to a disabled train situation caused by physical breakdowns in equipment, track, or signal systems. A railroad would not have to adopt or comply with an operating rule to address operational delays typical of normal railroad operations, such as one train waiting in a siding for another to pass, as that operational activity would not be considered disabling the train; FRA expects that each railroad is trying to optimize its performance and would avoid unnecessary operational delays whenever possible.

In addition to addressing disabled trains, this final rule requires that the railroad's operating rule address, at a minimum, several other types of situations. For instance, the operating rule must address an accidental or non-accidental release of any hazardous material. This means that any release of a hazardous material must be covered whether caused by a train collision or a non-accidental release (*e.g.,* a release caused by an offeror not properly preparing a shipment for transportation). All derailments, accidents, and incidents must also be addressed by operating rule. In addition, a railroad's operating rule must also address requests from an emergency responder to unblock a highway-rail grade crossing in response to a potentially life-threatening situation.

Further, as required by paragraph (c)(1)(i)(F), the operating rule will need to include mitigation measures to ensure the safety of the one-person train crewmember will be addressed in case of illness, injury, or another incapacitation. The communication requirements specified in paragraph (c)(2), and discussed below, will help each railroad with a one-person train crew operation to keep in close communication with a one-person train crewmember and, under this requirement, the railroad will need to specify who will act and how, and plan out how fast the reaction times will be to ensure the crewmember's safety.

Paragraph (c)(1)(i) lists the types of situations that each affected railroad must address. The situations listed could involve responses requiring protocols for mitigation measures because each situation may include potential harm to rail employees, the public, or the environment. It is fundamental to rail safety that each railroad have an unambiguous operating rule addressing such mitigation measures and that by doing so the railroad will demonstrate that it will be prepared to respond as quickly as it would if the train were crewed with a two-person crew. All of the situations listed are foreseeable events on a railroad (and a railroad should in any case seek to prevent, and mitigate the impact of, such situations). All railroad employees and supervisors must have clearly described roles and responsibilities, and all logistics involved and expected response times must be clearly described. The reasonableness of the logistics and expected response times of each operation will depend on the scope of the operation and the potential impact on the public.

Paragraph (c)(2) requires that each railroad have an operating rule to ensure radio or wireless communications with a one-person train crew can provide a level of safety for train operations and crewmember safety that is as safe or safer than a two-person train crew. The paragraph specifies that the required operating rule must cover four safety concerns: (i) the one-person train crew must have a working radio or working wireless communications on the controlling locomotive appropriate for railroad communications to cover those operations, even if the railroad is not otherwise required to supply them; [320] (ii) the train dispatcher or operator must confirm with the one-person train crewmember that the train is stopped before conveying a mandatory directive; (iii) whenever a one-person train crewmember can anticipate that radio or wireless communication will be lost, *e.g.,* when entering a tunnel, unless a railroad will monitor the train's real-time progress, the crewmember must contact another person who would be expected to act if communication is lost longer than what is specified by the operating rule; [321] and (4) the railroad must establish procedures for when to initiate search-and-rescue operations if all radio or wireless communication is lost with a one-person train crewmember because the safety of the one-person train crewmember is always a fundamental safety concern that a railroad can plan for and address in an operating rule.

Paragraph (c)(3) requires each railroad with an applicable one-person train crew operation to equip the operation's controlling locomotive with a functioning alerter that is operating as intended and requires that a one-person train crewmember test the alerter to confirm it is working before departure from each initial terminal, or prior to being coupled as the lead locomotive in a locomotive consist. This requirement is therefore consistent with requirements in § 229.140 of this chapter for ensuring that an alerter is functioning and operating as intended. Class I and II railroads that generally have newer locomotives, placed into service on or after June 10, 2013, or permit the controlling locomotives to operate at speeds in excess of 25 mph, will already have locomotives with installed alerters that comply with FRA's requirements; thus, the issue of adding an alerter and operating rules that address the safety of that alerter will largely be an issue for Class III railroads whose locomotives may lack such an alerter or have an older style of alerter installed.[322] That is, FRA is aware that some Class II and III freight railroads have alerters that do not meet, and are excepted from, these requirements. FRA also recognizes it may be less expensive to install a basic alerter that lacks all the functions of an alerter meeting FRA's current requirements. To address this issue, FRA will allow each railroad that limits the one-person train crew's operation to a maximum authorized speed of 25 mph to use a locomotive alerter that does not otherwise meet the requirements for alerters in § 229.140, if the alerter has a manual reset and will result in a penalty brake application that brings the locomotive or train to a stop if not properly acknowledged. Of course, if

[319] 87 FR at 45597.

[320] Although not a requirement, FRA encourages each railroad to provide a redundant electronic device when possible, as FRA's requirement is only a safety minimum.

[321] The person who would receive such a communication would typically be a dispatcher. However, for railroads that do not use dispatchers, the person might be a supervisor or manager, an intermittently assisting crewmember, or another railroad employee.

[322] 49 CFR 229.140(a).

the railroad is required to have an alerter that complies with § 229.140, this provision does not provide an alternative to that existing requirement.

Section 218.131 Special Approval Petition Requirements for Train Operations Staffed With a One-Person Train Crew

This section, which is based on proposed § 218.133, has a modified section heading to clarify that the section's requirements regarding the special approval petition will cover all special approval petition requirements, thus including requirements for both the initiation of new operations and potentially the continuation of some existing operations that are not otherwise exempted; on this issue, the proposed section was limited to the special approval petition requirements for only the initiation of train operations staffed with fewer than two crewmembers. Also, as changed in other sections, the ''fewer than two crewmembers'' phrase has been replaced for clarity with ''a one-person train crew,'' as this final rule only addresses one-person train crew operations and does not apply to autonomous operations.

Similar to the NPRM, paragraph (a)(1) prohibits a railroad from operating a train with a one-person train crew unless it receives special approval for the operation as required by this subpart or the operation complies with one of the exceptions specified in §§ 218.125 through 218.129. This paragraph has an option that will allow a railroad with an existing operation that is not otherwise excepted to continue that operation in the interim period before it receives FRA's decision on a special approval petition. For example, this option would apply to a Class II or III railroad's existing one-person train crew freight operation transporting hazardous materials of the types or quantities specified in § 218.123(c) that was initiated less than two years before the effective date of the final rule (and therefore does not qualify for the legacy operation exception in § 218.129(a)(1)). As provided in paragraph (a)(2), there are three conditions for continuing that operation during this interim period before FRA decides on the special approval. First, the railroad must submit a written notice by email to FRA no later than 15 days after the effective date of the final rule. The written notice must include a summary of the railroad's operation, which is not expected to be as thorough as the description provided with the special approval petition that will be filed later. The written notice must also include the contact information for the railroad's primary point of contact on the operation. Second, FRA may identify existing safety hazards with any aspect of the one-person train crew operation and will coordinate with the railroad about such safety hazards that are required to be corrected, could be readily mitigated, or otherwise should be addressed. For example, if FRA finds that the operation is occurring over track or with rolling equipment that does not meet existing Federal standards, the railroad will need to coordinate with FRA on remedial action to redress the problems and to provide assurances that the railroad will prevent future occurrences. Similarly, although a railroad will address safety hazards in the risk assessment submitted as part of a special approval petition, FRA will examine the existing operation for safety concerns to ensure such concerns are addressed to protect the safety of the one-person train crewmember or the communities that the trains pass through. Third, the railroad must submit its special approval petition meeting all the requirements for such a petition no later than 60 days after the effective date of the final rule. This deadline is necessary so that the review and decision-making process for these operations of less than two years can be processed quickly. As a practical matter, during the interim 60-day period from the effective date of the rule until the special approval petition deadline, a railroad may consider changing its one-person train crew operation to avoid having to submit a special approval petition by adding a second crewmember or changing aspects of the operation so that the operation otherwise complies with this final rule; in such circumstances, the railroad would no longer need to avail itself of this option. Because the final rule expressly permits a railroad to continue the operation in accordance with the requirements in this section ''pending FRA's decision on the railroad's special approval petition,'' if FRA requires additional information or requests modifications after receiving the petition, the railroad will have the discretion to continue the operation until FRA issues a decision on the petition.

As discussed in the response to comments above, paragraph (a)(3) has been added to the final rule. Each freight railroad seeking to either initiate or continue a train operation with a one-person train crew that may transport hazardous materials of the types or quantities specified in § 218.123(c) is required to receive FRA's special approval for the operation and to comply with the requirements in § 218.129(c). The paragraph thus requires those operations to have operating rules that address taking mitigation measures under specified situations, operating rules addressing the communication and safety concerns associated with a one-person train crew operation, and operating rules requiring a one-person train crew's controlling locomotive to be equipped with a functioning alerter and the testing of that alerter to determine it is functioning, in addition to requiring a special approval petition that includes a risk assessment.

Paragraph (a)(4) was originally proposed as § 218.133(a)(2), and the requirements are the same as proposed. Accordingly, the analysis provided in the NPRM is applicable for this paragraph.[323]

Paragraph (b), which is based on proposed § 218.133(b), contains the minimum petition requirements for a railroad to request FRA's special approval to initiate a train operation with a one-person train crew that is not otherwise permitted by one of the exceptions. FRA expects that a petition meeting these minimum requirements will contain sufficient information for FRA to issue a decision. In the NPRM, FRA stated that it would determine whether approving the petition operation is ''consistent with railroad safety.'' In this final rule, FRA will be determining whether approving the operation described in the petition is ''as safe or safer'' than a two-person train crew operation. The reason for changing the standard to ''as safe or safer'' is to coincide with the risk assessment that a railroad must include as part of its petition. In the risk assessment, a railroad will compare the risks associated with the one-person train crew operation to those associated with the operation if it were performed by a two-person train crew. Accordingly, FRA will approve a petition for a one-person train crew operation only where the risk assessment shows that it will be as safe or safer than a two-person train crew operation.

Where the requirements in paragraph (b) are substantively different than proposed, this analysis will address those differences.[324] Otherwise, because the changes from the proposed rule will not change the paragraph's meaning, the

[323] 87 FR 45597.

[324] FRA notes that it did not adopt proposed paragraph § 218.133(b)(14) in this final rule.

analysis provided in the NPRM is applicable for this final rule.[325]

Paragraph (b)(8) will require a railroad to state in its petition for special approval whether the railroad is seeking approval to transport hazardous materials of any quantity and type. The term ''hazardous materials'' is defined by PHMSA in 49 CFR 171.8. The final rule differs from the NPRM in that it contains the additional requirement that a railroad answer whether it is transporting hazardous materials listed in § 218.123(c), because those are the materials identified as posing the greatest safety and security risks in transportation.

Paragraph (b)(13) requires a railroad to submit with a special approval petition a copy of a railroad operating rule that will apply to the proposed train operation(s) with a one-person train crew, and which complies with the requirements of § 218.129(c)(1) to ensure rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations with the one-person train crew operation. In the NPRM, FRA described a disabled-train/post-accident protocol, which largely proposed the same requirement as in this final rule. The final rule provides clarity to the types of situations that will be required to be addressed in such an operating rule. The final rule also will require the same operating rule for an exception to the two-person train crew mandate under § 218.129(c)(1) as it will for an exception permitted by special approval under this section. As proposed in the NPRM, the final rule will also permit a passenger train operation, with an approved emergency preparedness plan under part 239, to omit this requirement as duplicative.

Paragraph (c) did not change from the NPRM and provides railroads notice that FRA may request any additional information, beyond what the railroad provided in the petition.

Section 218.133 Risk Assessment Content and Procedures

This section, which was proposed as § 218.135, contains the minimum requirements for a railroad's risk assessment under this subpart. As stated in the NPRM, the goal of a risk assessment is to assess risk in an objective manner by following a decision-making process designed to systematically identify hazards, assess the degree of risk associated with those hazards, and based on those assessed risks, identify and implement measures to minimize or mitigate the risks to an acceptable level. For this rule, a risk assessment is the process of determining, either quantitatively or qualitatively, or both, whether the level of risk associated with a proposed one-person train operation, when mitigated, is as safe or safer than the same operation operated with a two-person crew minimum.

In this final rule, FRA has modified the risk assessment process and standard from the NPRM for several reasons described above in the discussion of comments and conclusions and further summarized here. The overall approach was to remove proposed requirements that might be viewed as difficult to meet and to provide railroads with more flexibility in adopting a risk assessment approach. One major difference from the NPRM led FRA to revisit aspects of the proposed quantitative risk-based hazard analysis and move it to appendix E, where it has been identified as one risk assessment approach. Although some commenters objected to the proposed version of this approach, FRA is retaining the overall approach in the rule, so it is readily available to those railroads who may want to apply an objective approach that is already approved by FRA. Similarly, FRA is also addressing the concerns raised relating to a quantitative assessment that calculates a mean time to hazardous event, noting that not all railroads may have the historical safety data to perform the calculations required in the NPRM with the level of statistical confidence. Addressing the issue of flexibility in adopting an approach, the risk-based hazard analysis in the final rule provides for a comparison, allowing for a qualitative approach as well as a quantitative approach, including use of both approaches in the overall analysis. These changes are consistent with the system safety program and risk reduction program rules, which require a risk-based hazard analysis as part of the risk-based hazard management program. Providing for use of a similar form of analysis will help address concerns regarding the complexity and burden of the risk assessment.

Paragraph (a) of this section sets the minimum standards for the risk assessment's content and analysis requirements while paragraph (b) allows a railroad to use alternative risk assessment methodologies and/or procedures if approved by the Associate Administrator for Safety.

Paragraphs (a)(1) through (4) require a railroad's risk assessment to contain: (1) a complete description of the proposed operating environment, including a list and description of all functions, duties, and tasks associated with the operation of a train as proposed, performed by the one-person train crewmember, other railroad employee(s), or equipment; (2) a description of the allocation of all functions, duties, and tasks to the one-person train crewmember, other railroad employee(s), or equipment; (3) a risk-based hazard analysis for the proposed train operation's functions, duties and tasks that will identify new hazards, changes to existing hazards and/or changes to the risk of an existing hazard associated with the proposed train operation, as compared to a two-person minimum train crew operation, and then once mitigated, demonstrate that the proposed operation is as safe or safer than a train operation with a two-person minimum train crew; and (4) a mitigation plan that documents the design and implementation timeline of the sustained mitigation strategies to eliminate or reduce the overall risk to a level such that the one-person train crew operation is as safe or safer than a two-person minimum train crew operation considering mitigation design and human factors, at a minimum.

Using the information gathered in response to paragraphs (a)(1) and (2), paragraph (a)(3) requires a railroad to complete a risk-based hazard analysis that involves multiple steps. The first step, under paragraph (a)(3)(i), will be to identify any new hazards, changes to existing hazards, and/or changes to the risk of an existing hazard associated with the proposed one-person train operation, as compared a two-person minimum train crew operation. A ''hazard,'' as defined in § 218.5, is an existing or potential condition that can lead to an unplanned event or series of events (*i.e.,* mishap) that can cause an accident or incident; injury, illness, or death; damage to or loss of a system, equipment, or property; or environmental damage. Identifying relevant hazards and preparing a hazard analysis are fundamental to the process of assessing risk. This hazard analysis must take account of all aspects of the railroad's system, including at a minimum infrastructure, equipment, technology, work schedules, mode of operation, operating rules and practices, training and other areas impacting railroad safety. As mentioned with regard to paragraph (a)(1), the operating environment, as documented in the special approval petition as required by § 218.131(b), must also be considered as part of the hazard analysis. Next, under paragraph (a)(3)(ii), each risk associated with the new or changed hazard must be evaluated, either qualitatively or

[325] 87 FR 45597–98.

quantitatively, or both, in terms of the severity and likelihood of a mishap. The third step, under paragraph (a)(3)(iii), will be to identify mitigations that will be put in place to minimize or eliminate any new or changed hazard or any change to the risk of a hazard, and then recalculate in terms of severity and likelihood the risk of a mishap. The fourth and final step, under paragraph (a)(3)(iv), will require the railroad to provide a statement with supporting evidence that the one-person train crew operation with a fully implemented mitigation plan, is as safe or safer than a two-person minimum operation.

The alternative standard in paragraph (b) has the same meaning as the requirement proposed in § 218.135(b), with the only change from the proposal being that the term ''Associate Administrator'' is clarified as the ''Associate Administrator for Safety.'' Thus, the analysis for this paragraph in the NRPM applies the same.[326]

Section 218.135 Special Approval Procedure

Other than deleting some cross-references and updating the standard for a petition approval (*i.e.,* as safe or safer), this section is unchanged from proposed § 218.137. Paragraph (e) contains the same requirements as in the proposed rule, except that the final rule organized the requirements in a chronological order. Thus, the analysis provided in the NPRM is applicable for this section.[327] FRA encourages railroads to approach FRA should they have any questions or concerns about demonstrating compliance with the requirements for train operations staffed with a one-person crew.

Section 218.137 Annual Railroad Responsibilities After Receipt of Special Approval

In the NPRM, this section was proposed as § 218.139. The changes from the proposed rule are consistent with other changes made in the final rule, and the section's meaning has not changed. Thus, the analysis provided in the NPRM is applicable for this section.[328] The following explanation provides additional information for clarity.

Paragraph (a) requires each railroad that receives special approval to use an operation with a one-person train crew under this subpart to conduct a formal review and analysis each calendar year, of the one-person train crew operation, and report to FRA its findings and conclusions from its review no later than March 31 of the following year by email. The final rule clarifies that the review and analysis that will be required is the annual report and that the requirements in paragraphs (b) and (c) of this section describe the components of a railroad's annual report. Because, unlike the proposal in the NPRM, the final rule will not require special approval for certain existing passenger and freight train operations staffed with a one-person train crew, this section does not contain citations or references that include such operations as requiring an annual report.

Paragraph (b)(1)(ix) was changed from the proposed requirement to provide clarity. In the NPRM, the proposed requirement would have required a railroad to report the total number of instances where a person certified as both a locomotive engineer and conductor had a certification revoked for violation of an operating rule or practice that occurred when the person was in an FRA-approved train operation with fewer than two crewmembers. In this final rule, a railroad will be required to report the total number of instances where a one-person train crewmember had a certification revoked for violation of an operating rule or practice that occurred when the person was operating a one-person train crew operation that received special approval under this subpart. The change from the proposed rule will clarify that the annual report will require inclusion of revocations of a locomotive engineer or conductor's certification of the one-person train crewmember. The final rule defines the ''one-person train crewmember'' to mean the single assigned person who is performing the duty of the locomotive engineer and is traveling in the operating cab of the controlling locomotive when the train is moving as part of a one-person train crew in § 218.5. Thus, the final rule clarifies that a one-person train crewmember can be a locomotive engineer alone and does not also need to be the train's assigned conductor. The final rule also clarifies that the annual report must capture the total number of instances where a one-person train crewmember's locomotive engineer or conductor certification is revoked for a violation of an operating rule or practice that occurred when the person was operating a one-person train crew operation receiving special approval under this subpart, and subtotals for each type of certification revoked; *i.e.,* whether it is a locomotive engineer or conductor certification revocation.

Appendix E to Part 218—Recommended Procedures for Conducting Risk Assessments

This appendix provides a quantitative risk-based hazard analysis methodology that may be used to meeting the requirements of § 218.133(a)(3) and is based upon the proposed requirements in § 218.135 of the NPRM. It provides one acceptable approach that may be used by a railroad to prepare a risk-based hazard analysis, which is part of the risk assessment required by § 218.133. A railroad that is required to obtain FRA's special approval under § 218.135 and complete a risk assessment may adopt this approach. A railroad that decides to modify this approach or to use a completely different approach is required to petition FRA for approval under § 218.133(b).

The recommended and acceptable approach is a quantitative risk-based hazard analysis. A hazard analysis is performed to identify new or changed hazards relating to the operation of a one-person train crew, as compared to a two-person minimum train crew operation, for purposes of eliminating, or at least mitigating, those hazards, thus ensuring that the operation by a one-person train crew is as safe or safer than that operating by a two-person crew. Paragraph (a) describes the first step as identifying all new hazards, changes to existing hazards, or changes to the risk of existing hazards, when comparing a one-person train crew operation with a two-person minimum train crew operation. Paragraph (b) describes the quantitative approach to assessing the severity of each of the hazards identified under paragraph (a) and the probability of occurrence. Paragraph (c) describes the process for applying sustained mitigation strategies and the requirement to recalculate the risk based on the implementation of those mitigation strategies. Paragraph (d) describes how to prepare a risk matrix that classifies the risks calculated in paragraph (c) in terms of severity and likelihood of each new hazard, change to an existing hazard, or change to the risk of an existing hazard.

Paragraph (e) describes how to prepare a risk report documenting the basis for acceptability of all hazards not eliminated through the risk assessment process, *i.e.,* the residual risk associated with the remaining partially mitigated or unmitigated hazards identified in the risk matrix. Paragraph (f) describes that, for a railroad to exercise this option, it must be able to conclude its risk assessment by issuing a statement with supporting evidence, that the one-

[326] 87 FR 45603.

[327] 87 FR 45603–04.

[328] 87 FR 45604–05.

person operation with a fully implemented mitigation plan, is as safe or safer than a two-person minimum operation.

IV. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This final rule is a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review,[329] and DOT Order 2100.6A (''Rulemaking and Guidance Procedures''). Details on the estimated costs of this final rule can be found in the RIA, which FRA has prepared and placed in the docket (FRA–2021–0032).

The final rule requires railroads seeking to operate trains with one-person train crews to submit a notification to FRA and in some cases, seek FRA approval for such an operation. The petition process requires the submission of information to determine if a proposed one-person train crew operation will be as safe or safer than a two-person minimum train crew operation. Class II and Class III railroads not transporting certain types or quantities of hazardous materials are required to submit a notification to FRA when commencing one-person train crew operations, adopt and comply with operating rules necessary to ensure the one-person train crewmember's safety and ensure the railroad is prepared to take appropriate mitigation measures in response to certain safety-critical situations, and equip a one-person train crew's controlling locomotive with an alerter.

FRA analyzed the economic impact of this final rule. FRA estimated the costs associated with alerters, operating rules, notification to FRA, risk assessments and special approvals, annual reporting after receipt of special approval, and Government administration. FRA qualitatively discusses the benefits but does not have sufficient data to monetize those benefits.

FRA estimates the 10-year costs of the final rule to be $6.6 million, discounted at 7 percent. The annualized costs are estimated to be $0.9 million discounted at 7 percent. The following table shows the total costs of this final rule, over the 10-year analysis period.

TOTAL 10-YEAR DISCOUNTED COSTS

[2022 Dollars] [330]

Category	Total cost, 7 percent ($)	Total cost, 3 percent ($)	Annualized cost, 7 percent ($)	Annualized cost, 3 percent ($)
Alerters (Legacy Operations)	2,176,402	2,217,233	309,871	259,927
Alerters (New Operations)	2,251,306	2,483,470	320,535	291,138
Operating Rules (Existing Operations)	119,954	119,954	17,079	14,062
Operating Rules (New Operations)	280,824	308,591	39,983	36,176
Notification (Existing Operations)	185,114	185,114	26,356	21,701
Notification (New Operations)	111,133	122,593	15,823	14,372
Risk Assessment and Special Approval (Class I)	560,745	570,571	79,837	66,888
Risk Assessment and Special Approval (Class II and III)	162,446	164,506	23,129	19,285
Risk Assessment (Material Modifications)	93,031	111,178	13,246	13,033
Annual Reporting	182,821	221,284	26,030	25,941
Government Administrative Cost	513,100	579,523	73,054	67,938
Total Costs	6,636,876	7,084,016	944,942	830,463

The primary benefit of this final rule is to ensure that each train is adequately staffed and has appropriate safeguards in place for safe train operations under all operating conditions. This final rule will also ensure that several significant operational safety issues with one-person train crews are addressed and allow FRA to collect information and data on one-person train crews. For instance, FRA will close a safety issue by requiring alerters for Class II and III railroads operating with a one-person train crew that do not already have these safety devices installed on their locomotives for that type of operation. Alerters will ensure that if a crewmember becomes unresponsive, the train will apply emergency brakes—a function typically left to a conductor or other second crewmember. FRA will also address issues that it cannot currently verify are addressed by each railroad's one-person train crew operations. These include public and rail employee concerns with the operational safety of a train operated by a one-person crew, the operational safeguards to protect that crewmember in various situations, and the impact of one-person train crew operations that travel through communities and need to take action to mitigate consequences in certain safety-critical situations. These are important safety issues when operating trains with one-person crews.

For Class I railroads operating with one-person train crews and Class II and III railroads transporting certain types and quantities of hazardous materials, this rule will ensure the railroads identify, evaluate, and address safety concerns that may arise from such operations by submitting a risk assessment to FRA for approval.

A second crewmember performs important safety functions that could be lost when reducing crew size to one person. The safety requirements in this final rule will allow the rail industry to continue, or initiate, train operations with a one-person train crew by ensuring that at least minimum safety requirements are met and that more complex operations make a concerted effort to mitigate the risks of foreseeable hazards.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 [331] and Executive Order 13272 [332] require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare a Final Regulatory Flexibility Analysis

[329] 88 FR 21879 (April 6, 2023) located at *https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review.*

[331] 5 U.S.C. 601 *et seq.*

[332] 67 FR 53461 (Aug. 16, 2002).

(FRFA) unless it determines and certifies that a rule will not have a significant economic impact on a substantial number of small entities. FRA prepared this FRFA to evaluate the impact of the final rule on small entities and describe the effort to minimize the adverse impact because FRA did not make the determination necessary to avoid it.

1. Statement of the Need for, and Objectives of, the Rule

Currently, the majority of trains operate with two crewmembers. The final rule helps ensure safe rail operations when railroads are using one-person train crews, or plan to reduce train crew sizes from two or more crewmembers to a one-person train crew, by prohibiting railroads from taking on unacceptable levels of safety risks with the potential to detrimentally impact railroad employees, the public, or the environment.

This final rule requires that railroads have appropriate safeguards in place for safe train operations, whenever a railroad is operating with only one crewmember that travels on the train. Although operations with one-person train crews already exist in the United States, this final rule will help ensure consistency from State to State regarding the safety of such operations, and it provides several paths forward for railroads that wish to transition to one-person train crew operations. Additionally, the annual reporting requirement for operations that receive special approval will provide FRA with information regarding these one-person train crew operations on a periodic basis that is expected to be informative, allow for agency oversight, and lead to additional safety improvements.

2. Significant Issues Raised by Public Comments

FRA received several comments related to the costs of the proposed rule. ASLRRA and short line railroads submitted comments related to the proposed rule. Issues not concerning the economics of the rule have been discussed above in the discussion of comments and conclusions. Comments were received from ASLRRA relating to the cost estimates and the number of small entities impacted by the rule. ASLRRA's concerns included not accounting for the cost of alerters, too low of a cost estimate for risk assessments, and a higher number of affected entities than what FRA estimated in the proposed rule.

In response to the affected number of entities, FRA has increased the estimate to 75 legacy operations based on comments received in response to the NPRM. All but two of these legacy operations are on small railroads. Therefore, FRA estimates there are approximately 73 small railroads currently operating that will be impacted by this final rule. FRA has also accounted for the cost for alerters in the final rule's RIA. Based on ASLRRA's comment, FRA has included the estimated cost of $20,000 per alerter.

Further, FRA has revised the cost for preparing risk assessments from the estimates presented in the NPRM. ASLRRA commented that current one-person operations hauling hazardous materials would have to hire additional employees because such operations would not be allowed under the proposed requirements. However, in the final rule, Class III railroads will be allowed to continue legacy one-person train crew operations that transport hazardous materials of the types or quantities specified in § 218.123(c), provided that they notify FRA. Therefore, small railroads with such train operations will be able to continue operating with one-person crews and will not need to hire additional employees if they adhere to the requirements in this final rule. Class III railroads that would like to commence new one-person train crew operations transporting certain types and quantities of hazardous materials specified in the final rule will need to apply for special approval and conduct a risk assessment but should not need to hire additional crewmembers to transition from a two-person train crew operation to a one-person train crew operation.

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

FRA received a comment from SBA-Advocacy, asserting that FRA appears to have significantly understated the cost and number of small businesses that would be impacted by the proposed rule.

As stated above, FRA has revised the estimated number of small entities impacted to 73 railroads with legacy operations, up from the original 7 estimated in the RIA for the NPRM. Currently, approximately 75 railroads operate some trains with one-person crews. All but two of those operations are small railroads. Therefore, FRA estimates there are approximately 73 small railroads currently operating that will be impacted by this final rule.

SBA-Advocacy also commented that FRA should revise and republish its Initial Regulatory Flexibility Analysis (IRFA), or a Supplemental IRFA, including further consideration of significant regulatory alternatives, for additional public comment before proceeding.

As FRA has made several changes in the final rule from the proposal in the NPRM, FRA is publishing this FRFA to aid the public in determining the impact to small entities. FRA has adjusted the costs and revised the final rule based on public comments, including comments from small entities and SBA-Advocacy. FRA also provided extra time and various opportunities (including a public hearing) for interested parties, including small entities, to comment.

4. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. ''Small entity'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a ''small entity'' in the railroad industry is a for profit ''line-haul railroad'' that has fewer than 1,500 employees, a ''short line railroad'' with fewer than 1,500 employees, a ''commuter rail system'' with annual receipts of less than $47.0 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than $34.0 million.[333]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR part 1201, General Instruction 1–1, which is $20 million or less in inflation-adjusted annual revenues,[334] and commuter railroads or

[333] U.S. Small Business Administration, ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes, March 27, 2023. *https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.*

[334] The Class III railroad revenue threshold is $46.3 million or less, for 2022. *https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-C/part-1201.*

small governmental jurisdictions that serve populations of 50,000 or less.[335] FRA is using this definition for the final rule.

When shaping the final rule, FRA considered the impact that the final rule would have on small entities. FRA has provided exceptions to the two-person crew requirement which would limit the impact on small entities. In addition, tourist train operations that are not part of the general system may operate with one-person crews.

The final rule is applicable to all railroads, although only railroads that operate trains with one crewmember would be affected. FRA estimates there are 768 Class III railroads, of which 734 operate on the general system. These railroads are of varying size, with approximately 250 Class III railroads belonging to larger holding companies.

Many small railroads will qualify for an exception under § 218.129, which allows for one-person operations if a railroad is a legacy one-person freight train operation, work train operation, helper service train operation, or lite locomotive train operation staffed with a one-person train crew. Those railroads will not need to petition FRA for special approval for such an operation, nor will they be required to submit a risk assessment. They will be required to notify FRA of the operation and ensure that they adopt and comply with operating rules for the one-person operation and equip the one-person train crew's controlling locomotive with an alerter.

FRA estimates that there are 73 legacy operations on Class III railroads. Legacy operations will be required to notify FRA of the operation and ensure that they adopt and comply with operating rules for the one-person operation and equip the one-person train crew's controlling locomotive with an alerter. Over the 10-year analysis, FRA estimates an additional 84 Class III railroads will be impacted by this final rule; this includes 50 railroads that would be required to notify FRA and 34 that would require special approval from FRA. The following table shows the estimated number of new one person operations per year on Class III railroads.

Year	Class III railroads, notification	Class III railroads, special approval
1	11	7
2	11	7
3	5	4
4	5	4
5	3	2
6	3	2
7	3	2
8	3	2
9	3	2
10	3	2
Total	50	34

Some of those railroads may be some of the same railroads already operating a legacy one-person operation. If a railroad is beginning a new operation that does not fall under the parameters of the legacy operation, it will be required to notify FRA or apply for special approval, depending on the commodities transported. All new operations will need to adopt and comply with operating rules for one-person train crew operations and equip a one-person train crew's controlling locomotive with an alerter.

5. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The final rule requires Class III railroads to notify FRA of current one-person train crew operations. Those operations must have operating rules relevant to one-person train crews and equip one-person locomotives with alerters. Class III railroads that commence one-person train crew operations that transport hazardous materials of the types or quantities specified in § 218.123(c) must apply for special approval and conduct a risk assessment. Class III railroads commencing one-person train crew operations not hauling the types or quantities specified in § 218.123(c) will need to notify FRA of the operation but will not need to apply for special approval. Those railroads will also need to comply with the requirements for operating rules and alerters in locomotives of one-person train crews.

FRA estimates 73 one-person train crew operations currently exist across the Class III railroad industry. The following table shows the estimated number of new one-person operations over the 10-year analysis. These estimates are used throughout the analysis to estimate the impact to Class III railroads.

Railroads currently operating trains with one-person crews that do not have an alerter installed in the locomotive will need to install an alerter in a one-person train crew's controlling locomotive within two years of the effective date of the final rule.

Each alerter is estimated to cost $20,000 and each railroad would require, on average, 1.5 alerters for one-person train crew operations. The following table shows the cost to equip locomotives with alerters.

Class III railroads with legacy one-person train crew operations required to install alerters will have up to two years after the effective date of the final rule to install alerters. FRA estimates that the cost will be split over the first two years. The following table shows the 10-year estimated cost for legacy Class III one-person train crew operations to equip locomotives with alerters. The total estimated 10-year cost will be $2.2 million. The estimated annualized cost will be $301,607 (PV, 7%).

TOTAL 10-YEAR COST FOR ALERTERS, CLASS III RAILROADS WITH LEGACY OPERATIONS

Year	Total cost ($)	Present value 7% ($)	Present value 3% ($)
1	1,095,000	1,095,000	1,095,000
2	1,095,000	1,023,364	1,063,107
3	0	0	0
4	0	0	0
5	0	0	0
6	0	0	0
7	0	0	0
8	0	0	0
9	0	0	0

[335] *See* 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209).

TOTAL 10-YEAR COST FOR ALERTERS, CLASS III RAILROADS WITH LEGACY OPERATIONS—Continued

Year	Total cost ($)	Present value 7% ($)	Present value 3% ($)
10	0	0	0
Total	2,190,000	2,118,364	2,158,107
Annualized		301,607	252,996

The following table shows the cost for new one-person operations on Class III railroads to equip locomotives with alerters. The total estimated 10-year cost will be $2.5 million. The estimated annualized cost will be $296,791 (PV, 7%).

TOTAL 10-YEAR COST FOR ALERTERS, NEW CLASS III OPERATIONS

Year	Number of new one-person operations per year a	Number of alerters per operation b	Total cost per alerter ($) c	Total cost ($) d = a * b * c	Present value 7% ($)	Present value 3% ($)
1	18	1.5	20,000	540,000	540,000	540,000
2	18	1.5	20,000	540,000	504,673	524,272
3	9	1.5	20,000	270,000	235,828	254,501
4	9	1.5	20,000	270,000	220,400	247,088
5	5	1.5	20,000	150,000	114,434	133,273
6	5	1.5	20,000	150,000	106,948	129,391
7	5	1.5	20,000	150,000	99,951	125,623
8	5	1.5	20,000	150,000	93,412	121,964
9	5	1.5	20,000	150,000	87,301	118,411
10	5	1.5	20,000	150,000	81,590	114,963
Total				2,520,000	2,084,539	2,309,486
Annualized					296,791	270,742

The final rule requires each freight railroad with a legacy one-person train crew operation to adopt and comply with operating rules that establish regular and effective communication with a one-person train crew to ensure the safety of the train and that one-person train crewmember's safety. Each railroad will need approximately 12 hours to formalize these operating rules.

The following table shows the cost of formalizing operating rules for legacy Class III one-person train crew operations. This cost would be incurred only in year 1. Therefore, the total estimated 10-year cost will be $108,106. The estimated annualized cost will be $15,392 (PV, 7%).

COST OF FORMALIZING OPERATING RULES, LEGACY CLASS III OPERATIONS

Type of employee	Hours a	Hourly wage rate ($) b	Total cost per notification ($) c = a * b	Number of legacy operations d	Total annual cost across industry ($) e = c * d
Senior Managers	4	123.41	494		
Superintendents	4	123.41	494		
Train Masters	2	123.41	247		
Road Foreman	2	123.41	247		
Total	12		1,481	73	108,106

Class III railroads implementing one-person train crew operations will be required to adopt and comply with operating rules that establish regular and effective communication with a one-person train crew to ensure the safety of the train and that one-person train crewmember's safety. The following table shows the cost of formalizing operating rules for new Class III one-person train crew operations. It is estimated to take 12 hours per railroad for a total cost of $1,481 per railroad.

COST OF FORMALIZING OPERATING RULES, NEW CLASS III OPERATIONS

Type of employee	Hours	Hourly wage rate ($)	Total cost per railroad ($)
	a	b	c = a * b
Senior Managers	4	123.41	494
Superintendents	4	123.41	494
Train Masters	2	123.41	247
Road Foreman	2	123.41	247
Total	12		1,481

The following table shows the total 10-year costs for Class III railroads to adopt and comply with operating rules for communication and emergency situations specific to one-person train crew operations. The total estimated 10-year cost is $124,396. The annualized cost is $14,651 (PV, 7%).

TOTAL 10-YEAR COSTS OF OPERATING RULES, NEW CLASS III OPERATIONS

Year	Number of new one-person operations per year	Total cost per operation ($)	Total cost ($)	Present value 7% ($)	Present value 3% ($)
	a	b	c = a * b		
1	18	1,481	26,656	26,656	26,656
2	18	1,481	26,656	24,913	25,880
3	9	1,481	13,328	11,641	12,563
4	9	1,481	13,328	10,880	12,197
5	5	1,481	7,405	5,649	6,579
6	5	1,481	7,405	5,279	6,387
7	5	1,481	7,405	4,934	6,201
8	5	1,481	7,405	4,611	6,021
9	5	1,481	7,405	4,310	5,845
10	5	1,481	7,405	4,028	5,675
Total			124,396	102,901	114,005
Annualized				14,651	13,365

The final rule requires each freight railroad with a legacy one-person train crew operation to provide certain information about the operation in a written notification to FRA. It will take approximately 20 hours for each Class III railroad to prepare and make the notification to FRA of its one-person operations.

The following table shows the cost for legacy Class III railroad operations to make the notification to FRA. This cost would be incurred only in year 1. Therefore, the total estimated cost will be $180,177. The estimated annualized cost will be $25,653 (PV, 7%).

COST OF NOTIFICATION, LEGACY CLASS III OPERATIONS

Type of employee	Hours per notification	Hourly wage rate ($)	Total cost per notification ($)	Number of notifications	Total annual cost across industry ($)
	a	b	c = a * b	d	e = c * d
Senior Managers	7	123.41	864		
Superintendents	5	123.41	617		
Train Masters	4	123.41	494		
Road Foreman	4	123.41	494		
Total	20		2,468	73	180,177

The final rule requires each Class III freight railroad that plans to initiate a one-person train crew operation after the final rule's effective date that will not be transporting certain types or quantities of hazardous materials that have been determined to pose the highest risk in transportation to provide FRA with written notification of the operation before commencing the operation. The following table shows the cost for Class III railroads to notify FRA of new one-person operations. It is estimated to take 20 hours per railroad

to prepare and make the notification to FRA for a total cost of $2,468.

COST OF NOTIFICATION, NEW CLASS III RAILROAD OPERATIONS

Type of employee	Hours per notification a	Hourly wage rate ($) b	Total cost per notification ($) c = a * b
Senior Managers	7	123.41	864
Superintendents	5	123.41	617
Train Masters	4	123.41	494
Road Foreman	4	123.41	494
Total	20		2,468

The following table shows the total 10-year costs for Class III railroads to notify FRA when commencing new one-person train crew operations. This option could also be used by railroads that are continuing an operation that was established less than two years before the effective date of the final rule. Railroads hauling certain types and quantities of hazardous materials require special approval; hence, those operations are not included in this estimate. The estimates here are solely for operations that only require notification to FRA. The total estimated 10-year cost is $133,282. The annualized cost is $15,823 (PV, 7%).

TOTAL 10-YEAR COST OF NOTIFICATION, NEW CLASS III RAILROAD OPERATIONS

Year	Estimated notifications per year a	Total cost per notification ($) b	Total cost ($) c = a * b	Present value 7% ($)	Present value 3% ($)
1	12	2,468	29,618	29,618	29,618
2	12	2,468	29,618	27,681	28,756
3	6	2,468	14,809	12,935	13,959
4	6	2,468	14,809	12,089	13,552
5	3	2,468	7,405	5,649	6,579
6	3	2,468	7,405	5,279	6,387
7	3	2,468	7,405	4,934	6,201
8	3	2,468	7,405	4,611	6,021
9	3	2,468	7,405	4,310	5,845
10	3	2,468	7,405	4,028	5,675
Total			133,282	111,133	122,593
Annualized				15,823	14,372

The final rule requires Class III freight railroads that haul certain types or quantities of hazardous materials that have been determined to pose the highest risk in transportation that want to initiate a new operation with a one-person train crew or continue an operation that was established less than two years before the effective date of the final rule to petition FRA under a special approval procedure. As part of the special approval process, these railroads will be required to conduct a risk assessment. The risk assessment must include a description of the final operation, a hazard analysis, and discussion of the tasks and functions of the one crewmember and equipment.

ASLRRA and holding companies will likely create a model or template program that can be used by Class III railroads; therefore, the burden for each Class III railroad is estimated to be six hours per one-person train crew operation. The estimated cost per railroad is $665 to apply for special approval and submit a risk assessment.

COST OF SPECIAL APPROVAL AND RISK ASSESSMENT, CLASS III RAILROADS

	Hourly wage rate ($) (a)	Number of hours per railroad (b)	Total cost per railroad ($) (c) = (a) * (b)
Chief Safety Officer	123.41	4	494
Administrative Assistant	85.93	2	172
Total per Railroad		6	665

The following table shows the total 10-year costs for Class III railroads to apply for special approval and conduct a risk assessment. Only railroads hauling certain types and quantities of hazardous materials require special approval, including a risk assessment. The total estimated 10-year cost is $22,627. The annualized cost is $2,661 (PV, 7%).

TOTAL 10-YEAR COST FOR SPECIAL APPROVAL AND RISK ASSESSMENT, CLASS III RAILROADS

Year	Number of risk assessments per year a	Total cost per risk assessment ($) b	Total costs ($) c = a * b	Present value 7% ($)	Present value 3% ($)
1	7	665	4,658	4,658	4,658
2	7	665	4,658	4,354	4,523
3	4	665	2,662	2,325	2,509
4	4	665	2,662	2,173	2,436
5	2	665	1,331	1,015	1,183
6	2	665	1,331	949	1,148
7	2	665	1,331	887	1,115
8	2	665	1,331	829	1,082
9	2	665	1,331	775	1,051
10	2	665	1,331	724	1,020
Total			22,627	18,689	20,725
Annualized				2,661	2,430

Each railroad that receives special approval to use an operation with a one-person train crew must prepare an annual report, which will be a formal review and analysis each calendar year, of the one-person train crew operation. The annual report, which will include a railroad's findings and conclusions from its review, shall be submitted no later than March 31 of the following year. The following table shows the annual labor cost per railroad to complete each report. It is estimated to require approximately 8 hours of labor per railroad for a total cost of $687 per year.

COST OF ANNUAL REPORT, PER RAILROAD

Type of employee	Hours per railroad a	Hourly wage rate ($) b	Total annual cost per railroad ($) c = a * b
Professional and Administrative	8	85.93	687

The following table shows the total 10-year costs for Class III railroads to complete the annual report. The total estimated 10-year cost is $156,737. The annualized cost is $15,471 (PV, 7%).

TOTAL 10-YEAR COSTS OF ANNUAL REPORT, CLASS III RAILROADS

Year	Number of reports per year a	Cost per report ($) b	Total cost ($) c = a * b	Present value 7% ($)	Present value 3% ($)
1	0	687	0	0	0
2	14	687	9,624	8,995	9,344
3	18	687	12,374	10,808	11,664
4	22	687	15,124	12,346	13,840
5	24	687	16,499	12,587	14,659
6	26	687	17,874	12,744	15,418
7	28	687	19,248	12,826	16,120
8	30	687	20,623	12,843	16,769
9	32	687	21,998	12,803	17,366
10	34	687	23,373	12,713	17,914
Total			156,737	108,664	133,093
Annualized				15,471	15,603

The following table shows the annualized costs for all provisions of the final rule. The total annualized cost for all Class III railroads is $687,852 (PV, 7%).

ANNUALIZED COSTS FOR CLASS III RAILROADS' ONE-PERSON OPERATIONS

Cost category	Annualized cost, 7 percent ($)
Alerters, Legacy Operations	301,607
Alerters, New Operations	296,791
Operating Rules, Legacy Operations	15,392
Operating Rules, New Operations	14,651
Notification to FRA, Legacy Operations	25,653
Notification to FRA, New Operations	15,823
Special Approval and Risk Assessment	2,661
Annual Report	15,471
Total Annualized Cost for All Class III Railroads	688,050

The industry trade organization representing small railroads, ASLRRA, reports the average freight revenue per Class III railroad is $4.75 million.[336] The following table summarizes the average annual cost and revenue for Class III railroads.

ANNUAL CLASS III RAILROADS' COST AND REVENUE

Total costs for all Class III railroads, annualized 7 percent ($)	Number of Class III railroads	Average annual cost per Class III railroad ($)	Average Class III revenue ($)	Average annual cost as percent of revenue
a	b	c = a ÷ b	d	e = c ÷ d
688,050	157	4,382	4,750,000	0.09%

The estimated average annual cost for a Class III railroad that is operating one-person train crews will be $4,382. This represents a small percentage (0.1%) of the average annual revenue for a Class III railroad.

6. A Description of the Steps the Agency Has Taken To Minimize the Economic Impact on Small Entities

This final rule allows Class III freight railroads to continue operating with one-person train crews for operations established for at least two years before the effective date of the final rule as long as these railroads notify FRA, install alerters, and adopt and comply with operating rules specific for one-person train crews according to the implementation schedule.

In response to comments on the NPRM, FRA has simplified the risk assessment and reduced the number of operations to which the special approval requirement will apply. Railroads commencing one-person train crew operations with certain types and quantities of hazardous materials will be required to petition FRA for special approval and conduct a risk assessment. Class III railroads commencing one-person operations without certain types and quantities of hazardous materials will not need to petition FRA for special approval or complete a risk assessment. Those new one-person train crew operations will require notification to FRA, installation of alerters, and adoption and compliance with operating rules specific for one-person crews. The notification requirement provides flexibility for Class III railroads not hauling certain types and quantities of hazardous materials.

Based on comments requesting more time to comply with any new minimum requirements to allow for proper planning, operational changes, or hiring and training of additional crewmembers, FRA is extending compliance dates for Class III railroads for certain exceptions that cannot be used by a Class I railroad, and therefore Class III railroads are provided greater flexibility in those circumstances such as when a Class III railroad's legacy one-person train crew freight operation has been established for at least two years before the effective date of the final rule or the Class III railroad decides to initiate a new one-person train crew operation that is not transporting hazardous materials of the types or quantities specified in § 218.123(c).

The final rule reflects relief from the proposed prohibition on the transportation of some hazardous materials with a one-person train crew set forth in the NPRM to provide for these legacy operations and new operations subject to conditions to ensure safety.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.[337] The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

[336] American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures, p. 10 (2017 pamphlet).*

[337] 44 U.S.C. 3501 *et seq.*

CFR section	Respondent universe [338]	Total annual responses (A)	Average time per response (B)	Total annual burden (C = A * B)	Total cost equivalent in U.S. dollar (D = C * wage rates) [339]
218.123—General crew size staffing requirements—Each railroad's adoption or revision of rules and practices with the requirement of this subpart G (New requirement).	784 railroads	47 adopted rules and practices (27 legacy operations + 3 Class I new operations + 17 Class II and III new operations).	120 hours (96 + 12 + 12) [340].	816.00 hours (288 + 204 + 324).	$70,118.88
—(d)(2) Location of crewmember(s) that is not operating the train when the train is moving—Direct communication between train crew members (New requirement).	Direct communications between train crewmembers during train operations are a usual and customary practice. Consequently, there is no burden associated with this requirement.				
218.125(c)—Specific passenger and tourist train operation exceptions to crew size safety requirements—Passenger railroads' emergency preparedness plan approved under 49 CFR 239.201 (New requirement).	The estimated paperwork burden for emergency preparedness plans is already included under OMB Control Number 2130–0545. Consequently, there is no additional burden associated with this requirement.				
—(d)(3) Federal Transit Administration (FTA) and designated State Safety Oversight (SSO) Agency approved Public Transportation Agency Safety Plan in accordance with 49 CFR parts 673 and 674 (New requirement).	The estimated paperwork burden for approved FTA and SSO Public Transportation Agency Safety Plans is included under OMB Control Number 2132–0558. Consequently, there is no additional burden associated with this requirement.				
—(e) Existing passenger train operations one-person train crew with an approved emergency preparedness plan (New requirement).	The estimated paperwork burden for emergency preparedness plans is already included under OMB Control Number 2130–0545. Consequently, there is no additional burden associated with this requirement.				
218.129(a)–(b)(11)—Conditional exceptions based on compliance dates for legacy freight train operations, class II and III freight railroad train operations, work train operations, helper service train operations, and lite locomotive train operations staffed with a one-person train crew—Written notice requirements shall be submitted by email to FRA (New requirement).	Class II and III railroads ...	35 notices (25 legacy operations + 10 Class II and III new operations).	40 hours (20 + 20).	700 hours	$86,387
—(b)(12) Copy of any railroad rule or practice that applies to the one-person train crew operation (New requirement).	The estimated paperwork burden for this requirement is included above under § 218.129(a)–(b)(11).				
—(b)(13)–(14) Accident and incident data or any other information describing protections in lieu of a second train crewmember (New requirement).	The estimated paperwork burden for this requirement is included above under § 218.129(b)(1)–(11).				
—(c) Additional requirements—Adopt and comply with an operating rule that complies with the requirements of ensuring rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations with the one-person train crew operation (New requirement).	The estimated paperwork burden of this requirement is included above under § 218.123.				
218.131(a)(2)(i)—Special approval petition requirements for train operations staffed with a one-person train crew RR with established one-person train crew written notice to continue operations (New requirement).	The estimated paperwork burden for the special approval petition is included with the risk assessment burden under § 218.133.				
—(a)(2)(iii) RRs with established one-person train crew to submit special approval petition.	The estimated paperwork burden for the special approval petition is included with the risk assessment burden under § 218.133.				
—(a)(3)—Each freight railroad seeking to either initiate or continue a one-person train crew must receive FRA's special approval for the operation under this subpart and comply with section § 218.129(c) (New requirement).	The estimated paperwork burden for special approval petition is included with the risk assessment burden under § 218.133.				
—(a)(4)—Passenger railroads seeking to initiate train operations with a one-person train crew must receive FRA's special approval for the operation (New requirement).	The estimated paperwork burden for special approval petition is included with the risk assessment burden under § 218.133.				
—(b)(1)–(15) Petition for a train operation staffed with a one-person train crew that is not permitted under §§ 218.125 through 218.129 must contain sufficient information for FRA to determine whether approving the operation described in the petition is as safe or safer than a two-person minimum train crew operation (New requirement).	The estimated paperwork burden for special approval petition is included with the risk assessment burden under § 218.133.				

CFR section	Respondent universe [338]	Total annual responses (A)	Average time per response (B)	Total annual burden (C = A * B)	Total cost equivalent in U.S. dollar (D = C * wage rates) [339]
218.133(a) Risk assessment content and procedures—General (*Note:* The paperwork burden for special approval petition is included here. The paperwork burden for revised risk assessment is included under § 218.135(e)) (New requirement).	784 railroads	10.33 risk assessments (3.33 Class I/Passenger operations + 7 Class II and III operations).	586; 580 hours + 6 hours.	1,973.40 Hours (1,931.40 + 42).	171,148.42
—(b) Alternative standard—Petition for approval to use alternative methodologies (New requirement).	The estimated paperwork burden for this requirement is included under § 218.133 and § 218.135.				
218.135(c)—Special approval procedure—Comments sent to FRA on petitions for special approval (New requirement).	Railroad industry and interested parties.	10 petition comments	1 hour	10 hours	859.30
—(d)(1) Disposition of petitions—Hearings on petitions (New requirement).	The requirements of this provision are exempted from the Paperwork Reduction Act under 5 CFR 1320.4(a)(2) because this activity is conducted during an administrative action affecting specific individuals or entities.				
—(d)(2) Special approval procedure—Disposition of petitions—Petitioners' response to FRA's special conditions to the approval of petition (New requirement).	The estimated paperwork burden for this requirement is included under § 218.135.				
—(e) Modifications of operations already approved; revised risk assessments submitted to FRA—All operations (New requirement).	9 railroads	1.33 revised risk assessments.	70 hours	93.10 hours	8,000.08
218.137—Annual railroad responsibilities after receipt of special approval—Annual review and analysis of FRA-approved train operation(s) (New requirement).	784 railroads	23 annual reports	8 hours	184 hours	15,811.12
—(d) Railroads' review of FRA response to their annual report (New requirement).	The paperwork burden for this requirement is included above under § 218.137.				
Total [341]	784 railroads	127 responses	N/A	3,777 hours	352,324.81

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Ms. Arlette Mussington, Information Collection Clearance Officer, at email: *arlette.mussington@dot.gov* or telephone: (571) 609–1285; or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908.

OMB is required to decide concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The current OMB control number for this rule is 2130–0636.

D. Federalism Implications

Executive Order 13132, ''Federalism,'' [342] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, to the extent practicable and permitted by law, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this

[338] For purposes of this table, there are 784 railroads, excluding tourist railroads not on the general system, in the respondent universe. Additionally, FRA is currently aware of nine one-person train crew operations.

[339] Throughout the tables in this document, the dollar equivalent cost is derived from the 2022 Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

[340] This estimate also includes the burden associated with adopting and complying with operating rules under § 218.123(c).

[341] Totals may not add due to rounding.

[342] 64 FR 43255 (Aug. 10, 1999).

final rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the rule is not required.

Further, federalism concerns have been considered in the development of this rule both internally and through consultation within FRA's Federal advisory committee, RSAC, which has as permanent voting members two organizations representing State and local interests: the American Association of State Highway and Transportation Officials (AASHTO) and the Association of State Rail Safety Managers (ASRSM).[343] FRA has also received input from State and local officials through the notice and comment public participation process and left it to State or local officials to decide whether to participate in the publicly held hearing, either in person or virtually. In the discussion of comments and FRA's conclusions, FRA responded to the comments on preemption and further expanded upon the agency's explanation of the perceived preemption implications of the final rule.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979 [344] prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This final rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Assessment

FRA has evaluated this final rule consistent with the National Environmental Policy Act [345] (NEPA), the Council of Environmental Quality's NEPA implementing regulations,[346] and FRA's NEPA implementing regulations [347] and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.[348] Specifically, FRA has determined that this rule is categorically excluded from detailed environmental review.[349]

The main purpose of this rulemaking is to ensure that each train is adequately staffed and has appropriate safeguards in place for safe train operations under all operating conditions. This final rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[350] FRA has concluded that no such unusual circumstances exist with respect to this regulation and the final rule meets the requirements for categorical exclusion.[351]

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[352] FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).[353] Further, FRA reviewed this rule and found it consistent with Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad.''

G. Environmental Justice

Executive Order 14096, ''Revitalizing Our Nation's Commitment to Environmental Justice for All,'' which expands on Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' requires DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionate and adverse human health or environmental effects, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns. DOT Order 5610.2C (''U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'') instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order 5610.2C in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations.[354] FRA has evaluated this final rule under Executive Orders 14096 and 12898 and DOT Order 5610.2C and has determined it will not cause disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,[355] each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act [356] further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the

[343] In 1996, FRA established RSAC to develop new regulatory standards, through a collaborative process, with all segments of the rail community working together to fashion mutually satisfactory solutions on safety regulatory issues. Information about RSAC, including background, tasks, and documents, is available at *https://rsac.fra.dot.gov/about.* Although this rulemaking was not tasked to RSAC, FRA provided a regulatory activity update on the rulemaking at two RSAC meetings before the NPRM was published and at one meeting during the rulemaking's comment period and encouraged interested members of RSAC to submit comments or participate at the public hearing.

[344] 19 U.S.C. Ch. 13.

[345] 42 U.S.C. 4321 *et seq.*

[346] 40 CFR parts 1500 through 1508.

[347] 23 CFR part 771.

[348] 40 CFR 1508.4.

[349] *See* 23 CFR 771.116(c)(15) (categorically excluding ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise'').

[350] 23 CFR 771.116(b).

[351] 23 CFR 771.116(c)(15).

[352] *See* 54 U.S.C. 306108.

[353] *See* DOT Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

[354] Executive Order 14096 is not currently referenced in DOT Order 5610.2C.

[355] Public Law 104–4, 2 U.S.C. 1531.

[356] 2 U.S.C. 1532.

expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of $100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' [357] FRA evaluated this final rule under Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

List of Subjects in 49 CFR Part 218

Occupational safety and health, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 218—[AMENDED]

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20131, 20138, 20144, 20168; 28 U.S.C. 2461 note; and 49 CFR 1.89.

Subpart A—General

■ 2. Amend § 218.5 by adding definitions in alphabetical order for ''Associate Administrator for Safety'', ''FTA'', ''Hazard'', ''Helper service train operation'', ''Lite locomotive train operation'', ''Locomotive, MU'', ''Mishap'', ''One-person train crew'', ''One-person train crewmember'', ''Risk'', ''Risk assessment'', ''Switching service or switching operation'', ''Tourist train operation'', ''Tourist train operation that is not part of the general railroad system of transportation'', ''Trailing tons'', ''Train'' and ''Unit freight train'' to read as follows:

§ 218.5 Definitions.

* * * * *

Associate Administrator for Safety means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate as designated in writing.

* * * * *

FTA means the Federal Transit Administration.

* * * * *

Hazard means an existing or potential condition that could lead to an unplanned event or series of events that can result in an accident or incident (*i.e.,* mishap); injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

Helper service train operation means the train is a locomotive or group of locomotives being used to assist another train that has incurred mechanical failure or lacks sufficient tractive force necessary to traverse a particular section of track due to train tonnage and the grade of the terrain.

* * * * *

Lite locomotive train operation means the train is a locomotive or a consist of locomotives not attached to any piece of equipment or attached only to a caboose.

* * * * *

Locomotive, MU means rail rolling equipment self-propelled by any power source and intended to provide transportation for members of the general public.

* * * * *

Mishap means an event or condition or series of events or conditions resulting in an accident or incident.

One-person train crew means either:

(1) One railroad employee is assigned a train as a train crew, and that single assigned person is performing the duties of both the locomotive engineer and the conductor; or

(2) More than one railroad employee is assigned a train as a train crew, but only a single assigned person, who is performing the duty of the locomotive engineer, is traveling on the train when the train is moving, and the remainder of the train crew, that would include the conductor if the locomotive engineer is not the assigned conductor, is assigned to intermittently assist the train's movements.

One-person train crewmember means, in the context of a one-person train crew operation, the single assigned person who is performing the duty of the locomotive engineer and is traveling in the operating cab of the controlling locomotive when the train is moving.

Risk means the combination of the expected probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

Risk assessment means the process of determining, either quantitatively or qualitatively, or both, the level of risk associated with train operations with a one-person train crew, compared to operations with a two-person (or larger) crew, under all operating conditions.

* * * * *

Switching service or switching operation means classifying rail cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

Tourist train operation means a tourist, scenic, historic, or excursion train operation.

Tourist train operation that is not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion train operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

Trailing tons means the sum of the gross weights—expressed in tons–of the cars and the locomotives in a train that are not providing propelling power to the train.

Train means one or more locomotives coupled with or without cars, except during switching service.

* * * * *

Unit freight train means a freight train composed of cars carrying a single type of commodity.

* * * * *

Subpart F—Handling Equipment, Switches, and Fixed Derails

§ 218.93 [Amended]

■ 3. Amend § 218.93 by removing the definitions for ''Associate Administrator for Safety'' and ''Lite locomotive consist''.

* * * * *

■ 4. Amend § 218.99 by revising paragraph (a)(2), the introductory text of paragraph (b)(3), and paragraph (e)(2) to read as follows:

§ 218.99 Shoving or pushing movements.

(a) * * *

(2) The following requirements for shoving or pushing movements do not apply to rolling equipment intentionally

[357] 66 FR 28355 (May 22, 2001).

shoved or pushed to permit the rolling equipment to roll without power attached, *i.e.,* free rolling equipment, during switching service activities known as kicking, humping, or dropping cars.

(b) * * *

(3) *Point protection.* When rolling equipment or a lite locomotive train with two or more locomotives that is operated from a single control stand is shoved or pushed, point protection shall be provided by a crewmember or other qualified employee by:

* * * * *

(e) * * *

(2) Shoving or pushing operations with a helper service train operation or distributed power locomotives assisting a train when the train is being operated from the leading end in the direction of movement;

* * * * *

■ 5. Add subpart G to read as follows:

Subpart G—Train Crew Size Safety Requirements

Subpart G—Train Crew Size Safety Requirements

§ 218.121 Purpose and scope.

(a) The purpose of this subpart is to ensure that each train is adequately staffed and has appropriate safeguards in place for safe train operations under all operating conditions.

(b) This subpart prescribes minimum requirements for the size of different train crews depending on the type of operation and operating conditions. The minimum crew size requirements reflect the safety risks posed to railroad employees, the public, and the environment. This subpart also prescribes minimum requirements for the location of a second crewmember on a moving train and promotes safe and effective teamwork. Each railroad may prescribe additional or more stringent requirements in its operating rules, timetables, timetable special instructions, and other instructions.

(c) The requirements in this subpart are not applicable to a train operation controlled by a remote control operator as defined in § 229.5 of this chapter.

§ 218.123 General train crew size safety requirements.

(a) *General.* Each railroad shall comply with the requirements of this subpart and may adopt its own rules or practices consistent with the requirements of this subpart. If any person, as defined in § 218.9 (including, but not limited to, each railroad, railroad officer, supervisor, and employee), violates any requirement of a railroad rule or practice implementing the requirements of this subpart, that person shall be considered to have violated the requirements of this subpart.

(b) *Two-person train crew size safety requirement.* Except as provided in this subpart, each train shall be assigned a minimum of two crewmembers.

(c) *Hazardous materials.* For the purposes of this paragraph (c), a tank car containing residue of a hazardous material as defined in § 171.8 of this title is not considered a loaded car. The exceptions in §§ 218.125 and 218.127 are not applicable, and the exceptions in § 218.129 apply as specified therein, when any train is:

(1) A high-hazard flammable train (HHFT) as defined in § 171.8 of this title;

(2) Transporting twenty (20) or more loaded tank cars or loaded intermodal portable tanks of any one or any combination of the hazardous materials identified in § 232.103(n)(6)(i)(B) of this chapter; or

(3) Transporting one or more car loads of rail-security sensitive materials (RSSM) as defined in § 1580.3 of this title.

(d) *Location of crewmember(s) when the train is moving.* A train crewmember that is not operating the train may be located anywhere outside of the operating cab of the controlling locomotive when the train is moving if:

(1) The train crewmember is on the train, except when the train crewmember cannot perform the duties assigned without temporarily disembarking from the train;

(2) The train crewmember and a locomotive engineer in the cab of the controlling locomotive can directly communicate with each other;

(3) The train crewmember can continue to perform the duties assigned; and

(4) The location does not violate any Federal railroad safety law, regulation, or order.

§ 218.125 Specific passenger and tourist train operation exceptions to crew size safety requirements.

The requirements in this subpart are not applicable to the following passenger and tourist train operations that are operated with a one-person train crew:

(a) The train is a tourist train operation that is not part of the general railroad system of transportation;

(b) A tourist train operation that is part of the general system of transportation or a passenger operation in which:

(1) The locomotive engineer is moving cars empty of passengers; and

(2) Passengers will not board the train's cars until the crew conducts a safety briefing on the safe operation and use of the train's exterior side doors, in accordance with § 238.135 of this chapter;

(c) A tourist train operation that is part of the general system of transportation or a passenger operation involving a single self-propelled car or married-pair unit, *e.g.,* an MU locomotive operation, where the locomotive engineer has direct access to the passenger seating compartment and (for passenger railroads subject to part 239 of this chapter) the passenger railroad's emergency preparedness plan for this operation is approved under § 239.201 of this chapter;

(d) A rapid transit operation in an urban area, *i.e.,* an urban rapid transit system that is connected with the general railroad system of transportation under the following conditions:

(1) The operation is temporally separated from any conventional railroad operations;

(2) There is an FTA-approved and designated State Safety Oversight (SSO) Agency that is qualified to provide safety oversight; and

(3) The operator has an FTA/SSO-approved Public Transportation Agency Safety Plan in accordance with parts 673 and 674 of this title; or

(e) Each passenger train operation with a one-person train crew established before June 10, 2024 with an approved passenger train emergency preparedness plan under part 239 of this chapter for the operation.

§ 218.127 Specific freight train exceptions to crew size safety requirements.

The requirements in this subpart are not applicable to the following freight

train operations that are operated with a one-person train crew:

(a) *Mine load out, plant dumping, or similar operation exception.* A unit freight train:

(1) Being loaded or unloaded in an assembly line manner;

(2) Located on a track that is temporarily made inaccessible from the general railroad system of transportation;

(3) Moving at a maximum authorized speed of 10 miles per hour or less;

(4) Not requiring the one-person train crewmember to operate a hand-operated switch, fill out paperwork, or call signal indications during the loading or unloading process; and

(5) If the operation is overseen by another person, typically in a tower or on the ground, requiring that person to have the capability of communicating with the one-person train crewmember operating the train.

(b) [Reserved]

§ 218.129 Conditional exceptions based on compliance dates for Class II and III legacy freight train operations, certain other Class II and III freight railroad train operations, work train operations, helper service train operations, and lite locomotive train operations staffed with a one-person train crew.

(a) *Application of this section.* A railroad is not required to comply with the requirements in this section for each one-person train crew operation subject to an exception covered by § 218.125 or § 218.127. The following train operations may be operated with a one-person train crew subject to the requirements in this subpart:

(1) Each Class II or III railroad's legacy one-person train crew freight operation that has been established for at least two years before June 10, 2024, may continue to operate with a one-person train crew, including continuing to transport hazardous materials of the types or quantities specified in § 218.123(c), if:

(i) No later than September 6, 2024, the railroad:

(A) Provides FRA with written notice, as specified by the requirements in paragraph (b) of this section; and

(B) Complies with the additional requirements in paragraphs (c)(1) and (2) of this section; and

(ii) No later than June 9, 2026, the railroad complies with the additional requirements in paragraph (c)(3) of this section.

(2) Each Class II or III freight railroad seeking to initiate a train operation staffed with a one-person train crew not transporting hazardous materials of the types or quantities specified in § 218.123(c) shall:

(i) Provide FRA with written notice, as specified by the requirements in paragraph (b) of this section before commencing the operation; and

(ii) Comply with the additional requirements in paragraph (c) of this section.

(3) Each railroad seeking to continue or initiate work train operations with a one-person train crew, including operations involving a work train traveling to or from a work site, shall:

(i) Limit this type of non-revenue service train that is used for the administration and upkeep service of the railroad so that it does not exceed 4,000 trailing tons;

(ii) No later than September 6, 2024, comply with the additional requirements in paragraphs (c)(1) and (2) of this section; and

(iii) No later than June 9, 2026, comply with the additional requirements in paragraph (c)(3) of this section.

(4) Each railroad seeking to continue or initiate helper service train operations with a one-person train crew, including operations involving a helper service train traveling to or from a work site, shall:

(i) No later than September 6, 2024, comply with the additional requirements in paragraphs (c)(1) and (2) of this section; and

(ii) No later than June 9, 2026, comply with the additional requirements in paragraph (c)(3) of this section.

(5) Each railroad seeking to continue or initiate a lite locomotive train operation staffed with a one-person train crew, excluding an MU locomotive operation, shall:

(i) No later than September 6, 2024, comply with the additional requirements in paragraphs (c)(1) and (2) of this section; and

(ii) No later than June 9, 2026, comply with the additional requirements in paragraph (c)(3) of this section.

(b) *Written notice requirements.* The written notice shall be submitted by email to *FRAOPCERTPROG@dot.gov* and, at a minimum, include the following:

(1) The name, title, address, telephone number, and email address of the primary person(s) to be contacted regarding the written notice and the operation;

(2) The location of the operation, with as much specificity as can be provided, as to the characteristics of the geographic area through which the trains will operate (*e.g.,* population density and proximity to environmentally sensitive areas), the terrain over which the trains will be operated, industries or communities served, and track segments, territories, divisions, or subdivisions operated over. For each legacy one-person train crew freight operation under paragraph (a)(1) of this section, the written notice must include business records or other written documents supporting that the legacy operation was established for at least two years before June 10, 2024. To establish a legacy one-person train crew freight operation, the railroad must provide evidence that the operation occurred at regular intervals under a set of defined procedures or conditions;

(3) The class(es) of track operated over, the method of operation, a list of the signal and train control systems, devices, and appliances installed and in operation, and a list of all active and passive highway-rail grade crossings, including crossing numbers;

(4) The locations of any track where the average grade of any segment of the track operated over is 1 percent or more over 3 continuous miles or 2 percent or more over 2 continuous miles;

(5) The maximum authorized speed of the operation;

(6) The approximate average number of miles and hours a one-person train crew will operate in a single tour of duty;

(7) The number and frequency of the trains involved, and the maximum number of cars and tonnage set for the operation, if any;

(8) Whether the one-person train crew operation is permitted to haul hazardous materials of any quantity and type, and the approximate percentage of carload traffic in the one-person train crew operation that is hazardous materials;

(9) Whether any limitations are placed on a person operating as a one-person train crew. Such limitations may include, but are not limited to, a maximum number of miles or hours during a single tour of duty, or limitations placed on a person in coordination with a fatigue mitigation plan;

(10) Information regarding other operations traveling on the same track as the one-person train operation or that travel on an adjacent track. Such information shall include, but is not limited to, the volume of traffic and the types of opposing moves (*e.g.,* passenger trains or freight trains hauling hazardous materials);

(11) A detailed description of any technology that is used to perform tasks typically performed by a second crewmember, or that prevents or mitigates the consequences of accidents or incidents;

(12) A copy of any railroad rule or practice that applies to the one-person

train crew operation, but does not apply to train crew operations with two or more crewmembers;

(13) For each railroad seeking to continue a legacy freight train operation staffed with a one-person train crew as permitted by paragraph (a)(1) of this section, five (5) years of accident and incident data, as required by part 225 of this chapter, for the operation identified or, for operations established less than five (5) years before June 10, 2024, accident and incident data for the operation from the date the operation was established; and

(14) Any other information describing protections provided in lieu of a second train crewmember, or relevant data or analysis, or both, that the railroad can provide about its one-person train crew operation and how that operation is as safe or safer than a two-person minimum train crew operation.

(c) *Additional requirements.* Each railroad with an applicable one-person train crew operation shall:

(1) Adopt and comply with an operating rule that satisfies the requirements of this paragraph to ensure rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations with the one-person train crew operation.

(i) At a minimum, the operating rule shall address the following types of situations:

(A) An accidental or non-accidental release of any hazardous material;

(B) An accident/incident regardless of whether it is required to be reported to FRA under part 225 of this chapter;

(C) A request from an emergency responder to unblock a highway-rail grade crossing in response to a potentially life-threatening situation;

(D) A train or on-track equipment derailment;

(E) A disabled train; and

(F) An illness, injury, or other incapacitation of the one-person train crewmember.

(ii) At a minimum, the operating rule shall:

(A) Describe the role and responsibilities of the one-person train crewmember and any other railroad employees, including supervisors, with responsibility to address a situation described in paragraph (c)(1)(i) of this section; and

(B) Describe any logistics and the railroad's expected response time(s).

(2) Adopt and comply with an operating rule that satisfies the requirements of this paragraph to ensure radio or wireless communications with a one-person train crew is as safe or safer than a two-person train crew for train operations and crewmember safety. At a minimum, the operating rule shall require that:

(i) The one-person train crew have a working radio or working wireless communications on the controlling locomotive appropriate for railroad communications as defined in § 220.5 of this chapter, even if not otherwise required in § 220.9 of this chapter;

(ii) The train dispatcher or operator must confirm with a one-person train crewmember that the train is stopped before conveying a mandatory directive by radio transmission as required in § 220.61 of this chapter;

(iii) A one-person train crewmember must contact a railroad employee, typically a dispatcher, a supervisor or manager, or an intermittently assisting crewmember, whenever it can be anticipated that radio or wireless communication could be lost, *e.g.,* before the train enters a tunnel, unless technology or a different protocol is established to monitor the train's real-time progress; and

(iv) Procedures that establish when search-and-rescue operations shall be initiated if all radio or wireless communication is lost with a one-person train crewmember.

(3) Adopt and comply with an operating rule that satisfies the requirements of this paragraph to ensure:

(i) A one-person train crew's controlling locomotive is equipped with a functioning alerter that is operating as intended as defined in § 229.5 of this chapter. For each railroad that limits the one-person train crew's operation to a maximum authorized speed of 25 miles per hour and is not required to have an alerter on the locomotive that is equipped per the requirements in § 229.140 of this chapter, any functioning alerter that is operating as intended will be acceptable if it has a manual reset and will result in a penalty brake application that brings the locomotive or train to a stop if not properly acknowledged; and

(ii) That a one-person train crewmember must test that alerter to confirm it is functioning before departure from each initial terminal, or prior to being coupled as the lead locomotive in a locomotive consist.

§ 218.131 Special approval petition requirements for train operations staffed with a one-person train crew.

(a) *General.* With the exception of operations permitted under §§ 218.125 through 218.129, and as provided in paragraph (a)(2) of this section:

(1) No railroad may operate a train with a one-person train crew unless it receives special approval for the operation under this subpart.

(2) For a railroad that has established a one-person train crew operation before June 10, 2024, the railroad may continue the operation in accordance with this section pending FRA's decision on the railroad's special approval petition if:

(i) The railroad submits a written notice by email to *FRAOPCERTPROG@dot.gov* no later than June 24, 2024 that, at a minimum, provides a summary of the operation and the name, title, address, telephone number, and email address of the primary person(s) to be contacted regarding the written notice and the operation;

(ii) The railroad, in coordination with FRA, eliminates, mitigates, or otherwise addresses any safety hazards related to the one-person train crew operation FRA finds in reviewing the railroad's special approval petition; and

(iii) The railroad submits its special approval petition, as specified by the requirements in paragraph (b) of this section, no later than August 7, 2024.

(3) Each freight railroad seeking to either initiate or continue a train operation with a one-person train crew must receive FRA's special approval for the operation under this subpart and shall comply with the requirements in § 218.129(c).

(4) Each passenger railroad seeking to initiate a train operation with a one-person train crew must receive FRA's special approval for the operation under this subpart and have either:

(i) An approved passenger train emergency preparedness plan under part 239 of this chapter for the operation; or

(ii) An approved waiver from the passenger train emergency preparedness plan requirements as permitted under part 211 of this chapter. A passenger railroad may petition FRA for both a waiver under part 211 and special approval for a train operation staffed with a one-person train crew in the same filing.

(b) *Petition for a train operation staffed with a one-person train crew.* Each petition for a train operation with a one-person train crew that is not permitted under §§ 218.125 through 218.129 must contain sufficient information for FRA to determine whether approving the operation described in the petition is as safe or safer than a two-person minimum train crew operation. At a minimum, a petition must include:

(1) The name, title, address, telephone number, and email address of the primary person to be contacted

regarding review of the special approval petition;

(2) The location of the operation, with as much specificity as can be provided, as to the characteristics of the geographic area through which the trains will operate (*e.g.* population density and proximity to environmentally sensitive areas), the terrain over which the trains will be operated, industries or communities served, and track segments, territories, divisions, or subdivisions operated over;

(3) The class(es) of track to be operated over, the method of operation, a list of the signal and train control systems, devices, and appliances installed and in operation, and a list of all active and passive highway-rail grade crossings, including crossing numbers;

(4) The locations of any track where the average grade of any segment of the track operated over is 1 percent or more over 3 continuous miles or 2 percent or more over 2 continuous miles;

(5) The maximum authorized speed of the operation;

(6) The approximate average number of miles and hours a person is projected to operate as a train crewmember in a one-person train crew operation;

(7) The maximum number of cars and tonnage proposed for the operation, if any;

(8) Whether the railroad is seeking approval to transport hazardous materials of the types or quantities specified in § 218.123(c) or whether the railroad is seeking approval to transport other hazardous materials (as defined by § 171.8 of this title) of any quantity and type;

(9) Whether any limitations will be placed on a person operating as a one-person train crew. Such limitations may include, but are not limited to, a maximum number of miles or hours during a single tour of duty, or limitations placed on a person in coordination with a fatigue mitigation plan;

(10) Information regarding other operations that may travel on the same track as, or an adjacent track to, the train operation staffed with a one-person train crew. Such information shall include, but is not limited to, the volume of traffic and the types of opposing moves (*e.g.,* passenger or freight trains hauling hazardous materials);

(11) A detailed description of any technology that will be used to perform or support tasks typically performed by a second crewmember, or that will prevent or significantly mitigate the consequences of accidents or incidents;

(12) A copy of any railroad rule or practice that will apply to the proposed train operation(s) with a one-person train crew, but does not apply to train crew operations with two or more crewmembers;

(13) A copy of a railroad operating rule that will apply to the proposed train operation(s) with a one-person train crew, and which complies with the requirements of § 218.129(c)(1), to ensure rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations with the one-person train crew operation. A passenger train operation with an approved emergency preparedness plan under part 239 of this chapter satisfies the requirement in this paragraph (b)(13);

(14) Five (5) years of accident and incident data, as required by part 225 of this chapter, for the operation identified in paragraph (b)(2) of this section, when operating with two or more crewmembers, or, for operations established less than five (5) years before June 10, 2024, accident and incident data for the operation from the date the operation was established;

(15) A risk assessment of the proposed operation that meets the requirements of § 218.133;

(16) Any other information describing protections provided in lieu of a second train crewmember, or other relevant data or analysis.

(c) *Additional information.* FRA may request any additional information, beyond what is provided in the petition, that it deems necessary.

§ 218.133 Risk assessment content and procedures.

(a) *General.* A risk assessment submitted under this subpart must meet the following requirements:

(1) Contain a list and descriptions of all functions, duties, and tasks associated with the proposed operation to be performed by the one-person train crewmember, other railroad employee(s), or equipment, including, at a minimum, any function performed:

(i) To prepare a train for operation (including, but not limited to, pre-departure inspections, obtaining track bulletins, orders, or manifests, managing the train consist, including train makeup, obtaining and ensuring the accuracy of the train consist, arming and testing the end-of-train device, and performing brake tests);

(ii) To operate a train (including, but not limited to, operating and controlling the train, interacting with non-crewmembers such as the dispatcher or roadway workers, and responding to emergencies or unexpected events); and

(iii) To ensure safety once a train has stopped moving (*e.g.,* including, but not limited to, securing the train).

(2) Describe the allocation of all functions, duties, and tasks to the one-person train crewmember, other railroad employee(s), or equipment.

(3) Contain a risk-based hazard analysis for the proposed train operation's functions, duties, and tasks, that shall:

(i) Identify any new hazards, changes to existing hazards and/or changes to the risk of an existing hazard associated with the proposed train operation, as compared to a two-person minimum train crew operation, taking account of all aspects of the railroad's system, including, at a minimum, infrastructure, equipment, technology, work schedules, mode of operation, operating rules and practices, training and other areas impacting railroad safety;

(ii) Calculate and/or update each risk, quantitatively or qualitatively, or both, by assessing each new hazard, change to an existing hazard and/or change to the risk of a hazard, in terms of the severity and likelihood of a mishap;

(iii) Recalculate each risk mitigated in accordance with § 218.131(b)(15), quantitatively or qualitatively, or both, by assessing each new hazard, change to an existing hazard and/or change to the risk of a hazard and the level of mitigation (elimination or reduction), in terms of the severity and likelihood of a mishap; and

(iv) Provide a statement with supporting evidence that the one-person train crew operation with a fully implemented mitigation plan is as safe or safer than a two-person minimum train crew operation.

(4) Contain a mitigation plan that documents the design and implementation timeline of the sustained mitigation strategies to eliminate or reduce the overall risk to a level such that the one-person train crew operation is as safe or safer than a two-person minimum train crew operation, considering, at a minimum, the following:

(i) The design of the system, equipment, and components, including equipment reliability and the necessary functions to be performed, in both a normal operation and in a degraded or failed state; and

(ii) The human factors associated with the processes and tasks to be performed, including the required skills and capabilities, the operating environment, and existing or potential impairments.

(b) *Alternative standard.* A railroad may petition the Associate

Administrator for Safety for approval to use alternative methodologies or procedures, or both, other than those required by paragraph (a) of this section to assess the risk associated with an operation proposed under this section. If, after providing public notice of the request for approval and an opportunity for public comment on the request, the Associate Administrator for Safety finds that any such petition demonstrates that the alternative proposed methodology or procedures, or both, will provide an accurate assessment of the risk associated with the operation, the Associate Administrator for Safety may approve the use of the proposed alternative(s).

§ 218.135 Special approval procedure.

(a) *Petition.* Each railroad submitting a petition under § 218.131 shall send the petition by email to *FRAOPCERTPROG@dot.gov.* FRA will make the petition publicly available at *https://www.regulations.gov.*

(b) ***Federal Register*** *notice.* FRA will publish a notice in the **Federal Register** concerning each petition under § 218.131.

(c) *Comment.* Not later than 60 days from the date of publication of the notice in the **Federal Register** under paragraph (b) of this section, any person may comment on the petition.

(1) Each comment shall provide all relevant information and data in support of the commenter's position.

(2) Each comment shall be submitted to FRA through *https://www.regulations.gov* to the docket identified in the **Federal Register** notice.

(d) *Disposition of petitions.* (1) If the Administrator finds it necessary or desirable, FRA will conduct a hearing on a petition in accordance with its rules of practice in part 211 of this chapter.

(2) A petition must not be implemented until approved. If FRA finds that the petition complies with the requirements of § 218.131 and that approving the petition is as safe or safer than a two-person minimum train crew operation, FRA will grant the petition, normally within 120 days of its receipt. If the petition is neither granted nor denied within 120 days, the petition remains pending for decision. FRA may attach special conditions to the approval of the petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause stated.

(3) If FRA finds that a petition does not comply with the requirements of this subpart or that approving the petition would not be as safe or safer than a two-person minimum train crew operation, FRA will deny the petition, normally within 120 days of its receipt.

(4) When FRA decides a petition, reopens consideration of a petition, or closes a reopened petition, FRA will send written notice of the decision to the petitioner and publish that decision in the docket.

(e) *Modifications.* (1) A railroad that intends to materially modify an operation subject to an FRA approval under this section shall submit a description of how it intends to modify the operation, along with either a new or an updated risk assessment accounting for the identified proposed modifications. The new or updated risk assessment must meet the requirements of § 218.133 and be submitted by email to *FRAOPCERTPROG@dot.gov* at least 60 days before the date proposed to implement any such modification. For the purposes of this paragraph (e), a material modification is a change:

(i) To a railroad's operations, infrastructure, locomotive control technology, or risk mitigation technology, that may affect the safety of the operation;

(ii) That would affect the assumptions underlying the risk assessment on which an FRA approval under this section is based; or

(iii) That would affect the assumptions underlying the risk assessment's risk calculations or mitigations on which an FRA approval under this section is based.

(2) When FRA decides on a material modification to a petition, FRA will send written notice of the decision to the petitioner and publish that decision in the same docket created for the petition in paragraph (a) of this section. FRA may reopen consideration of a petition based on a material modification, deny the material modification, or grant the material modification with or without special conditions to the approval. A material modification must not be implemented until approved. If the material modification submission is neither granted nor denied within 60 days, the petition remains pending for decision.

§ 218.137 Annual railroad responsibilities after receipt of special approval.

(a) Each railroad that receives special approval to use an operation with a one-person train crew under this subpart shall prepare an annual report, which will be a formal review and analysis each calendar year, of the one-person train crew operation. The annual report, which will include a railroad's findings and conclusions from its review, shall be submitted no later than March 31 of the following year to *FRAOPCERTPROG@dot.gov.* The requirements in paragraphs (b) and (c) of this section describe the components of a railroad's annual report.

(b) A railroad's annual report must include the safety data and information listed in paragraphs (b)(1) and (2) of this section for any one-person train crew operation that receives special approval under this subpart.

(1) The total number of:

(i) FRA-reportable accidents/incidents under part 225 of this chapter, including subtotals for accidents/incidents that occurred at a highway-rail grade crossing and those that did not occur at a highway-rail grade crossing, and subtotals by State and cause. If an accident/incident was FRA-reportable for more than one reason (*e.g.,* the accident/incident occurred at a highway-rail grade crossing and resulted in rail equipment damages higher than the current reporting threshold), the accident/incident shall only be listed once in the total calculation;

(ii) FRA-reportable employee fatalities;

(iii) FRA-reportable employee injuries;

(iv) Trespasser fatalities at a highway-rail grade crossing;

(v) Trespasser injuries at a highway-rail grade crossing;

(vi) Passenger fatalities at a highway-rail grade crossing;

(vii) Passenger injuries at a highway-rail grade crossing;

(viii) Instances where a railroad employee did not comply with a railroad rule or practice applicable to the one-person train crew operation receiving special approval under this subpart but not applicable to train crew operations with two or more crewmembers that travel on the train;

(ix) Instances where a one-person train crewmember had a locomotive engineer or conductor certification revoked for violation of an operating rule or practice that occurred when the person was operating a one-person train crew operation receiving special approval under this subpart. In addition to the total number of these instances, the railroad must report the subtotals for each type of certification revoked;

(x) Accountable rail equipment accidents/incidents under part 225 of this chapter;

(xi) Instances when the railroad was required to comply with an operating rule to ensure rail employees can take mitigation measures that provide a level of safety that is as safe or safer than a two-person train crew operation to address certain situations with the one-

person train crew operation under § 218.131(b)(13);

(xii) Instances when a dispatcher, operator, or other required employee unexpectedly lost communication with the one-person train crew operation receiving special approval under this subpart;

(xiii) Employee hours worked; and

(xiv) Train miles.

(2) For each instance counted in the totals reported in paragraphs (b)(1)(i) through (xii) of this section, a railroad's annual report must clearly identify each instance by date and location and provide a complete factual description of the event.

(c) The annual report must also include written confirmation that the risk assessment for operations receiving special approval under this subpart, including all calculations and assumptions, remains unchanged and that no technology changes have been implemented or new or additional hazards identified.

(1) If any risk assessment calculation or assumption changes for an operation receiving special approval under this subpart, a new or updated risk assessment meeting the requirements of § 218.133 must be prepared and submitted with the railroad's annual report. This annual reporting requirement does not negate the requirement to submit a new or updated risk assessment when making a material modification to an operation as required in § 218.135.

(2) Any new or updated risk assessment submitted in accordance with paragraph (c) of this section must include a written plan and schedule for implementing any mitigations required to address any newly identified hazards.

(d) FRA will review and respond to a railroad's annual report submission in accordance with paragraph (a) of this section by September 30 of the year it is submitted.

(1) FRA's response may include advice or recommendations; and

(2) For a one-person train crew operation receiving special approval under this subpart, FRA may reopen consideration of a petition under § 218.135 based on a finding that a railroad's annual report submission suggests that the petition does not comply with the requirements of this subpart or that the operation is no longer as safe or safer than a two-person train crew operation.

■ 6. Add appendix E to part 218 to read as follows:

Appendix E to Part 218—Recommended Procedures for Conducting Risk Assessments

A railroad petitioning to operate with a one-person train crew in accordance with § 218.133 must prepare a risk-based hazard analysis that quantitatively and/or qualitatively demonstrates that the proposed operation using a one-person train crew will be as safe or safer than an operation using a two-person train crew under normal operation and in a degraded or failed state. This appendix provides one approach that may be used by a railroad to prepare a risk-based hazard analysis and compare the risks to determine if a proposed one-person train crew operation will be as safe or safer than a two-person minimum train crew operation, when all mitigations are in place. A railroad is not restricted to this approach and may use another formal safety methodology that fulfills the requirements of § 218.133.

Quantitative Risk-Based Hazard Analysis

(a) Identify new hazards, changes to existing hazards or changes to the risk of existing hazards of the one-person train crew operation, as compared to a two-person minimum train crew operation, as provided in § 218.133(a)(3)(i).

(b) Calculate and/or update each risk of the one-person train crew operation, as compared to a two-person minimum train crew operation, by assessing each new hazard, change to an existing hazard and/or change to the risk of an existing hazard, in terms of the severity and likelihood of potential events using the following framework:

(1) The assessment of the severity is measured as the worst-credible mishap resulting from the hazard and categorized in accordance with Table 1 of this paragraph (b)(1):

TABLE 1 TO PARAGRAPH (b)(1)

Category	Severity ranking (1 being the most severe)	Definition
SEVERITY CATEGORIES		
Catastrophic	1	Results in one or more of the following: fatality, irreversible significant environmental damage, or significant monetary loss. Accidents/incidents that must be reported to FRA telephonically under § 225.9 of this chapter are considered catastrophic.
Critical	2	Results in one or more of the following: significant injury (as defined in § 225.5 of this chapter), reversible significant environmental damage, or reportable monetary loss. Accidents/incidents that are not telephonically reported under § 225.9 of this chapter but are still FRA-reportable under § 225.19 of this chapter, are considered critical.
Marginal	3	Results in one or more of the following: minor injuries (i.e., injuries that are not significant as defined in § 225.5 of this chapter), reversible non-significant environmental damage, or monetary loss. Mishaps that are not FRA-reportable accidents/incidents but are considered accountable rail equipment accidents/incidents as defined in § 225.5 of this chapter, are considered marginal.
Negligible	4	Results in one or more of the following: no injuries, no environmental damage, or equipment or railroad structure damage(s) that do not require repair.

(2) The assessment of probability of occurrence as defined in Table 2 of this paragraph (b)(2):

TABLE 2 TO PARAGRAPH (b)(2)

Description	Level	Qualitative characterization of probability	Quantitative characterization of probability [1]
PROBABILITY LEVELS			
FREQUENT	A	Likely to occur frequently	Greater than once every 1,000 operating hours.
PROBABLE	B	Likely to occur several times	Between once every 1,000 hours and once every 100,000 hours.
OCCASIONAL	C	Likely to occur once, but not several times	Between once every 100,000 hours and once every 10,000,000 hours.
REMOTE	D	Unlikely but possible to occur	Between once every 10,000,000 hours and once every 1,000,000,000 hours.
IMPROBABLE	E	So unlikely that it can be assumed the occurrence may not be experienced.	Less than once every 1,000,000,000 hours.

[1] Probability of a hazard occurring per 1,000 operating hours.

(c) Applying the sustained mitigation strategies designed and implemented in accordance with § 218.133(a)(4), recalculate the risk using the framework documented in paragraph (b) of this appendix.

(d) Prepare a risk matrix in the format of Table 3 of this paragraph (d) that classifies the risks calculated in paragraph (c) of this appendix in terms of severity and likelihood of each new hazard, change to an existing hazard, or change to the risk of an existing hazard as follows:

TABLE 3 TO PARAGRAPH (d)

Probability	Severity			
	(1) Catastrophic	(2) Critical	(3) Marginal	(4) Negligible
Risk Matrix				
(A) FREQUENT	1A	2A	3A	4A
(B) PROBABLE	1B	2B	3B	
(C) OCCASIONAL	1C	2C	3C	4C
(D) REMOTE	1D	2D	4D	
(E) IMPROBABLE	1E	3E	4E	

(e) Prepare a risk report of the train operation staffed with a one-person train crew, as compared to a two-person minimum train crew operation, documenting the basis for acceptability of all new hazards, changes to existing hazards and/or changes to the risk of existing hazards identified in the matrix required by paragraph (d) of this appendix. The risk report should categorize the risk of each new hazard, change to existing hazard and/or change to the risk of an existing hazard as follows:

(1) *Unacceptable.* Categories 1A, 1B, 1C, 1D, 2A, 2B, 2C, 3A, 3B, and 4A are unacceptable. A railroad should not file a petition for special approval with a new hazard, change to existing hazard and/or change to the risk of an existing hazard in this category as FRA will not approve an operation with a partially mitigated or unmitigated hazard that is categorized as unacceptable;

(2) *Acceptable under specific conditions.* Categories 1E, 2D, 3C, 3D, 4B, and 4C are acceptable under specific conditions. A railroad's risk report should describe why the railroad finds the conditions acceptable. A new hazard, change to existing hazard and/or change to the risk of an existing hazard will be acceptable under specific conditions if FRA finds that the one-person operation is as safe or safer than a two or more-person operation; and

(3) *Acceptable.* Categories 2E, 3E, 4D, and 4E are acceptable. FRA will not deny a petition for special approval solely on the basis an appropriately categorized acceptable new hazard, change to existing hazard and/or change to the risk of an existing hazard if the one-person operation is as safe or safer than a two-person minimum operation.

(f) Provide a statement with supporting evidence, that the one-person operation with a fully implemented mitigation plan, is as safe or safer than a two-person minimum operation.

Amitabha Bose,

Administrator.

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CFR PARTS AFFECTED DURING APRIL

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

125.....22934

26 CFR

54.....23338

Proposed Rules:

1.....22971, 24396
54.....22971
301.....22971

27 CFR

9.....24378

29 CFR

102.....24713
1903.....22558
2550.....23090
2590.....23338

Proposed Rules:

2510.....22971
2520.....22971
2550.....22971
4000.....22971
4007.....22971
4010.....22971
4041.....22971
4041A.....22971
4043.....22971
4050.....22971
4062.....22971
4063.....22971
4204.....22971
4211.....22971
4219.....22971
4231.....22971
4245.....22971
4262.....22971
4281.....22971

30 CFR

723.....23908
724.....23908
733.....24714
842.....24714
845.....23908
846.....23908

33 CFR

1.....22942
5.....22942
104.....22942
117.....24381, 24383
151.....22942
155.....22942
161.....22942
164.....22942
165.....22637, 22942, 23512, 23911, 23914, 24385, 24387
174.....22942
175.....22942

Proposed Rules:

101.....24751
117.....24396
160.....24751
165.....22645

34 CFR

Ch. VI.....23514

36 CFR

242.....22949

37 CFR

Proposed Rules:

1.....23226
41.....23226
42.....23226

38 CFR

17.....23518

Proposed Rules:

76.....24752

40 CFR

52.....22337, 22963, 23521, 23523, 23526, 23916, 24389
60.....24090
63.....23294, 23840, 24090
75.....23526
78.....23526
97.....23526

Proposed Rules:

52.....22363, 22648
131.....24758
721.....24398
751.....22972

41 CFR

Proposed Rules:

102–118.....24775

42 CFR

431.....22780
435.....22780
436.....22780
447.....22780
457.....22780
600.....22780

Proposed Rules:

412.....23146
413.....23424
418.....23778
488.....23424

44 CFR

Proposed Rules:

61.....24415

45 CFR

144.....23338
146.....23338
148.....23338

46 CFR

3.....22942
15.....22942
70.....22942
117.....22942
118.....22942
119.....22942
147.....22942

47 CFR

2.....23527

48 CFR

Ch. 1.....22604, 22605
40.....22604
519.....22638
538.....22966
552.....22638, 22966

49 CFR

23.....24898
26.....24898
218.....25052

50 CFR

17.....22522, 23919
100.....22949
300.....22966
402.....24268
424.....24300
648.....23941
660.....22342, 22352
665.....23949
679.....23949, 24736

Proposed Rules:

17.....22649, 23534, 24415
635.....24416
679.....23535

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 March 26, 2024

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