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

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DEPARTMENT OF HOMELAND SECURITY

6 CFR Chapter I

49 CFR Chapter XII

Recommendation Regarding Emergency Action in Aviation

AGENCY: Office of Strategy, Policy, and Plans, Department of Homeland Security (DHS).

ACTION: Notice.

SUMMARY: DHS is publishing official notice that the Transportation Security Oversight Board (TSOB) has recommended to the Transportation Security Administration (TSA) that a cybersecurity emergency exists that warrants TSA's determination to expedite the implementation of critical cyber mitigation measures through the exercise of emergency regulatory authority.

DATES: The TSOB provided this recommendation on April 20, 2023.

FOR FURTHER INFORMATION CONTACT: Thomas McDermott, Acting Assistant Secretary for Cyber, Infrastructure, Risk and Resilience Policy at 202–834–5803 or *thomas.mcdermott@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On March 7, 2023, TSA issued Joint Emergency Amendment (EA) 23–01 [1] to certain aviation stakeholders to address the significant cybersecurity threat to the aviation system, evidenced by recent incidents and intelligence. Joint EA 23–01 is part of TSA's and the Government's, more broadly, ongoing plans and efforts to rapidly increase the cybersecurity resilience of critical transportation infrastructure. TSA determined that proceeding with immediate action was warranted under the circumstances to ensure timely implementation of critical mitigation measures by higher risk regulated entities. Joint EA 23–01 amends the security programs [2] for covered owners/operators to require performance-based cybersecurity measures intended to prevent the disruption and degradation of their critical systems. Joint EA 23–01's requirements are similar to performance-based requirements that TSA has already issued to critical pipeline and rail entities.[3]

II. TSOB Recommendation

The TSOB was created by the Aviation and Transportation Security Act (ATSA) to provide guidance regarding transportation security-related matters. TSOB members include the Secretaries of Homeland Security, Transportation, Defense, and the Treasury, the Attorney General, the Director of National Intelligence, or their designees, and one member appointed by the President to represent the National Security Council. The Secretary of Homeland Security serves in the role of TSOB chairman, which has been further delegated within the Department to the Deputy Secretary.[4] As part of its statutory duties, the TSOB is authorized to review plans for transportation security and make recommendations to the TSA Administrator regarding those plans.[5]

Following the issuance of Joint EA 23–01, TSA sought the TSOB's discretionary review under 49 U.S.C. 115(c)(5) and (6) regarding whether a cybersecurity emergency exists that warrants TSA's determination to expedite the implementation of critical cyber mitigation measures through the exercise of its emergency regulatory authority, under which the EA was issued.[6] TSA sought the TSOB's perspective and guidance given the TSOB's role in ratifying TSA's emergency cybersecurity actions applicable in the pipeline and rail sectors as well as the context of the coordinated efforts across the Government to counter the continuing and serious cyber threats.

Under the authority of 49 U.S.C. 115(c)(5) and (6), the chairman of the TSOB convened a meeting of the Board to review TSA's transportation security plans for cybersecurity in the aviation sector and provide a recommendation regarding whether a cybersecurity emergency exists that warrants TSA's determination to expedite the implementation of critical cyber mitigation measures by exercising its emergency regulatory authority to issue Joint EA 23–01. Representatives from the White House Office of the National Cyber Director, the Department of Defense's United States Transportation Command, DHS's Cybersecurity and Infrastructure Security Agency, and the Federal Aviation Administration, as well as the Deputy National Security Advisor for Cyber and Emerging Technology at NSC were also invited to participate in the meeting given their relevant expertise.

During the meeting, the TSOB was briefed on the cyber threat to the aviation transportation system and on TSA's effort to mitigate the threat through Joint EA 23–01. The briefing included presentation of sensitive security information and classified information. Following the briefing, the TSOB discussed the circumstances precipitating TSA's issuance of Joint EA 23–01, including relevant events and intelligence presented during the briefing. At the meeting's conclusion, the TSOB recommended that a cybersecurity emergency exists that warrants TSA's determination to expedite the implementation of a critical cyber mitigation measures through the exercise of its emergency regulatory authority to issue Joint EA 23–01. This action reinforced the need for TSA to proceed with critical

[1] EA 23–01 is Sensitive Security Information (SSI). *See* 49 CFR 1520.5(b).

[2] Under TSA regulations, airport and aircraft operators must adopt and carry out a security program approved by TSA that provides for the safety and security of persons and property engaged in air transportation. 49 CFR part 1542, subpart B; 49 CFR part 1544, subpart B.

[3] The TSOB reviewed and ratified TSA's security directives mandating performance-based cybersecurity requirements in the pipeline and rail sectors. 88 FR 36919; 88 FR 36921.

[4] 49 U.S.C. 115(a), (b)(1), (b)(2), and (c).

[5] 49 U.S.C. 115(c)(5)–(6).

[6] Certain TSA actions issued pursuant to statutory emergency authority, like the security directives mandating cybersecurity measures in the pipeline and rail sectors, must be ratified by the TSOB to remain effective beyond 90 days. 49 U.S.C. 114(*l*)(2)(B). Unlike those directives, EA 23–01 was issued under separate TSA regulatory authority, 49 CFR 1542.105(d); 49 CFR 1544.105(d), which does not require TSOB ratification.

mitigation measures on an emergency basis.

Kristie Canegallo,

Senior Official Performing the Duties of the Deputy Secretary & Chairman of the Transportation Security Oversight Board.

[FR Doc. 2024–08394 Filed 4–18–24; 8:45 am]

BILLING CODE 9110–9M–P

DEPARTMENT OF HOMELAND SECURITY

6 CFR Chapter I

49 CFR Chapter XII

Ratification of Security Directives

AGENCY: Office of Strategy, Policy, and Plans, Department of Homeland Security (DHS).

ACTION: Notice of ratification of security directives.

SUMMARY: The Department of Homeland Security (DHS) is publishing official notice that the Transportation Security Oversight Board (TSOB) ratified Transportation Security Administration (TSA) Security Directive Pipeline–2021–01C and Security Directive Pipeline–2021–02D, applicable to owners and operators of critical hazardous liquid and natural gas pipeline infrastructure (owner/operators). Security Directive Pipeline–2021–01C, issued on May 22, 2023, extended the requirements of the Security Directive Pipeline-2021–01 series for an additional year. Security Directive Pipeline–2021–02D, issued on July 26, 2023, extended the requirements of the Security Directive Pipeline–2021–02 series for an additional year and amended them to strengthen their effectiveness and address emerging cyber threats.

DATES: The TSOB ratified Security Directive Pipeline–2021–01C on June 21, 2023, and Security Directive Pipeline–2021–02D on August 24, 2023.

FOR FURTHER INFORMATION CONTACT: Thomas McDermott, Deputy Assistant Secretary for Cyber, Infrastructure, Risk and Resilience Policy, at 202–834–5803 or *thomas.mcdermott@hq.dhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Cybersecurity Threat

The cyber threat to the country's critical infrastructure has only increased in the time since TSA issued its initial cybersecurity-related security directive (Security Directive Pipeline–2021–01) in response to the Colonial Pipeline incident. Cyber threats to surface transportation systems, including pipelines, continue to proliferate, as both nation-states and criminal cyber groups continue to target critical infrastructure in order to cause operational disruption and economic harm.[1] Cyber incidents, particularly ransomware attacks, are likely to increase in the near and long term, due in part to vulnerabilities identified by threat actors in U.S. networks.[2] Particularly in light of the ongoing Russia-Ukraine conflict,[3] these threats remain elevated and pose a risk to the national and economic security of the United States.

B. Security Directive Pipeline–2021–01C

On May 27, 2021, TSA issued Security Directive Pipeline–2021–01, which was the first of two security directives issued by TSA to enhance the cybersecurity of critical pipeline systems in response to the Colonial Pipeline attack on May 7, 2021. Security Directive Pipeline–2021–01, and the subsequent amendments in this series, required covered owner/operators to: (1) report cybersecurity incidents to CISA; (2) appoint a cybersecurity coordinator to be available 24/7 to coordinate with TSA and CISA; and (3) conduct a self-assessment of cybersecurity practices, identify any gaps, and develop a plan and timeline for remediation.[4] This first security directive went into effect on May 28, 2021, was ratified by the TSOB on July 3, 2021, and was set to expire on May 28, 2022.[5]

On December 2, 2021, TSA issued Security Directive Pipeline–2021–01A, amending Security Directive Pipeline–2021–01, to update the definition of cybersecurity incident covered by the directive's reporting requirement and align it with the definition applicable to the other modes.[6] The TSOB ratified Security Directive Pipeline–2021–01A on December 29, 2021.[7] Security Directive Pipeline–2021–01, as amended by Security Directive Pipeline–2021–01A, was set to expire May 28, 2022. On May 27, 2022, TSA issued Security Directive Pipeline–2021–01B to extend the requirements of Security Directive Pipeline–2021–01A for an additional year.[8] Security Directive Pipeline–2021–01B became effective May 29, 2022 and was set to expire on May 29, 2023. The TSOB ratified Security Directive Pipeline–2021–01B on June 24, 2021.[9]

In light of the continuing threat, TSA determined that the measures required by the Security Directive Pipeline–2021–01, as amended and extended by Security Directive Pipeline–2021–01A and Security Directive Pipeline–2021–01B, remain necessary to protect the Nation's critical pipeline infrastructure beyond Security Directive Pipeline–2021–01B's expiration date of May 29, 2023. On May 22, 2023, TSA issued Security Directive Pipeline–2021–01C to extend the requirements of Security Directive Pipeline–2021–01B for an additional year. Security Directive Pipeline–2021–01C became effective May 29, 2023 and expires on May 29, 2024. Security Directive Pipeline–2021–01C contains no substantive changes from Security Directive Pipeline–2021–01B. Security Directive Pipeline–2021–01C is available online in TSA's Surface Transportation Cybersecurity Toolkit.[10]

C. Security Directive Pipeline–2021–02D

On July 19, 2021, TSA issued Security Directive Pipeline-2021–02, the second security directive TSA issued in response to the attack on Colonial Pipeline. This directive required owner/operators to implement additional

[1] Annual Threat Assessment of the U.S. Intelligence Community, Office of the Director of National Intelligence, 10, 15 (February 2023); Press Release 23–530, *Justice Department Announces Court-Authorized Disruption of Snake Malware Network Controlled by Russia's Federal Security Service,* Department of Justice, issued on May 9, 2023, available at *https://www.justice.gov/opa/pr/justice-department-announces-court-authorized-disruption-snake-malware-network-controlled;* Joint Cybersecurity Advisory (AA23–144a), *People's Republic of China State-Sponsored Cyber Actor Living off the Land to Evade Detection,* released by CISA on May 24, 2023.

[2] Alert (AA22–040A), *2021 Trends Show Increased Globalized Threat of Ransomware,* released by CISA on February 10, 2022 (as revised).

[3] Joint Cybersecurity Alert—Alert (AA22–011A), *Understanding and Mitigating Russian State-Sponsored Cyber Threats to U.S. Critical Infrastructure,* released by CISA, the Federal Bureau of Investigation (FBI), and the National Security Agency (NSA) on January 11, 2022 (as revised); Joint Cybersecurity Alert—Alert (AA22–110A), *Russian State-Sponsored and Criminal Cyber Threats to Critical Infrastructure,* released cybersecurity authorities of the United States, Australia, Canada, New Zealand, and the United Kingdom on April 20, 2022 (as revised).

[4] Security Directive Pipeline–2021–01: Enhancing Pipeline Cybersecurity.

[5] 86 FR 38209.

[6] During TSA's development of cybersecurity actions applicable to other transportation modes, TSA made a determination to modify the definition of cybersecurity incident it had used in the first security directive following industry input and consultation with DHS cybersecurity experts.

[7] 87 FR 31093.

[8] 88 FR 36919. Security Directive Pipeline–2021–01B also extended the deadline by which cybersecurity incidents must be reported to CISA from 12 hours to 24 hours after an incident is identified. This change aligned the reporting timeline for critical pipeline entities to mirror the reporting requirements applicable to other surface transportation entities and aviation entities.

[9] *Id.*

[10] TSA Surface Transportation Cybersecurity Toolkit, *available at https://www.tsa.gov/for-industry/surface-transportation-cybersecurity-toolkit.*

cybersecurity measures to prevent disruption and degradation to their infrastructure in response to the ongoing threat, including a number of specific, prescribed mitigation measures.[11] On December 17, 2021, TSA issued Security Directive Pipeline–2021–02B, revising Security Directive Pipeline–2021–02 to provide additional flexibility to owner/operators in complying with certain requirements. The TSOB ratified Security Directive Pipeline–2021–02B on January 13, 2022.[12]

On July 21, 2022, TSA issued Security Directive Pipeline–2021–02C, transitioning the requirements of the previous versions in the series to be more performance-based and less prescriptive. The performance-based approach enhanced security by mandating that critical security outcomes are achieved while allowing owner/operators to choose the most appropriate security measures for their specific systems and operations. The directive became effective on July 27, 2022, and was set to expire on July 27, 2023. The TSOB ratified Security Directive Pipeline–2021–02C on August 19, 2022.[13]

Security Directive Pipeline–2021–02C identified critical security outcomes that covered parties must achieve. To ensure that these outcomes are met, the directive requires owner/operators to:

- Establish and implement a TSA-approved Cybersecurity Implementation Plan (CIP) that describes the specific cybersecurity measures employed and the schedule for achieving the security outcomes identified;
- Develop and maintain an up-to-date Cybersecurity Incident Response Plan (CIRP) to reduce the risk of operational disruption, or the risk of other significant impacts on necessary capacity, as defined in the directive, should the Information and/or Operational Technology systems of a gas or liquid pipeline be affected by a cybersecurity incident; and
- Establish a Cybersecurity Assessment Program (CAP) and submit an annual plan that describes how the owner/operator will proactively and regularly assess the effectiveness of cybersecurity measures and identify and resolve device, network, and/or system vulnerabilities.

In light of the continuing threat, TSA issued Security Directive Pipeline–2021–02D on July 26, 2023, extending the requirements of Security Directive Pipeline–2021–02C for an additional year. The directive became effective on July 27, 2023, and expires on July 27, 2024.

In addition to extending the performance-based requirements, Security Directive Pipeline–2021–02D includes several revisions intended to strengthen the effectiveness of the directive's requirements and allow greater ability to respond to changing threats. Security Directive Pipeline–2021–02D modified the requirements related to CIRPS and CAPS to provide greater clarity and strengthen their effectiveness and to ensure the provisions related to defining Critical Cyber Systems allow flexibility to respond to emerging and evolving threats. The security directive also contains several other clarifications and refinements of the existing requirements. The revisions contained in the directive were made following engagement with covered entities and in consultation with federal partners. Security Directive Pipeline–2021–02D is available online in TSA's Surface Transportation Cybersecurity Toolkit.[14]

II. TSOB Ratification

TSA has broad statutory responsibility and authority to safeguard the nation's transportation system.[15] The TSOB—a body consisting of the Secretary of Homeland Security, the Secretary of Transportation, the Attorney General, the Secretary of Defense, the Secretary of the Treasury, the Director of National Intelligence, or their designees, and a representative of the National Security Council—reviews certain TSA regulations and security directives as consistent with law.[16] TSA issued Security Directive Pipeline–2021–01C and Security Directive Pipeline–2021–02D under 49 U.S.C. 114(*l*)(2)(A), which authorizes TSA to issue emergency regulations or security directives without providing notice or the opportunity for public comment where ''the Administrator determines that a regulation or security directive must be issued immediately in order to protect transportation security.'' Security directives issued pursuant to the procedures in 49 U.S.C. 114(*l*)(2) ''shall remain effective for a period not to exceed 90 days unless ratified or disapproved by the Board or rescinded by the Administrator.'' [17]

Following the issuance of Security Directive Pipeline–2021–01C on May 22, 2023, the chair of the TSOB convened the board to review the directive. In reviewing Security Directive Pipeline–2021–01C, the TSOB reviewed the required measures extended by the directive and the continuing need for TSA to maintain these requirements pursuant to its emergency authority under 49 U.S.C. 114(*l*)(2) to prevent the disruption and degradation of the country's critical transportation infrastructure. The TSOB also considered whether to authorize TSA to extend the security directive beyond its current expiration date of May 29, 2024, subject to certain conditions, should the TSA Administrator believe such an extension is necessary to address the evolving threat that may continue beyond the original expiration date.

Following its review, the TSOB ratified Security Directive Pipeline–2021–01C on June 21, 2023. The TSOB also authorized TSA to extend the security directive beyond its current expiration date, should the TSA Administrator determine such an extension is necessary to address the evolving threat that may continue beyond the original expiration date. Such an extension is subject to the following conditions: (1) there are no changes to the security directive other than an extended expiration date; (2) the TSA Administrator makes an affirmative determination that conditions warrant the extension of the directive's requirements; and (3) the TSA Administrator documents such a determination and notifies the TSOB.

After TSA issued Security Directive Pipeline–2021–02D on July 26, 2023, the chair of the TSOB again convened the board to review that directive. In reviewing Security Directive Pipeline–2021–02D, the TSOB reviewed the amended required measures extended by the directive as well as the continuing need for TSA to maintain these requirements pursuant to its emergency authority under 49 U.S.C. 114(*l*)(2) to protect critical transportation infrastructure. Again, the TSOB also considered whether to authorize TSA to extend Security Directive Pipeline–2021–02D beyond its current expiration date of July 27, 2024, subject to the same conditions, should the TSA Administrator believe such an extension is necessary to address the threat.

[11] Security Directive Pipeline–2021–02 became effective on July 26, 2021, and was ratified by the TSOB on August 17, 2021.

[12] *See* 87 FR 31093 (May 23, 2022).

[13] *See* 88 FR 36919 (May 6, 2023). The TSOB also authorized TSA to extend Security Directive Pipeline–2021–02C beyond its expiration date of July 27, 2023, subject to certain conditions, including that such an extension would make no changes other than the extension of the expiration date.

[14] TSA Surface Transportation Cybersecurity Toolkit, *available at https://www.tsa.gov/for-industry/surface-transportation-cybersecurity-toolkit.*

[15] *See, e.g.,* 49 U.S.C. 114(d), (f), (*l*), (m).

[16] *See, e.g.,* 49 U.S.C. 115; 49 U.S.C. 114(*l*)(2)(B).

[17] 49 U.S.C. 114(*l*)(2)(B).

The TSOB ratified Security Directive Pipeline–2021–02D on August 24, 2023. The TSOB also authorized TSA to extend the security directive beyond its current expiration date, should the TSA Administrator determine such an extension is necessary to address the evolving threat that may continue beyond the original expiration date. Such an extension is subject to the following conditions: (1) there are no changes to the security directive other than an extended expiration date; (2) the TSA Administrator makes an affirmative determination that conditions warrant the extension of the directive's requirements; and (3) the TSA Administrator documents such a determination and notifies the TSOB.

Kristie Canegallo,

Senior Official Performing the Duties of the Deputy Secretary & Chairman of the Transportation Security Oversight Board.

[FR Doc. 2024–08393 Filed 4–18–24; 8:45 am]

BILLING CODE 9110–9M–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 220, 225, and 292

[FNS–2023–0029]

RIN 0584–AE96

Establishing the Summer EBT Program and Rural Non-Congregate Option in the Summer Meal Programs

AGENCY: Food and Nutrition Service (FNS), Department of Agriculture (USDA).

ACTION: Interim final rule, extension of comment period.

SUMMARY: The USDA Food and Nutrition Service is extending for 120 days the public comment period on the interim final rule, ''Establishing the Summer EBT Program and Rural Non-Congregate Option in the Summer Meal Programs'', which published in the **Federal Register** on December 29, 2023. This action extends the public comment period from April 29, 2024, to August 27, 2024, to give the public additional time to prepare and submit comments.

DATES: The comment period of the interim final rule published December 29, 2023, at 88 FR 90230, is extended through August 27, 2024. To be assured of consideration, written comments on this interim final rule must be received on or before August 27, 2024.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this interim final rule. Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Send comments to Community Meals Policy Division, Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314.
- All written comments submitted in response to this interim final rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. USDA will make the written comments publicly available on the internet via *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: J. Kevin Maskornick, Division Director, Community Meals Policy Division, USDA Food and Nutrition Service, 1320 Braddock Place, Alexandria, VA 22314; telephone: 703–305–2537.

SUPPLEMENTARY INFORMATION: The Food and Nutrition Service is extending the public comment period on the interim final rule ''Establishing the Summer EBT Program and Rural Non-Congregate Option in the Summer Meal Programs'', which published on December 29, 2023, at 88 FR 90230. The Consolidated Appropriations Act, 2023 required the Secretary of Agriculture to make available an option to States to provide summer meals for non-congregate meal service in rural areas with no congregate meal service and to establish a permanent Summer Electronic Benefits Transfer for Children Program (Summer EBT) for the purpose of ensuring continued access to food when school is not in session for the summer. This interim final rule amends the Summer Food Service Program (SFSP) and the National School Lunch Program's Seamless Summer Option (SSO) regulations to codify the flexibility for rural program operators to provide non-congregate meal service in the SFSP and SSO, collectively referred to as the summer meal programs. This rule also establishes regulations and codifies the Summer EBT Program in the Code of Federal Regulations.

This action extends the public comment period to August 27, 2024, to provide additional time for the public, including State administering agencies, Territories, and Indian Tribal Organizations, as well as program participants and beneficiaries, and other stakeholders, to prepare and submit comments. Because the interim final rule became effective immediately upon publication, stakeholders are already taking active steps to implement its provisions. Extending the comment period ensures that these stakeholders are able to provide robust feedback on the entirety of the interim final rule's provisions, and that this feedback is reflective of their implementation experiences in advance of and during Summer 2024. Receipt of informed public input accounting for the first year of operations under the new Program rules will be vital when the Food and Nutrition Service considers future rulemaking to finalize the provisions of the interim final rule.

Cynthia Long,

Administrator, Food and Nutrition Service.

[FR Doc. 2024–08369 Filed 4–18–24; 8:45 am]

BILLING CODE 3410–30–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2023–0220]

RIN 3150–AL05

List of Approved Spent Fuel Storage Casks: FuelSolutions™ Spent Fuel Management System, Certificate of Compliance No. 1026, Renewal of Initial Certificate and Amendment Nos. 1 Through 4

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026. The renewal of the initial certificate of compliance and Amendment Nos. 1 through 4 for 40 years revises the certificate's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

DATES: This direct final rule is effective July 3, 2024, unless significant adverse comments are received by May 20, 2024. If the direct final rule is withdrawn as

a result of such comments, timely notice of the withdrawal will be published in the **Federal Register**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Comments received on this direct final rule will also be considered to be comments on a companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2023–0220, at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

You can read a plain language description of this direct final rule at *https://www.regulations.gov/docket/NRC-2023-0220.* For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: George Tartal, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–0016, email: *george.tartal@nrc.gov* and Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–1018, email: *yen-ju.chen@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0220 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0220. Address questions about NRC dockets to Dawn Forder, telephone: 301–415–3407, email: *Dawn.Forder@nrc.gov.* For technical questions contact the individuals 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, 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, Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC–2023–0220 in your comment submission. The NRC requests that you submit comments through the Federal rulemaking website at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

This direct final rule is limited to the changes contained in the Initial Certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026 and does not include other aspects of the FuelSolutions™ Spent Fuel Management System Cask System design. The NRC is using the ''direct final rule procedure'' to issue this amendment because it represents a limited and routine change to an existing certificate of compliance that is expected to be non-controversial. Adequate protection of public health and safety continues to be reasonably assured. The amendment to the rule will become effective on July 3, 2024. However, if the NRC receives any significant adverse comment on this direct final rule by May 20, 2024, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register** or as otherwise appropriate. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to

the rule, certificate of compliance, or technical specifications (TS).

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on January 16, 2001 (66 FR 3444), that approved the FuelSolutions™ Spent Fuel Management System design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance No. 1026.

On August 28, 2007 (72 FR 49352), the NRC amended the scope of the general licenses issued under 10 CFR 72.210 to include the storage of spent fuel in an independent spent fuel storage installations (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 52. On February 16, 2011 (76 FR 8872), the NRC amended subparts K and L in 10 CFR part 72, to extend and clarify the term limits for certificates of compliance and revised the conditions for spent fuel storage cask renewals, including adding requirements for the safety analysis report to include time-limited aging analyses and a description of aging management programs. The NRC also clarified the terminology used in the regulations to use ''renewal'' rather than ''reapproval'' to better reflect that extending the term of a currently approved cask design is based on the cask design standards in effect at the time the certificate of compliance was approved rather than current standards.

IV. Discussion of Changes

The term certified by the initial Certificate of Compliance No. 1026 was 20 years. The period of extended operation for each cask begins 20 years after the cask is first used by the general licensee to store spent fuel. On November 6, 2020, Westinghouse Electric Company LLC submitted a request to the NRC to renew Certificate of Compliance No. 1026 for a period of 40 years beyond the initial certificate period. Westinghouse Electric Company LLC supplemented its request on March 30, 2021; June 30, 2022; and September 13, 2022.

The FuelSolutions™ Storage System (the system) is certified as described in the Safety Analysis Report (SAR) and in NRC's Safety Evaluation Report (SER) accompanying the certificate of compliance (CoC). The system consists of the following components: (1) canister for dry storage of spent nuclear fuel (W21 and W74); (2) transfer cask for canister loading, closure and handling capability (W100); and (3) storage cask which provides passive vertical dry storage of a loaded canister (W150). The system stores up to 21 pressurized water reactor (PWR) assemblies or 64 boiling water reactor (BWR) assemblies.

The canister is the component providing confinement to the system for the stored fuel. A typical canister consists of a shell assembly, top and bottom inner closure plates, vent and drain port covers, internal basket assembly, top and bottom shield plugs, and top and bottom outer closure plates. All structural components are constructed of high-strength carbon steel (electroless nickel coated) or stainless steel. The canister shell, top and bottom inner closure plates, and the vent and drain port covers form the confinement boundary. The storage overpack provides structural support, shielding, protection from environmental conditions, and natural convection cooling of the canister during long-term storage. The transfer cask provides shielding during canister movements between the spent fuel pool and the storage cask.

The Nuclear Energy Institute's (NEI) document NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management,'' (December 2016) provides an operations-based, learning approach to aging management for the storage of spent fuel, which builds on the lessons learned from industry's experience with aging management for reactors. The NRC endorsed NEI 14–03, Revision 2, with clarifications, in Regulatory Guide 3.76, Revision 0, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals,'' issued July 2021. Specifically, NEI 14–03 provides a framework for sharing operating experience through an industry-developed database called the ISFSI Aging Management Institute of Nuclear Power Operations Database. NEI 14–03 also includes a framework for learning aging management programs using aging management ''tollgates,'' which offer a structured approach for periodically assessing operating experience and data from applicable research and industry initiatives at specific times during the period of extended operation and performing a safety assessment that confirms the safe storage of the spent nuclear fuel by ensuring the aging management programs continue to effectively manage the identified aging effects. The ISFSI Aging Management Institute of Nuclear Power Operations Database provides operating experience information and a basis to support licensees' future changes to the aging management programs. The ISFSI Aging Management Institute of Nuclear Power Operations Database and the aging management tollgates are considered key elements in ensuring the effectiveness of aging management activities and the continued safe storage of spent fuel during the period of extended operation.

Westinghouse Electric Company, LLC incorporated periodic tollgate assessments as requirements in the renewed certificate of compliance, as recommended in NEI 14–03, Revision 2. The implementation of tollgate assessments provides reasonable assurance that the aging management programs for the canister, the transfer cask, and the overpack will continue to effectively manage aging effects during the period of extended operation.

The renewal of the initial certificate and Amendment Nos. 1 through 4 was conducted in accordance with the renewal provisions in § 72.240. The NRC's regulations require the safety analysis report for the renewal to include time-limited aging analyses that demonstrate that structures, systems, and components important to safety will continue to perform their intended function for the requested period of extended operation and a description of the aging management programs for the

management of issues associated with aging that could adversely affect structures, systems, and components important to safety. In addition, the regulations in § 72.240(e) authorize the NRC to revise the certificate of compliance to include any additional terms, conditions, and specifications it deems necessary to ensure the safe operation of the cask during the certificate of compliance's renewal term.

The NRC is revising the initial certificate and Amendment Nos. 1 through 4 to update the certificate holder name and address and to make corrections and editorial changes to the CoC and TSs. The changes to the aforementioned documents are identified with revision bars in the margin of each document. The NRC is adding three new conditions to address aging management activities related to the structures, systems, and components important to the safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations. The three new conditions added to the renewal of the initial certificate of compliance and Amendment Nos. 1 through 4 are:

- A condition requiring the certificate of compliance holder to submit an updated final safety analysis report within 90 days after the effective date of the renewal. The updated final safety analysis report must reflect the changes resulting from the review and approval of the renewal of the certificate of compliance, including the FuelSolutions™ Spent Fuel Management System final safety analysis report. This condition ensures that final safety analysis report changes are made in a timely fashion to enable general licensees using the storage system during the period of extended operation to develop and implement necessary procedures related to renewal and aging management activities. The certificate of compliance holder is required to continue to update the final safety analysis report pursuant to the requirements of § 72.248.
- A condition requiring each general licensee using the FuelSolutions™ Spent Fuel Management System design to include, in the evaluations required by § 72.212(b)(5), evaluations related to the terms, conditions, and specifications of this certificate of compliance amendment as modified (*i.e.,* changed or added) as a result of the renewal of the certificate of compliance and include, in the document review required by § 72.212(b)(6), a review of the final safety analysis report changes resulting from the renewal of the certificate of compliance and the NRC Safety Evaluation Report for the renewal of the certificate of compliance. The general licensee would also be required to ensure that the evaluations required by § 72.212(b)(7) in response to these changes are conducted and the determination required by § 72.212(b)(8) is made. This condition also makes it clear that to meet the requirements in § 72.212(b)(11), general licensees that currently use a FuelSolutions™ Spent Fuel Management System will need to update their § 72.212 reports, even if they do not put additional Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management Systems into service after the renewal's effective date. These evaluations, reviews, and determinations are to be completed before the dry storage system enters the period of extended operation (which begins 20 years after the first use of the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System) or no later than 365 days after the effective date of this rule, whichever is later. This will provide general licensees a minimum of 365 days to comply with the new terms, conditions, specifications, and other changes to the certificate of compliance and to make the necessary determinations required by § 72.212(b)(8) as to whether activities related to the storage of spent nuclear fuel using the renewed certificate of compliance involve a change in the facility Technical Specifications or requires a license amendment for the facility.
- A condition requiring all future amendments and revisions to the certificate of compliance (*i.e.,* the initial certificate 1026 and Amendment Nos. 1 through 4) include evaluations of the impacts to aging management activities (*i.e.,* time-limited aging analyses and aging management programs) to ensure that they remain adequate for any changes to structures, systems, and components important to safety within the scope of renewal. This condition ensures that future amendments to the certificate of compliance address the renewed design bases for the certificate of compliance, including aging management impacts that may arise from any changes to the system in proposed future amendments.

Additionally, the condition for the initial certificate and Amendment Nos. 1 through 4 would be amended to reflect changes to the scope of the general license granted by § 72.210 that were made after the approval of the initial certificate. The authorization is amended to allow persons authorized to possess or operate a nuclear power reactor under 10 CFR part 52 to use the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System under the general license issued under § 72.210.

The NRC made one corresponding change from the technical specifications for the initial certificate of compliance and Amendment Nos. 1 through 4 by adding a section addressing the aging management program. General licensees using the FuelSolutions™ Spent Fuel Management System design during the period of extended operation will need to establish, implement, and maintain written procedures for each applicable aging management program in the final safety analysis report to use the FuelSolutions™ Spent Fuel Management System design during the approved period of extended operation. The procedures will need to include provisions for changing aging management program elements, as necessary, and within the limitations of the approved design bases to address new information on aging effects based on inspection findings and/or industry operating experience. General licensees will also be required to perform tollgate assessments as described in the final safety analysis report.

General licensees will need to establish and implement these written procedures prior to entering the period of extended operation (which begins 20 years after the first use of the cask system) or no later than 365 days after the effective date of this rule, whichever is later. The general licensee is required to maintain these written procedures for as long as the general licensee continues to operate the FuelSolutions™ Spent Fuel Management System in service for longer than 20 years.

Under § 72.240(d), the design of a spent fuel storage cask will be renewed if (1) the quality assurance requirements in 10 CFR part 72, subpart G, ''Quality Assurance,'' are met, (2) the requirements of § 72.236(a) through (i) are met, and (3) the application includes a demonstration that the storage of spent fuel has not, in a significant manner, adversely affected the structures, systems, and components important to safety. Additionally, § 72.240(c) requires that the safety analysis report accompanying the application contain time-limited aging analyses that demonstrate that the structures, systems, and components important to safety will continue to perform their intended function for the requested period of extended operation and a description of the aging management program for management of aging issues that could adversely affect structures,

systems, and components important to safety.

As documented in the preliminary safety evaluation report, the NRC reviewed the application for the renewal of the certificate of compliance and the conditions in the certificate of compliance and determined that the conditions in subpart G, § 72.236(a) through (i), have been met and the application includes a demonstration that the storage of spent nuclear fuel has not, in a significant manner, adversely affected structures, systems, and components important to safety. The NRC's safety review determined that the FuelSolutions™ Spent Fuel Management System, with the added terms, conditions, and specifications in the certificate of compliance and the technical specifications, will continue to meet the requirements of 10 CFR part 72 for an additional 40 years beyond the initial certificate term. Consistent with § 72.240, the NRC is renewing the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System initial certificate 1026 and Amendment Nos. 1 through 4.

Extending the expiration date of the approval for the initial certificate and Amendment Nos. 1 through 4 for 40 years and requiring the implementation of aging management activities during the period of extended operation does not impose any modification or addition to the design of a cask system's structures, systems, and components important to safety, or to the procedures or organization required to operate the system during the initial 20-year storage term certified by the cask's initial certificate of compliance. General licensees who have loaded these casks, or who load these casks in the future under the specifications of the applicable renewed certificate of compliance, may store spent fuel in these cask system designs for 20 years without implementing the aging management program. For any casks that have been in use for more than 20 years, the general licensee will have 365 days to complete the analyses required to use the cask system design pursuant to the terms and conditions in the renewed certificate of compliance. As explained in the 2011 final rule that amended 10 CFR part 72 (76 FR 8872), the general licensee's authority to use a particular storage cask design under an approved certificate of compliance will be for at least the term certified by the cask's certificate of compliance. For casks placed into service before the expiration date of the initial certificate, the general licensee's authority to use the cask would be extended for an additional 40 years from the date the initial certificate expired. For casks placed into service after the expiration date of the initial certificate and before the effective date of this rule, the general licensee's authority to use the cask would last the length of the term certified by the cask's certificate of compliance (*i.e.,* 40 years after the cask is placed into service). For casks placed into service after this rule becomes effective, the general licensee's authority to use the cask would expire 40 years after the cask is first placed into service.

This direct final rule revises the FuelSolutions™ Spent Fuel Management System design listing in § 72.214 by renewing, for 40 more years, the initial certificate and Amendment Nos. 1 through 4 of Certificate of Compliance No. 1026. The renewed certificate of compliance includes the changes to the certificate of compliance and technical specifications previously described. The renewed certificate of compliance includes the terms, conditions, and specifications that will ensure the safe operation of the cask during the renewal term and the added conditions that will require the implementation of an aging management program. The preliminary safety evaluation report describes the new and revised conditions in the certificate of compliance, the changes to the technical specifications, and the NRC staff evaluation.

V. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC revises the FuelSolutions™ Spent Fuel Management System Cask System design listed in § 72.214, ''List of approved spent fuel storage casks.'' This action does not constitute the establishment of a standard that contains generally applicable requirements.

VI. Agreement State Compatibility

Under the ''Agreement State Program Policy Statement'' approved by the Commission on October 2, 2017, and published in the **Federal Register** on October 18, 2017 (82 FR 48535), this rule is classified as Compatibility Category NRC—Areas of Exclusive NRC Regulatory Authority. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR chapter I. Therefore, compatibility is not required for program elements in this category.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885).

VIII. Environmental Assessment and Finding of No Significant Impact

Under the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' the NRC has determined that this direct final rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has made a finding of no significant impact based on this environmental assessment.

A. The Action

The action is to amend § 72.214 to revise the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026.

B. The Need for the Action

This direct final rule renews the certificate of compliance for the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design within the list of approved spent fuel storage casks to allow power reactor licensees to store spent fuel at reactor sites in casks with the approved modifications under a general license. Specifically, this rule extends the expiration date for the FuelSolutions™ Spent Fuel Management System certificate of compliance for an additional 40 years, allowing a power reactor licensee to continue using the cask design during a period of extended operation for a term certified by the cask's renewed certificate of compliance.

In addition, this direct final rule revises the certificate of compliance for the initial certificate and Amendment Nos. 1 through 4 to update the

certificate holder name and address and adds three new conditions:

- A condition for submitting an updated FSAR to the NRC, in accordance with § 72.4, within 90 days after the effective date of the CoC renewal.
- A condition for renewed CoC use during the period of extended operation to ensure that a general licensee's report prepared under § 72.212 evaluates the appropriate considerations for the period of extended operation. All future amendments and revisions to this CoC must include evaluations of the impacts to aging management activities. The NRC is revising the initial certificate and Amendment Nos. 1 through 4 to address the language change in § 72.210 ''General license issue'' and other updates to the regulations. The NRC is making changes to TSs including updating the certificate holder's information in all TSs for the initial certificate and Amendment Nos. 1 through 4 and updating references to ''FuelSolutions'' and ''Westinghouse Electric Company LLC'' or ''WEC.''
- A condition requiring all future amendments and revisions to the certificate of compliance (*i.e.,* the initial certificate 1026 and Amendment Nos. 1 through 4) include evaluations of the impacts to aging management activities (*i.e.,* time-limited aging analyses and aging management programs) to ensure that they remain adequate for any changes to structures, systems, and components important to safety within the scope of renewal.

Finally, the NRC will make various corrections and editorial changes to the CoC and TSs.

C. Environmental Impacts of the Action

On July 18,1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The potential environmental impact of using NRC-approved storage casks was analyzed in the environmental assessment for the 1990 final rule and are described in ''Environmental Assessment for Proposed Rule Entitled, 'Storage of Spent Nuclear Fuel in NRC-Approved Storage Casks at Nuclear Power Reactor Sites.' '' The potential environmental impacts for the longer-term use of dry cask designs and the renewal of certificates of compliance were analyzed in the environmental assessment for the 2011 final rule establishing the regulatory requirements for renewing certificates of compliance and are described in ''Environmental Assessment and Finding of No Significant Impact for the Final Rule Amending 10 CFR part 72 License and Certificate of Compliance Terms.'' The environmental impacts from continued storage were also considered in NUREG–2157, ''Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel.'' The environmental assessment for the initial certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026 tiers off the environmental assessment for the February 16, 2011, final rule and NUREG–2157. Tiering on past environmental assessments is a standard process under the National Environmental Policy Act of 1969, as amended.

The Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System is designed to mitigate the effects of design basis accidents that could occur during storage. Design basis accidents account for human-induced events and the most severe natural phenomena reported for the site and surrounding area. Postulated accidents analyzed for an independent spent fuel storage installation, the type of facility at which a holder of a power reactor operating license would store spent fuel in casks in accordance with 10 CFR part 72, can include tornado winds and tornado-generated missiles, a design basis earthquake, a design basis flood, an accidental cask drop, lightning effects, fire, explosions, and other incidents.

A renewal reaffirms the original design basis and allows the cask to be used during a period of extended operation that corresponds to the term certified by the cask's certificate of compliance in the renewal. As a condition of the renewal, the NRC requires an aging management program that will ensure that structures, systems, and components important to safety will perform as designers intended during the renewal period. The renewal does not reflect a change in design or fabrication of the cask system. This renewal does not reflect a significant change in design or fabrication of the cask. Because there are no significant design or process changes, any resulting occupational exposure or offsite dose rates from the renewal of the initial certificate and Amendment Nos. 1 through 4 would remain well within the 10 CFR part 20 limits. The NRC has also determined that the design of the cask would continue to maintain confinement, shielding, and criticality control in the event of an accident. Therefore, these changes will not result in any radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the February 16, 2011, final rule. There will be no significant change in the types or significant revisions in the amounts of any effluent released, no significant increase in the individual or cumulative radiation exposures, and no significant increase in the potential for, or consequences from, radiological accidents. The NRC determined that the structures, systems, and components important to safety will continue to perform their intended functions during the requested period of extended operation. The NRC determined that the renewed Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design, when used under the conditions specified in the renewed certificate of compliance, the technical specifications, and the NRC's regulations, will meet the requirements of 10 CFR part 72; therefore, adequate protection of public health and safety will continue to be reasonably assured. The NRC documented its safety findings in the preliminary safety evaluation report.

D. Alternative to the Action

The alternative to this action is to deny the renewal of the initial certificate and Amendment Nos. 1 through 4 and not issue the direct final rule. Consequently, any 10 CFR part 72 general licensee that seeks to load spent nuclear fuel into Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System after the expiration date of the certificate of compliance or that seeks to continue storing spent nuclear fuel in the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System for longer than the term certified by the cask's certificate of compliance for the initial certificate (*i.e.,* more than 20 years) would have to request an exemption from the requirements of §§ 72.212 and 72.214 or would have to load the spent nuclear fuel into a different approved cask design. Under this alternative, those licensees interested in continuing to use the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee. If the general licensee is granted an exemption, the environmental impacts would be the same as the proposed action. If the general licensee is not granted an exemption, the general licensee would need to unload the Westinghouse Electric Company LLC FuelSolutions™

Spent Fuel Management System and load the fuel into another cask system design, which would result in environmental impacts that are greater than for the proposed action because activities associated with cask loading and decontamination may result in some small liquid and gaseous effluent.

E. Alternative Use of Resources

Renewal of the initial certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026 would result in no irreversible commitment of resources.

F. Agencies and Persons Contacted

No agencies or persons outside the NRC were contacted in connection with the preparation of this environmental assessment.

G. Finding of No Significant Impact

This direct final rule is to amend § 72.214 to revise the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System listing within the ''List of approved spent fuel storage casks'' to renew, for an additional 40 years, the initial certificate and Amendment Nos. 1 through 4 of Certificate of Compliance No. 1026. The environmental impacts of the action have been reviewed under the requirements in the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in subpart A of 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'' The renewal does not reflect a change in design or fabrication of the cask system as approved for the initial certificate or Amendment Nos. 1 through 4. The NRC determined that the renewed Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design, when used under the conditions specified in the renewed certificate of compliance, the technical specifications, and the NRC's regulations, will meet the requirements of 10 CFR part 72; therefore, adequate protection of public health and safety will continue to be reasonably assured.

Based on the foregoing environmental assessment, the NRC concludes that this direct final rule, ''List of Approved Spent Fuel Storage Casks: FuelSolutions™ Spent Fuel Management System, Certificate of Compliance No. 1026, Renewal of Initial Certificate and Amendment Nos. 1 through 4,'' will not have a significant effect on the quality of the human environment. Therefore, the NRC has determined that an environmental impact statement is not necessary for this direct final rule.

IX. Paperwork Reduction Act Statement

This direct final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget, approval number 3150–0132.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid Office of Management and Budget control number.

X. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this direct final rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and Westinghouse Electric Company LLC. These entities do not fall within the scope of the definition of small entities set forth in the Regulatory Flexibility Act or the size standards established by the NRC (§ 2.810).

XI. Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if (1) it notifies the NRC in advance; (2) the spent fuel is stored under the conditions specified in the cask's certificate of compliance; and (3) the conditions of the general license are met. A list of NRC-approved cask designs is contained in § 72.214. On January 16, 2001 (66 FR 3444), the NRC issued an amendment to 10 CFR part 72 that approved the FuelSolutions™ Spent Fuel Management System by adding it to the list of NRC-approved cask designs in § 72.214.

On November 6, 2020, and as supplemented on March 30, 2021, June 30, 2022, and September 13, 2022, Westinghouse Electric Company LLC submitted a request to renew the FuelSolutions™ Spent Fuel Management System as described in Section IV, ''Discussion of Changes,'' of this document.

The alternative to this action is to withhold approval of the renewal of the initial certificate and Amendment Nos. 1 through 4 and to require any 10 CFR part 72 general licensee seeking to continue the storage of spent nuclear fuel in Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System using the initial certificate or Amendment Nos. 1 through 4 beyond the initial 20-year storage term certified by the cask's initial certificate of compliance to request an exemption from the requirements of §§ 72.212 and 72.214. The term for general licenses would not be extended from 20 years to 40 years. Under this alternative, each interested 10 CFR part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of this direct final rule is consistent with previous NRC actions. Further, as documented in the preliminary safety evaluation report and environmental assessment, this direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of this direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory; therefore, this action is recommended.

XII. Backfitting and Issue Finality

The NRC has determined that the actions in this direct final rule do not require a backfit analysis because they do not fall within the definition of backfitting under § 72.62 or § 50.109(a)(1), they do not impact the issue finality provisions applicable to combined licenses under 10 CFR part 52, and they do not impact general licensees that are using these systems for the duration of their current general licenses.

Certificate of Compliance No. 1026 for the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design, as currently listed in § 72.214, ''List of Approved Spent Fuel Storage Casks,'' was initially approved for a 20-year term. This direct final rule would renew the initial certificate and Amendment Nos. 1 through 4, extending their

approval period by 40 years. The term certified by the cask's certificate of compliance for a renewed certificate of compliance is the period of time commencing with the most recent certificate of compliance renewal date and ending with the certificate of compliance expiration date. With this renewal, the term certified by the cask's certificate of compliance would change from 20 years to 60 years, with the period of extended operation beginning 20 years after the cask is placed into service. The revision to the certificate of compliance through the renewal consists of the changes in the renewed initial certificate (Amendment No. 0) and renewed Amendment Nos. 1 through 4 as previously described, and as set forth in the renewed certificates of compliance and technical specifications. These changes would not affect the use of the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design for the initial 20- year term for previously loaded casks. The renewed certificates would require implementation of aging management programs during the period of extended operation, which begins after the storage cask system's initial 20-year service period.

Because the term for the renewal would be longer than the initial term certified by the cask's certificate of compliance, the general licensee's authority to use the cask would be extended and would be no less than 60 years. This change would not add, eliminate, or modify (1) structures, systems, or components of an independent spent fuel storage installation or a monitored retrievable storage installation or (2) the procedures or organization required to operate an independent spent fuel storage installation or a monitored retrievable storage installation.

Renewing these certificates does not fall within the definition of backfit under § 72.62 or § 50.109, or otherwise represent an inconsistency with the issue finality provisions applicable to combined licenses in 10 CFR part 52. General licensees who have loaded these casks, or who load these casks in the future under the specifications of the applicable certificate, may continue to store spent fuel in these systems for the initial 20-year storage period authorized by the original certificate. Extending the certificates' expiration dates for 40 more years and requiring the implementation of aging management programs does not impose any modification or addition to the design of the structures, systems, and components important to safety of a cask system, or to the procedures or organization required to operate the system during this initial 20-year term certified by the cask's certificate of compliance. The aging management programs required to be implemented by this renewal are only required to be implemented after the storage cask system's initial 20-year service period ends.

Because this rulemaking renews the certificates, and because renewal is a separate NRC licensing action voluntarily implemented by vendors or licensees, the renewal of these certificates is not an imposition of new or changed requirements from which these certificate of compliance holders or licensees would otherwise be protected by the backfitting provisions in § 72.62 or § 50.109. Even if renewal of this certificate of compliance cask system design could be considered a backfit, Westinghouse Electric Company LLC, as the certificate of compliance holder and vendor of the casks, is not protected by the backfitting provisions in § 72.62 in this capacity.

Unlike a vendor, general licensees using the existing systems subject to these renewals would be protected by the backfitting provisions in § 72.62 and § 50.109 if the renewals constituted new or changed requirements. But as previously explained, renewal of the certificates for these systems does not impose such requirements. The general licensees using these certificates of compliance may continue storing material in the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design for the initial 20-year storage period identified in the applicable certificate or amendment with no changes. If general licensees choose to continue to store spent fuel in the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System design after the initial 20-year period, these general licensees will be required to implement the applicable aging management programs for any cask systems subject to a renewed certificate of compliance, but such continued use is voluntary.

Additionally, the actions in this direct final rule do not impact issue finality provisions applicable to combined licenses under 10 CFR part 52. For these reasons, renewing the initial certificate and Amendment Nos. 1 through 4 of Certificate of Compliance No. 1026 does not constitute backfitting under § 72.62 or § 50.109(a)(1), or otherwise represent an inconsistency with the issue finality provisions applicable to combined licenses in 10 CFR part 52. Accordingly, the NRC has not prepared a backfit analysis for this rulemaking.

XIII. Congressional Review Act

This direct final rule is not a rule as defined in the Congressional Review Act.

XIV. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	Adams Accession No./ Web Link/ **Federal Register** Citation
Proposed Certificate of Compliance	
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 0	ML22354A265.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 1	ML22354A269.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 2	ML22354A273.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 3	ML22354A277.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 4	ML22354A281.
Preliminary Safety Evaluation Report	
Preliminary Safety Evaluation Report for Renewed Certificate of Compliance No. 1026, Amendments Nos. 0–4	ML22354A285.
Proposed Technical Specifications	
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 0	ML22354A266.

Document	Adams Accession No./ Web Link/ **Federal Register** Citation
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 0 ...	ML22354A267.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 0 ...	ML22354A268.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 1 ...	ML22354A270.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 1 ...	ML22354A271.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 1 ...	ML22354A272.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 2 ...	ML22354A274.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 2 ...	ML22354A275.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 2 ...	ML22354A276.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 3 ...	ML22354A278.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 3 ...	ML22354A279.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 3 ...	ML22354A280.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 4 ...	ML22354A282.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 4 ...	ML22354A283.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 4 ...	ML22354A284.
Environmental Documents	
''Environmental Assessment and Findings of No Significant Impact for the Final Rule Amending 10 CFR Part 72 License and Certificate of Compliance Terms.'' (2010).	ML100710441.
Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2). (2014).	ML14198A440 (package).
Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System Renewal Application Documents	
Westinghouse Electric Company LLC ''Submittal of FuelSolutions™ Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–20–64. (November 6, 2020).	ML20315A012 (package).
Westinghouse Electric Company LLC ''Reponses to Requests for Supplemental Information for the Application for the FuelSolutions™ Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–21–14 Revision 0. (March 30, 2021).	ML21090A201 (package).
Westinghouse Electric Company LLC ''Submittal of FuelSolutions™ Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–22–27. (June 30, 2022).	ML22186A053 (package).
Westinghouse Electric Company LLC ''Submittal of Supplemental Response to NRC RAI A–RCS1.'' Westinghouse letter LTR–NRC–22–38. (September 13, 2022).	ML22256A285 (package).
Other Documents	
''Standard Review Plan for Renewal of Specific Licenses and Certificates of Compliance for Dry Storage of Spent Nuclear Fuel.'' NUREG–1927, Revision 1. Washington, DC. (June 2016).	ML16179A148.
''Managing Aging Processes in Storage (MAPS) Report.'' Final Report. NUREG–2214. Washington, DC. (July 2019) ..	ML19214A111.
''General License for Storage of Spent Fuel at Power Reactor Sites.'' (July 18, 1990)	55 FR 29181.
''List of Approved Spent Fuel Storage Casks: FuelSolutions Addition.'' (January 16, 2001)	66 FR 3444.
''License and Certificate of Compliance Terms.'' (February 16, 2011)	76 FR 8872.
''Agreement State Program Policy Statement; Correction.'' (October 18, 2017)	82 FR 48535.
Nuclear Energy Institute NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management.'' (December 2016).	ML16356A210.
Regulatory Guide 3.76, Revision 0, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals.'' (July 2021).	ML21098A022.
''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' (August 28, 2007)	72 FR 49352.
Presidential Memorandum, ''Plain Language in Government Writing.'' (June 10, 1998)	63 FR 31885.

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2023–0220. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2023–0220); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Indians, Intergovernmental relations, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72:

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851);

National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

■ 2. In § 72.214, Certificate of Compliance No. 1026 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1026.

Initial Certificate Effective Date: February 15, 2001, superseded by Renewed Initial Certificate on July 3, 2024.

Amendment Number 1 Effective Date: May 14, 2001, superseded by Renewed Amendment Number 1 on July 3, 2024.

Amendment Number 2 Effective Date: January 28, 2002, superseded by Renewed Amendment Number 2 on July 3, 2024.

Amendment Number 3 Effective Date: May 7, 2003, superseded by Renewed Amendment Number 3 on July 3, 2024.

Amendment Number 4 Effective Date: July 3, 2006, superseded by Renewed Amendment Number 4 on July 3, 2024.

SAR Submitted by: Westinghouse Electric Company LLC.

SAR Title: Final Safety Analysis Report for the FuelSolutions™ Spent Fuel Management System.

Docket Number: 72–1026.

Renewed Certificate Expiration Date: February 15, 2061.

Model Number: WSNF–220, WSNF–221, and WSNF–223 systems; W150 storage cask; W100 transfer cask; and the W21 and W74 canisters.

* * * * *

Dated: April 8, 2024.

For the Nuclear Regulatory Commission.

Raymond Furstenau,

Acting Executive Director for Operations.

[FR Doc. 2024–08388 Filed 4–18–24; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2022–BT–TP–0005]

RIN 1904–AF11

Energy Conservation Program: Test Procedure for Uninterruptible Power Supplies

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (''DOE'') is amending the test procedure for uninterruptable power supplies (''UPSs'') to incorporate by reference relevant portions of the latest version of the industry testing standard, harmonize the current DOE definitions for UPS, total harmonic distortion, and certain types of UPSs with the definitions in the latest version of the industry standard, and add a no-load testing condition, as an optional test.

DATES: The effective date of this rule is July 3, 2024. The amendments will be mandatory for product testing starting October 16, 2024.

The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register on July 3, 2024.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as those containing information that is exempt from public disclosure.

A link to the docket web page can be found at *www.regulations.gov/docket/EERE-2022-BT-TP-0005.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Kristin Koernig, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–3593. Email: *Kristin.koernig@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE incorporates by reference the following industry standard into part 430:

IEC 62040–3, ''*Uninterruptible power systems (UPS)—Part 3: Method of specifying the performance and test requirements*,'' Edition 3.0, copyright April 2021.

Copies of IEC 62040–3 Ed. 3.0 are available from the International Electrotechnical Commission, 3 Rue de Varembe, Case Postale 131, 1211 Geneva 20, Switzerland; *webstore.iec.ch.*

For a further discussion of this standard, see section IV.N of this document.

Table of Contents

I. Authority and Background

Uninterruptible power supplies (''UPSs'') are a class of battery chargers and fall among the list of ''covered products'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6295(u)) DOE's test procedure for UPSs is currently prescribed at title 10 of the Code of Federal Regulations (CFR), part 430 section 32(z)(3); and 10 CFR part 430 subpart B appendix Y (''appendix Y'') and appendix Y1 (''appendix Y1''). The following sections discuss DOE's authority to establish and amend test procedures for UPSs and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

The Energy Policy and Conservation Act, Public Law 94–163, as amended (EPCA),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. These products include UPSs, the subject of this document. (42 U.S.C. 6295(u))

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA (42 U.S.C. 6295(s)), and (2) making other representations about the efficiency of those products. (42 U.S.C. 6293(c)) Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle (as determined by the Secretary) or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

EPCA also requires that, at least once every 7 years, DOE evaluate test procedures for each type of covered product, including UPSs, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures to not be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)). If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedure. (42 U.S.C. 6293(b)(1)(A)(ii))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor, unless the current test procedure already incorporates the standby mode and off mode energy consumption, or if such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)) If an integrated test procedure is technically infeasible, DOE must prescribe separate standby mode and off mode energy use test procedures for the covered product, if a separate test is technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (''IEC'') Standard 62301 [3] and IEC Standard 62087 [4] as applicable. (42 U.S.C. 6295(gg)(2)(A))

DOE is publishing this final rule in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A))

B. Background

On December 12, 2016, DOE amended its battery charger test procedure by publishing a final rule in the **Federal Register** that added a discrete test procedure for UPSs (''December 2016 Final Rule''). 81 FR 89806. The December 2016 Final Rule incorporated by reference specific sections of the relevant industry standard for UPSs, with additional instructions, into the current battery charger test procedure published at appendix Y. 81 FR 89806, 89810.

On September 8, 2022, DOE published a final rule in the **Federal Register** amending the existing test procedure at appendix Y for battery chargers and creating a new test procedure at appendix Y1 that expanded the scope of the battery charger test method to include open placement and fixed-position wireless battery chargers and established separate metrics for active mode, standby mode, and off mode for all battery chargers other than UPSs (''September 2022 Final Rule''). 87 FR 55090. Manufacturers will be required to continue to use the amended test procedure in appendix Y until the compliance date of any new final rule establishing amended energy conservation standards based on the newly established test procedure in appendix Y1. 87 FR 55090, 55122. At such time as DOE establishes new standards for battery chargers other than UPSs using these new metrics, manufacturers would no longer use appendix Y and instead will be required to determine compliance using the updated test procedure at appendix Y1. *Id.* at 87 FR 55125. The September 2022 Final Rule also replicated all aspects of testing UPSs from appendix Y to appendix Y1, ensuring that instructions for all battery chargers are consolidated in one location. *Id.* at 87 FR 55125–55132.

On February 2, 2022, DOE initiated a rulemaking process to consider amendments to the UPS test procedure

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[4] IEC 62087, *Audio, video and related equipment—Methods of measurement for power consumption* (Edition 1.0, Parts 1–6: 2015, Part 7: 2018).

by publishing in the **Federal Register** a request for information (''RFI'') seeking data and information regarding the existing DOE test procedure for UPSs (''February 2022 RFI''). 87 FR 5742. On May 11, 2022, DOE issued a correcting amendment to address an error in describing input dependency modes in the regulatory text as it appeared in the December 2016 Final Rule. 87 FR 28755.

On January 5, 2023, DOE published a notice of proposed rulemaking (NOPR) proposing amendments to appendices Y and Y1 of the UPS test procedure to consider the latest revision of the industry standard that is incorporated by reference and to provide an optional test method for measuring power consumption of a UPS at no-load conditions (''January 2023 NOPR''). 88 FR 790. DOE held a webinar related to the January 2023 NOPR on February 2, 2023 (''February 2023 public meeting'').

DOE received comments in response to the January 2023 NOPR from the interested parties listed in Table I.1.

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS IN RESPONSE TO THE JANUARY 2023 NOPR

Commenter(s)	Reference in this final rule	Comment No. in the docket	Commenter type
National Electrical Manufacturers Association	NEMA	10	Trade Association.
Northwest Energy Efficiency Alliance	NEEA	11	Efficiency Organization.
Appliance Standards Awareness Project and American Council for an Energy-Efficient Economy.	Joint Commenters	12	Efficiency Organizations.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[5] To the extent that interested parties have provided written comments that are substantively consistent with any oral comments provided during the February 2023 public meeting, DOE cites the written comments throughout this final rule. Any substantial oral comments provided during the webinar but were not accompanied by written comments are summarized and cited separately throughout this final rule.

II. Synopsis of the Final Rule

In this final rule, DOE amends appendices Y and Y1 as follows:

- Incorporate by reference the current revision to the applicable industry standard—IEC 62040–3 Ed. 3.0, ''Uninterruptible power systems (UPS)—Part 3: Method of specifying the performance and test requirements''—to reflect redesignated subsections in the latest version of that standard.
- Provide an optional test method for measuring the power consumption of UPSs at no-load conditions.

The adopted amendments are summarized in Table II.1 and compared to the test procedure provision prior to the amendment, as well as the reason for the adopted change.

TABLE II.1—SUMMARY OF CHANGES IN THE AMENDED UPS TEST PROCEDURE

DOE test procedure prior to amendment	Amended test procedure	Attribution
References IEC 62040–3 Ed. 2.0	Updates each reference to IEC 62040–3 Ed. 3.0	To harmonize with the latest industry standard.
Provides definitions for UPS, total harmonic distortion, and certain types of UPSs that differ non-substantively from the definitions in IEC 62040–3 Ed. 3.0.	Harmonizes DOE definitions with definitions of UPS provided in IEC 62040–3 Ed. 3.0.	To harmonize with the latest industry standard.
Does not provide a method for testing the power consumption of UPSs at no-load conditions.	Incorporates the no-load test from Annex J of IEC 62040–3, Ed. 3.0 as an optional test method for voluntary representations of no-load power consumption.	In response to comments received on the February 2022 RFI and the January 2023 NOPR.

DOE has determined that the amendments described in section III of this document and adopted in this document will not alter the measured efficiency of UPSs or require retesting or recertification solely as a result of DOE's adoption of the amendments to the test procedure. Additionally, DOE has determined that the amendments will not increase the cost of testing. Discussion of DOE's actions are addressed in detail in section III of this document.

The effective date for the amended test procedure adopted in this final rule is 75 days after publication of this document in the **Federal Register**. Representations of energy use or energy efficiency must be based on testing in accordance with the amended test procedure beginning 180 days after the publication of this final rule.

III. Discussion

In the following sections, DOE adopts certain proposed amendments to its test procedure for UPSs. For each adopted amendment, DOE provides relevant background information, discusses relevant public comments, and provides reasons for the amendment.

A. Scope of Applicability

The scope of the current test procedure at appendices Y and Y1, as applicable to UPSs, covers UPSs[6] that utilize the standardized National Electrical Manufacturer Association (''NEMA'') plug, 1–15P or 5–15P,[7] and have an alternating current (''AC'') output. Appendices Y and Y1, section 1.

To the extent that a portable power system meets the definition of a battery charger, operates on direct current

[5] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop test procedures for UPSs. (Docket No. EERE–2022–BT–TP–0005, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[6] As discussed further in section III.B of this document, DOE defines a UPS as a battery charger consisting of a combination of convertors, switches, and energy storage devices (such as batteries), constituting a power system for maintaining continuity of load power in case of input power failure. Appendices Y and Y1, section 2.27.

[7] Plug designations are as specified in American National Standards Institute (''ANSI'')/NEMA WD 6–2016, incorporated by reference at 10 CFR 430.2.

(''DC'') or United States AC line voltage, but does not meet the definition of a back-up battery charger as defined by DOE, such a product is currently covered within the scope of the non-UPS portion of the battery charger test procedure, which includes all battery chargers operating at either DC or United States AC line voltage (115V at 60Hz). Appendices Y and Y1, section 1. As discussed in the January 2023 NOPR, DOE has identified—based on a review of product literature—a wide range of portable power stations currently certified as non-UPS battery chargers and listed in the compliance certification database (''CCD''),[8] suggesting that manufacturers have the mutual understanding that such products are covered within the scope of the non-UPS portion of the battery charger test procedure. 88 FR 790, 793. Because such products are already included within the scope of the non-UPS battery charger test procedure, DOE tentatively determined that no changes were warranted to the scope of the UPS test procedure with respect to such products. *Id.*

To the extent that a portable power station meets DOE's definition of a back-up battery charger, such a product is likely a ''whole-home power backup device'' and would be outside the scope of appendices Y and Y1. DOE tentatively determined in the January 2023 NOPR that the market for whole-home backup devices is still nascent, albeit growing, and the devices currently lack widespread use among consumers. *Id.* at 88 FR 794. DOE stated its concern that defining such technologies and addressing them in the UPS test procedure at this time could potentially restrict the development of these less mature technologies. *Id.* Furthermore, DOE did not have sufficient consumer usage data, nor did commenters provide any such information, that would be needed at this time to develop a test procedure that produces representative results for these products. *Id.* For these reasons, DOE did not propose to expand the scope of the UPS test procedure to include whole-home backup power systems. *Id.*

In response to the January 2023 NOPR, NEEA expressed its support for DOE's determination that portable power stations would be covered under the non-UPS battery charger test procedure scope. (NEEA, No. 11 at p. 2)

For the reasons discussed here and in the January 2023 NOPR, in this final rule, DOE has determined that no amendments are needed to the scope of the UPS test procedure to address portable power systems that meet the definition of a battery charger, operate on DC or United States AC line voltage, but do not meet the definition of a back-up battery charger as defined by DOE. Consistent with the January 2023 NOPR, DOE is also not expanding the scope of the UPS test procedure to include whole-home backup power systems.

B. Definitions

DOE defines a UPS as a battery charger consisting of a combination of convertors, switches, and energy storage devices (such as batteries), constituting a power system for maintaining continuity of load power in case of input power failure. Appendices Y and Y1, section 2.27. This definition aligns with the definition of a UPS provided in IEC 62040–3 Ed. 2.0, which is currently incorporated by reference into appendices Y and Y1.

DOE recognizes the benefit of harmonizing with the latest versions of industry standards where applicable and appropriate. IEC 62040–3 Ed. 3.0 includes slightly revised language stating ''maintaining continuity of AC load power in case of AC input power failure.'' In the January 2023 NOPR, DOE tentatively determined that the addition of the term ''AC'' in the IEC 62040–3 Ed. 3.0 definition is consistent with the range of products that meet the current definition of a UPS and would not change the scope of products subject to the test procedure.[9] 88 FR 790, 794. Therefore, DOE proposed to update its definition of a UPS to incorporate by reference the definition specified in IEC 62040–3 Ed. 3.0 and requested comment on its proposal to harmonize its definition of a UPS with that of IEC 62040–3 Edition 3.0 in the January 2023 NOPR. *Id.* Specifically, DOE requested comment on its tentative determination that such harmonization would not affect the current scope of the UPS test procedure. *Id.*

In response to the January 2023 NOPR, NEMA supported DOE's proposal to harmonize its UPS definition with IEC 62040–3 Ed. 3.0 but suggested that DOE further clarify that the load power being maintained must be AC. (NEMA, No. 10 at pp. 1–2) Similarly, in the February 2023 public meeting, Schneider Electric suggested to DOE to further clarify in the UPS definitions that the current test procedure is only designed for AC input and AC output UPSs.[10]

With regards to the suggestions from NEMA and Schneider Electric, DOE notes that the proposed UPS definition has already harmonized with IEC 62040–3 Ed. 3.0 by adding the clarification of ''maintaining continuity of AC load power in case of AC input power failure.'' Additionally, section 1 of appendices Y and Y1 describes the scope of the test procedure as applying to only those UPSs that utilize a NEMA 1–15P or 5–15P plug and have an AC output. DOE has determined that adding the term ''AC'' to describe the load power within the definition of UPS is redundant and risks falling out of harmonization with the definition found in IEC 62040–3 Ed. 3.0 without much to gain. As such, DOE has determined that adding the additional term ''AC'' to describe output power in the definition is unnecessary. Accordingly, DOE is finalizing its proposed definition of a UPS to harmonize with that of IEC 62040–3 Edition 3.0 without changes in this final rule.

Section 2.26 of appendices Y and Y1 defines ''total harmonic distortion'' (THD), expressed as a percent, as the root mean square (RMS) value of an AC signal after the fundamental component is removed and interharmonic components are ignored, divided by the RMS value of the fundamental component. Section 3.5.49 of IEC 62040–3 Ed. 3.0 defines THD as the ratio of the RMS value of the sum of the harmonic components X_h of orders 2 to 40 to the RMS value of the fundamental component X_1, and also includes a mathematical formula accompanying this descriptive definition. The key difference between the definitions is that DOE refers to the RMS value of the AC signal, whereas the IEC 62040–3 Ed. 3.0 definition more narrowly specifies measuring the RMS value of harmonic components of order 2 through 40. DOE understands that, in measuring the RMS value of a signal, a laboratory would be required to determine the number of harmonics to include within the measurement. By specifying harmonic components of order 2 through 40, DOE tentatively concluded in the January 2023 NOPR that the IEC definition may provide a more reproducible measurement among different laboratories compared to the current DOE definition, which requires a laboratory to determine which harmonic

[8] For example, DOE has identified the following inexhaustive list of portable power stations models in the battery charger CCD: Jackery 550, DEWALT DXAEPS14, STANLEY J5C09, Anker A1710, Duracell PPS1000–1050–120–01.

[9] DOE notes that use of NEMA 1–15P/5–15P wall plugs, as specified by the currently defined scope for UPSs, implies the use of AC input power.

[10] Schneider Electric's comment can be found at pp. 8–9 of the February 2023 public meeting transcript, available at *https://www.regulations.gov/document/EERE-2022-BT-TP-0005-0009*.

components to measure. For this reason, DOE proposed to update its definition of THD to incorporate by reference the definition specified in IEC 62040–3 Ed. 3.0. 88 FR 790, 794.

Additionally, DOE carefully reviewed its definitions of ''voltage frequency dependent (VFD) UPS,'' [11] ''voltage and frequency independent (VFI) UPS,'' [12] and ''voltage independent (VI) UPS'' [13] in comparison to the definitions provided in sections 5.3.4.2.2,[14] 5.3.4.2.3,[15] and 5.3.4.2.4,[16] respectively, of IEC 62040–3 Ed. 3.0. The IEC definitions closely align with the core capabilities described by the DOE definitions. However, DOE's definitions each include a ''Note'' that provides greater specificity regarding certain product characteristics than the definitions provided by IEC 62040–3 Ed. 3.0. For example, the Note to section 2.27.2 of appendices Y and Y1 (providing the definition for VFI UPS) specifies that, at a minimum, the VFI UPS produces an output voltage and frequency within the specified output range even when the input voltage is varied by ±10 percent of the rated input voltage and the input frequency is varied by ±2 percent of the rated input frequency. By contrast, the definition of VFI UPS in IEC 62040–3 Ed. 3.0 specifies the AC input power voltage tolerance bands to be the greater of ±10 percent of the rated input voltage and what is declared by the manufacturer and the AC input power frequency to be the greater of ±2 percent of the rated input frequency and what is declared by the manufacturer. Similarly, the Note to section 2.27.3 of appendices Y and Y1 (providing the definition for VI UPS) specifies an input voltage variation of ±10 percent, whereas the corresponding definition in IEC 62040–3 Ed 3.0 specifies the voltage limits to be the greater of ±10 percent of the rated input voltage and what is declared by the manufacturer.

DOE notes that there are scenarios where using the manufacturer-declared limits may result in a different input dependency classification of a UPS when compared to using DOE's current input voltage tolerance limits. For example, a manufacturer that declares an input voltage tolerance limit of ±15 percent for a VI basic model could have a unit that is unable to maintain the required output when the input voltage is adjusted by more than 13 percent in real world testing. Per the IEC definition, this unit would fail the VI input dependency at the manufactured declared limits of ±15 percent and therefore be classified as a VFD UPS (the highest input dependent UPS topology). However, the same unit when tested per DOE's current input voltage limits of ±10 percent would continue to classify it as a VI.

To avoid such discrepancies, DOE proposed in the January 2023 NOPR to harmonize its definitions of VFD UPS, VI UPS, and VFI UPS with IEC 62040–3 Ed 3.0 but maintain the notes alongside each definition that currently establish the input voltage and frequency tolerance limits of ±10 percent and ±2 percent, respectively. *Id.* at 88 FR 794–795.

DOE noted also that the section numbers of IEC 62040–3 Ed. 2.0 currently referenced by DOE's definitions have been updated to different section numbers in IEC 62040–3 Ed. 3.0. Therefore, DOE proposed to update its definitions of VFD UPS, VI UPS, and VFI UPS to reference the corresponding updated section numbers within IEC 62040–3 Ed. 3.0. *Id.* at 88 FR 795.

DOE initially determined that the proposed amended definitions would not substantively change the scope or applicability of the test procedure as compared to the current definitions. *Id.*

In the January 2023 NOPR, DOE requested comment on its proposal to update its definitions of THD, VFD UPS, VI UPS, and VFI UPC to harmonize with the IEC 62040–3 Ed 3.0 definitions. *Id.*

In response to the January 2023 NOPR, NEEA and NEMA supported DOE's proposal to harmonize with IEC 62040–3 Ed. 3.0, specifically on the proposed updated definitions of THD, VFD, VI, and VFI. (NEEA, No. 11 at pp. 2–3; NEMA, No. 10 at pp. 1–2) NEEA further stated that these updated definitions can increase reproducibility and reduce complexity. (NEEA, No. 11 at p. 2)

NEMA further recommended that DOE specify VFI operating conditions and revise the language used when referring to drawing power from the energy storage device. (NEMA, No. 10 at p. 2) NEMA also recommended that DOE clarify that the voltage limits should be referring to those described in section 5.3 of IEC 62040–3 Ed. 3.0 for VI UPSs. (*Id.*)

DOE appreciates the comments from NEMA and NEEA regarding their support for the updates to the definitions of THD, VFD, VI, and VFI. In

[11] Section 2.27.1 of appendices Y and Y1 defines VFD UPS as a UPS that produces an AC output where the output voltage and frequency are dependent on the input voltage and frequency. This UPS architecture does not provide corrective functions like those in voltage independent and voltage and frequency independent systems. The definition also includes a *Note* specifying that VFD input dependency may be verified by performing the AC input failure test in section 6.2.2.7 of IEC 62040–3 Ed. 2.0 and observing that, at a minimum, the UPS switches from normal mode of operation to battery power while the input is interrupted.

[12] Section 2.27.2 of appendices Y and Y1 defines VFI UPS as a UPS where the device remains in normal mode producing an AC output voltage and frequency that is independent of input voltage and frequency variations and protects the load against adverse effects from such variations without depleting the stored energy source. The definition also includes a *Note* specifying that VFI input dependency may be verified by performing the steady state input voltage tolerance test and the input frequency tolerance test in sections 6.4.1.1 and 6.4.1.2 of IEC 62040–3 Ed. 2.0, respectively, and observing that, at a minimum, the UPS produces an output voltage and frequency within the specified output range when the input voltage is varied by ±10 percent of the rated input voltage and the input frequency is varied by ±2 percent of the rated input frequency.

[13] Section 2.27.3 of appendices Y and Y1 defines VI UPS as a UPS that produces an AC output within a specific tolerance band that is independent of under-voltage or over-voltage variations in the input voltage without depleting the stored energy source. The output frequency of a VI UPS is dependent on the input frequency, similar to a voltage and frequency dependent system. The definition also includes a *Note* specifying that VI input dependency may be verified by performing the steady state input voltage tolerance test in section 6.4.1.1 of IEC 62040–3 Ed. 2.0 and ensuring that the UPS remains in normal mode with the output voltage within the specified output range when the input voltage is varied by ±10 percent of the rated input voltage.

[14] Section 5.3.4.2.2 of IEC 62040–3 Ed. 3.0 specifies that a UPS classified as VFD shall protect the load from a complete loss of AC input power. The output of the VFD UPS is dependent on changes in voltage and frequency of the AC input power and is not intended to provide additional voltage corrective functions, such as those arising from the use of tapped transformers. VFD classification is verified when performing the test described in section 6.2.2.7.

[15] Section 5.3.4.2.3 of IEC 62040–3 Ed. 3.0 specifies that a UPS classified VI shall protect the load as required for VFD and also from under-voltage applied continuously to the input, and over-voltage applied continuously to the input. The output voltage of the VI UPS shall remain within declared voltage limits (provided by voltage corrective functions, such as those arising from the use of active and/or passive circuits). The manufacturer shall declare an output voltage tolerance band narrower than the input voltage tolerance band. VI classification is verified when performing the tests described in section 6.4.1.2. The definition also includes a *Note* specifying that the energy storage device does not discharge when the AC input power is within the input voltage tolerance band.

[16] Section 5.3.4.2.4 of IEC 62040–3 Ed. 3.0 specifies that a UPS classified VFI is independent of AC input power voltage and frequency variations as specified and declared in section 5.2 and shall protect the load against adverse effects from such variations without discharging the energy storage device. VFI classification is verified when performing the tests described in section 6.4.1.3.

response to the recommendation from NEMA, DOE notes that DOE's proposed updates to the VFI UPS definition already reference section 5.2 of IEC 62040–3 Ed. 3.0 for VFI UPS input voltage and frequency variation limits. Furthermore, the proposed definition also clarifies that VFI UPSs ''shall protect the load against adverse effects from such variations without discharging the energy storage device.'' 88 FR 790, 805. DOE further notes that IEC 62040–3 Ed. 3.0 does not specifically prescribe a voltage limit for VI UPSs. Rather, the voltage limit is based on the UPS model and is declared by manufacturers directly. As such, DOE has determined that it would not be essential to add reference to section 5.3 of IEC 62040–3 Ed. 3.0 for VI UPS output voltage tolerance.

For the reasons discussed here and in the January 2023 NOPR, in this final rule, DOE is updating the definitions of THD, VFD, VI, and VFI to harmonize with the IEC 62040–3 Ed 3.0 definitions, including referencing the corresponding updated section numbers within IEC 62040–3 Ed 3.0 definitions, and maintaining the notes to these definitions as proposed in the January 2023 NOPR.

C. Updates to Industry Standards

As discussed, the current UPS test procedure incorporates by reference certain sections of IEC 62040–3 Ed. 2.0 regarding test setup, input and output power measurement, and the optional determination of UPS architecture. Specifically:

- The definitions of VFD UPS, VFI UPS, and VI UPS in sections 2.27.1 through 2.27.3 of appendices Y and Y1 reference: (1) the AC input failure test in section 6.2.2.7 of IEC 62040–3 Ed. 2.0, which in turn references section 5.3.4 and Annex G of IEC 62040–3 Ed. 2.0; (2) the steady state input voltage tolerance test in section 6.4.1.1 of IEC 62040–3 Ed. 2.0, as a subsection to section 6.4.1, which in turn references sections 5.2.1 and 5.2.2.k of IEC 62040–3 Ed. 2.0; and (3) the input frequency tolerance test in section 6.4.1.2 of IEC 62040–3 Ed. 2.0, which in turn references sections 5.3.2.d and 5.3.2.3 of IEC 62040–3 Ed. 2.0.
- Section 4.2.1 of appendices Y and Y1 specifies configuring the UPS according to Annex J.2 of IEC 62040–3 Ed. 2.0.
- Section 4.3.3 of appendices Y and Y1 specifies measuring input and output power according to section J.3 of Annex J of IEC 62040–3 Ed. 2.0.

Since the publication of the December 2016 Final Rule, IEC has updated the IEC 62040–3 standard to its third edition (*i.e.,* IEC 62040–3 Ed. 3.0). The following paragraphs summarize the key changes from the second edition, based on DOE's review of the revised standard.

Section 4 of IEC 62040–3 Ed. 3.0 includes updates to various environmental conditions, such as the general test environment and operating conditions when testing UPSs. Appendices Y and Y1, however, do not refer to section 4 of the IEC 62040–3 standard but instead provide their own environmental and operating conditions for testing purposes. Therefore, DOE determined in the January 2023 NOPR that its test procedure for measuring the efficiency of UPSs will remain unaffected by the updates to section 4 of the IEC 62040–3 Ed. 3.0. 88 FR 790, 795.

Section 5.2 of IEC 62040–3 Ed. 2.0 addresses UPS input specifications, such as the input voltage range, input frequency range, and total harmonic distortions during which the UPS under test must remain in the normal mode of operation. While an initial review of IEC 62040–3 Ed. 3.0 shows significant editorial changes to the sections that define these parameters, the remainder of the parameters remain unchanged. Similarly, section 5.3 of IEC 62040–3 Ed. 3.0 provides the minimum output specifications for UPSs that must be declared by manufacturers, such as its input dependency, rated output voltage and RMS output voltage tolerance band, rated frequency tolerance band, rated output active and apparent power, total harmonic distortion, etc. As before, the majority of the changes to this section are editorial or a reorganization.

Section 6 of IEC 62040–3 Ed. 2.0 previously provided instructions for performing the AC input failure test (*see* section 6.2.2.7), the steady-state input voltage tolerance test (*see* section 6.4.1.1), and the input frequency tolerance test (*see* section 6.4.1.2) that are used to classify the input dependency of a UPS as VI, VFD, or VFI. IEC 62040–3 Ed. 3.0 has since updated these subsections with the following changes: subsection titles and numbering have been updated to specifically refer to them as VI, VFD, and VFI input dependency tests; additional criteria have been added for meeting the VI, VFD, and VFI classifications; and a new test load condition at 0 percent (*i.e.,* no-load) has been added (see section III.E of this document for further discussion of a no-load test).

Additional updates to Annex J to IEC 62040–3 Ed. 3.0 require multi-mode UPSs to be tested at all dependency modes, whereas DOE's current test procedure explicitly requires UPSs to be tested at only their highest and lowest input dependency modes. Annex J has also been updated to allow manufacturers to test UPSs with functions or ports set to the lowest power-consuming mode or disconnected if they are not related to maintaining the energy storage device (*i.e.,* batteries) at full charge, along with added reporting requirements for manufacturers to report these features, interfaces, or ports that have been turned off or set to the lowest power-consuming mode. This updated clarification regarding additional features is similar to DOE's current UPS test procedure, which requires UPSs to be tested with such features off or disconnected; however, DOE currently does not require manufacturers to report these manually switched-off features.

DOE did not propose to amend the certification or reporting requirements for UPSs in the January 2023 NOPR. *Id.* at 88 FR 796. Instead, DOE stated that it may consider proposals to amend the certification requirements and reporting for UPSs under a separate rulemaking regarding appliance and equipment certification. *Id.*

In the January 2023 NOPR, DOE carefully reviewed IEC 62040–3 Ed. 3.0 as it relates to measuring the efficiency of a UPS. DOE determined that the relevant updates to IEC 62040–3 Ed. 3.0 compared to IEC 62040–3 Ed. 2.0 are largely editorial, including renumbering of certain sections referenced by the DOE test procedure, and that updating DOE's existing references to IEC 62040–3 Ed. 3.0 would not alter the measured efficiency of basic models. As a result, DOE proposed in the January 2023 NOPR to update its incorporation by reference of IEC 62040–3 Ed. 2.0 to IEC 62040–3 Ed. 3.0 in 10 CFR 430.3 and to update its references in appendices Y and Y1 accordingly to reflect the renumbering of sections in IEC 62040–3 Ed. 3.0. *Id.*

DOE's existing test procedure for UPSs allows recording of either instantaneous power or accumulated energy over a 15-minute period. DOE's review of Annex J in IEC 62040–3 Ed. 3.0 did not reveal any additional instructions that would further facilitate the use of the accumulated energy method. As such, DOE did not propose any changes to its existing language in section 4.3.3 of appendices Y and Y1. *Id.*

In the January 2023 NOPR, DOE requested comment on its proposal to incorporate by reference IEC 62040–3 Ed 3.0 and to update references in appendices Y and Y1 accordingly to

reflect the renumbering of sections in IEC 62040–3 Ed 3.0. *Id.*

In response to the January 2023 NOPR, NEMA supported the proposed incorporation by reference and the associated renumbering. (NEMA, No. 10 at p. 2) NEEA also commented in support of DOE's proposal to update references based on the IEC 62040–3 Ed. 3.0 edition and recommended that DOE consider requiring manufacturers to report whether additional functionality was switched off for testing, which would increase transparency and harmonization. (NEEA, No. 11 at pp. 2–3) DOE appreciates NEEA's recommendation but reiterates that, under a separate rulemaking regarding appliance and equipment certification, DOE will review relevant reporting and certification requirements and may consider proposals to amend the certification requirements for UPSs at that time.

For the reasons discussed here and in the January 2023 NOPR, in this final rule, DOE is incorporating by reference IEC 62040–3 Ed 3.0 and updating references in appendices Y and Y1 to reflect the renumbering of sections in IEC 62040–3 Ed 3.0.

D. Loading Conditions

Section 4.3.3 of appendices Y and Y1 requires that the efficiency of a UPS be measured at 100, 75, 50, and 25 percent of the device's rated output power. Each of these measured efficiencies is weighted according to values provided in Table 4.3.1 of appendices Y and Y1 and combined to determine a single weighted average output metric (*i.e.,* the average load adjusted efficiency) representing the UPS's overall efficiency. These load conditions and weightings were established in the December 2016 Final Rule consistent with the load weightings specified in ENERGY STAR UPS Specification Version 1.0.[17] 81 FR 89806, 89816. The current ENERGY STAR UPS Specification Version 2.0 [18] maintains these same load conditions and weightings. These load conditions and weightings are also consistent with those specified in section 6.4.1.6 of IEC 62040–3 Ed. 2.0 and section 6.4.1.9 of IEC 62040–3 Ed. 3.0.

In the January 2023 NOPR, DOE discussed comments received in response to the February 2022 RFI regarding a 10 percent loading point. 88 FR 790, 796–797. DOE noted that EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results that measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use, and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) As such, DOE must weigh the representativeness of test results with the associated test burden in evaluating any amendments to its test procedures. Regarding the representativeness of the DOE UPS test procedure, the commenters did not provide specific data, nor was DOE aware of any specific data, demonstrating that a 10-percent loading condition would produce a more representative measure of energy use or energy efficiency of UPSs. In addition, DOE's test procedure does not differentiate between specific end-use applications. Therefore, load profiles specific to certain applications (*e.g.,* desktop computers) may not be representative of overall average use of UPSs across all end-use applications. Further, were DOE to consider a 10-percent load condition, DOE was not aware of any data to suggest what corresponding weighting factor should be used to combine this loading condition with the other defined loading conditions comprising the overall efficiency metric.

Regarding test burden, as noted, the loading points currently specified in appendices Y and Y1 are consistent with the loading points defined by ENERGY STAR, as well as section 6.4.1.6 of IEC 62040–3 Ed. 3.0. DOE also noted that the requirements of IEC 62040–3 Ed. 3.0 are referenced by the European Union (''EU'') Code of Conduct (''CoC'') on Energy Efficiency and Quality of AC UPSs Version 2.0.[19] Like many other types of consumer electronics, UPSs are manufactured and distributed globally by multi-national suppliers; as such, any differences between the DOE UPS test procedure (applicable to products sold or imported into the United States) and internationally-recognized industry test methods impose a burden that is acutely impactful to the consumer electronics industry.

Having weighed the potential improvement to representativeness against the potential for increased test burden associated with adding a required 10-percent loading condition that would be applicable to all UPSs, DOE tentatively concluded in the January 2023 NOPR—based on information available—that the potential burden would outweigh any potential improvement in representativeness (*i.e.,* would introduce undue test burden). *Id.* at 88 FR 797. Consequently, DOE did not propose to modify its existing loading points, weightings, or overall efficiency metric in the January 2023 NOPR. *Id.*

In the January 2023 NOPR, DOE requested comment on its proposal to not modify the existing loading points, weighting, or the overall efficiency metric in the current UPS test procedure. *Id.*

In response to the January 2023 NOPR, NEMA commented in support of DOE's proposal to maintain the existing loading points as the referenced loading points and associated coefficients are employed by not only the IEC standard, but also EU CoC's regulation for UPSs. (NEMA, No. 10 at p. 2)

For the reasons discussed here and in the January 2023 NOPR, in this final rule, DOE is not modifying the existing loading points, weighting, or the overall efficiency metric in the UPS test procedure.

E. No-Load Test

DOE's test procedure for UPSs does not currently specify a method for determining the energy consumption of a UPS at no-load (*i.e.,* 0-percent loading condition).

However, DOE recognizes the usefulness of a no-load power consumption metric to the industry and stakeholders and proposed in the January 2023 NOPR to incorporate by reference the no-load test condition specified in section 6.4.1.10 of IEC 62040–3 Ed. 3.0 as an optional test in section 4.3.3 of appendices Y and Y1 that would be used as the basis for any representations of no-load power consumption. 88 FR 790, 797. DOE noted that manufacturers would not be required to certify no-load power consumption to DOE as a result of this amendment because the energy conservation standards for UPSs do not have a no-load requirement at this time. *Id.*

In the January 2023 NOPR, DOE requested feedback on its proposal to add a method for measuring the power consumption of UPSs at no-load as a test to be used as the basis for any representations of no-load power consumption. *Id.*

[17] The ENERGY STAR UPS Specification Version 1.0 is available at *www.energystar.gov/products/spec/uninterruptible_power_supplies_specification_version_1_0_pd.*

[18] The ENERGY STAR UPS Specification Version 2.0 is available at *www.energystar.gov/sites/default/files/asset/document/ENERGY%20STAR%20Uninterruptible%20Power%20Supplies%20Final%20Version%202.0%20Specification_1.pdf.*

[19] The EU CoC on Energy Efficiency and Quality of AC UPSs Version 2.0 is available at *e3p.jrc.ec.europa.eu/publications/code-conduct-energy-efficiency-and-quality-ac-uninterruptible-power-systems-ups-0.*

During the February 2023 public meeting, Appliance Standards Awareness Project (ASAP) supported adding the optional no-load test based on the IEC test method and stated that the added no-load test can provide important information to customers. ASAP further encouraged DOE to enable voluntary no-load power reporting in the compliance database.[20] Schneider Electric also expressed support of the optional no-load testing requirement during the February 2023 public meeting.[21]

NEMA and NEEA also supported adding the optional no-load test procedure. (NEMA, No. 10 at p. 3; NEEA, No. 11 at p. 1) NEEA additionally urged DOE to enable manufacturer reporting of the no-load power and to require the no-load test in the next round of rulemaking. (NEEA, No. 11 at p. 1) NEEA stated that the no-load test would improve harmonization with other test procedures as the no-load test was already required by both the IEC and the ENERGY STAR test procedure. (*Id.* at pp. 1–2) NEEA stated that the no-load test can better and more effectively represent real-world usage of UPSs because desktop computers that are commonly connected to UPSs spend substantial time in sleep or off mode. (*Id.* at p. 2) NEEA noted that addressing the energy use of a UPS in no-load condition will increase the representativeness and can possibly achieve additional energy savings. (*Id.*) Similarly, the Joint Commenters supported DOE's proposal to add an optional no-load test, which would better represent current UPS usage, and requested DOE to enable voluntary reporting of the no-load power consumption on DOE's CCD. (Joint Commenters, No. 12 at p. 1) The Joint Commenters recommended that DOE establish a separate standby mode metric and standard based on the no-load testing condition in the future because UPSs' no-load mode aligns closely with battery chargers' maintenance mode, which qualify under EPCA's definition of standby. (*Id.*)

Regarding the comments recommending enabling the reporting option for the optional no-load test, DOE reiterates that DOE is not making any amendments to reporting or certification requirements for UPSs in this rulemaking. Instead, DOE may consider proposals to amend the certification requirements and reporting for UPSs under a separate rulemaking regarding appliance and equipment certification. DOE notes that it is only adopting the no-load test as an optional test in this rulemaking and will continue to regularly review the UPS market to analyze the representativeness of the no-load test condition in real world applications. DOE also notes that an analysis of any potential energy conservation standards pertaining to the no-load test is outside the scope of this test procedure rulemaking.

For the reasons discussed here and in the January 2023 NOPR, in this final rule, DOE is finalizing the proposals to add a method for measuring the power consumption of UPSs at no-load as a test to be used as the basis for any representations of no-load power consumption.

F. Reference Test Load

DOE's UPS test procedure refers to the 25, 50, 75, and 100-percent loads as ''reference test loads.'' In general, test loads for testing consumer electronics can be either linear [22] or non-linear [23] in nature.

While IEC 62040–3 Ed. 2.0 provides a definition for reference test load,[24] it does not explicitly address whether such a test load is linear or non-linear in nature. Section 2.24 of appendices Y and Y1 defines ''reference test load'' as a load or condition with a power factor of greater than 0.99 in which the AC output socket of the UPS delivers the active power (W) for which the UPS is rated. By specifying a power factor requirement of greater than 0.99, DOE's current definition of ''reference test load'' necessitates the use of a test load that is both linear and resistive.

Section D.2 in Annex D of IEC 62040–3 Ed. 3.0 explains that the diversity of types of load equipment and their relevant characteristics are always changing with technology. For this reason, the UPS output performance is characterized by loading with passive reference loads to simulate, as far as practical, the expected load types, but it cannot be taken that these load types are totally representative of the actual load equipment in a given application. The UPS industry has generally specified UPS output characteristics under conditions of linear loading (*i.e.,* resistive or resistive/inductive). The effect on the output of the UPS by non-linear loads both in steady state and dynamic is, in many cases, to cause deviation from the output characteristic specified by the manufacturer/supplier where these are quoted under linear load conditions.

In the January 2023 NOPR, DOE discussed comments suggesting the use of non-linear loads. 88 FR 790, 798. While DOE recognized that loads protected by UPSs can be non-linear, the use of non-linear loads for testing may create certain challenges or difficulties in meeting the specified test conditions, as described within section D.2 of IEC 62040–3 Ed. 3.0. *Id.* This suggests that testing with non-linear loads may produce results that are less repeatable or reproducible than testing with linear loads. *Id.* In the January 2023 NOPR, DOE stated that it had no information, nor had commenters provided any information, about how the use of non-linear loads for UPS testing may affect repeatability, reproducibility, or test burden. *Id.* As a result, DOE did not propose the use of non-linear test loads for testing UPSs in the January 2023 NOPR. *Id.*

DOE did not receive any stakeholder comments on this topic in response to the January 2023 NOPR. As such, in this final rule, DOE is not making any amendments to the UPS test loads.

G. Test Procedure Costs and Harmonization

In this final rule, DOE is amending the existing test procedure for UPSs by updating the industry standard incorporated by reference to its latest version, updating definitions consistent with the latest version of the industry standard, and introducing an optional test for measuring the power consumption of UPSs at no-load conditions. DOE has determined that these amendments would not be unduly burdensome for manufacturers to conduct.

EPCA requires that test procedures prescribed by DOE not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The following sections discuss DOE's evaluation of estimated costs associated with the finalized amendments.

1. Test Procedure Costs and Impact

This final rule updates certain referenced sections in the UPS test procedure at appendices Y and Y1 to the latest version of the industry standard and would not change the method of testing UPSs, but rather

[20] ASAP's comment can be found at pp. 14–15 of the February 2023 public meeting transcript, available at *www.regulations.gov/document/EERE-2022-BT-TP-0005-0009.*

[21] Schneider Electric's comment can be found at pp. 15–16 of the February 2023 public meeting transcript, available at *www.regulations.gov/document/EERE-2022-BT-TP-0005-0009.*

[22] IEC 62040–3 Ed 3.0 defines a linear load as a load wherein the load impedance is a constant.

[23] IEC 62040–3 Ed 3.0 defines a non-linear load as a load wherein the load impedance is a variable dependent on other parameters, such as voltage or time.

[24] IEC 62040–3 Ed. 2.0 defines ''reference test load'' as a load or condition in which the output of the UPS delivers the active power (W) for which the UPS is rated.

would only make non-substantive changes, such as section renumbering. The adopted amendments to harmonize certain definitions with the industry standard would not change the scope of products currently subject to the DOE test procedure or energy conservation standards. Additionally, the adopted optional test procedure for measuring the power consumption of UPSs at no-load conditions would not be required for demonstrating compliance with standards. Therefore, the finalized amendments would not alter the measured energy efficiency or energy use of UPSs. Manufacturers will be able to rely on data generated under the current test procedure. Further, the adopted changes would not require the purchase of additional equipment or increased test burden, and consequently would not impact testing costs. If manufacturers elected to continue to make representations or begin making representations regarding UPS power consumption at no-load conditions, they may need to retest the no-load power portion of the test procedure for their UPS model. DOE estimates that this retest would cost approximately $1,700 per unit if the test is conducted by a third-party lab and substantially less if done by the manufacturer themselves. However, as stated previously, any representations from such a retest would not be required for demonstrating compliance with standards for UPSs.

2. Harmonization With Industry Standards

DOE's established practice is to adopt relevant industry standards as DOE test procedures unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA), or estimated operating costs of that product during a representative average use cycle or period of use. Section 8(c) of appendix A of 10 CFR part 430 subpart C. In cases where the industry standard does not meet EPCA statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards as the DOE test procedure.

The test procedure for UPSs at appendices Y and Y1 currently incorporates by reference IEC 62040–3 Ed. 2.0 regarding test setup, input and output power measurement, and the optional determination of UPS architecture. DOE is incorporating by reference the latest version of this industry standard (*i.e.,* IEC 62040–3 Ed. 3.0). Additional discussion of this update is provided in section III.C of this document.

In the January 2023 NOPR, DOE requested comment on the benefits and burdens of the proposed updates and additions to the industry standard referenced in the test procedure for UPSs. 88 FR 790, 798. NEMA supported DOE's proposal to harmonize with industry standards. (NEMA, No. 10 at p. 3) Therefore, in this final rule, DOE is adopting its proposal to harmonize with IEC 62040–3 Ed. 3.0.

H. Effective and Compliance Dates

The effective date for the adopted test procedure amendment will be 75 days after publication of this final rule in the **Federal Register**. EPCA prescribes that all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with an amended test procedure, beginning 180 days after publication of the final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

DOE also recognizes that the publication of separate final rules for battery chargers and UPSs may complicate the compliance dates in appendices Y and Y1 as they apply to battery chargers and UPSs, respectively. As an example, the September 2022 Final Rule amended appendices Y and Y1 requiring manufacturers of battery chargers to use this recently updated version of appendix Y beginning March 7, 2023. Considering that there are no differences in how a UPS is tested between the two versions, DOE concludes that it would be beneficial to refer to the same version of the appendix (as finalized by the September 2022 Final Rule) for testing both battery chargers and UPSs. DOE also concludes that presenting these various compliance dates and references to different versions of the appendices in a tabular format would clearly show the applicability of each appendix. Accordingly, in this final rule, DOE is updating the notes section at the beginning of appendices Y and Y1 to include a table that clearly identifies the appropriate appendix reference and compliance dates for each product at any given time.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in this preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this final regulatory action does not constitute a ''significant regulatory action'' under section 3(f) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any final rule where the agency was first required by law to publish a proposed rule for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *www.energy.gov/gc/office-general-counsel.* DOE reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has recently conducted a focused inquiry into small business manufacturers of the UPSs covered by this rulemaking. DOE used available public information to identify potential small manufacturers. DOE accessed the CCD [25] to create a list of companies that import or otherwise manufacture the UPSs covered by this final rule.

For manufacturers of UPSs, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. *See* 13 CFR part 121. The size standards are listed by the North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support—table-size-standards.* Manufacturing of UPSs is classified under NAICS 335999, ''All Other Miscellaneous Electrical Equipment and Component Manufacturing.'' The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for this category.

To estimate the number of small businesses that manufacture UPSs impacted by this rulemaking, DOE conducted a survey using information from DOE's CCD and previous rulemakings. DOE used information from these sources to create a list of companies that potentially manufacture or sell UPSs. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a ''small business,'' or are foreign owned and operated. DOE identified five companies that are small businesses manufacturing UPSs covered by this rulemaking.

However, DOE has concluded that the updates to DOE's test procedure for UPSs do not involve substantive changes to the test setup and methodology and will not pose any additional test burden or additional test costs for any UPS manufacturers, large or small.

Therefore, DOE concludes that the cost effects accruing from the final rule would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of a FRFA is not warranted. DOE has submitted a certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of UPSs must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including UPSs. (*See generally* 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOE is not amending the certification or reporting requirements for UPSs in this final rule. Instead, DOE may consider proposals to amend the certification requirements and reporting for UPSs under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE establishes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for UPSs. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, appendix A to subpart D, A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for

[25] U.S. Department of Energy Compliance Certification Database, available at: *www.regulations.doe.gov/certification-data/products.html.*

the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.energy.gov/gc/office-general-counsel.* DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of

the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The modifications to the test procedure for UPSs adopted in this final rule incorporate testing methods contained in certain sections of the following commercial standard: IEC 62040–3 Ed. 3.0. DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in this standard and has received no comments objecting to its use.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

N. Description of Materials Incorporated by Reference

IEC 62040–3 Ed. 3.0, ''Uninterruptible power systems (UPS)—Part 3: Method of specifying the performance and test requirements'' is an industry-accepted test standard that specifies methods for measuring the efficiency of a UPS. The test procedure amended in this final rule updates all references from the previous edition (IEC 62040–3 Ed. 2.0) to this most current edition (IEC 62040–3 Ed. 3.0). IEC 62040–3 Ed. 3.0 is reasonably available from IEC at *https://webstore.iec.ch/* and ANSI at *webstore.ansi.org.*

In this final rule, DOE included amendments to add a new section 0 (Incorporation by Reference) to both appendices Y and Y1 listing the applicable sections of IEC 62040–3 Ed. 3.0 that are referenced by the test procedure.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on March 25, 2024, by Jeff Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 5, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends part 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.3 by removing paragraph (o)(3) and revising paragraph (q)(4) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(q) * * *

(4) IEC 62040–3:2021 (''IEC 62040–3 Ed. 3.0'') *Uninterruptible power systems (UPS)—Part 3: Method of specifying the performance and test requirements,* Edition 3.0, 2021–04; IBR approved for appendices Y and Y1 to subpart B.

* * * * *

■ 3. Amend appendix Y to subpart B of part 430 by:

■ a. Revising the introductory note;

■ b. Adding section 0;

■ c. Revising sections 2.26, 2.27, 2.27.1, 2.27.2, and 2.27.3;

■ d. Revising the introductory text of sections 4.2.1 and 4.3.3; and

■ e. Adding section 4.3.3(c).

The revisions and additions read as follows:

Appendix Y to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Battery Chargers

Note 1: For all Battery Chargers, including UPSs, compliance with the relevant standard in § 430.32(z) or any representation must be based upon results generated under the corresponding appendix listed in the following table:

	Battery chargers other than UPSs	UPS
On or After July 3, 2024 and Before October 16, 2024	Use appendix Y as it appeared on either March 7, 2023, or July 3, 2024.	Use appendix Y as it appeared on either March 7, 2023, or July 3, 2024
On or After October 16, 2024 and Before compliance date of any new or amended standards published any time after September 2022.	Use appendix Y as it appeared on July 3, 2024..	Use appendix Y as it appeared on July 3, 2024.
On or After compliance date of any new or amended standards published any time after September 2022.	Use appendix Y1	Use appendix Y1.

0. Incorporation by Reference

DOE incorporated by reference in § 430.3 the entire test standard for IEC 62040–3 Ed. 3.0. However, only enumerated provisions of this standard are applicable to this appendix, as follows. In cases in which there is a conflict, the language of the test procedure in this appendix takes precedence over the referenced test standard.

0.1 IEC 62040–3 Ed. 3.0:

(a) Section 3.5, Specified values;

(b) Section 3.5.49, total harmonic distortion;

(c) Section 5, Electrical conditions, performance and declared values;

(d) Section 5.2, UPS input specification, as specified in section 2.28.2 of this appendix;

(e) Section 5.2.1, Conditions for normal mode of operation; Clause 5.2.1.a;

(f) Clause 5.2.1.b;

(g) Section 5.2.2, Conditions to be declared by the manufacturer; Clause 5.2.2.k;

(h) Clause 5.2.2.l;

(i) Clause 5.2.2.m;
(j) Section 5.3, UPS output specification; Section 5.3.2, Characteristics to be declared by the manufacturer; Clause 5.3.2.b;
(k) Clause 5.3.2.c;
(l) Clause 5.3.2.d;
(m) Clause 5.3.2.e;
(n) Section 5.3.4.2, Input dependency AAA;
(o) Section 6.2, Routine test procedure; Section 6.2.2, Electrical; Section 6.2.2.4, No load, as specified in section 4.3.3(c) of this appendix;
(p) Section 6.2.2.7, AC input failure, as specified in Note to section 2.28.1 of this appendix;
(q) Section 6.4, Type test procedure (electrical); Section 6.4.1, Input—AC input power compatibility; Section 6.4.1.2, Steady state input voltage tolerance and VI input independency, as specified in Note to section 2.28.3 of this appendix;
(r) Section 6.4.1.3, Combined input voltage/frequency tolerance and VFI input independency, as specified in Note to section 2.28.2 of this appendix;
(s) Annex G—AC input power failure—Test method;
(t) Annex J—UPS efficiency and no load losses—Methods of measurement, as specified in sections 4.2.1 and 4.3.3 of this appendix.

0.2 [Reserved]

* * * * *

2.26. *Total harmonic distortion (THD),* expressed as a percent, is as defined in section 3.5.9 of IEC 62040–3 Ed. 3.0.

2.27. *Uninterruptible power supply or UPS* means a battery charger consisting of a combination of convertors, switches and energy storage devices (such as batteries), constituting a power system for maintaining continuity of load power in case of AC input power failure.

2.27.1. *Voltage and frequency dependent UPS or VFD UPS* means a UPS that protects the load from a complete loss of AC input power. The output of a VFD UPS is dependent on changes in voltage and frequency of the AC input power and is not intended to provide additional voltage corrective functions, such as those arising from the use of tapped transformers.

Note to 2.27.1: VFD input dependency may be verified by performing the AC input failure test in section 6.2.2.7 of IEC 62040–3 Ed. 3.0 and observing that, at a minimum, the UPS switches from normal mode of operation to battery power while the input is interrupted.

2.27.2. *Voltage and frequency independent UPS or VFI UPS* means a UPS that is independent of AC input power voltage and frequency variations as specified and declared in section 5.2 of IEC 62040–3 Ed. 3.0 and shall protect the load against adverse effects from such variations without discharging the energy storage device.

Note to 2.27.2: VFI input dependency may be verified by performing the combined input voltage/frequency tolerance and VFI input independency test in section 6.4.1.3 of IEC 62040–3 Ed. 3.0 respectively and observing that, at a minimum, the UPS produces an output voltage and frequency within the specified output range when the input voltage is varied by ±10% of the rated input voltage and the input frequency is varied by ±2% of the rated input frequency.

2.27.3. *Voltage independent UPS or VI UPS* means a UPS that protects the load as required for VFD and also from (a) under-voltage applied continuously to the input, and (b) over-voltage applied continuously to the input. The output voltage of a VI UPS shall remain within declared voltage limits (provided by voltage corrective functions, such as those arising from the use of active and/or passive circuits). The output voltage tolerance band shall be narrower than the input voltage tolerance band.

Note to 2.27.3: VI input dependency may be verified by performing the steady state input voltage tolerance test in section 6.4.1.2 of IEC 62040–3 Ed. 3.0 and ensuring that the UPS remains in normal mode with the output voltage within the specified output range when the input voltage is varied by ±10% of the rated input voltage.

* * * * *

4.2.1. General Setup

Configure the UPS according to Annex J.2 of IEC 62040–3 Ed. 3.0 with the following additional requirements:

* * * * *

4.3.3. Power Measurements and Efficiency Calculations

Measure input and output power of the UUT according to section J.3 of Annex J of IEC 62040–3 Ed. 3.0, or measure the input and output energy of the UUT for efficiency calculations with the following exceptions:

* * * * *

(c) For representations of no-load losses, measure the active power at the UPS input port with no load applied in accordance with section 6.2.2.4 of IEC 62040–3 Ed. 3.0.

* * * * *

■ 4. Amend appendix Y1 to subpart B of part 430 by:
■ a. Revising the introductory note;
■ b. Adding section 0;
■ c. Revising sections 2.27, 2.28, 2.28.1, 2.28.2, and 2.28.3;
■ d. Revising the introductory text of sections 4.2.1 and 4.3.3; and
■ e. Adding section 4.3.3(c).

The revisions and additions read as follows:

Appendix Y1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Battery Chargers

Note 1: For all Battery Chargers, including UPSs, compliance with the relevant standard in § 430.32(z) or any representation must be based upon results generated under the corresponding appendix listed in the following table:

	Battery chargers other than UPSs	UPS
On or After July 3, 2024 and Before October 16, 2024	Use appendix Y as it appeared on either October 11, 2022, or July 3, 2024.	Use appendix Y as it appeared on either October 11, 2022, or July 3, 2024.
On or After October 16, 2024 and Before compliance date of any new or amended standards published any time after September 2022.	Use appendix Y as it appeared on July 3, 2024.	Use appendix Y as it appeared on July 3, 2024.
On or After compliance date of any new or amended standards published any time after September 2022.	Use appendix Y1	Use appendix Y1.

Manufacturers may begin to use appendix Y1 to certify compliance with any new or amended energy conservation standards, published after September 8, 2022, prior to the applicable compliance date for those standards.

0. Incorporation by Reference

DOE incorporated by reference in § 430.3 the entire test standard for IEC 62040–3 Ed. 3.0. However, only enumerated provisions of this standard are applicable to this appendix, as follows. In cases in which there is a conflict, the language of the test procedure in this appendix takes precedence over the referenced test standard.

0.1 IEC 62040–3 Ed. 3.0:
(a) Section 3.5 Specified values;
(b) Section 3.5.49 total harmonic distortion;
(c) Section 5, Electrical conditions, performance and declared values;
(d) Section 5.2, UPS input specification, as specified in section 2.28.2 of this appendix;
(e) Section 5.2.1, Conditions for normal mode of operation; Clause 5.2.1.a;
(f) Clause 5.2.1.b;
(g) Section 5.2.2, Conditions to be declared by the manufacturer; Clause 5.2.2.k;
(h) Clause 5.2.2.l;
(i) Clause 5.2.2.m;
(j) Section 5.3, UPS output specification; Section 5.3.2, Characteristics to be declared by the manufacturer; Clause 5.3.2.b;
(k) Clause 5.3.2.c;
(l) Clause 5.3.2.d;
(m) Clause 5.3.2.e;
(n) Section 5.3.4.2, Input dependency AAA;
(o) Section 6.2, Routine test procedure; Section 6.2.2, Electrical; Section 6.2.2.4, No

load, as specified in section 4.3.3(c) of this appendix;

(p) Section 6.2.2.7, AC input failure, as specified in Note to section 2.28.1 of this appendix;

(q) Section 6.4, Type test procedure (electrical); Section 6.4.1, Input—AC input power compatibility; Section 6.4.1.2, Steady state input voltage tolerance and VI input independency, as specified in Note to section 2.28.3 of this appendix;

(r) Section 6.4.1.3, Combined input voltage/frequency tolerance and VFI input independency, as specified in Note to section 2.28.2 of this appendix;

(s) Annex G—AC input power failure—Test method;

(t) Annex J—UPS efficiency and no load losses—Methods of measurement, as specified in sections 4.2.1 and 4.3.3 of this appendix.

0.2 [Reserved]

* * * * *

2.27. *Total harmonic distortion (THD),* expressed as a percent, is as defined in section 3.5.9 of IEC 62040–3 Ed. 3.0.

2.28. *Uninterruptible power supply or UPS* means a battery charger consisting of a combination of convertors, switches and energy storage devices (such as batteries), constituting a power system for maintaining continuity of load power in case of AC input power failure.

2.28.1. *Voltage and frequency dependent UPS or VFD UPS* means a UPS that protects the load from a complete loss of AC input power. The output of a VFD UPS is dependent on changes in voltage and frequency of the AC input power and is not intended to provide additional voltage corrective functions, such as those arising from the use of tapped transformers.

Note to 2.28.1: VFD input dependency may be verified by performing the AC input failure test in section 6.2.2.7 of IEC 62040–3 Ed. 3.0 and observing that, at a minimum, the UPS switches from normal mode of operation to battery power while the input is interrupted.

2.28.2. *Voltage and frequency independent UPS or VFI UPS* means a UPS that is independent of AC input power voltage and frequency variations as specified and declared in section 5.2 of IEC 62040–3 Ed. 3.0 and shall protect the load against adverse effects from such variations without discharging the energy storage device.

Note to 2.28.2: VFI input dependency may be verified by performing the combined input voltage/frequency tolerance and VFI input independency test in section 6.4.1.3 of IEC 62040–3 Ed. 3.0 respectively and observing that, at a minimum, the UPS produces an output voltage and frequency within the specified output range when the input voltage is varied by ±10% of the rated input voltage and the input frequency is varied by ±2% of the rated input frequency.

2.28.3. *Voltage independent UPS or VI UPS* means a UPS that protects the load as required for VFD and also from (a) under-voltage applied continuously to the input, and (b) over-voltage applied continuously to the input. The output voltage of a VI UPS shall remain within declared voltage limits (provided by voltage corrective functions, such as those arising from the use of active and/or passive circuits). The output voltage tolerance band shall be narrower than the input voltage tolerance band.

Note to 2.28.3: VI input dependency may be verified by performing the steady state input voltage tolerance test in section 6.4.1.2 of IEC 62040–3 Ed. 3.0 and ensuring that the UPS remains in normal mode with the output voltage within the specified output range when the input voltage is varied by ±10% of the rated input voltage.

* * * * *

4.2.1. General Setup

Configure the UPS according to Annex J.2 of IEC 62040–3 Ed. 3.0 with the following additional requirements:

* * * * *

4.3.3. Power Measurements and Efficiency Calculations

Measure input and output power of the UUT according to section J.3 of Annex J of IEC 62040–3 Ed. 3.0, or measure the input and output energy of the UUT for efficiency calculations with the following exceptions:

* * * * *

(c) For representations of no-load losses, measure the active power at the UPS input port with no load applied in accordance with section 6.2.2.4 of IEC 62040–3 Ed. 3.0.

[FR Doc. 2024–07612 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734, 738, 740, 742, 743, 744, 754, 758, 772, 774

[Docket No. 240415–0109]

RIN 0694–AJ58

Export Control Revisions for Australia, United Kingdom, United States (AUKUS) Enhanced Trilateral Security Partnership

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Interim final rule.

SUMMARY: With this interim final rule (IFR), the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to remove license requirements, expand the availability of license exceptions, and reduce the scope of end-use and end-user-based license requirements for exports, reexports, and transfers (in-country) to or within Australia and the United Kingdom (UK) to enhance technological innovation among the three countries and support the goals of the AUKUS Trilateral Security Partnership.

DATES: This rule is effective April 19, 2024. Comments must be received by BIS no later than June 3, 2024.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The *regulations.gov* ID for this rule is: BIS–2024–0019. Please refer to RIN 0694–AJ58 in all comments.

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' Any submissions with file names that do not begin with either a ''BC'' or a ''P'' will be assumed to be public and will be made publicly available through *https://www.regulations.gov.* Commenters submitting business confidential information are encouraged to scan a hard copy of the non-confidential version to create an image of the file, rather than submitting a digital copy with redactions applied, to avoid inadvertent redaction errors which could enable the public to read business confidential information.

FOR FURTHER INFORMATION CONTACT: For questions on this rule, contact Philip Johnson at *RPD2@bis.doc.gov* or (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

BIS is amending the EAR (15 CFR parts 730–774), by revising the license requirements for items being exported, reexported, or transferred (in-country) to or within Australia and the UK. Background regarding these changes is detailed below.

AUKUS Trilateral Security Partnership

On September 15, 2021, the leaders of Australia, the UK, and the United States

announced their ''resolve to deepen diplomatic, security, and defense cooperation in the Indo-Pacific region, including by working with partners, to meet the challenges of the twenty-first century'' by creating AUKUS, an enhanced trilateral security partnership. Through AUKUS, partner governments are strengthening each other's ability to support their collective security and defense interests, building on longstanding and ongoing bilateral ties. AUKUS implementation promotes deeper information and technology sharing, while fostering integration of security and defense-related science, technology, industrial bases, and supply chains. In particular, AUKUS significantly enhances cooperation on a range of security and defense capabilities, many of which are detailed below. AUKUS is part of a broader U.S. Government effort to fortify international alliances and partnerships in mutually reinforcing ways across issues and continents. It is one of multiple partnerships that the United States is pursuing, enhancing cooperation on security issues in the Indo-Pacific region and around the world.

As it currently stands, AUKUS consists of two main pillars, Pillar I and Pillar II. Pillar I focuses on trilateral submarine cooperation. Pillar II has a wider scope than Pillar I because it focuses initial partner collaboration efforts on advanced capabilities in the following areas: (1) advanced cyber, artificial intelligence (AI), and autonomy; (2) quantum technologies; (3) hypersonic and counter-hypersonic capabilities; (4) electronic warfare; (5) innovation; (6) information sharing; and (7) additional undersea capabilities. Recognizing the deep defense ties built over decades, the three partner nations endeavor to streamline their collective defense collaboration while strengthening the ability to protect the sensitive technologies that underpin national security on these topics. It should be noted that the AUKUS partnership will continue to evolve. The technologies and areas of cooperation highlighted above are illustrative, not exhaustive, and are referenced here to highlight how license-free exports of certain items facilitated by the changes in this rule directly support not only the AUKUS partnership, but general defense trade and innovation between and among the AUKUS nations.

Export Control Cooperation With the UK and Australia

On December 22, 2023, President Biden signed the National Defense Authorization Act (NDAA) for Fiscal Year 2024, Public Law 118–31, which enacted provisions related to streamlining defense trade between and among the United States, UK, and Australia, provided certain conditions are met. The Department of State has purview over the implementation of the new authorities provided through the NDAA's revisions to the Arms Export Control Act. Separately, to support the United States' broader defense trade and technology cooperation with the AUKUS partners, BIS is issuing this rule to remove certain license requirements under the EAR.

The UK and Australia are two of the United States' closest allies, with longstanding collective defense arrangements. They are also members of all four multilateral export control regimes (*i.e.,* the Wassenaar Arrangement on Export Controls for Conventional Arms and Related Dual-Use Goods and Technologies, Australia Group, Nuclear Suppliers Group, and Missile Technology Control Regime (MTCR)) and are also members of the Global Export Controls Coalition (GECC) of governments that have substantially aligned on export control measures in response to Russia's illegal war against Ukraine (see supplement no. 3 to part 746 of the EAR). The UK and Australia have robust export control systems and have taken additional measures in recent months to enhance technology protection and promote secure trade. Specifically, in December 2023, the United Kingdom's National Security Act 2023 came into force, providing for *inter alia* enhanced protections against the unauthorized disclosure of certain defense-related information. In March 2024, the Australian Parliament passed the Defence Trade Controls Amendment Act 2024 and the Safeguarding Australia's Military Secrets Act 2024, providing for *inter alia* controls on the reexport of items originally exported from Australia, and disclosures of controlled technology to certain foreign persons within Australia, as well as controls on the provision of defense services. Following their passage in their respective parliaments, the UK and Australian actions received royal assent. These actions highlight the UK's and Australia's commitment to implementing robust export controls and technology protection measures. Accordingly, this rule significantly streamlines many license requirements under the EAR for exports, reexports, and transfers (in-country) to and within the UK and Australia.

Regulatory Changes

With this rule, Australia and the UK will have nearly the same licensing treatment under the EAR as Canada. The liberal licensing treatment of items destined to Canada was made possible in part because Canada is included in the National Technology and Industrial Base (NTIB) (as defined in 10 U.S.C. 4801(1)). In 2017, this definition was broadened to include the UK and Australia. Accordingly, the regulatory changes in this rule not only advance the goals of the AUKUS Enhanced Trilateral Security Partnership, but also further align treatment of the UK and Australia under the EAR with fellow NTIB member Canada. This rule makes six primary export control policy changes as well as several minor conforming changes to further align the treatment of Australia, Canada, and the UK under the EAR.

The first three changes involve the removal of list-based license requirements for exports, reexports, and transfers (in-country) to Australia and the UK. Specifically, BIS is removing license requirements for national security column 1 (NS1), regional stability column 1 (RS1), and missile technology column 1 (MT1) reasons for control for the destinations of Australia and the UK. As Australia and the UK are not currently subject to NS2 or RS2 controls, with this rule all Commerce Country Chart-based NS and RS controls are removed for these countries. As detailed above, the AUKUS partners are among the closest allies of the United States and have similar export control and technology protection systems in place, mitigating the risk of misuse or diversion of license-free exports, reexports, and transfers of NS1, RS1, and MT1 items to and within these destinations. To facilitate this change, the Xs are being removed from the Country Chart (supplement no. 1 to part 738) for NS1, RS1, and MT1 for Australia and the UK. Corresponding to the Commerce Country Chart, provisions in part 742 of the EAR that specify the license requirements for NS, MT, and RS reasons (§§ 742.4(a), .5(a), and .6(a), respectively) are revised in order to fully remove the license for Australia and the UK.

With these changes, ''600 series'' items, which are generally items on the Wassenaar Arrangement Munitions List, will no longer require a license to Australia or the UK. In addition, items controlled under the EAR for missile technology reasons consistent with the MTCR Annex will also no longer require a license to Australia or the UK. Finally, except for those items requiring a license to all destinations worldwide pursuant to § 742.6(a)(9), many 9x515 satellite-related items will no longer require a license to Australia or the UK.

These changes will significantly reduce the volume of BIS licenses for exports, reexports, and transfers to and within Australia and the UK, as BIS previously issued over 1,800 licenses per year for such items to Australia and the UK.

The fourth policy change is consistent with the general RS1 removal. BIS maintains a special RS Column 1 license requirement in § 742.6(a)(3) applicable to military commodities described under ECCN 0A919. Specifically, the special RS1 control required a license for reexports to all destinations except Canada for items classified under ECCN 0A919 except when such items are being reexported as part of a military deployment by a unit of the government of a country in Country Group A:1 (see supplement no. 1 to part 740 of the EAR) or the United States. This final rule will remove license requirements for 0A919 items to Australia and the UK, further aligning their treatment with Canada. As licenses for ECCN 0A919 items will no longer be required to the two countries under § 744.9(a)(1)(iii), this rule also removes footnote 3 on the Country Chart from Australia and the UK, which highlighted that a license was required for these items to those destinations.

Fifth, BIS is removing military end-use and end-user-based license requirements for exports, reexports, and transfers (in-country) of certain cameras, systems, or related components detailed under § 744.9(a)(1)(i) and (a)(1)(iii) of the EAR. Paragraph (a)(1)(i) of § 744.9 pertains to commodities described in ECCN 6A003.a.3, 6A003.a.4, or 6A003.a.6 that will be or are intended to be used by a 'military end-user,' as defined in § 744.9(d); paragraph (a)(1)(iii) pertains to commodities described in ECCNs 0A504 (incorporating commodities controlled by ECCNs 6A002 or 6A003, or commodities controlled by 6A993.a that meet the criterion of Note 3.a to 6A003.b.4), 6A002, 6A003, or 6A993.a (having a maximum frame rate equal to or less than 9 Hz and thus meeting the criteria of Note 3.a to 6A003.b.4), or 8A002.d that will be or are intended to be incorporated into a ''military commodity'' controlled by ECCN 0A919. Prior to this rule, the only exception to the requirements under these paragraphs was to Canada. With the publication of this rule, the exception now applies to Australia, Canada, and the UK.

Finally, BIS is revising its treatment of significant items (SI) (*i.e.,* hot section technology for the development, production or overhaul of commercial aircraft engines, components, and systems) controlled under ECCN 9E003.a.1 through a.6, a.8, .h, .i, and .l, and related controls to allow these items to be exported, reexported, or transferred (in-country) to or within Australia and the UK without a license, consistent with the current exception for Canada. This provision is in § 742.14(a).

In addition to the major policy changes discussed above, the broader alignment of controls on Australia, Canada, and the UK under the EAR requires additional minor policy changes. These changes are as follows:

1. Under § 734.17(c)(1), precautions for internet transfers of products eligible for export under § 740.17(b)(2) shall include such measures as an access control system that, either through automated means or human intervention, checks the address of every system outside of the U.S. or Canada to check against transfers to foreign government end users, is edited to include Australia and the UK within the list of countries exempted from the required measures;

2. Under §§ 740.15, 740.16, and 740.17 (License Exceptions Aircraft, Vessels and Spacecraft (AVS), Additional Permissive Reexports (APR), and Encryption Commodities, Software, and Technology (ENC), respectively), BIS is expanding the explicit applicability of these License Exceptions for use to Australia, Canada, and the UK;

3. Under § 742.2(a)(1), a license was required to all destinations, including Canada, for CB Column 1 items; with the publication of this rule the countries exempt from the license requirement is expanded to include Australia and the UK in the list for clarity, although the revision does not change existing license requirements;

4. Under § 742.7(a)(4), Canada remains exempted from certain crime control related license requirements for non-firearms items, but the text has been edited to read ''Canada only'' as these items are not available without a license to Australia and the UK;

5. Under § 742.13(a)(1), Canada is mentioned as requiring a license for certain communications intercepting devices, with the publication of this rule, this phrase now includes Australia and the UK for clarity, although the revision does not change existing license requirements;

6. Under § 742.18(a)(1), Canada is mentioned as requiring a license under the Chemical Weapons Convention; with the publication of this rule, this phrase now includes Australia and the UK for clarity although the revision does not change existing license requirements;

7. Under § 743.3(b), BIS is exempting Australia and the UK alongside Canada from unilateral reporting requirements for thermal imaging camera transactions;

8. Under §§ 754.3(a), .4(a), and .5(a), a license is required for short supply reasons for control for certain items, including to Canada; these phrases now include Australia and the UK for clarity without changing existing license requirements;

9. Under § 758.1(b)(3), (6), and (9), BIS requires certain transactions involving Canada to be reported in Electronic Export Information (EEI) filings, and these paragraphs now include Australia and the UK for clarity without changing existing EEI filing requirements; and

10. Under § 758.11(a), which covers the scope of export clearance requirements for firearms and related items, BIS now includes Australia and the UK alongside Canada for clarity as destinations to which certain clearance requirements continue to pertain.

Among other things, license exception Aircraft, Vessels, and Spacecraft (AVS) treats exports to Canadian airlines in most destinations as an export to Canada. Since MT1 items do not require a license for export to Canada, the primary impact of this AVS eligibility is that Canadian airlines in most destinations may receive MT1 items as spare parts. Consistent with the removal in this rule of MT1 license requirements for the UK and Australia, and as discussed above, BIS is adding AVS eligibility for Australian and United Kingdom airlines to receive such items in most destinations. As a conforming change, BIS is creating two new definitions for what constitutes an ''Australian airline'' and ''United Kingdom (or UK) airline.'' These two definitions are added to § 772.1 and mirror the definition of ''Canadian airline.'' Both definitions state that an Australian or UK airline is a citizen of that destination who is authorized by their respective government to engage in business as an airline. The definitions then define, for purposes of these defined terms only, what it means to be a citizen of these countries, including firms incorporated or otherwise organized in a state or territory for Australia and a country or territory for the UK. To ensure alignment across these definitions, BIS is adding the term territory under the existing definition for a ''Canadian airline,'' which will now include firms incorporated or otherwise organized in Canadian provinces or territories.

Furthermore, BIS notes one particular license requirement that will remain unchanged as a result of this rule. Under

the EAR, firearms-related items and other CC controlled items in ECCNs 0A501 (except 0A501.y), 0A502, 0A503, 0A504, 0A505. a, .b, and .x, 0A981, 0A982, 0A983, 0D501, 0D505, 0E501, 0E502, 0E504, 0E505, and 0E982 will continue to require a license when destined to and among the UK and Australia. This license requirement mirrors the license requirement for firearms-related items in ECCNs 0A501 (except 0A501.y), 0A502, 0A504 (except 0A504.f), and 0A505 (except 0A505.d) destined to Canada. Prior to this IFR, license requirements for these items to the UK and Australia were implemented through NS1/RS1 reasons for control. Since these license requirements are removed for the UK and Australia in this rule, BIS is adding a footnote to the Commerce Country Chart for the UK and Australia, which indicates that a license is still required for these 0x5zz firearms-related items to those two countries. This does not change the scope of the license requirements for these items to the UK and Australia that applied prior to the effective date of this rule.

Request for Public Comments

To ensure that the export control revisions implemented in this rule advance AUKUS objectives, BIS requests comments on the impacts of these changes. BIS also requests comments on additional revisions to the EAR that would further enhance defense industrial base cooperation and technology innovation with Australia and the United Kingdom. In particular, BIS is not removing license requirements to Australia and the UK in this IFR for encryption items (EI) in § 742.15(a)(1) of the EAR. BIS notes that license exceptions such as encryption commodities, software, and technology (ENC) and authorized cybersecurity exports (ACE) are currently available for exports, reexports, and transfers (in-country) of such items to and within Australia and the UK, subject to certain conditions. BIS welcomes comments on the potential impact of removing EI licensing requirements for Australia and the UK.

Export Control Reform Act of 2018

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

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated a ''significant regulatory action'' under Executive Order 12866.

2. Notwithstanding any other provision of law, no person may be required to respond to, or be subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection currently approved by OMB under control number 0694–0088, Simplified Network Application Processing System. This collection includes, among other things, license applications and commodity classification, and carries a burden estimate of 29.4 minutes for a manual or electronic submission for a total burden estimate of 38,826 hours. BIS expects license application submissions to decrease by approximately 1,800 applications annually, for a total decrease in burden estimate under this collection of approximately 882 hours.

3. This rule does not contain policies with federalism implications as that term is defined under Executive Order 13132.

4. Pursuant to Section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date. Additionally, this rule is exempt from the ordinary rulemaking requirements of the APA pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States Government.

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

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology.

15 CFR Part 738

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

15 CFR Part 740

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

15 CFR Part 742

Exports and Terrorism.

15 CFR Part 743

Administrative practice and procedure, Reporting and recordkeeping requirements.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 754

Agricultural commodities, Exports, Forests and forest products, Horses, Petroleum, Reporting and recordkeeping requirements.

15 CFR Part 758

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

15 CFR Part 772

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 734, 738, 740, 742, 743, 744, 754, 758, 772, and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 734—SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

■ 1. The authority citation for 15 CFR part 734 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 2. Revise § 734.17(c)(1) to read as follows:

§ 734.17 Export of encryption source code and object code software.

(c) * * *

(1) The access control system, either through automated means or human intervention, checks the address of every system outside of the U.S., Australia, Canada, or the United Kingdom requesting or receiving a transfer and verifies such systems do not have a domain name or internet address of a foreign government end-user (*e.g.,* ''.gov,'' ''.gouv,'' ''.mil'' or similar addresses);

* * * * *

PART 738—COMMERCE CONTROL LIST OVERVIEW AND THE COUNTRY CHART

■ 3. The authority citation for 15 CFR part 738 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 4. In supplement no. 1 to part 738, revise the entries for Australia and the United Kingdom and add footnote 9 as follows:

Supplement No. 1 to Part 738—Commerce Country Chart

* * * * *

COMMERCE COUNTRY CHART

Countries	Chemical & biological weapons			Nuclear nonproliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
*		*		*			*		*		*		*			
Australia [9]	X															
*		*		*			*		*		*		*			
United Kingdom [9]	X															
*		*		*			*		*		*		*			

* * * * *

[9] A license is required to these destinations for items in the following ECCNs: 0A501 (except 0A501.y), 0A502, 0A503, 0A504, 0A505.a, .b, and .x, 0D501, 0D505, 0E501, 0E502, 0E504, and 0E505.

PART 740—LICENSE EXCEPTIONS

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

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

■ 6. Amend § 740.15 by revising the introductory text and paragraph (c)(1) introductory text, and revising and republishing paragraph (c)(2) to read as follows:

§ 740.15 Aircraft, vessels and spacecraft (AVS).

This License Exception authorizes departure from the United States of foreign registry civil aircraft on temporary sojourn in the United States and of U.S. civil aircraft for temporary sojourn abroad; the export of equipment and spare parts for permanent use on a vessel or aircraft; exports to vessels or planes of U.S., Australian, Canadian, or UK (the United Kingdom) registry and U.S., Australian, Canadian, or UK Airlines' installations or agents; the export or reexport of cargo that will transit Cuba on an aircraft or vessel on temporary sojourn; and the export of spacecraft and components for fundamental research. Generally, no License Exception symbol is necessary for export clearance purposes; however, when necessary, the symbol ''AVS'' may be used.

* * * * *

(c) *Shipments to U.S., Australian, Canadian, or UK vessels, planes and airline installations or agents*—(1) *Exports to vessels or planes of U.S., Australian, Canadian, or UK registry.* Export may be made of the commodities set forth in paragraph (c)(3) of this section, for use by or on a specific vessel or plane of U.S., Australian, Canadian, or UK registry located at any seaport or airport outside the United States, Australia, Canada, or the UK except a port in Cuba or Country Group D:1 (excluding the PRC), (see supplement no. 1 to part 740) provided that such commodities are all of the following: [3]

* * * * *

(2) *Exports to U.S., Australian, Canadian, or UK airline's installation or agent.* Exports of the commodities set forth in paragraph (c)(3) of this section, except fuel, may be made to a U.S., Australian, Canadian, or UK airline's [4] installation or agent in any foreign destination except Cuba or Country Group D:1 (excluding the PRC), (see supplement no. 1 to part 740) provided such commodities are all of the following:

(i) Ordered by a U.S., Australian, Canadian, or UK airline and consigned to its own installation or agent abroad;

(ii) Intended for maintenance, repair, or operation of aircraft registered in either the U.S., Australia, Canada, or UK and necessary for the aircraft's proper operation, except where such aircraft is located in, or owned, operated or controlled by, or leased or chartered to, Cuba or Country Group D:1 (excluding the PRC) (see supplement no. 1 to part 740) or a national of such country;

(iii) In usual and reasonable kinds and quantities; and

(iv) Shipped as cargo for which Electronic Export Information (EEI) is filed to the Automated Export System (AES) in accordance with the requirements of the Foreign Trade Regulations (FTR) (15 CFR part 30), except EEI is not required to be filed when any of these commodities is exported by U.S. airlines to their own installations and agents abroad for use in their aircraft operations, see 15 CFR 30.37(o) of the FTR.

* * * * *

[3] Where a license is required, see §§ 748.1, 748.4 and 748.6 of the EAR.

[4] See part 772 of the EAR for definitions of United States, Australia, Canadian, and UK airlines.

■ 7. Revise § 740.16(d) and (f) to read as follows:

§ 740.16 Additional permissive reexports (APR).

* * * * *

(d) Reexports of any item from Australia, Canada, or the United Kingdom that, at the time of reexport,

may be exported directly from the United States to the new country of destination under any License Exception.

* * * * *

(f) Reexports from a foreign destination to Australia, Canada, or the United Kingdom of any item if the item could be exported to Australia, Canada, or the United Kingdom without a license.

* * * * *

■ 8. Amend § 740.17 by revising paragraphs (e)(1) introductory text, (e)(1)(i) and (e)(iii)(C) to read as follows:

§ 740.17 Encryption commodities, software, and technology (ENC).

* * * * *

(e) *Reporting requirements*—(1) *Semiannual reporting requirement.* Semiannual reporting is required for exports to all destinations other than Australia, Canada, or the United Kingdom, and for reexports from Australia, Canada, or the United Kingdom for items described under paragraphs (b)(2) and (b)(3)(iii) of this section. Certain encryption items and transactions are excluded from this reporting requirement (see paragraph (e)(1)(iii) of this section). For information about what must be included in the report and submission requirements, see paragraphs (e)(1)(i) and (ii) of this section, respectively.

(i) *Information required.* Exporters must include, for each item, the Commodity Classification Automated Tracking System (CCATS) number and the name of the item(s) exported (or reexported from Australia, Canada, or the United Kingdom), and the following information in their reports:

(A) *Distributors or resellers.* For items exported (or reexported from Australia, Canada, or the United Kingdom) to a distributor or other reseller, including subsidiaries of U.S. firms, the name and address of the distributor or reseller, the item and the quantity exported or reexported and, if collected by the exporter as part of the distribution process, the end user's name and address;

(B) *Direct sales.* For items exported (or reexported from Australia, Canada, or the United Kingdom) through direct sale, the name and address of the recipient, the item, and the quantity exported; or

(C) *Foreign manufacturers and products that use encryption items.* For exports (*i.e.,* from the United States) or direct transfers (*e.g.,* by a ''U.S. subsidiary'' located outside the United States) of encryption components, source code, general purpose toolkits, equipment controlled under ECCN 5B002, technology, or items that provide an ''open cryptographic interface,'' to a foreign developer or manufacturer headquartered in a country not listed in supplement no. 3 to this part when intended for use in foreign products developed for commercial sale, the names and addresses of the manufacturers using these encryption items and, if known, when the product is made available for commercial sale, a non-proprietary technical description of the foreign products for which these encryption items are being used (*e.g.,* brochures, other documentation, descriptions or other identifiers of the final foreign product; the algorithm and key lengths used; general programming interfaces to the product, if known; any standards or protocols that the foreign product adheres to; and source code, if available).

* * * * *

(iii) * * *

(C) Encryption items exported (or reexported from Australia, Canada, or the United Kingdom) via free and anonymous download;

* * * * *

PART 742—CONTROL POLICY—CCL BASED CONTROLS

■ 5. The authority citation for 15 CFR part 742 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 6. Amend § 742.2 by revising paragraph (a)(1) introductory text to read as follows:

§ 742.2 Proliferation of chemical and biological weapons.

(a) * * *

(1) If CB Column 1 of the Country Chart (supplement no. 1 to part 738 of the EAR) is indicated in the appropriate ECCN, a license is required to all destinations, including Australia, Canada, and the United Kingdom, for the following:

* * * * *

■ 6. Revise § 742.4(a)(1) to read as follows:

§ 742.4 National security.

(a) * * *

(1) *National Security column 1 (NS:1).* A license is required for exports and reexports to all destinations, except Australia, Canada, or the United Kingdom, for all items in ECCNs on the CCL that include NS Column 1 in the Country Chart column of the ''License Requirements'' section.

* * * * *

■ 7. Revise § 742.5(a)(1) to read as follows:

§ 742.5 Missile technology.

(a) * * *

(1) In support of U.S. foreign policy to limit the proliferation of missiles, a license is required to export and reexport items related to the design, development, production, or use of missiles. These items are identified in ECCNs on the CCL as MT Column No. 1 in the Country Chart column of the ''License Requirements'' section. Licenses for these items are required to all destinations, except Australia, Canada, or the United Kingdom, as indicated by MT Column 1 of the Country Chart (see supplement no. 1 to part 738 of the EAR).

* * * * *

■ 8. Amend § 742.6 by revising paragraphs (a)(1), (a)(2)(i), (ii), (iv), (3), and (9) to read as follows:

§ 742.6 Regional stability.

(a) * * *

(1) *RS Column 1 license requirements in general.* A license is required for exports and reexports to all destinations, except Australia, Canada, or the United Kingdom, for all items in ECCNs on the CCL that include RS Column 1 in the Country Chart column of the ''License Requirements'' section. Transactions described in paragraph (a)(2), (3), or (9) of this section are subject to the RS Column 1 license requirements set forth in those paragraphs rather than the license requirements set forth in this paragraph (a)(1).

(2) * * *

(i) As indicated in the CCL and in RS Column 1 of the Commerce Country Chart, cameras described in 6A003.b.4.b require a license to all destinations other than Australia, Canada, or the United Kingdom if such cameras have a frame rate greater than 60 Hz.

(ii) Except as noted in paragraph (a)(2)(iii) of this section, as indicated in the CCL and in RS Column 1 of the Commerce Country Chart, cameras described in 6A003.b.4.b require a license to all destinations other than Australia, Canada, or the United

Kingdom if such cameras incorporate a focal plane array with more than 111,000 elements and a frame rate of 60 Hz or less, or cameras described in 6A003.b.4.b that are being exported or reexported to be embedded in a civil product.

* * * * *

(iv) Except as noted in paragraph (a)(2)(v) of this section, as indicated in the CCL and in RS Column 1 of the Commerce Country Chart, cameras described in 6A003 b.4.b require a license to all destinations other than Australia, Canada, or the United Kingdom if such cameras incorporate a focal plane array with 111,000 elements or less and a frame rate of 60 Hz or less and are being exported or reexported to be embedded in a civil product.

* * * * *

(3) *Special RS Column 1 license requirement applicable to military commodities.* A license is required for reexports to all destinations except Australia, Canada, or the United Kingdom for items classified under ECCN 0A919 except when such items are being reexported as part of a military deployment by a unit of the government of a country in Country Group A:1 (see supplement no. 1 to part 740 of the EAR) or the United States.

* * * * *

(9) *Special RS Column 1 license requirement applicable to certain spacecraft and related items.* A license is required for all destinations, including Australia, Canada, and the United Kingdom, for spacecraft and related items classified under ECCN 9A515.a.1, .a.2., .a.3., .a.4., .g, and ECCN 9E515.f.

* * * * *

■ 9. Amend § 742.7 by revising paragraphs (a)(4) through (6) to read as follows:

§ 742.7 Crime control and detection.

(a) * * *

(4) Certain crime control items require a license to all destinations, except Canada only. These items are identified under ECCNs 0A982, 0A503, and 0E982. Controls for these items appear in each ECCN; a column specific to these controls does not appear in the Country Chart (supplement no. 1 to part 738 of the EAR).

(5) Items designed for the execution of human beings as identified in ECCN 0A981 require a license to all destinations including Australia, Canada, and the United Kingdom.

(6) See § 742.11 of the EAR for further information on items controlled under ECCN 0A983, which require a license to all destinations, including Australia, Canada, and the United Kingdom.

* * * * *

■ 10. Revise § 742.11(a) to read as follows:

§ 742.11 Specially designed implements of torture, including thumbscrews, thumbcuffs, fingercuffs, spiked batons, and parts and accessories, n.e.s.

(a) *License Requirements.* In support of U.S. foreign policy to promote the observance of human rights throughout the world, a license is required to export any commodity controlled by ECCN 0A983 to all destinations including Australia, Canada, and the United Kingdom.

* * * * *

■ 11. Revise § 742.13(a)(1) to read as follows:

§ 742.13 Communications intercepting devices; software and technology for communications intercepting devices.

(a) * * *

(1) In support of U.S. foreign policy to prohibit the export of items that may be used for the surreptitious interception of wire, oral, or electronic communications, a license is required for all destinations, including Australia, Canada, and the United Kingdom, for ECCNs having an ''SL'' under the ''Reason for Control'' paragraph. These items include any electronic, mechanical, or other device primarily useful for the surreptitious interception of wire, oral, or electronic communications (ECCNs 5A001.f.1 and 5A980); and for related ''software'' primarily useful for the surreptitious interception of wire, oral, or electronic communications (ECCN 5D001.c and 5D980.a); and ''software'' primarily useful for the ''development'', ''production'', or ''use'' of devices controlled under ECCNs 5A001.f.1 and 5A980 (ECCNs 5D001.a and 5D980.b); and for ''technology'' primarily useful for the ''development'', ''production'', or ''use'' of items controlled by ECCNs 5A001.f.1, 5D001.a (for 5A001.f.1), 5A980 and 5D980 (ECCNs 5E001.a and 5E980); and for ''software'' primarily useful to support such ECCN 5E001.a ''development'', ''production'', or ''use'' ''technology'' for 5A001.f.1 equipment and certain 5D001.a ''software'' (ECCN 5D001.b). These licensing requirements do not supersede the requirements contained in the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2512). This license requirement is not reflected on the Commerce Country Chart (supplement no. 1 to part 738 of the EAR).

* * * * *

■ 12. Revise § 742.14(a) to read as follows:

§ 742.14 Significant items: hot section technology for the development, production or overhaul of commercial aircraft engines, components, and systems.

(a) *License requirement.* Licenses are required for all destinations, except Australia, Canada, and the United Kingdom, for ECCNs having an ''SI'' under the ''Reason for Control'' paragraph. These items include hot section technology for the development, production or overhaul of commercial aircraft engines controlled under ECCN 9E003.a.1 through a.6, a.8, .h, .i, and .l, and related controls.

* * * * *

■ 14. Revise § 742.18(a)(1) to read as follows:

§ 742.18 Chemical Weapons Convention (CWC or Convention).

* * * * *

(a) * * *

(1) Schedule 1 chemicals and mixtures controlled under ECCN 1C351. A license is required for CW reasons to export or reexport Schedule 1 chemicals controlled under ECCN 1C351.d.14 or .d.15 to all destinations including Australia, Canada, and the United Kingdom. CW applies to 1C351.d.14 for ricin in the form of Ricinus Communis AgglutininII (RCA_{II}), which is also known as ricin D or Ricinus Communis LectinIII (RCL_{III}), and Ricinus Communis LectinIV (RCL_{IV}), which is also known as ricin E. CW applies to 1C351.d.15 for saxitoxin identified by C.A.S. #35523–89–8. (Note that the advance notification procedures and annual reporting requirements described in § 745.1 of the EAR also apply to exports of Schedule 1 chemicals.)

* * * * *

PART 743—SPECIAL REPORTING AND NOTIFICATION

■ 15. The authority citation for 15 CFR part 743 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; 78 FR 16129 (January 23, 2020).

■ 16. Revise § 743.3(b) to read as follows:

§ 743.3 Thermal imaging camera reporting.

* * * * *

(b) *Transactions to be reported.* Exports that are not authorized by an individually validated license of more than 100 thermal imaging cameras in a

monocular, biocular, or binocular configuration controlled by ECCN 6A003.b.4.b to a destination in Country Group A:1 (see supplement no. 1 to part 740 of the EAR), except Australia, Canada, or the United Kingdom, must be reported to BIS.

* * * * *

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

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

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 202); Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

■ 18. Revise § 744.9(a)(1)(i) and (iii) to read as follows:

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

(a) * * *

(1) * * *

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

* * * * *

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

* * * * *

PART 754—SHORT SUPPLY CONTROLS

■ 19. The authority citation for 15 CFR part 754 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 15 U.S.C. 1824; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 20. Revise § 754.3(a) to read as follows:

§ 754.3 Petroleum products not including crude oil.

(a) *License requirement.* As indicated by the letters ''SS'' in the ''Reason for Control'' paragraph in the ''License Requirements'' section of ECCNs 1C980, 1C982, 1C983, and 1C984 on the CCL (supplement no. 1 to part 774 of the EAR), a license is required to all destinations, including Australia, Canada, and the United Kingdom, for the export of petroleum products, excluding crude oil, listed in supplement no. 1 to this part, that were produced or derived from the Naval Petroleum Reserves (NPR) or became available for export as a result of an exchange of any NPR produced or derived commodities.

* * * * *

■ 21. Revise § 754.4(a) to read as follows:

§ 754.4 Unprocessed western red cedar.

(a) *License requirement.* As indicated by the letters ''SS'' in the ''Reason for Control'' paragraph in the ''License Requirements'' section of ECCN 1C988 on the CCL (supplement no. 1 to part 774 of the EAR), a license is required to all destinations, including Australia, Canada, and the United Kingdom, for the export of unprocessed western red cedar covered by ECCN 1C988 (Western red cedar (thuja plicata) logs and timber, and rough, dressed and worked lumber containing wane). For a non-exhaustive list of 10-digit Harmonized System-based Schedule B commodity numbers that may apply to unprocessed western red cedar products subject to the license requirements of this section, see supplement no. 2 to part 754 of the EAR. See paragraph (c) of this section for license exceptions for timber harvested from public lands in the State of Alaska, private lands, or Indian lands, and see paragraph (d) of this section for relevant definitions.

* * * * *

■ 22. Revise § 754.5(a) to read as follows:

§ 754.5 Horses for export by sea.

(a) *License requirement.* As indicated by the letters ''SS'' in the ''Reason for Control'' paragraph of the ''License Requirements'' section of ECCN 0A980 on the CCL (supplement no. 1 to part 774 of the EAR) a license is required for the export of horses exported by sea to all destinations, including Australia, Canada, and the United Kingdom.

* * * * *

PART 758—EXPORT CLEARANCE REQUIREMENTS AND AUTHORITIES

■ 23. The authority citation for 15 CFR part 758 continues to read as follows:

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

■ 24. Amend § 758.1 by revising paragraphs (b)(3), (6), and (9) to read as follows:

§ 758.1 The Electronic Export Information (EEI) filing to the Automated Export System (AES).

* * * * *

(b) * * *

(3) For all exports of 9x515 or ''600 series'' items enumerated or otherwise described in paragraphs .a through .x of a 9x515 or ''600 series'' ECCN regardless of value or destination, including exports to Australia, Canada, and the United Kingdom;

* * * * *

(6) For all exports of items subject to the EAR that will be transshipped through Australia, Canada, or the United Kingdom to a third destination, where the export would require EEI or license if shipped directly to the final destination from the United States (see 15 CFR 30.36(b)(2) of the FTR);

* * * * *

(9) For all exports, except for exports authorized under License Exception BAG, as set forth in § 740.14 of the EAR, of items controlled under ECCNs 0A501.a or .b, shotguns with a barrel length less than 18 inches controlled under ECCN 0A502, or ammunition controlled under ECCN 0A505 except for .c, regardless of value or destination, including exports to Australia, Canada, and the United Kingdom. * * *

* * * * *

■ 25. Revise § 758.11(a) to read as follows:

§ 758.11 Export clearance requirements for firearms and related items.

(a) *Scope.* The export clearance requirements of this section apply to all exports of commodities controlled under ECCNs 0A501.a or .b, shotguns with a barrel length less than 18 inches controlled under ECCN 0A502, or ammunition controlled under ECCN 0A505 except for .c, regardless of value or destination, including exports to Australia, Canada, and the United Kingdom, that are authorized under

License Exception BAG, as set forth in § 740.14 of the EAR.

* * * * *

PART 772—DEFINITIONS OF TERMS

■ 26. The authority citation for 15 CFR part 772 continues to read as follows:

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

■ 25. Revise § 772.1 by:
■ a. Adding the definitions of ''Australian airline'';
■ b. Revising the definition for ''Canadian airline''; and
■ c. Adding and ''United Kingdom (or UK) airline''.

The additions and revisions read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Australian airline. Any citizen of Australia who is authorized by the Australian Government to engage in business as an airline. For purposes of this definition, an Australian citizen is:

(1) A natural person who is a citizen of Australia; or

(2) A partnership of which each member is such an individual; or

(3) An Australian firm incorporated or otherwise organized under the laws of Australia or any Australian state or territory, having a total foreign stock interest not greater than 40 percent, and having the Chairman or Acting Chairman and at least two-thirds of the Directors thereof Australian citizens.

* * * * *

Canadian airline. Any citizen of Canada who is authorized by the Canadian Government to engage in business as an airline. For purposes of this definition, a Canadian citizen is:

(1) A natural person who is a citizen of Canada; or

(2) A partnership of which each member is such an individual; or

(3) A Canadian firm incorporated or otherwise organized under the laws of Canada or any Canadian province or territory, having a total foreign stock interest not greater than 40 percent, and having the Chairman or Acting Chairman and at least two-thirds of the Directors thereof Canadian citizens.

* * * * *

United Kingdom (or UK) airline. Any citizen of the United Kingdom who is authorized by the Government of the United Kingdom to engage in business as an airline. For purposes of this definition, a United Kingdom citizen is:

(1) A natural person who is a citizen of the United Kingdom; or

(2) A partnership of which each member is such an individual; or

(3) A United Kingdom firm incorporated or otherwise organized under the laws of the United Kingdom or any country or territory that comprises the United Kingdom, having a total foreign stock interest not greater than 40 percent, and having the Chairman or Acting Chairman and at least two-thirds of the Directors thereof United Kingdom citizens.

* * * * *

PART 774—THE COMMERCE CONTROL LIST

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

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

■ 28. Revise ECCN 1C351 in supplement no. 1 to part 774 to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

1C351 Human and animal pathogens and ''toxins,'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, CW, AT

Control(s)	*Country chart (see Supp. No. 1 to part 738)*
CB applies to items controlled by 1C351.d.14 and .15.	CB Column 1.
CB applies to entire entry.	CB Column 2.

CW applies to 1C351.d.14 and .d.15 and a license is required for CW reasons for all destinations, including Australia, Canada, and the United Kingdom, as follows: CW applies to 1C351.d.14 for ricin in the form of (1) Ricinus communis AgglutininII (RCA_{II}), also known as ricin D or Ricinus Communis LectinIII (RCL_{III}) and (2) Ricinus communis LectinIV (RCL_{IV}), also known as ricin E. CW applies to 1C351.d.15 for saxitoxin identified by C.A.S. #35523–89–8. See § 742.18 of the EAR for licensing information pertaining to chemicals subject to restriction pursuant to the Chemical Weapons Convention (CWC). The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.

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

LICENSE REQUIREMENT NOTES:

1. All vaccines and 'immunotoxins' are excluded from the scope of this entry. Certain medical products and diagnostic and food testing kits that contain biological toxins controlled under 1C351.d, with the exception of toxins controlled for CW reasons under 1C351.d.14 or .d.15, are excluded from the scope of this entry. Vaccines, 'immunotoxins', certain medical products, and diagnostic and food testing kits excluded from the scope of this entry are controlled under ECCN 1C991.

2. For the purposes of this entry, only saxitoxin is controlled under 1C351.d.15; other members of the paralytic shellfish poison family (e.g., neosaxitoxin) are designated EAR99.

3. Clostridium perfringens strains, other than the epsilon toxin-producing strains of Clostridium perfringens described in 1C351.c.12, are excluded from the scope of this entry, since they may be used as positive control cultures for food testing and quality control.

4. Unless specified elsewhere in this ECCN 1C351 (e.g., in License Requirement Notes 1–3), this ECCN controls all biological agents and ''toxins,'' regardless of quantity or attenuation, that are identified in the List of Items Controlled for this ECCN, including small quantities or attenuated strains of select biological agents or ''toxins'' that are excluded from the lists of select biological agents or ''toxins'' by the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), or the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services (HHS), in accordance with their regulations in 9 CFR part 121 and 42 CFR part 73, respectively.

5. Biological agents and pathogens are controlled under this ECCN 1C351 when they are an isolated live culture of a pathogen agent, or a preparation of a toxin agent that has been isolated or extracted from any source or material, including living material that has been deliberately inoculated or contaminated with the agent. Isolated live cultures of a pathogen agent include live cultures in dormant form or in dried preparations, whether the agent is natural, enhanced or modified.

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

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: (1) Certain forms of ricin and saxitoxin in 1C351.d.14 and .d.15 are CWC Schedule 1 chemicals (see § 742.18 of the EAR). The U.S. Government must provide advance notification and annual reports to the OPCW of all exports of Schedule 1 chemicals. See § 745.1 of the EAR for notification procedures. See 22 CFR part 121, Category XIV and § 121.7 for

CWC Schedule 1 chemicals that are ''subject to the ITAR.'' (2) The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, and the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, maintain controls on the possession, use, and transfer within the United States of certain items controlled by this ECCN (for APHIS, see 7 CFR 331.3(b), 9 CFR 121.3(b), and 9 CFR 121.4(b); for CDC, see 42 CFR 73.3(b) and 42 CFR 73.4(b)). (3) See 22 CFR part 121, Category XIV(b), for modified biological agents and biologically derived substances that are ''subject to the ITAR.''

Related Definitions: For the purposes of this entry, 'immunotoxins' are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact.

Items:

a. Viruses identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

a.1. African horse sickness virus;

a.2. African swine fever virus;

a.3. Andes virus;

a.4. Avian influenza (AI) viruses identified as having high pathogenicity (HP), as follows:

a.4.a. AI viruses that have an intravenous pathogenicity index (IVPI) in 6-week-old chickens greater than 1.2; *or*

a.4.b. AI viruses that cause at least 75% mortality in 4- to 8-week-old chickens infected intravenously.

NOTE: *Avian influenza (AI) viruses of the H5 or H7 subtype that do not have either of the characteristics described in 1C351.a.4 (specifically, 1C351.a.4.a or .a.4.b) should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0). If the amino acid motif is similar to that observed for other HPAI isolates, then the isolate being tested should be considered as HPAI and the virus is controlled under 1C351.a.4.*

a.5. Bluetongue virus;

a.6. Chapare virus;

a.7. Chikungunya virus;

a.8. Choclo virus;

a.9. Classical swine fever virus (Hog cholera virus);

a.10. Crimean-Congo hemorrhagic fever virus;

a.11. Dobrava-Belgrade virus;

a.12. Eastern equine encephalitis virus;

a.13. Ebolavirus (includes all members of the Ebolavirus genus);

a.14. Foot-and-mouth disease virus;

a.15. Goatpox virus;

a.16. Guanarito virus;

a.17. Hantaan virus;

a.18. Hendra virus (Equine morbillivirus);

a.19. Japanese encephalitis virus;

a.20. Junin virus;

a.21. Kyasanur Forest disease virus;

a.22. Laguna Negra virus;

a.23. Lassa virus;

a.24. Louping ill virus;

a.25. Lujo virus;

a.26. Lumpy skin disease virus;

a.27. Lymphocytic choriomeningitis virus;

a.28. Machupo virus;

a.29. Marburgvirus (includes all members of the Marburgvirus genus);

a.30. Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus);

a.31. Monkeypox virus;

a.32. Murray Valley encephalitis virus;

a.33. Newcastle disease virus;

a.34. Nipah virus;

a.35. Omsk hemorrhagic fever virus;

a.36. Oropouche virus;

a.37. Peste-des-petits ruminants virus;

a.38. Porcine Teschovirus;

a.39. Powassan virus;

a.40. Rabies virus and all other members of the Lyssavirus genus;

a.41. Reconstructed 1918 influenza virus;

TECHNICAL NOTE: *1C351.a.41 includes reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments.*

a.42. Rift Valley fever virus;

a.43. Rinderpest virus;

a.44. Rocio virus;

a.45. Sabia virus;

a.46. Seoul virus;

a.47. Severe acute respiratory syndrome-related coronavirus (SARS-related coronavirus);

a.48. Sheeppox virus;

a.49. Sin Nombre virus;

a.50. St. Louis encephalitis virus;

a.51. Suid herpesvirus 1 (Pseudorabies virus; Aujeszky's disease);

a.52. Swine vesicular disease virus;

a.53. Tick-borne encephalitis virus (Far Eastern subtype, formerly known as Russian Spring-Summer encephalitis virus—see 1C351.b.3 for Siberian subtype);

a.54. Variola virus;

a.55. Venezuelan equine encephalitis virus;

a.56. Vesicular stomatitis virus;

a.57. Western equine encephalitis virus; *or*

a.58. Yellow fever virus.

b. Viruses identified on the APHIS/CDC ''select agents'' lists (see Related Controls paragraph #2 for this ECCN), but not identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

b.1. [Reserved];

b.2. [Reserved]; *or*

b.3. Tick-borne encephalitis virus (Siberian subtype, formerly West Siberian virus—see 1C351.a.53 for Far Eastern subtype).

c. Bacteria identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

c.1. Bacillus anthracis;

c.2. Brucella abortus;

c.3. Brucella melitensis;

c.4. Brucella suis;

c.5. Burkholderia mallei (Pseudomonas mallei);

c.6. Burkholderia pseudomallei (Pseudomonas pseudomallei);

c.7. Chlamydia psittaci (Chlamydophila psittaci);

c.8. Clostriduim argentinense (formerly known as Clostridium botulinum Type G), botulinum neurotoxin producing strains;

c.9. Clostridium baratii, botulinum neurotoxin producing strains;

c.10. Clostridium botulinum;

c.11. Clostridium butyricum, botulinum neurotoxin producing strains;

c.12. Clostridium perfringens, epsilon toxin producing types;

c.13. Coxiella burnetii;

c.14. Francisella tularensis;

c.15. Mycoplasma capricolum subspecies capripneumoniae (''strain F38'');

c.16. Mycoplasma mycoides subspecies mycoides SC (small colony) (a.k.a. contagious bovine pleuropneumonia);

c.17. Rickettsia prowazekii;

c.18. Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi);

c.19. Shiga toxin producing Escherichia coli (STEC) of serogroups O26, O45, O103, O104, O111, O121, O145, O157, and other shiga toxin producing serogroups;

NOTE: *Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).*

c.20. Shigella dysenteriae;

c.21. Vibrio cholerae; *or*

c.22. Yersinia pestis.

d. ''Toxins'' identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows, or their subunits:

d.1. Abrin;

d.2. Aflatoxins;

d.3. Botulinum toxins;

d.4. Brevetoxins;

d.5. Clostridium perfringens alpha, beta 1, beta 2, epsilon and iota toxins;

d.6. Conotoxins;

d.7. Diacetoxyscirpenol;

d.8. Gonyautoxins;

d.9. HT–2 toxin;

d.10. Microcystins (Cyanginosins);

d.11. Modeccin;

d.12. Nodularins;

d.13. Palytoxin;

d.14. Ricin;

d.15. Saxitoxin;

d.16. Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins);

d.17. Staphylococcus aureus enterotoxins, hemolysin alpha toxin, and toxic shock syndrome toxin (formerly known as Staphylococcus enterotoxin F);

d.18. T–2 toxin;

d.19. Tetrodotoxin;

d.20. Viscumin (Viscum album lectin 1); *or*

d.21. Volkensin.

e. ''Fungi'', as follows:

e.1. Coccidioides immitis; *or*

e.2. Coccidioides posadasii.

* * * * *

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2024–08446 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–33–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1700

[Docket No. CPSC–2021–0027]

Poison Prevention Packaging Requirements; Exemption of Baloxavir Marboxil Tablets in Packages Containing Not More Than 80 mg of the Drug

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (Commission or CPSC) is amending the child-resistant packaging requirements of CPSC's regulation to exempt baloxavir marboxil tablets, currently marketed as XOFLUZA™, in packages containing not more than 80 mg of the drug, from the special packaging requirements. XOFLUZA is used to treat the flu, and the drug is taken in one dose within 48 hours of experiencing flu symptoms. The final rule exempts this prescription drug product on the basis that child-resistant packaging is not needed to protect young children from serious injury or illness because the product is not acutely toxic and lacks adverse human experience associated with ingestion.

DATES: The rule is effective May 20, 2024.

FOR FURTHER INFORMATION CONTACT: Will Cusey, Small Business Ombudsman, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7945 or (888) 531–9070; email: *sbo@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

1. The Poison Prevention Packaging Act of 1970 and CPSC's Implementing Regulations

The Poison Prevention Packaging Act of 1970 (PPPA), 15 U.S.C. 1471–1476, gives the Commission authority to establish standards for the ''special packaging'' of household substances, such as drugs, when child-resistant (CR) packaging is required to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting the substance, and the special packaging is technically feasible, practicable, and appropriate for such substance. 15 U.S.C. 1472(a). Special packaging requirements under the PPPA have been codified at 16 CFR parts 1700 and 1702. Specifically, CPSC regulations require special packaging for oral prescription drugs. 16 CFR 1700.14(a)(10). CPSC regulations allow companies to petition the Commission for an exemption from CR requirements. 16 CFR part 1702.

Two of the three ''reasonable grounds'' [1] for granting an exemption from the special packaging requirements are: (1) that the degree or nature of the hazard to children in the availability of the substance, by reason of its packaging, is such that special packaging is not required to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting the substance; or (2) special packing is not technically feasible, practicable, or appropriate for the subject substance. 16 CFR 1702.17(a) and (b).

If the Commission determines that a petition presents reasonable grounds for an exemption, CPSC regulations require publication in the **Federal Register** of a proposed amendment to the listing of substances that require special packaging, stating that the substance at issue would be exempt. 16 CFR 1702.17.

2. The Product for Which an Exemption Is Sought

On March 30, 2020, Genentech, Inc. (Genentech), petitioned the Commission to exempt two specified sized tablets of baloxavir marboxil, which it markets as XOFLUZA, from the special packaging requirements for oral prescription drugs. The U.S. Food and Drug Administration (FDA) approved XOFLUZA in October 2018, with a two-tablet dose for acute uncomplicated flu in patients older than 12 years old showing symptoms for less than 48 hours. FDA approved single tablet doses in March 2021. XOFLUZA has been marketed in tablet form and is currently dispensed in CR packaging. The petitioner asserted that an exemption from special packaging is justified because of the lack of toxicity and lack of adverse human experience with the drug. The petitioner also claimed that special packaging is not technically feasible, practicable, or appropriate for XOFLUZA.

Genentech represents that it intends to continue U.S. production and packaging of XOFLUZA if the petition is granted. The firm also states that grant of the petition would allow it to use a packaging site in Kaiseraugst, Switzerland, as a back-up facility for the U.S. market in the event there is a spike in demand for XOFLUZA over a short period of time.

[1] The third reasonable ground for an exemption is that special packaging is incompatible with the particular substance. 16 CFR 1702.17(c). The petitioner has not requested an exemption on this basis, so it is not relevant here.

In September 2021, after considering the information provided by the petitioner up to that date and other available toxicity and human experience data, the Commission preliminarily concluded in the preamble of the Notice of Proposed Rulemaking (NPR) that the ''lack of toxicity and lack of adverse human experience for the substance'' presented by the availability of 40 mg and 80 mg tablets of baloxavir marboxil (currently marketed as XOFLUZA) is such that special packaging is not required to protect children from serious injury or serious illness from handling, using, or ingesting XOFLUZA. 86 FR 51640, at 54641–42 (September 16, 2021); 16 CFR 1702.17(a). However, the Commission preliminarily found that the petitioner's request for an exemption from special packaging, on the basis that it is not technically feasible, practicable, or appropriate for XOFLUZA, was not warranted based on the information provided by the petitioner. Based on the lack of toxicity, the Commission determined that reasonable grounds for an exemption were presented and voted to grant the petition and begin a rulemaking proceeding to exempt baloxavir marboxil tablets in packages containing not more than 80 mg of the drug from the special packaging requirements for oral prescription drugs.

B. Toxicity and Injury Data for XOFLUZA

1. Summary of Data From Proposed Rule

Toxicity

Staff reviewed the toxicity of XOFLUZA. XOFLUZA has been studied in pediatric patients.[2] Overall, clinically relevant doses of XOFLUZA (40 or 80 mg total dose) in humans are well tolerated.[3]

[2] Hirotsu N. (2019). Baloxavir Marboxil in Japanese Pediatric Patients with Influenza: Safety and Clinical and Virologic Outcomes. Clin Infect Dis Aug 14;71(4):971–981.; Heo Y–A. (2018). Baloxavir: First Global Approval. Drugs 78:693 697.;*https://clinicaltrials.gov/ct2/show/NCT03653364;* XOFLUZA Prescribing Information, 2021; Hayden F.G. (2018). Baloxavir Marboxil for Uncomplicated Influenza in Adults and Adolescents. The New England Journal of Medicine.379:(10); Dziewiatkowski N.A., Osmon E.N., Chahine E.B., Thornby K.A. (2019). Baloxavir: a novel single-dose oral antiviral for the treatment of influenza. Sr Care. Pharm; 34:243–52.

[3] Dziewiatkowski N.A., Osmon E.N., Chahine E.B., Thornby K.A. (2019). Baloxavir: a novel single-dose oral antiviral for the treatment of influenza. Sr Care. Pharm; 34:243–52.; Taieb V., Ikeoka, Fang-Fang Ma H., Borkowski K., Aballea S., Tone Keiko and Hirotsu N. (2019). A network meta-analysis of the efficacy and safety of baloxavir marboxil versus neuraminidase inhibitors for the treatment of influenza in otherwise healthy patients; Current Medical Research and Opinion 35:8, 1355–1364.;

The analysis of total adverse events (AE) included 10 studies [4] with six treatments and 5,628 patients. AE did not differ significantly between placebo and XOFLUZA. For drug-related vomiting, 3,297 patients from five studies were included. XOFLUZA did not differ from placebo in these studies. The percentage of patients experiencing any AE of 610 patients (12 to 64 years old) in the CAPSTONE 1 clinical trial was 1.0% grade 3 or grade 4, which can be categorized as not serious. The adverse events experienced were diarrhea, bronchitis, nasopharyngitis, nausea, sinusitis, increase in the level of aspartate aminotransferase (AST, headache, vomiting, dizziness, leukopenia, and constipation. Five deaths have been reported by the Adverse Event Reporting System (AERS); [5] however, staff assessed that these deaths were not caused by XOFLUZA.

The most common AE of the correct dose of XOFLUZA is diarrhea.[6] The XOFLUZA Product Information, 2021 reported that diarrhea (3%), bronchitis (3%), nausea (2%), headache (1%) were the most significant adverse events found. Treatment of an overdose of XOFLUZA should consist of general supportive measures, including monitoring of vital signs and observations of the clinical status of the patient.[7] There is no specific antidote for overdose with XOFLUZA, and it is unlikely to be significantly removed by dialysis because it is highly protein bound.[8] Two overdoses of XOFLUZA were reported in children under 5 years old in the FAERS data. Neither overdose resulted in serious injury or death; one of the children experienced malaise and the other child experienced a rash.

Overall, treatment with XOFLUZA is well tolerated. In drug trials, XOFLUZA was well-tolerated as a treatment for flu in otherwise healthy children age 1 to less than 12 years old. Additionally, two Phase 3 pediatric studies in Japan demonstrate that XOFLUZA is well tolerated across all pediatric age groups. Finally, the FDA concluded there are no safety concerns for children from Phase I, Phase 2, and Phase 3 trials of XOFLUZA. If accidentally ingested, the most likely symptoms are diarrhea, nausea, or headache. For these reasons, staff determined that XOFLUZA will not cause serious injury or death upon acute exposure by a child under 5 years old.

Injury Data

The NPR explained that CPSC staff had searched the Consumer Product Safety Risk Management System (CPSRMS) and the National Electronic Injury Surveillance System (NEISS) databases, and reviewed reports from FDA related to adverse events associated with XOFLUZA. Staff found no incidents related to XOFLUZA in CPSRMS or NEISS from January 2015 through December 2020.

2. Updated Injury Data Since NPR

Since publication of the NPR staff has done an updated search and found no incidents related to XOFLUZA in the CPSRMS and NEISS databases from January 2021 through March 2024. CPSC staff also reviewed 26 reports received from FDA related to AEs associated with XOFLUZA between January of 2018 through March 2024. Of these 26 reports, there were 8 nonserious reports, such as off-label use of XOFLUZA. There were also 18 reported AEs. All of these AEs, such as febrile seizures, delirious behaviors, and gastrointestinal bleeding, were assessed by staff to be due to the flu disease progression and not due to XOFLUZA. The staff briefing package on this final rule provides more detailed information.[9]

C. Response to Comments on the Proposed Rule

Two comments were submitted in response to the publication of the NPR. One comment stated that XOFLUZA should not be exempt from child-resistant packaging because there is little-to-no existing human toxicity data for age groups 0–12 years old, and asserted there is a risk of allergic reactions (including anaphylaxis, angioedema, urticaria, and erythema multiforme). In response to this comment, CPSC staff advises that a drug trial demonstrated that XOFLUZA is a well-tolerated potential treatment for the flu in otherwise healthy children within the age range of 1 year and over to 12 years and under. Additionally, two Phase 3 pediatric studies conducted in Japan demonstrate that XOFLUZA is well tolerated across all pediatric age groups. Finally, the FDA concluded there are no safety findings of concern for children from Phase 1, Phase 2, or Phase 3 trials of XOFLUZA. Indeed, as compared to adults, drugs are less common triggers of anaphylaxis in children, with a frequency which is increasing from infancy to adolescence.[10] Of the 26 adverse reactions in the FDA FAERS data, there were no hypersensitivity reactions in children under 5 years of age.[11]

The second comment stated that people should use zinc instead of XOFLUZA for treatment of the flu. The use of other substances to treat the flu is not relevant to whether baloxavir marboxil should be given an exemption from the special packing requirements and, therefore, is outside the scope of this rulemaking.

D. Description of the Final Rule

The final rule amends 16 CFR part 1700 to include a new exemption from the special packaging requirements for baloxavir marboxil tablets in packages

Hayden F.G. (2018).; Baloxavir Marboxil for Uncomplicated Influenza in Adults and Adolescents. The New England Journal of Medicine.379:(10).

[4] Taieb V., Ikeoka, Fang-Fang Ma H., Borkowski K., Aballea S., Tone Keiko and Hirotsu N. (2019). A network meta-analysis of the efficacy and safety of baloxavir marboxil versus neuraminidase inhibitors for the treatment of influenza in otherwise healthy patients. Current Medical Research and Opinion 35:8, 1355–1364.

[5] AERS is a computerized information database designed to support the FDA's post-marketing safety surveillance program for all approved drug and therapeutic biologic products. The FDA uses AERS to monitor for new adverse events and medication errors that might occur with these marketed products.

[6] Heo Y–A. (2018). Baloxavir: First Global Approval. Drugs 78:693–697.; Shionogi & Co. Ltd. Xofluza (baloxavir marboxil) tablets 10 mg/20mg approved for the treatment of influenza types A and B in Japanese [media release] 23 Feb 2018.

[7] (PoisIndex, 2021).

[8] Prescribing Information for XOFLUZA, 2021; Micromedex Solutions, Poisindex Xofluza search 2/1/2021.

[9] The staff briefing package is available here: *https://www.cpsc.gov/s3fs-public/Briefing-Package-Final-Rule-to-Exempt-Xofluza-from-Special-Packaging-Requirements-in-the-PPPA.pdf?VersionId=rr6qgyEz7Tjc_1AHXq6OndQHRzIaCFgX.*

[10] Cardinale F, Amato D, Mastrototaro MF, Caffarelli C., Crisafulli D., Franceshini F., Liotti L., Bottau P., Saretta F., Mori F. and Bernardini R. Drug-induced anaphylaxis in children. Acta Biomed. 2019 90 (3–S): 30–35.; Atanaskovic-Markovic M, Gomes E, Cernadas JR, du Toit G, Kidon M, Kuyucu S, Mori F, Ponvert C, Terreehorst I, Caubet JC. Diagnosis and management of drug-induced anaphylaxis in children: An EAACI position paper. Pediatric Allergy Immunol. 2019 May;30(3):269–276.). In the pediatric population the average age of diagnosis for drug-induced hypersensitivity was 8.7 years old. The most common causative drugs included antiepileptics (50%) and antibiotics (30.8%) (Metterle L, Hatch L, Seminario-Vidal L. Pediatric drug reaction with eosinophilia and systemic symptoms: A systemic review of the literature, with a focus on relapsing cases. Pediatric Dermatol. 2020 Jan;37(1):124–129. doi: 10.1111/pde.14044. Epub 2019 Nov 5., Oberlin KE, Rahnama-Moghadam S, Alomari AK, Haggstrom AN. Drug reaction with eosinophilia and systemic symptoms: Pediatric case series and literature review. Pediatric Dermatol. 2019 Nov;36(6):887–892.). Pediatric drug reaction with eosinophiliea and systemic symptoms is an uncommon disease with a mean age of 11.5 years of age presenting with the syndrome (Oberlin KE, Rahnama-Moghadam S, Alomari AK, Haggstrom AN. Drug reaction with eosinophilia and systemic symptoms: Pediatric case series and literature review. Pediatric Dermatol. 2019 Nov;36(6):887–892.).

[11] *https://www.fda.gov/drugs/questions-and-answers-fdas-adverse-event-reporting-system-faers/fda-adverse-event-reporting-system-faers-public-dashboard.*

containing not more than 80 mg of the drug in proposed 1700.14(a)(10)(xxiv).[12] The exemption is intended to cover baloxavir marboxil tablets in a dosage of 80 mg or less. The text of the final rule is unchanged from the proposed rule. The final rule makes no other changes to part 1700.

E. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), an agency that engages in rulemaking generally must prepare initial and final regulatory flexibility analyses describing the impact of the rule on small businesses and other small entities. Section 605(b) of the Act provides that an agency is not required to prepare an RFA if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

As noted in the preamble to the proposed rule (86 FR 51640 at 51642), the Commission's Directorate for Economic Analysis prepared a preliminary assessment of the impact of the proposed rule. Based on this assessment, the Commission preliminarily concluded that the proposed rule would not have a significant impact on a substantial number of small businesses or other small entities. We received no comments on this assessment or any additional information. Therefore, we certify that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

F. Effective Date

The Administrative Procedure Act (APA) generally requires that a substantive rule must be published not less than 30 days before its effective date. 5 U.S.C. 553(d)(1). The NPR proposed an effective date of 30 days after publication of the final rule in the **Federal Register**. We received no comments on the proposed effective date. Therefore, the effective date for the final rule will be May 20, 2024.

G. Environmental Considerations

The Commission's regulations provide a categorical exclusion from any requirement to prepare an environmental assessment or an environmental impact statement the Commission rules ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(3). Rules exempting products from poison prevention packaging rules fall within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

H. Preemption

The PPPA provides that, generally, when a special packaging standard issued under the PPPA is in effect, ''no State or political subdivision thereof shall have any authority either to establish or continue in effect, with respect to such household substance, any standard for special packaging (and any exemption therefrom and requirement related thereto) which is not identical to the [PPPA] standard.'' 15 U.S.C. 1476(a). A state or local standard may be excepted from this preemptive effect if (1) the state or local standard provides a significantly higher degree of protection from the risk of injury or illness than the PPPA standard and (2) the state or political subdivision applies to the Commission for an exemption from the PPPA's preemption clause and the Commission grants the exemption through a process specified at 16 CFR part 1061. 15 U.S.C. 1476(c)(1). In addition, the Federal government, or a State or local government, may establish and continue in effect a nonidentical special packaging requirement that provides a higher degree of protection than the PPPA requirement for a household substance for that government's own use. 15 U.S.C. 1476(b).

Thus, with the exceptions noted above, the final rule exempting baloxavir marboxil tablets in packages containing not more than 80 mg of the drug from special packaging requirements preempts nonidentical state or local special packaging standards for the substance.

List of Subjects in 16 CFR Part 1700

Consumer protection, Drugs, Infants and children, Packaging and containers, Poison prevention, Toxic substances.

For the reasons given above, the Commission amends 16 CFR part 1700 as follows:

PART 1700—[AMENDED]

■ 1. The authority citation for part 1700 continues to read as follows:

Authority: 15 U.S.C. 1471–76. Secs. 1700.1 and 1700.14 also issued under 15 U.S.C. 2079(a).

■ 2. Section 1700.14 is amended by adding paragraph (a)(10)(xxiv) to read as follows:

§ 1700.14 Substances requiring special packaging.

(a) * * *

(10) * * *

(xxiv) Baloxavir marboxil tablets in packages containing not more than 80 mg of the drug.

* * * * *

Alberta E. Mills,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2024–07651 Filed 4–18–24; 8:45 am]

BILLING CODE 6355–01–P

[12] The Commission voted 4–1 to publish this final rule. The Record of Commission Action can be viewed here: *https://www.cpsc.gov/s3fs-public/RCA-Draft-Final-Rule-to-Exempt-Baloxavir-Marboxil-XOFLUZA-from-Packaging-Requirements-in-PPPA.pdf?VersionId=TR31D0KETbniRXpLZHUqI_9R28VqffJo.*

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–11277; 34–99752; 39–2554; IC–35155]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to Volume II of the Electronic Data Gathering, Analysis, and Retrieval system Filer Manual (''EDGAR Filer Manual'' or ''Filer Manual'') and related rules and forms. EDGAR Release 24.1 will be deployed in the EDGAR system on March 18, 2024.

DATES: *Effective date:* April 19, 2024. The incorporation by reference of the revised Filer Manual is approved by the Director of the **Federal Register** as of April 19, 2024.

FOR FURTHER INFORMATION CONTACT: For questions regarding the amendments to Volume II of the Filer Manual, please contact Rosemary Filou, Deputy Director and Chief Counsel, Laurita Finch, Senior Special Counsel, or Lidian Pereira, Senior Special Counsel, in the EDGAR Business Office at (202) 551–3900. For questions regarding the Inline eXtensible Business Reporting Language (''Inline XBRL'') mandate for filing financial statements and schedules required by Form 11–K, please contact the Office of Rulemaking in the Division of Corporation Finance at (202) 551–3430. For technical questions concerning Inline XBRL, please contact the Office of Structured Disclosure in the Division of Economic and Risk Analysis at (202) 551–5494. For questions regarding the filing of submission form types 17AD–27 and 17AD–27/A in an Inline XBRL format that includes the data elements described in Rule 17Ad-27(b)(1) through

(5), please contact Matthew Lee, Assistant Director, or Seoyeon Park, Counsel to the Director, in the Division of Trading and Markets; at (202) 551–5710. For questions regarding the extension of Schedules 13D and 13G EDGAR filing hours, please contact Nicholas Panos, Senior Special Counsel, or Valian Afshar, Senior Special Counsel, in the Division of Corporation Finance at (202) 551–3440. For questions regarding the Share Repurchase Disclosure Modernization rule (vacated), please contact Robert Errett, Disclosure Management Office, in the Division of Corporation Finance at (202) 551–3225 or, for questions related to the SHR taxonomy, please contact Jim Yu in the Division of Economic and Risk Analysis, at (202) 551–6845.

SUPPLEMENTARY INFORMATION: We are adopting an updated Filer Manual, Volume II: ''EDGAR Filing,'' Version 69 (March 2024) and amendments to 17 CFR 232.301 (''Rule 301''). The updated Filer Manual is incorporated by reference into the Code of Federal Regulations.

I. Background

The Filer Manual contains information needed for filers to make submissions on EDGAR. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[1] Filers must consult the Filer Manual in conjunction with our rules governing mandated electronic filings when preparing documents for electronic submission.

II. EDGAR System Changes and Associated Modifications to Volume II of the Filer Manual

EDGAR is being updated in EDGAR Release 24.1, and corresponding amendments to Volume II of the Filer Manual are being made to reflect these changes, as described below.[2]

Inline XBRL Mandate for Financial Statements and Schedules Required by Form 11–K

On June 2, 2022, the Commission adopted amendments to its rules governing the electronic filing and submission of documents to require the use of Inline eXtensible Business Reporting Language (''Inline XBRL'') for the filing of the financial statements and accompanying schedules to the financial statements required by Form 11–K.[3] EDGAR will be updated to allow filers to file submission form types 11–K, 11–KT, 11–K/A, and 11–KT/A in Inline XBRL format.

Shortening the Securities Transaction Settlement Cycle

In furtherance of the Commission's rule requiring clearing agencies that provide a central matching service to establish, implement, maintain, and enforce policies and procedures reasonably designed to facilitate straight-matching processing, filers will be able to file submission form types 17AD–27 and 17AD–27/A in an Inline XBRL format that includes the data elements described in Rule 17Ad–27(b)(1) through (5).[4] These form types will allow the filer to request confidential treatment on sections of the document that the filer does not want to be publicly disseminated.

Extending Schedules 13D and 13G EDGAR Filing Hours

Consistent with the Commission's amendments to rules that govern beneficial ownership reporting,[5] on February 5, 2024, EDGAR underwent software changes to extend the filing ''cut-off'' times for Schedule 13D, Schedule 13G, and corresponding amendments from 5:30 p.m. Eastern time to 10 p.m. eastern time. In accordance with this software change, the EDGAR Filer Manual will be revised to include references to SC 13D, SC 13G, SC 13D/A, SC 13G/A, SCHEDULE 13D, SCHEDULE 13D/A, SCHEDULE 13G, and SCHEDULE 13G/A as submission types that will have a ''Filing Date'' identical to the EDGAR ''Received Date'' even if received after 5:30 p.m. eastern time, and will be disseminated until 10 p.m. eastern time.

Share Repurchase Disclosure Modernization

References to submission types F–SR and F–SR/A, Exhibit 26 of Form 10–K and 10–Q, and the SHR taxonomy were removed from the EDGAR Filer Manual as a result of the United States Court of Appeals for the Fifth Circuit ruling[6] vacating the Share Repurchase Disclosure Modernization rule.[7] Further, the SHR taxonomy has been removed from EDGAR.

General functional enhancements to EDGAR Release 24.1 are set forth below.

Revision of Filer Manual Volume II, Chapter 6, and Relocation of Technical Content

Chapter 6 of the Filer Manual, Interactive Data, will be revised to remove technical and instructional details of XBRL formatting and validation. The information to be removed from Chapter 6 consists of technical specifications and guidance that filers will be able to consult in a new EDGAR XBRL Guide on *SEC.gov.* The revised Chapter 6 will present XBRL content in a concise fashion and will continue to complement Chapter 3, Index to Forms, by identifying different XBRL formatted documents associated with relevant EDGAR form and submission types. The revised Chapter 6 will also make clear that Interactive Data submissions in EDGAR use the Extensible Business Reporting Language (''XBRL'') information model and explain the use of taxonomies and instances which comprise this model.

Taxonomy Update

The EDGAR system will be updated to accept the 2024 versions of the following taxonomies:

- US–GAAP, SRT (published by FASB)
- CEF, COUNTRY, CURRENCY, DEI, ECD, EXCH, FFD, FND, NAICS, OEF, RXP, SIC, SNJ, SRO, STPR, VIP (published by SEC)[8]

EDGAR will also accept validations based on FASB's 2024 XBRL US Data Quality Committee Rules Taxonomy (DQCRT).

- *Updates to Table 7–1 of the Filer Manual*

The EDGAR Filer Manual reference to 8–K and 1–U Items will be updated in Table 7–1: Information Fields Available on Main Page.

On January 29, 2024, EDGAR Release 24.0.1 introduced the following changes, in addition to those noted in the December 2023 Filer Manual update:

- The check box labeled ''Attach Inline XBRL Fee Tagging Exhibit'' on the EDGARLink Online ''Documents'' tab was renamed to ''Attach Inline XBRL Filing Fee Exhibit'' for the 72 fee bearing submission types impacted.

[1] See Rule 301 of Regulation S–T.

[2] EDGAR Release 24.1 was deployed on [Mar. 18, 2024].

[3] Updating EDGAR Filing Requirements and Form 144 Filings, Release No. 33–11070 (June 2, 2022) [87 FR 35393 (June 10, 2022)].

[4] Shortening the Securities Transaction Settlement Cycle, Release No. 34–96930 (Feb.15, 2023) [88 FR 13872 (Mar. 6, 2023)].

[5] Modernization of Beneficial Ownership Reporting, Release No. 33–11253 (Oct. 10, 2023) [88 FR 76896 (Nov. 7, 2023)].

[6] *Chamber of Commerce of the USA* v. *SEC,* 88 F.4th 115 (5th Cir., Dec. 19, 2023).

[7] Share Repurchase Disclosure Modernization, Release No. 34–97424 (May 3, 2023) [88 FR 36002 (June 1, 2023)].

[8] See *https://www.sec.gov/edgar/information-for-filers/standard-taxonomies.*

• Submission type SC 13E1 has been updated to remove the ''Is Fee Table/Exhibit included?'' check box from the ''Main'' tab of the EDGARLink Online interface. As a result, filers are now required to attach an EX–FILING FEES exhibit attachment on a SC 13E1 filing.

III. Amendments to Rule 301 of Regulation S–T

Along with the adoption of the updated Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of the current revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The updated EDGAR Filer Manual is available at *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

IV. Administrative Law Matters

Because the Filer Manual and rule amendments relate solely to agency procedures or practice and do not substantially alter the rights and obligations of non-agency parties, publication for notice and comment is not required under the Administrative Procedure Act (''APA'').[9] It follows that the amendments do not require analysis under requirements of the Regulatory Flexibility Act [10] or a report to Congress under the Small Business Regulatory Enforcement Fairness Act of 1996.[11]

The effective date for the updated Filer Manual and related rule amendments is April 19, 2024. In accordance with the APA,[12] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the related system upgrades.

V. Statutory Basis

We are adopting the amendments to Regulation S–T under the authority in Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[13] Sections 3, 12, 13, 14, 15, 15B, 23, and 35A of the Securities Exchange Act of 1934,[14] Section 319 of the Trust Indenture Act of 1939,[15] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[16]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–10, 80b–11, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the EDGAR Filer Manual, Volume I: ''General Information,'' Version 41 (December 2022). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 69 (March 2024). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for inspection at the Commission and at the National Archives and Records Administration (NARA). The EDGAR Filer Manual is 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. Operating conditions may limit access to the Commission's Public Reference Room. For information on the availability of the EDGAR Filer Manual at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The EDGAR Filer Manual may also be obtained from *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

By the Commission.

Dated: March 18, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08091 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

[9] 5 U.S.C. 553(b)(A).

[10] 5 U.S.C. 601 through 612.

[11] 5 U.S.C. 804(3)(c).

[12] 5 U.S.C. 553(d)(3).

[13] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[14] 15 U.S.C. 78c, 78*l,* 78m, 78n, 78*o,* 78*o*–4, 78w, and 78*ll.*

[15] 15 U.S.C. 77sss.

[16] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 416

[Docket No. SSA–2023–0015]

RIN 0960–AI81

Expand the Definition of a Public Assistance Household

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are finalizing our proposed rule to expand the definition of a public assistance (PA) household for purposes of our programs, particularly the Supplemental Security Income (SSI) program, to include the Supplemental Nutrition Assistance Program (SNAP) as an additional means-tested public income-maintenance (PIM) program. We are also revising the definition of a PA household from a household in which every member receives some kind of PIM payment to a household that has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed PIM payments (the *any other* definition). If determined to be living in a PA household, inside in-kind support and maintenance (ISM) would no longer need to be developed. The final rule will decrease the number of SSI applicants and recipients charged with ISM from others within their household. In addition, we expect this rule to decrease the amount of income we would deem to SSI applicants and recipients because we will no longer deem as income from ineligible spouses and parents who live in the same household: the value of the SNAP benefits that they receive; any income that was counted or excluded in figuring the amount of that payment; or any income that was used to determine the amount of SNAP benefits to someone else. These policy changes reduce administrative burden for low-income households and SSA.

DATES: This final rule will be effective September 30, 2024.

FOR FURTHER INFORMATION CONTACT: Tamara Levingston, Office of Income Security Programs, 6401 Security Blvd., Robert M. Ball Building, Suite 2512B, Woodlawn, MD 21235, 410–966–7384.

For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213, or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *https://www.ssa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The SSI program provides monthly payments to: (1) adults and children with a disability or blindness; and (2) people aged 65 and older who have little or no income and resources. Eligible individuals must meet all the requirements in the Social Security Act (Act), including having resources and income below specified amounts.[1] Generally, the more income an individual has, the less their SSI payment will be. Under the SSI program, resources are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for their support and maintenance.[2] Income, on the other hand, is anything the SSI applicant or recipient receives in cash or in-kind that can be used to meet food and shelter needs.[3] Applicants' and recipients' resources may affect their SSI eligibility, while their income may affect both their SSI eligibility and payment amounts.

Once an applicant is found eligible for SSI, their monthly payment is determined by subtracting countable monthly income from the Federal benefit rate (FBR), which is the monthly maximum Federal SSI payment.[4] The FBR for 2024 is $943 for an individual and $1,415 for an eligible individual with an eligible spouse.[5] The Act and our regulations[6] define income as ''earned,'' such as wages from work, and ''unearned,'' such as gifted cash or ISM.[7]

ISM

As indicated above, income that affects an individual's monthly SSI payment can be provided in cash or in-kind. We calculate ISM considering any shelter that is given to the individual or that the individual receives because someone else pays for it.[8] For example, if an applicant or recipient lives with their sibling and does not pay rent, we would consider the shelter that their sibling provides to be ISM.

Like other forms of income, ISM can reduce the amount of a recipient's monthly SSI payment. For example, we reduce the SSI monthly payment by one-third of the FBR if an individual is living in another person's household, receives shelter from others living in the household, and others within the household pay for or provide the individual with all of the individual's meals.[9]

Additional circumstances regarding ISM are discussed further in our regulations.[10]

Deeming Income

In addition to counting ISM that an applicant or recipient receives, the SSI program deems income of certain individuals to the SSI applicant or recipient.[11] ''Deeming'' is the process of considering a portion of another person's income to be the income of an SSI applicant or recipient.[12] When our deeming rules apply, it does not matter whether the other person's income is actually available to the applicant or recipient.[13] In determining an SSI applicant's or recipient's eligibility and payment amount, we consider both the SSI applicant's or recipient's own income as well as any relevant deemed income from others. For example, when a child who is applying for or receiving SSI lives with a parent who is ineligible for SSI, we deem a portion of that parent's income to the child through the month in which the child reaches age 18.[14] Likewise, when an adult who is applying for or receiving SSI lives with a spouse who is ineligible for SSI, we deem a portion of the ineligible spouse's income to the applicant or recipient.[15] We look at the deemor's income to see if we must deem a portion of it to the applicant or recipient because we expect the deemor, based on their relationship with the SSI applicant or recipient, to use some of their income to take care of (some of) the applicant's or recipient's needs. Ultimately, only some of the deemor's income is assigned to the SSI applicant or recipient.

Some income from ineligible parents and spouses is not deemed to the SSI applicant or recipient. For example, our policy excludes from deeming: the amount of any PIM payments the ineligible parents and spouses receive under the programs listed in the PA household definition;[16] any income that those programs counted or excluded in determining the amount of the PIM payments they received; and any income of the ineligible spouse or parent that is used by a PIM program to determine the amount of that program's benefit to someone else.[17] For example, if an ineligible spouse or parent receives Temporary Aid for Needy Families (TANF) assistance based on their income of $400 per month, we do not consider the TANF benefit amount or the $400 in our income determination for the SSI applicant or recipient. This is based on the premise that the income used to demonstrate eligibility for a PIM program and the PIM payment itself are required for that individual's own needs.

Prior Policy

We previously defined a PA household as one in which every member receives a PIM payment under at least one of the following:

1. Title IV–A of the Social Security Act (Temporary Assistance for Needy Families or TANF);
2. Title XVI of the Social Security Act (Supplemental Security Income or SSI);
3. The Refugee Act of 1980 (payments based on need);
4. The Disaster Relief and Emergency Assistance Act;
5. General assistance programs of the Bureau of Indian Affairs;
6. State or local government assistance programs based on need (tax credits or refunds are not assistance based on need); and
7. Department of Veterans Affairs program (payments based on need).[18]

New Policy

We are making changes based on the Commissioner of Social Security's

[1] See 42 U.S.C. 1382 and 20 CFR 416.202 for a list of the eligibility requirements. See also 20 CFR 416.420 for general information on how we compute the amount of the monthly payment by reducing the benefit rate by the amount of countable income as calculated under the rules in subpart K of 20 CFR part 416.

[2] 20 CFR 416.1201(a).

[3] 20 CFR 416.1102. See also 20 CFR 416.1103 for examples of items that are not considered income.

[4] See 20 CFR 416.405 through 416.415. Some States supplement the FBR amount.

[5] 88 FR 72803, 72804 (2023). A table of the monthly maximum Federal SSI payment amounts for an eligible individual, and for an eligible individual with an eligible spouse, is available at *https://www.ssa.gov/oact/cola/SSIamts.html.* When the FBR is adjusted for the cost of living, the amount of the potential ISM reduction adjusts accordingly.

[6] See 42 U.S.C. 1382a; 20 CFR 416.1102 through 416.1124.

[7] See 20 CFR 416.1104.

[8] See 20 CFR 416.1130(b).

[9] See 20 CFR 416.1130(b)(2).

[10] See 20 CFR 416.1130 through 416.1148.

[11] See 42 U.S.C. 1382c(f); 20 CFR 416.1160.

[12] See 20 CFR 416.1160.

[13] See 20 CFR 416.1160, 416.1161.

[14] See 20 CFR 416.1165.

[15] See 20 CFR 416.1163.

[16] See 20 CFR 416.1142(a).

[17] See 20 CFR 416.1161(a)(2) and (3).

[18] 20 CFR 416.1142(a) (prior version).

rulemaking authority specified in sections 205(a), 702(a)(5), 1631(d)(1), 1631(e)(1)(A), and 1633(a) of the Social Security Act. Under those sections, the Commissioner may adopt rules regarding, among other things, the nature and extent of evidence needed to establish benefit eligibility, as well as methods of taking and furnishing such evidence.

We are finalizing three changes discussed in the Notice of Proposed Rulemaking (NPRM) that we published on September 29, 2023.[19] First, we are finalizing a minor clarification to our definition of a PA household at 20 CFR 416.1142(a). The term ''public assistance'' may have implications outside our programs. We are finalizing, without change from the NPRM, the clarification that our definition of ''public assistance household,'' which we use as a term of art, applies only for purposes of our programs. Second, we are finalizing, without change from the NPRM, our proposed revision to the definition of a PA household in 20 CFR 416.1142(a) of adding SNAP to the existing list of PIM programs.[20] Third, we are changing our definition of a PA household from one in which *every* member receives a PIM payment to one in which the household has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed PIM payments. If determined to be living in a PA household, inside ISM would no longer need to be developed. We discussed this potential change (from *every* to *any other*) in the NPRM and invited public comment; public commenters were largely supportive of the change.[21]

In the event of an invalidation of any part of this rule, our intent is to preserve the remaining portions of the rule to the fullest possible extent. Each of the three changes can be implemented independently of the others, and we intend each of the three changes to be severable from the others. The addition of SNAP to our list of PIM programs in 20 CFR 416.1142(a) is independent of our adoption of the *any other* definition—adding SNAP could be implemented separately even if we did not adopt the *any other* definition. Likewise, expanding our definition of a PA household by adopting the *any other* definition could be fully implemented whether or not SNAP is added to the list of PIM programs in 20 CFR 416.1142(a). The clarification that our definition of ''public assistance household'' is a term of art that applies only for purposes of our programs is a minor administrative clarification that is not contingent on the implementation of the two ways in which we are expanding the definition of a PA household with this final rule. If any of these three changes were to be invalidated, the others could still be implemented fully, as these changes relate to three separate aspects of the PA household policy.

During the development of the NPRM, we considered other programs which are often considered means-tested programs, including Medicaid,[22] the Low Income Home Energy Assistance Program (LIHEAP),[23] the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC),[24] the Housing Choice Voucher Program,[25] Project Based Rental Assistance, and Public Housing [26] which we discussed in the ''Rationale for the Proposed Policy'' in the NPRM.[27] At this time, we have decided to add SNAP with this expansion and continue to explore adding other programs in the future.

SNAP provides nutrition benefits via an Electronic Benefit Transfer (EBT) card, which can be used to buy groceries at authorized food stores and retailers.[28] Everyone who lives together and purchases and prepares meals together is grouped together as one SNAP household; and, in most cases, the household must meet both gross and net income limits, which vary with household size, for the household to be eligible for and receive SNAP benefits.[29] If everyone in the SNAP household is receiving TANF and/or SSI, the household may be deemed ''categorically eligible'' for SNAP because they have already been determined eligible for another means-tested program.[30] SNAP benefits meet the definition of income in our regulations.[31] However, SNAP benefits are excluded from our income counting based on Federal statute.[32] Because our policy links the types of PIM payments listed in 20 CFR 416.1142(a) with the income of ineligible spouses and parents that is excluded from deeming under 20 CFR 416.1161(a)(2)–(3), adding SNAP to the list of PIM programs will decrease the amount of income that is deemed to SSI applicants and recipients. If an SSI-ineligible spouse or parent is receiving SNAP benefits, the value of the SNAP benefit, as well as any income that was counted or excluded in figuring the amount of the SNAP benefits, would not be deemed to the SSI applicant or recipient. In addition, any income of the ineligible spouse or parent that is used to determine the amount of SNAP benefits to someone else would not be deemed to the SSI applicant or recipient.

We also discussed and invited public comment on broadening our definition of a PA household from one in which every member receives a PIM payment to one in which any member other than the SSI applicant or recipient receives a PIM payment. We have decided to adopt this change. Thus, under our new definition of PA household, if there is an SSI applicant or recipient in a household where at least one other member receives one or more of the listed PIM payments, the household will be considered a PA household, and we will not develop for inside ISM.[33]

As we discussed in the NPRM, the previous definition of PA household (requiring *every* member to receive a PIM payment) may have disadvantaged individuals in low-income households where household members still needed their income (and resources) to meet their own needs but where a household member was not receiving a PIM payment for reasons unrelated to need.

[19] 88 FR 67148.

[20] For more information on SNAP, visit *https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program.*

[21] In the NPRM, we referred to this potential change as from *every* to *any other.* In this final rule, we are adopting that proposed change but, for purposes of clarification, have slightly modified the new language defining a PA household in 20 CFR 416.1142(a), such that the *any other* language is no longer used. Because the substance of the new definition is the same as the *any other* proposal, we continue to refer to the new definition as the *any other* definition throughout this final rule.

[22] For more information on Medicaid, visit *https://www.medicaid.gov/.*

[23] For more information on LIHEAP, visit *https://www.acf.hhs.gov/ocs/low-income-home-energy-assistance-program-liheap.*

[24] For more information on WIC, visit *https://www.fns.usda.gov/wic.*

[25] For more information on the Housing Choice Voucher Program, visit *https://www.hud.gov/hcv.*

[26] For more information on Public Housing, visit *https://www.hud.gov/program_offices/public_indian_housing/programs/ph.*

[27] 88 FR 67148, 67151.

[28] See ''How do I receive SNAP benefits?'' available at *https://www.fns.usda.gov/snap/recipient/eligibility.*

[29] See ''Who is in a SNAP household?'' and ''What are the SNAP income limits?'' available at: *https://www.fns.usda.gov/snap/recipient/eligibility.*

[30] See ''What are the SNAP income limits?'' available at: *https://www.fns.usda.gov/snap/recipient/eligibility.*

[31] See 20 CFR 416.1102.

[32] 7 U.S.C. 2017(b); *see also* 20 CFR 416, Subpart K, Appendix (I)(a).

[33] ''Inside ISM'' is ISM that is provided to the SSI applicant or recipient from others within the same household in which the applicant or recipient is living. *See* POMS SI 00835.465.B.; *see also* POMS SI 00835.515. In contrast, ''[w]hen a person who is not a household member pays a vendor directly for any of the household's costs or provides the household with [ISM] for less than the current market value (CMV),'' we consider this ''outside ISM.'' *See* POMS SI 00835.465.C.; *see also* POMS SI 00835.515. ISM that is neither inside, nor outside—such as ISM provided to only one person in the household—is considered ''other ISM.'' *See* POMS SI 00835.630.E.

For example, college students, who do not meet a student exception for SNAP, may not receive SNAP benefits even though the rest of the household does.[34] In such circumstances, under our previous definition of PA household, the household would not qualify. But under the expanded definition of PA household that we are adopting, the household would not be disqualified as a PA household simply because one member was not receiving a PIM payment. In fact, many commenters supported the change we are now adopting based on their experiences, under the previous definition, of households that did not qualify for reasons unrelated to need.[35]

Additionally, when we first established the PA household rule in 1980, we explained that our rule ''relied on the fact that other agencies have determined that these individuals [receiving PIM payments] need all their income for their own needs.'' [36] Because SNAP and several of the other PIM programs listed in our PA household definition provide, or may provide, benefits at the household (or family) level instead of the individual level (*e.g.,* TANF, Refugee Act of 1980, Disaster Relief and Emergency Assistance Act, and general assistance programs of the Bureau of Indian Affairs), we note that in many circumstances a needs-based determination has been made for other household members. We discuss further justification for the change (from *every* member to *any other* member) in the Comments Summary section below.

Comments Summary

We received 221 public comments on our NPRM from September 29 through November 29, 2023. Of the total comments, 219 are available for public viewing at *https://www.regulations.gov/document/SSA-2023-0015-0001*.[37] These comments were from:

- Individuals; and
- Advocacy groups, such as the National Organization of Social Security Claimants' Representatives and the National Association of Disability Representatives.

We carefully considered the public comments we received. More than 95 percent of commenters supported the proposals in the NPRM to add SNAP and to adopt the change from *every* member to *any other* member, meaning the household has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed PIM payments. Some commenters agreed with the overarching proposals but recommended amendments. Other commenters asked questions and offered opinions on the potential financial and legal implications of the proposals. A few commenters disagreed with the proposals altogether.

We received some comments that were outside the scope of this rulemaking because they did not relate to our proposals either to add SNAP to our list of PIM programs or to change our definition from *every* member to *any other* member. Even though outside the scope, we address some of these other comments where they related to ISM more generally because a response might help the public understand our program better.

The next section summarizes and responds to the public comments.

Comments and Responses

General Support

Comment: Many commenters broadly supported, and encouraged us to quickly finalize and implement, adding SNAP to the list of PIM programs in our definition of a PA household.

Response: We acknowledge and appreciate the support for that change.

Comments Regarding Scope of Change

Comment: Many commenters supported the proposed change in the PA household definition from one in which *every* member receives some kind of PIM payments to one that has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed PIM payments. Some commenters stated that the *any other* proposal would simplify our processing of SSI claims, save time, and increase the speed with which we serve applicants and recipients. Some commenters noted that some SNAP households face barriers to SNAP enrollment for all household members, including households with: college students who do not meet a student exemption for SNAP; individuals with Able-Bodied Adults Without Dependent (ABAWD) status who are otherwise eligible for SNAP, but who are generally limited to no more than three months of SNAP benefits within a three-year period if they are not meeting certain work requirements or they do not qualify for an exception; and households with mixed immigration status.[38] These commenters stated that such households, where some, but not all, members may be eligible for SNAP, would not benefit from the addition of SNAP to our list of PIM programs unless we adopted the *any other* proposal. In support of this point, commenters stated that the change to *any other* member would be consistent with Executive Order (E.O.) 13985.[39]

One commenter objected to the examination and discussion of the *any other* proposal because they want further analysis and justification of the change. The commenter suggested that such a change should be explored through an Advance Notice of Proposed Rulemaking.

Response: We carefully considered the comments on the *any other* proposal and have decided to adopt the *any other* change in this final rule.

First, the commenters cited examples of how requiring every member of the household to receive a PIM payment has disadvantaged individuals in low-income households under the previous definition when there was a household member who did not receive a PIM payment for reasons unrelated to need. We found these examples to be persuasive. The commenters noted, for example, that SNAP and TANF restrict certain individuals in the household from receiving benefits even if their income is used to determine the household's eligibility for the benefits.[40] Specifically, several commenters [41] pointed out that some members of a household are not eligible to receive SNAP because of their immigration

[34] See *https://www.fns.usda.gov/snap/students.*

[35] See public comments in the rulemaking docket at *https://www.regulations.gov,* under the docket SSA–2023–0015. Examples include Center on Budget and Policy Priorities; Justice in Aging; The Legal Aid Society; and Community Legal Service of Philadelphia.

[36] 45 FR 65542, *https://www.federalregister.gov/citation/45-FR-65542.*

[37] We excluded two comments. One comment was identical from the same commenter, and one was a partial submission that was missing pages that was resubmitted by the commenter for completeness.

[38] For additional details on USDA/FNS's policy regarding families with mixed immigration status, see *https://www.fns.usda.gov/snap/eligibility/citizen/non-citizen-policy.*

[39] Executive Order 13985. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. January 20, 2021. *Available at: https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government.*

[40] For example, adults who have exceeded eligibility time limits and certain non-citizens are not eligible to receive TANF, even if their income is used to determine a household's eligibility for TANF benefits. See ''Characteristics and Financial Circumstances of TANF Recipients Fiscal Year (FY) 2021,'' *available at https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021_characteristics.pdf.*

[41] Comments are available to the public at *https://www.regulations.gov.* Search for docket ''SSA–2023–0015.'' See comments from: National Organization of Social Security Claimants' Representatives (NOSSCR); California Association of Food Banks (CAFB); Californians for SSI (CA4SSI); Center on Budget and Policy Priorities (CBPP); Justice in Aging; and the Legal Aid Society.

status, even if they would otherwise qualify for SNAP benefits based on their income (or need).[42] In such a case, under the previous policy, although the SSI recipient lives in a household where all but one of the other members are receiving SNAP, we would not have considered this a PA household because not every member of the household was receiving a PIM payment. As a result, we may have treated the SSI recipient as receiving inside ISM and would have reduced their benefit despite the fact that the household was still sufficiently low income to qualify everyone in the household for the PIM payments based on financial need.

Second, for households with an SSI applicant or recipient and at least one other member who receives means-tested PIM payments, we find it reasonable to conclude that members of the household likely would not be able to provide the SSI applicant or recipient with inside ISM. This conclusion is supported by the data we have about the composition of households that receive the types of PIM payments covered by our PA household policy. This data generally shows that individuals eligible for PIM payments live in low-income households. For example:

- The average monthly income for TANF households is $958 (or under $12,000 annually). These income levels indicate that if someone in a household is receiving TANF, the entire household is likely to be low income.[43]
- In 2014, a study showed that families who receive public assistance are significantly lower income than families who do not, with annual incomes averaging $33,549 for a family of four who receive at least one form of public assistance versus $74,597 for a family of four who do not receive any assistance.[44]
- 70 percent of SSI recipients live in households with family incomes below $30,000, including income from assistance benefits.[45]
- In FY 2020, 81 percent of SNAP households had gross monthly income less than or equal to the poverty line.[46]
- An analysis of families receiving multiple public benefits (but not necessarily where every member received some form of public assistance) found that higher levels of benefit receipt are associated with lower income, earnings, and employment, and greater material hardship.[47]
- A 2013 study found that about 25 percent of SSI recipients lived in a household where the total family income was below 100 percent of the applicable family poverty threshold, even though the household contained at least one member who was not receiving PIM payments. This was true regardless of whether the SSI recipients were individuals/couples or noncouple multi-recipient.[48]
- The 2019 Survey of Income and Program Participation found that in households that receive both TANF and SSI, 85.7 percent (+/− 8.4 percent) have incomes less than 200 percent of the Federal poverty rate, even after all transfers (that is, including the income the household receives from all sources of cash public assistance payments).[49]
- Lastly, related to the policy to add SNAP to the list of PIM programs, among households receiving SSI in 2021, 64.7 percent also qualified for and received SNAP.[50]

Third, as discussed above and in our NPRM, SNAP and several other listed PIM programs provide, or may provide, household-level (or family-level) benefits (*e.g.,* TANF, Refugee Act of 1980, Disaster Relief and Emergency Assistance Act, and General assistance programs of the Bureau of Indian Affairs). This means a government agency has already determined that a household's income is sufficiently low such that the household is in need of public assistance. Based on that finding, it is reasonable for us to conclude that household members require their own income (and resources) to meet their own needs.

Finally, regarding the suggestion that we explore whether to adopt the *any other* definition through an ANPRM, we used the NPRM to explore this option. In the NPRM, we discussed the possible policy change, examined evidence that supported the change, invited public comment specifically on the proposed change, and included an estimate and cost analysis from our Office of the Chief Actuary (OCACT) over the fiscal years 2024 to 2033. The OCACT estimate projected SSI payments, and estimated changes for both recipients and new individuals who will be eligible under the revised *any other* definition that would not have been eligible under our previous rules.

Comment: Some commenters encouraged us to go beyond the *any other* proposal and change the definition of a PA household to refer simply to *any* member, including the SSI applicants or recipients themselves.

Response: Under the commenters' alternative proposal, *every* SSI recipient would live in a PA household and, thus, would be considered not to be receiving ISM from other members of the household (*i.e.,* inside ISM). We do not think that result would be supportable because it would mean that we would never apply the one-third reduction (VTR) rule,[51] which is based on a provision in the Social Security Act.[52]

Comment: Many commenters encouraged us to expand the definition of PA household to include additional programs, whether in this final rule or in a future rulemaking, including: Medicaid; LIHEAP and similar energy assistance programs; housing assistance from the Department of Housing and Urban Development (HUD); WIC; CHIP; and the earned income tax credit (EITC).

Response: As we discussed in the NPRM,[53] this is our first expansion of the definition of a PA household since 1980, when the policy was first established. Therefore, we decided to add SNAP initially and will consider other programs in the future; our

[42] See ''Are non-citizens eligible for SNAP?'' at *https://www.fns.usda.gov/snap/recipient/eligibility.*

[43] See Table 40 (''TANF Recipient Families by Receipt of Non-TANF Income: FY 2021), available at *https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2021.*

[44] See Program participation and spending patterns of families receiving government means-tested assistance: Monthly Labor Review: U.S. Bureau of Labor Statistics, available at *https://www.bls.gov/opub/mlr/2018/article/program-participation-and-spending-patterns-of-families-receiving-means-tested-assistance.htm.*

[45] Messel and Trenkamp. 2022. ''Characteristics of Noninstitutional DI, SSI, and OASI Program Participants 2016 Update.'' Research and Statistics Note No. 2022–01. Washington, DC: SSA. Available at: *https://www.ssa.gov/policy/docs/rsnotes/rsn2022-01.html.*

[46] See USDA FNS. 2022. Characteristics of U.S. Department of Agriculture's Supplemental Nutrition Assistance Program Households: Fiscal Year 2020. Available at *https://fns-prod.azureedge.us/sites/default/files/resource-files/Characteristics2020-Summary.pdf.*

[47] Edelstein, Pergamit, and Ratcliffe. 2014. Characteristics of Families Receiving Multiple Public Benefits. The Urban Institute. Available at *https://www.urban.org/sites/default/files/publication/22366/413044-Characteristics-of-Families-Receiving-Multiple-Public-Benefits.PDF.*

[48] Nicholas. 2013. Prevalence, Characteristics, and Poverty Status of Supplemental Security Income Multirecipients. Social Security Bulletin, Vol. 73, No. 3. Washington, DC: SSA. Available at *https://www.ssa.gov/policy/docs/ssb/v73n3/v73n3p11.html.*

[49] We selected the 2019 (reference year 2018) SIPP survey because it had the largest sample size of pre-COVID 19 SIPP surveys. U.S. Census Bureau. 2019. Survey of Income and Program Participation. Available at *https://www.census.gov/library/visualizations/interactive/social-safety-net-benefits.html.* The most recent SIPP survey found that 61.2 percent (+/− 21.4 percent) of these same households had incomes less than 200 percent of the Federal poverty rate. The 2021 SIPP is inclusive of COVID-era stimulus payments and other transfer programs that no longer exist.

[50] U.S. Census Bureau. 2022. Who Is Receiving Social Safety Net Benefits? available at *https://www.census.gov/library/stories/2022/05/who-is-receiving-social-safety-net-benefits.html.*

[51] See 20 CFR 416.1131; POMS SI 00835.200.

[52] See 42 U.S.C. 1382a(a)(2)(A).

[53] 88 FR 67152–67153.

choosing not to do so now does not preclude adding other programs via future rulemaking. As discussed in our NPRM, SNAP recipients have been determined to be low-income and, therefore, need their income (and resources) to take care of their own needs, which is consistent with the rationale underlying our policy when it was first established.[54] The other programs cited by the commenter do not align as easily with the criteria we used. For example, while the benefits of the EITC are concentrated among low-income households, some moderate-income taxpayers are eligible for a small credit, including taxpayers with three or more children earning up to $63,398 and with up to $11,000 in investment income (in 2023). This demonstrates that the EITC does not align with the underlying intent of our initially established PA household policy to the extent that SNAP does.

In addition, SNAP has several advantages over other programs that we considered that make it the best fit for this first expansion of our PA household definition. First, SNAP eligibility and receipt have relatively low State variability because SNAP is a nationwide program with relatively uniform eligibility standards. In general, net monthly income limits for SNAP eligibility are set at 100 percent of the poverty level.[55] In contrast, Medicaid, for example, has varying income limits based on an individual's State of residence.[56] Likewise, the upper eligibility levels for CHIP vary by State and range widely,[57] as do the types of CHIP programs and groups covered by States. In contrast, the relative uniformity in SNAP eligibility requirements makes this initial expansion of our PA household policy more consistent and supportable.

Second, SNAP benefits are typically certified for relatively longer periods than other government benefit programs. For example, many SNAP participants are certified for 12 months, and older individuals and individuals with disabilities may be certified for up to 24 or 36 months. In contrast, other programs with shorter or less predictable benefit periods might require more frequent development of individuals' living arrangements, which could be burdensome for recipients and our staff. For example, LIHEAP benefits, which help low-income households pay for heating or cooling, are typically seasonal, meaning that eligibility can vary within a 12-month period.

Moreover, SNAP does not have a cap on enrollment, meaning those who qualify or meet eligibility requirements receive benefits. This ensures that we can include the entire SNAP-eligible population when we determine what households qualify as PA households. In contrast, programs like WIC, LIHEAP, and HUD housing are capped based on the availability of resources, which means there are waiting lists for those who are financially eligible and priority levels to receive benefits.[58] As we strive for uniformity across the SSI program, we are concerned that including government benefit programs with enrollment caps or waiting lists may lead to disparate treatment of similarly situated SSI applicants and recipients.

Finally, we note that SNAP participation overlaps to a great extent with participation in other means-tested programs and, thus, by adding SNAP to the definition of PA household, we anticipate that we will also capture many of the individuals who receive benefits from other means-tested programs. We would like to observe how adding SNAP to the PA household definition affects the SSI population before we determine whether to add additional programs, and if so, which programs.

Despite the considerations cited above, we are not precluding adding other programs to the list of PIM payments in our PA Household definition. As well, changes to the programs discussed here might also cause us to reconsider them for inclusion on the list. Expanding the definition of PA household to include additional programs would require further, program-specific consideration.

Use of Data Sharing To Implement New Policy

Comment: One commenter encouraged us to proactively recalculate benefits for existing recipients based on this new rule, rather than waiting until the recipients' next scheduled redetermination. The commenter wanted us to do this to ensure recipients received the benefit of the new policy as soon as possible. The commenter also stated that this process of proactive recalculation could be simplified by utilizing data we already receive through existing data matches. The commenter further stated that ''SSA should conduct Limited Issue reviews of all VTR and ISM records in order to comply with the new rules, as well as of all claims denied in the previous twelve months to identify erroneously denied applicants.''

Similarly, many commenters, in their support for finalizing the proposed rule, encouraged us to expand or implement data sharing agreements with State SNAP administrators across the country. They advocated that expanded data sharing with SNAP administrators would be an improvement over using redeterminations to identify and correct ''over-reduction'' of payment and ineligibility decisions.

Response: We acknowledge and share the commenter's desire to ensure existing recipients receive the benefit of the new PA household policy as soon as possible. However, due to limited resources it is not administratively feasible to conduct Limited Issue reviews of all the VTR and ISM records. Further, this final rule does not apply to any claims denied before its effective date.

Expanding or implementing data sharing agreements with States across the country would involve several important considerations that are outside the scope of this rulemaking, including the interest, capacity, and requirements of the States. We have an established process for data exchanges that we follow to implement any data exchange, including establishing the agreements. We currently have 174 data sharing agreements with States/State agencies under which we provide data for the State/State agency to determine entitlement and eligibility for federally funded benefit programs, including Medicaid, SNAP, and TANF.

Income From Family or Friends

Comment: One commenter expressed concern that our regulations that deem income create a disincentive for SSI recipients to get married, and implied tension or conflict with the Supreme Court's holding in *Obergefell* v. *Hodges,*[59] which holds that same-sex couples may not be deprived of the fundamental right to marry.

Response: In general, deeming from a spouse is required by the Social Security Act.[60] In the context of this rulemaking, as we explained in the NPRM, adding SNAP to our list of PIM programs will ''decrease the amount of

[54] 88 FR 67152.

[55] See ''What are the SNAP income limits?'' available at *https://www.fns.usda.gov/snap/recipient/eligibility.* Note that Alaska and Hawaii have separate, higher income eligibility standards for the SNAP program.

[56] *https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/medicaid-childrens-health-insurance-program-basic-health-program-eligibility-levels/index.html*

[57] *Id.*

[58] Dorn, Stan, et al. (2013). Overlapping Eligibility and Enrollment: Human Services and Health Programs Under the Affordable Care Act. The Urban Institute. *https://aspe.hhs.gov/sites/default/files/private/pdf/76961/rpt_integrationproject.pdf.*

[59] 576 U.S. 644 (2015).

[60] 42 U.S.C. 1382c(f)(1).

income we [will] deem to SSI applicants and recipients because we [will] no longer deem income from ineligible spouses . . . who receive SNAP benefits and live in the same household.'' There is no tension or conflict between spouse-to-spouse deeming and the Supreme Court's holding in *Obergefell:* spouse-to-spouse deeming applies equally to opposite-sex couples and same-sex couples.

Comment: Several commenters made a broad suggestion to entirely eliminate ISM because counting ISM discourages friends and family from providing assistance to disabled loved ones, while one commenter acknowledged that a statutory change would be required to eliminate ISM.

Response: We acknowledge the commenters' desired policy change, but as the one commenter stated, entirely removing ISM from our income calculations would require a statutory change.[61]

Opposition to the Rule

Comment: One commenter opposed the proposed rulemaking because the NPRM did not extensively discuss the distinctions in the definitions of household composition for SSI and SNAP.

Response: This rulemaking does not change the definition of a household for SSI purposes [62] or for SNAP purposes.[63] The commenter did not explain how the distinctions in the household composition definitions are relevant to our addition of SNAP, and we do not believe that the distinctions preclude us from adding SNAP to our regulatory list.

Comment: One commenter asserted that because a federal food-stamp program existed in 1980, when the PA household policy was first created, the relative increase in SNAP participation since that time does not sufficiently justify the change to include SNAP in the list of PIM programs in our definition of a PA household. The commenter further noted that ''the large increase in SNAP users and concurrent decline in the poverty rate since 1980 . . . is not a relevant indication of increased need.''

Response: When we first established the PA household policy in 1980, we explained that it was based on the idea that if the other individuals in the household were receiving a PIM payment, they needed their income (and resources) to meet their own needs. This meant they could not support the SSI applicant or recipient because they had no extra income (or resources) to share. The determination of need, made by the applicable Federal or State agency providing the PIM payments, supported the assumption that the others in the household could not provide ISM to the SSI applicant or recipient. The fluctuations in the overall poverty rate in the United States are not directly relevant to whether the household members are able to provide ISM to the SSI applicant or recipient. As we discussed in the NPRM, when the PA household policy was first created in 1980, the list of PIM programs in our definition of a PA household reflected the most widely used means-tested public benefit programs at that time.[64] The nationwide food-stamp program began in 1974—just six years before the establishment of the PA household policy—and had approximately 21.1 million participants in 1980.[65] In contrast, approximately 42.1 million people receive SNAP benefits today,[66] making SNAP now one of the most widely used public benefit programs. As we discussed in the NPRM, we have not updated our list of PIM programs for the PA household policy since 1980, despite the significant shifts in the landscape of public assistance programs since that time. SNAP recipients have been determined to be low-income and, therefore, need their income (and resources) to meet their own needs.[67] Indeed, a USDA report from 2019 showed that approximately 80 percent of all SNAP households had gross monthly income that was less than or equal to the Federal poverty level.[68]

Comment: One commenter opposed adding other programs, such as ''in-kind assistance programs like food and medical care,'' that are not cash assistance programs, to the programs listed in our definition of a PA household. Further, the commenter asserted that we had taken an inconsistent stance by calling our treatment of food ''insignificant'' in a different rulemaking [69] but ''including SNAP . . . as significant'' in this PA household rulemaking.

Response: Regarding the commenter's statement that we should not add in-kind assistance programs like food and medical care to our PA household definition, we have determined that means-tested programs largely have shifted over the last several decades from cash assistance programs toward voucher-based or in-kind support programs. Because of this shift over time, we have a reduced ability to effectively identify the individuals we intended to serve under our PA household definition.

As we noted in the NPRM, SNAP benefits meet our definition of income in 20 CFR 416.1102.[70] The commenter's reference to our NPRM on *Omitting Food from In-Kind Support and Maintenance* is generally outside the scope of this rulemaking. However, we note that, contrary to the commenter's assertion, we have not described food assistance as ''insignificant,'' nor is food assistance treated inconsistently under the two rules. Here, we are adding SNAP benefits to the list of PIM programs under the PA household policy. This change means that if the household has both an SSI applicant or recipient, and at least one other household member who receives SNAP benefits (or other PIM payments listed in the PA household definition), we will not develop inside ISM because we consider that the household is sufficiently low income such that the members need all of their income (and resources) to meet their own needs—they are not able to share with or provide ISM to the SSI applicant or recipient. In contrast, under the final rule *Omitting Food from In-Kind Support and Maintenance,* we removed food from our calculations of ISM. More importantly, it is less accurate to compare potentially partial, inconsistent food assistance that an individual receives from family or friends with something like SNAP, a Federal benefit one can only qualify for after demonstrating they do not have enough income or resources to fulfill their own basic nutrition needs.

Comment: One commenter described the NPRM as incomplete because there was ''no federalism, no distributional

[61] See 42 U.S.C. 1382a(a)(2)(A).

[62] SSA—POMS: SI 00835.020—Definitions of Terms Used in Living Arrangements (LA) and In-Kind Support and Maintenance (ISM) Instructions—8/2023. *https://secure.ssa.gov/apps10/poms.nsf/lnx/0500835020.*

[63] See ''Who is in a SNAP household?'' at SNAP Eligibility | Food and Nutrition Service (*usda.gov*). *https://www.fns.usda.gov/snap/recipient/eligibility.*

[64] See 88 FR 67151–52.

[65] See Congressional Budget Office, ''The Food Stamp Program: Eligibility and Participation,'' Nov. 1988, p. 2, *available at https://www.cbo.gov/sites/default/files/100th-congress-1987-1988/reports/88-cbo-0010.pdf.*

[66] See USDA Food and Nutrition Service (FNS), SNAP Data Tables, ''FY19 through FY23 National View Summary,'' Sept. 2023, *available at https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap.*

[67] See 88 FR 67152.

[68] See USDA, ''Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2019,'' March 2021, Report No. SNAP–20–CHAR, *available at: https://fns-prod.azureedge.us/sites/default/files/resource-files/Characteristics2019.pdf.*

[69] The commenter appears to be referring to the NPRM the agency published on ''Omitting Food from In-Kind Support and Maintenance.'' *See* 88 FR 9779 (Feb. 15, 2023).

[70] See 88 FR 67151.

analysis, no alternatives considered[.]'' The commenter also desired estimates of costs from Medicaid, and other programs using an SSI Financial Eligibility Model (FEM). The same commenter asserted that data from the Survey of Income and Program Participation (SIPP) was better for this rulemaking than the Current Population Survey (CPS) data used in our proposed rule. The commenter asserted that CPS data undercounts income and suggested our estimates might be incorrect.

Response: Regarding federalism, section 1(a) of E.O. 13132 defines ''policies that have federalism implications'' as ''refer[ring] to regulations, legislative comments or proposed legislation, and other policy statements or actions 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.'' [71] As stated in the NPRM and this final rule, we analyzed the rule in accordance with the principles and criteria established by E.O. 13132 and determined that the rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. As also stated in the NPRM and this final rule, we also determined that the rule will not preempt any State law or State regulation or affect States' abilities to discharge traditional State governmental functions. We maintain that those determinations are accurate, and the commenter did not give any reason to believe they are not.

As a matter of protocol, the estimates prepared by SSA's Office of the Chief Actuary (OCACT) focus on the impact on SSA. The commenter is incorrect in stating regarding the NPRM that ''no alternatives [were] considered[.]'' For example, the reasons that we provided in support of the proposal, particularly in the ''Rationale for the Proposed Policy'' section of the NPRM, demonstrate that we considered the proposal against the alternative of making no change.[72] Also, as we stated in the ''Proposed Policy'' section of the NPRM, ''[d]uring the development of [the NPRM], we considered other means-tested programs, including Medicaid, the Low Income Home Energy Assistance Program (LIHEAP), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the Housing Choice Voucher Program, Project Based Rental Assistance, and Public Housing, which we discuss[ed] in the 'Rationale for the Proposed Policy' section'' of the NPRM.[73]

With regard to the commenter's assertion that SIPP data was better for this rulemaking than CPS data, in our development of the estimated Federal SSI program cost effects, we did not use the income fields from the CPS to estimate the effects of this proposal. The CPS was only used for the purpose of determining how many SSI households were also receiving SNAP and would thus be impacted by implementation of the proposal. Regarding the research cited in the NPRM that used the CPS, the CPS Annual Social and Economic Supplement (CPS ASEC) is the source of official poverty measures, and we consider it sufficiently reliable for other government estimates. A chief advantage of the CPS ASEC over the SIPP (used by the FEM) is larger sample size. Because PA households represent a small fraction of the SSI caseload, we rely on the larger data source to make more precise estimates. Even the CPS ASEC does not include enough cases to support the additional detailed analyses that the commenter would like to see.

Comment: Two commenters stated that the NPRM should comply with the Fiscal Responsibility Act of 2023, known as the Administrative Pay-As-You-Go Act of 2023.[74]

Response: This rule complies with the Administrative Pay-As-You-Go Act of 2023. That Act does not impose requirements at the NPRM stage. Additionally, this final rule is not subject to the Act's requirements because it is not estimated to increase direct spending by at least $100 million for FY 2024 (the first fiscal year during the 10-year period). See section 266 of the Act.

Comment: One commenter opposed the proposed rule based on the administrative implementation cost of $105 million because, in the commenter's view, it conflicts with our anticipated administrative burden reduction from simplified calculations. The commenter also stated that there will be more redeterminations and more applications because of the new policy.

Response: To clarify, administrative costs to implement a new regulation (stemming from a variety of sources, such as new systems) are distinct from non-financial administrative burden sources such as time, ease, and efficiency. Administrative costs and non-financial burdens, then, will not necessarily move in the same direction. As explained in the NPRM, we anticipate this policy change will result in administrative costs that will be only partially offset by administrative savings. At the same time, we expect processing time savings because employees will spend less time developing household expenses and making inside ISM determinations. Nonetheless, as the comment suggests, we estimated that there will be costs to process additional claims, reconsiderations, and appeals. As we stated in the NPRM, we anticipate that this expansion of our PA household policy will increase the amount of monthly SSI benefits for those to whom the policy applies and make more individuals eligible for SSI benefits. Consequently, we anticipate that there will be additional costs to process redeterminations and post-eligibility actions associated with this rule change.

In summary, we acknowledge what the commenter is expressing, and we provided revised estimate text in the preamble to clarify that the administrative burden would be reduced in a subset of cases, which would only partially offset the greater amount of costs from newly eligible recipients. However, as further discussed in the preamble and in the Regulatory Impact Analysis, we have determined that the benefits of the rule justify the costs, and that the rule can have administrative benefits even while it imposes administrative costs.

Comment: One commenter asserted that using SNAP to confirm SSI eligibility will result in overpayments in multiple programs, thereby increasing financial burdens on beneficiaries to repay the funds. The commenter stated that ''SNAP income and asset testing has changed dramatically with the creation and expansion of Broad-Based Categorical Eligibility (BBCE). This has contributed to a massive increase in SNAP participation rolls and a greater reliance on recipient self-attestation—the number one contributor to program overpayments.'' The commenter also asserted that our proposed rule ''will increase the participation in SSI, not decrease as imagined in [the] NPRM.''

Response: Under this final rule, receipt of SNAP is not dispositive of the applicant's or recipient's SSI eligibility. It is true that under this final rule, receipt of SNAP by one or more household members (other than the SSI applicant or recipient) may factor into our determination of whether the SSI applicant or recipient lives in a PA household, but this is advantageous to the individual applying for or receiving SSI. If the SSI applicant or recipient lives in a PA household, that means

[71] See *https://www.govinfo.gov/content/pkg/FR-1999-08-10/html/99-20729.htm.*

[72] See 88 FR 67148, 67151–52 (Sept. 29, 2023).

[73] Id. at 67150–51 (footnotes omitted).

[74] Public Law 118–5, div. B, title III.

only that we consider the SSI applicant or recipient not to be receiving ISM from members of the household—not necessarily that the SSI applicant or recipient is eligible for SSI.

We carefully considered the commenter's reservations about SNAP. However, we continue to maintain that adding SNAP is consistent with the rationales and purposes of our PA household policy, as discussed in the NPRM and in this final rule. We would add, first, that we find it reasonable and supportable to consider a needs-based eligibility determination by a government entity, on a matter within its competence, as reliable. Second, an overpayment determination for a given type of benefit does not necessarily mean that the applicant or recipient was not entitled or eligible to receive *any* such benefits for the period at issue; and our PA household policy looks at receipt of a PIM payment generally, not the *amount* of the PIM payment. Third, if we determined, in light of another government entity's overpayment determination, that a household member did not receive a PIM payment, we could and would make a correction, as appropriate and subject to all our usual rules, including administrative finality.[75] Fourth, BBCE ''is a policy in which households may become categorically eligible for SNAP because they qualify for a non-cash Temporary Assistance for Needy Families (TANF) or state maintenance of effort (MOE) funded benefit.'' [76] BBCE is consistent with our longstanding list of PIM programs, which includes both TANF and State or local government assistance programs based on need.[77]

Lastly, contrary to the commenter's statement, our proposed rule did not indicate that we anticipated a decrease in SSI participation. In the NPRM, we stated that there would be a ''decrease [in] the number of SSI applicants and recipients charged with in-kind support and maintenance (ISM)'' and a ''decrease [in] the amount of income we would deem to SSI applicants or recipients because we would no longer deem income from ineligible spouses and parents who receive SNAP benefits and live in the same household.'' [78]

Comment: One commenter suggested reducing administrative burden when we determine eligibility by conducting mandatory verifications of all income and assets in SSI applications, because self-attestation creates ''an environment favorable to first and third-party fraud[.]'' The commenter stated that ''the 'pay and chase' implications in overpayment recoveries infers an administrative burden upon state and local welfare agencies.''

Response: Verification of ''all income and assets in SSI applications'' is outside the scope of this rulemaking. However, we note that in administering the SSI program, we carefully ensure that our policies and procedures are consistent with the requirement in the Social Security Act: ''that eligibility for [SSI] benefits . . . will not be determined solely on the basis of declarations by the applicant concerning eligibility factors or other relevant facts, and that relevant information will be verified from independent or collateral sources and additional information obtained as necessary in order to assure that such benefits are provided only to eligible individuals (or eligible spouses) and that the amounts of such benefits are correct.'' [79]

Regarding our PA household policy, we do not rely on self-attestation alone. For initial claims, we ''substantiate receipt of PA payments'' (or PIM payments) with ''evidence . . . [in] the form of an award letter, report of contact with the paying agency, etc.''; and, in post-eligibility situations, we appropriately document or substantiate PIM payments depending on indications of a changed living arrangement.[80] Lastly, after over 40 years of applying our PA household policy, we are aware of no evidence that the policy as such leads to overpayments or that overpayments occur with respect to PA household determinations more than other comparable determinations.

Miscellaneous Comments

Comment: One commenter asserted the proposed rule would not benefit the quality of life of all U.S. citizens and that ''[t]here is no defined option to revert changes if [the rulemaking] proves to be incorrect.''

Response: Under the Social Security Act, we have broad authority to make and revise rules and regulations, consistent with the Act, that are necessary or appropriate for the administration of our programs, including the SSI program.[81] Adding SNAP to the list of PIM programs in our definition of a PA household and adopting the *any other* definition are proper exercises of the Commissioner's rulemaking authority under the Act, and these changes are appropriate and justified. For the reasons articulated in the NPRM and this final rule, we believe these changes will help us administer the SSI program and provide better support to individuals with limited income and resources. Administering the SSI program as we have been charged to do benefits the public more broadly and the common good.

Comment: One commenter opposed the proposed rule in light of inflation, which ''is presenting challenges for low/no income individuals with their SSI payment and SNAP benefits taken together. Any cuts to their SSI payment at this time will place such individuals at a disadvantage in paying their bills and living with dignity in their households.'' The commenter also suggested that we tax ''the super-rich'' and ''[s]top illegal immigrants at the border and stop them from exploiting the benefits budgeted for legal residents with genuine needs.''

Response: This rulemaking will not result in cuts to SSI payments. We anticipate that the expansion of our PA household policy will increase SSI payments for those to whom the policy applies. Taxation and border control are outside our administrative authority and outside the scope of this rulemaking. Immigration status may be relevant for SSI purposes, but changes to national immigration policy are outside the scope of this rulemaking.

Regulatory Procedures

E.O. 12866, as Amended by E.O. 14094

We consulted with the OMB, and OMB determined that this final rule meets the criteria for a significant regulatory action under section (3)(f)(1) of E.O. 12866, as amended by E.O. 14094, and is subject to OMB review.

Anticipated Transfers to Our Program

The primary anticipated impact of this rule is an increase in monetary transfers from the government to SSI recipients. Our Office of the Chief Actuary (OCACT) estimates that implementation of this rule would result in a total increase in Federal SSI payments of $15 billion over fiscal years 2024 through 2033, assuming implementation of this rule beginning on September 30, 2024. When the effects of implementing this rule are fully realized, the annual increase in Federal SSI payments is estimated to be about two percent relative to what would have occurred under previous rules. To estimate the impact, OCACT used the Annual and Social Economic Supplement (ASEC) to the Current

[75] See 20 CFR 416.1488.

[76] *https://www.fns.usda.gov/snap/broad-based-categorical-eligibility.*

[77] See 20 CFR 416.1142(a)(1), (6).

[78] 88 FR 67148, 67148.

[79] 42 U.S.C. 1383(e)(1)(B)(i).

[80] POMS SI 00835.130E.

[81] See 42 U.S.C. 405(a), 902(a)(5), 1383(d)(1), 1383b(a).

Population Survey (CPS) and our administrative data. We expect that adding SNAP to the list of PIM programs and changing to the *any other* definition of a PA household will increase the number of PA households for which we do not charge inside ISM, which will increase Federal SSI payments for these recipients. In addition, we expect that no longer deeming income from ineligible spouses and parents whose income is used to determine eligibility for or amount of SNAP payments will also increase Federal SSI payments. We expect that implementation of this final rule will also cause some individuals to receive Federal SSI payments who would not have been eligible under the previous rules.

According to our Office of the Chief Information Officer, Office of Benefit Information Systems, as of January 2023, there were 303,609 SSI recipients living in a PA household according to the previous definition, approximately four percent of our total 7.5 million SSI recipients.[82] We expect the share of SSI recipients living in a PA household, as defined under this rule, to increase substantially when this final rule is implemented. Specifically, OCACT estimates that once this rule is implemented and the effects have stabilized, in fiscal year 2033 roughly 277,000 Federal SSI recipients (4 percent of all SSI recipients) will have an increase in monthly payments compared to current rules, and an additional 109,000 individuals (1 percent increase) will receive Federal SSI payments who would not have been eligible under current rules.

Additionally, the expansions of our PA household definition could result in a reduction of SNAP benefits due to potential interaction between SSI and SNAP. For example, if an ineligible spouse or parent were receiving SNAP, we would no longer deem their income to an SSI applicant or recipient. Not deeming income for SSI purposes could lead to an increase in the SSI payment, which could in turn cause the household to receive a SNAP reduction that is 30 percent of the SSI increase, up to the point of ineligibility.[83] The household's ineligibility for SNAP could mean, in turn, that the SSI recipient is no longer part of a PA household for SSI purposes. Our understanding is that: an individual or household generally would prefer cash to SNAP benefits; an increase in SSI could not result in a decrease in SNAP benefits greater than the increase in SSI; and, in the main, the increase in SSI that may result from the expansions of our definition of a PA household will be favorable on net to individuals and households. However, we recognize that the interplay among various benefit types, as well as the relationships and financial interests of the SSI individual and other household members, can be complicated. We cannot necessarily predict how the change could affect individuals participating in other programs within these households.

Anticipated Net Administrative Cost to the Social Security Administration

The Office of Budget, Finance, and Management estimates that this proposal will result in a total net administrative cost of $83 million for the 10-year period from FY 2024 to FY 2033. This estimate includes costs to update our systems, to send notices to inform current recipients of the policy changes, to address inquiries from the notices, to verify receipt of SNAP benefits, and to perform additional post-eligibility actions to account for changes in living arrangements. Under this final rule, more individuals will be newly eligible for SSI benefits than under the current rule, resulting in additional costs to process additional claims, reconsiderations, appeals, redeterminations, and post-eligibility actions. In addition to the costs, our estimate also includes processing time savings as field office employees will not have to spend time developing for household expenses/contributions or the full income of deemors (ineligible parents and spouses) or go through the inside ISM determination process during initial claims, pre-effectuation reviews, redeterminations, and post-eligibility actions. While our estimate includes savings due to the reduction in processing times for affected cases, we expect that the costs to process new claims, reconsiderations, and appeals for additional newly eligible individuals will outweigh the savings.

Anticipated Qualitative Costs & Benefits

We anticipate qualitative benefits from the revision of adding SNAP to the PA household definition, thereby ensuring that ISM and income deeming do not undermine the economic security of households who receive nutrition assistance.

Additionally, the revision will reduce administrative burdens for SSI applicants or recipients. Under our finalized policy, the list of PIM programs includes SNAP, and the definition of PA household has changed to refer to a household which has both the SSI applicant or recipient, and at least one other household member who receives a PIM payment. Once we identify that an SSI applicant or recipient lives in a PA household, the applicant or recipient would not have to provide household expenses information.

Our change from every member to *any other* member receiving a PIM payment to meet the definition of a PA household further simplifies the development of living arrangements and ISM, reduces SSA's administrative costs and compliance costs during initial determinations and redeterminations for applicants and recipients living in PA households, and reduces ISM complexities that lead to payment errors. Removing the requirement that every member be in receipt of a PIM payment will help ensure that we reach more SSI applicants and recipients based on their need, especially in cases where one individual in a household was categorically ineligible for a PIM payment for reasons unrelated to their potential need. For example, the change to *any other* will save time for individuals, household members, and us, since we will no longer have to develop for the entire household once we identify one other person in the household receiving a PIM payment. We acknowledge that if the individual receiving the PIM payment leaves the household we would subsequently inquire if there is another household member also receiving a PIM payment, and this would impose a small administrative burden. However, this burden is not meaningfully different from those caused by other changes in circumstances that would lead us to verify whether the SSI recipient remains eligible for SSI benefits. We anticipate this final rule will still reduce administrative burden overall.

We also anticipate some qualitative costs. Specifically, because of our new definition of a ''public assistance household,'' the SSI applicant or recipient will now need to answer new questions and provide documentation about the public assistance they and others in their household receive, so we can accurately determine if they live in a ''public assistance household.'' As well, since SNAP is being added to the list of programs considered for PA household determinations, processing times may temporarily increase as we

[82] Annual Statistical Supplement, 2023—Summary of SSI. Available at: *https://www.ssa.gov/policy/docs/statcomps/supplement/2023/7a.html.*

[83] Because SNAP households are expected to spend about 30 percent of their own resources on food, the maximum monthly allotment is calculated by multiplying a household's net monthly income by 0.3 and subtracting the result from the maximum monthly allotment for the household size. See ''How much could I receive in SNAP benefits?'' at *https://www.fns.usda.gov/snap/recipient/eligibility.*

verify receipt of SNAP benefits. This additional information is a qualitative cost of the regulation, although ultimately, providing the information may be beneficial to the SSI applicant or recipient.

Additionally, the rule change may impose quantitative costs on us due to our increased need for additional development in certain circumstances. For instance, it is possible our regulatory change may incentivize current SSI recipients to change living arrangements to co-locate with family or friends who are receiving SNAP. This is similar to our current policy that requires SSI applicants and recipients to notify us of changes in their living arrangements. SSI applicants and recipients will need to ask ineligible spouses or parents whether their income was used to determine eligibility for, or the amount of, the SNAP benefits. If it was, and if this information is verified by SSA during the initial claim, we would exclude the income for deeming purposes in the SSI program.[84]

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as meeting the criteria in 5 U.S.C. 804(2).

[84] See POMS SI 01320.141.

E.O. 13132 (Federalism)

We analyzed this rule in accordance with the principles and criteria established by E.O. 13132 and determined that the rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. We also determined that this rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Regulatory Flexibility Act

We certify that this rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

The final rule requires minor revisions to our existing information collections to expand our definition of PA Household and include SNAP as an example of a PIM program. In addition, the application of the revisions to these rules causes a burden change to our currently approved information collections under the following information collection requests: 0960 0174, the SSA–8006, Statement of Living Arrangements, In Kind Support and Maintenance; 0960–0456, the SSA–8011, Statement of Household Expense and Contributions; and 0960–0529, the SSA–5062, Claimant Statement about Loan of Food or Shelter, and the SSA L5063–F3, Statement about Food or Shelter Provided to Another. We also anticipate a small burden reduction per response for the SSA 8006 (0960–0174) as respondents will not need to develop the responses about their household. In addition, we anticipate a 50% reduction in the number of respondents based on those who indicate they are part of a Public Assistance Household and who may not need to complete the follow-up forms SSA–5062, SSA L5063, SSA–8006, and SSA 8011. We anticipate this will result in a reduction in the overall burden for these information collections.

We published a notice of proposed rulemaking on September 29, 2023, at 88 FR 67148. In that notice, we solicited comments under the PRA on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. The comments section above includes our responses to the PRA-related public comments we received under the NPRM.

The following chart shows the reduction in time burden information associated with the final rule:

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OMB #; Form #;	Number of Respondents	Frequency of Response	Current Average Burden Per Response (minutes)	Current Estimated Total Burden (hours)	Anticipated New Number of Respondents Under Regulation	Anticipated New Burden Per Response Under Regulation (minutes)	Anticipated Estimated Total Burden Under Regulation (hours)	Estimated Burden Savings (hours)
0960-0174 SSA-8006 (Paper Form)	12,160	1	7	1,419	12,160	6	1,216	203
0960-0174 SSA-8006 (SSI Claims System)	109,436	1	7	12,768	109,436	6	10,944	1,824
0960-0456 SSA-8011-F3 (Paper Form)	21,000	1	15	5,250	10,500		2,625	2,625
0960-0456 Personal Interview (SSI Claims System)	398,759	1	15	99,690	199,380		49,845	49,845
0960-0529 SSA-5062 (Paper version)	29,026	1	30	14,513	14,513		7,257	7,256
0960-0529 SSA-5062 (SSI claim system)	29,026	1	20	9,675	14,513		4,838	4,837
0960-0529 SSA-L5063 (Paper version)	29,026	1	30	14,513	14,513		7,257	7,256
0960-0529 SSA-L5063 (SSI claim system)	29,026	1	20	9,675	14,513		4,838	4,837
Totals	**657,459**			**167,503**	**389,528**		**88,820**	**78,693**

The following chart shows the reduction in theoretical cost burdens associated with the final rule:

OMB #; Form #;	Anticipated New Number of Respondents	Estimated Anticipated Burden Per Response from Chart Above (minutes)	Anticipated Estimated Total Burden Under Regulation from Chart Above (hours)	Average Theoretical Hourly Cost Amount (dollars)*	Average Combined Wait Time in Field Office and/or Teleservice Centers (minutes)**	Anticipated Annual Opportunity Cost (dollars)***
0960-0174 SSA-8006 (Paper Form)	12,160	6	1,216	$13.30*	24**	$80,864***
0960-0174 SSA-8006 (SSI Claims System)	109,436	6	10,944	$13.30*	24**	$727,749***
0960-0456 SSA-8011 (Paper Form)	10,500	15	2,625	$31.48	21**	$198,324***
0960-0456 Personal Interview (SSI Claims System)	199,380	15	49,845	$31.48	21**	$3,765,889***
0960-0529 SSA-5062 (Paper version)	14,513	30	7,257	$22.39*	24**	$292,458***
0960-0529 SSA-5062 (SSI claim system)	14,513	20	4,838	$22.39*	24**	$238,297***

OMB #; Form #;	Anticipated New Number of Respondents	Estimated Anticipated Burden Per Response from Chart Above (minutes)	Anticipated Estimated Total Burden Under Regulation from Chart Above (hours)	Average Theoretical Hourly Cost Amount (dollars)*	Average Combined Wait Time in Field Office and/or Teleservice Centers (minutes)**	Anticipated Annual Opportunity Cost (dollars)***
0960-0529 SSA-L5063 (Paper version)	14,513	30	7,257	$22.39*	24**	$292,458***
0960-0529 SSA-L5063 (SSI claim system)	14,513	20	4,838	$22.39*	24**	$238,297***
Totals	**389,528**		**88,820**			**$5,834,336*** **

* We based this figure on the average DI payments based on SSA's current FY 2024 data (https://www.ssa.gov/legislation/2024FactSheet.pdf); on the average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (https://www.bls.gov/oes/current/oes_nat.htm); as well as the combined theoretical wages for both DI Payments and Average U.S. Workers.

** We based this figure on the average FY 2024 wait times for field offices and hearings office, as well as by 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**.

SSA submitted a single new Information Collection Request which encompasses revisions to information collections currently under OMB Numbers 0960-0174, 0960-0456, and 0960-0529

to OMB for the approval of the changes due to the final rule. After approval at the final rule stage, we will adjust the figures associated with the current OMB numbers for these forms to reflect the new burden.

As we have revised the associated burdens for the above-mentioned forms since we made revisions to the final rule which were not included at the NPRM stage, we are currently soliciting comment on the burden for the forms as shown in the charts above. If you would like to submit comments, please send them to the following locations:

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Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: 202–395–6974

Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*

You can submit comments until May 20, 2024, which is 30 days after the publication of this notice. To receive a copy of the OMB clearance package, contact the SSA Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by email or fax.

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

The Commissioner of Social Security, Martin O'Malley, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary **Federal Register** Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

For the reasons stated in the preamble, we amend 20 CFR chapter III, part 416, as follows:

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart K—Income

■ 1. The authority citation for subpart K of part 416 continues to read as follows:

Authority: 42 U.S.C. 902(a)(5), 1381a, 1382, 1382a, 1382b, 1382c(f), 1382j, 1383, and 1383b; sec. 211, Pub. L. 93–66, 87 Stat. 154 (42 U.S.C. 1382 note).

■ 2. Amend § 416.1142 by revising paragraphs (a) introductory text, (a)(6) and (7) and adding paragraph (a)(8) to read as follows:

§ 416.1142 If you live in a public assistance household.

(a) Definition. For purposes of our programs, a public assistance household is one that has both an SSI applicant or recipient, and at least one other household member who receives one or more of the listed public income maintenance payments. These are payments made under—

* * * * *

(6) State or local government assistance programs based on need (tax credits or refunds are not assistance based on need);

(7) U.S. Department of Veterans Affairs programs (those payments based on need); and

(8) The Supplemental Nutrition Assistance Program (SNAP).

* * * * *

[FR Doc. 2024–08364 Filed 4–18–24; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 2022R–09; AG Order No. 5921–2024]

RIN 1140–AA57

Bipartisan Safer Communities Act Conforming Regulations

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

ACTION: Direct final rule.

SUMMARY: The Department of Justice (''Department'') is amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') regulations to implement firearms-related definitions and requirements established by the Bipartisan Safer Communities Act (''BSCA'') and the NICS Denial Notification Act (''NDNA''). These statutes went into effect on June 25, 2022, and October 1, 2022, respectively. It is necessary to make conforming changes to ensure that ATF's regulations are current and consistent with the applicable statutes. For this reason, this direct final rule incorporates many of the BSCA and NDNA provisions that are applicable to ATF.

DATES: This final rule is effective on July 18, 2024, unless ATF receives any significant adverse comment by May 20, 2024. If ATF receives a significant adverse comment within the stated time that warrants revising the rule (as described under the Public Participation heading in the **SUPPLEMENTARY INFORMATION** section of this regulation), the Department will publish notification in the **Federal Register,** withdrawing this direct final rule before its effective date.

ADDRESSES: You may submit comments, identified by docket number ATF 2022R–09, by either of the following methods—

- *Federal eRulemaking portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* ATF Rulemaking Comments, Mail Stop 6N–518, Office of Regulatory Affairs, Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives; 99 New York Ave. NE, Washington, DC 20226; *ATTN: ATF 2022R–09.*

Instructions: All submissions received must include the agency name and docket number (ATF 2022R–09) for this direct final rule. All properly completed comments received through either of the methods described above will be posted without change to the Federal eRulemaking portal, *www.regulations.gov.* This includes any personal identifying information (''PII'') submitted in the body of the comment or as part of a related attachment. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit PII from the body of their comment or in any uploaded attachments. Commenters who submit through mail should likewise omit their PII from the body of the comment and provide any PII on the cover sheet only. For detailed instructions on submitting comments, the scope of comments for this rulemaking, and additional information on the rulemaking process,

see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this rule.

FOR FURTHER INFORMATION CONTACT: Helen Koppe, Office of Regulatory Affairs, Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives; U.S. Department of Justice; 99 New York Ave. NE, Washington, DC 20226; or by telephone at (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the Gun Control Act of 1968 (''GCA''), as amended. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA. *See* 18 U.S.C. 926(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1), (c)(1); 28 CFR 0.130(a)(1)–(2); Treas. Order No. 221(2)(a), (d), 37 FR 11696–97 (June 10, 1972). Accordingly, the Department and ATF have promulgated regulations to implement the GCA. *See* 27 CFR part 478.

The Bipartisan Safer Communities Act (''BSCA'') (Pub. L. 117–159) was signed into law and became effective on June 25, 2022. It made several changes to the mental health services system, school safety programs, and gun safety laws. Among other provisions, the BSCA requires enhanced background checks for firearm purchasers under 21 years old, addresses Federal firearms license requirements, authorizes funding for State red flag laws and other crisis intervention programs, creates new Federal offenses for firearms trafficking and straw purchases, and partially closes the ''boyfriend loophole,'' which previously excluded domestic violence offenses involving dating relationships from firearms restrictions that apply to spouses convicted of similar offenses. This direct final rule serves only to incorporate many of these new statutory provisions into existing ATF firearms regulations.

Federal law prohibits persons meeting certain criteria from receiving any firearm or ammunition that has been shipped or transported in interstate or foreign commerce, *see* 18 U.S.C. 922(g), (n), and makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person who is known or reasonably believed to meet certain criteria, *see* 18 U.S.C. 922(d).[1] The Brady Handgun Violence Prevention Act of 1993 (''Brady Act'') (Pub. L. 103–159), as amended, established a background check system that federally licensed manufacturers, dealers, and importers of firearms—otherwise known as Federal firearms licensees (''FFLs''), *see* 18 U.S.C. 923—must, unless the transfer is excepted, contact for an immediate response on whether transfer of a firearm to, or receipt of a firearm by, a prospective transferee would violate 18 U.S.C. 922 or State, local, or Tribal law. Consistent with the Brady Act's requirements, the Federal Bureau of Investigation (''FBI'') operates the National Instant Criminal Background Check System (''NICS'') for FFLs to use to initiate a background check in connection with a proposed transfer of a firearm to a non-licensee.

When an FFL contacts NICS to initiate a background check, NICS searches three nationally held electronic systems—the National Crime Information Center (''NCIC''),[2] the Interstate Identification Index,[3] and the NICS Index [4]—that may reveal the existence of a record demonstrating that the person is prohibited from receiving or possessing firearms. If the query of those three systems results in no matching records, NICS provides a ''Proceed'' response to the FFL. If a record demonstrates that the person is prohibited from receiving or possessing a firearm, NICS provides the FFL with a ''Denied'' response. For those transactions for which NICS cannot provide a definitive response of either ''Proceed'' or ''Denied'' and must conduct additional research to determine whether the prospective transferee is disqualified from receiving or possessing a firearm by Federal or State law, the transaction will be placed in a ''Delayed'' status. If NICS has not notified the FFL that the transferee is prohibited from receiving or possessing a firearm within three business days of when the FFL initiated the NICS check, the FFL is not federally prohibited from transferring the firearm beginning on the day after the third business day. *See* 18 U.S.C. 922(t)(1), 27 CFR 478.102, 28 CFR 25.6. However, the BSCA now provides that, in the case of a person under 21 years old, if NICS notifies the FFL that cause exists to further investigate possible disqualifying juvenile records, an FFL may not transfer the firearm until 10 business days have elapsed [5] since the FFL contacted NICS. *See* 18 U.S.C. 922(t)(1)(C).

As described below, the BSCA also added new disqualifying factors to existing restrictions on the transfer of firearms and ammunition and set forth additional requirements for transfers of firearms to persons under the age of 21, including enhanced contacts to State and local entities. The BSCA provisions affecting NICS are discussed in this rulemaking only to the extent that they inform FFLs of the requirements they must follow during prospective firearms transfers. Such FFL transfer requirements are the subject of ATF regulations that are among those amended in this rule. *See* 27 CFR 478.102. As noted above, the Department regulates and manages NICS processes, such as notifications and responses, under the FBI's authority, not ATF's.

The BSCA also necessitated conforming changes to the Firearms Transaction Record, ATF Form 4473 (''Form 4473''). FFLs are required to complete a Form 4473 as part of a firearms transaction involving a non-licensee, and some of the information recorded on the form must be submitted to NICS for the background check. ATF received emergency approval, beginning December 9, 2022, from the Office of Management and Budget (''OMB'') to issue a revised Form 4473 (OMB No. 1140–0020) that incorporates conforming changes so that FFLs could begin complying with the information-collecting requirements set forth in the BSCA. In August 2023, OMB approved the new form for another three years.

In addition, on March 15, 2022, the President signed into law the Consolidated Appropriations Act of

[1] Prior to passage of the BSCA, 18 U.S.C. 922(d) made it unlawful to sell or otherwise dispose of a firearm or ammunition to persons meeting the same criteria as provided in 18 U.S.C. 922(g) and (n). As discussed further in this preamble, the BSCA added new criteria to section 922(d) to match new prohibitions on straw purchases and firearms trafficking in 18 U.S.C. 932 and 933.

[2] The NCIC is a national criminal justice information system linking criminal (and authorized non-criminal) justice agencies located in the 50 states, the District of Columbia, U.S. territories and possessions, and select foreign countries to facilitate the cooperative sharing of criminal justice information. The NCIC provides a system to receive and maintain information contributed by participating agencies relating to criminal justice and national security.

[3] The Interstate Identification Index is part of the FBI's Next Generation Identification system and is used to search for available Federal, State, Tribal, and local criminal history records such as arrests, charges, and case dispositions.

[4] The NICS Index consists of entries from Federal, State, Tribal, and local agencies relating to persons who are prohibited from receiving or possessing firearms under Federal or State law.

[5] As discussed further below in this preamble, this delay is up through the tenth business day unless the FFL receives a ''Proceed'' or ''Denied'' response during that time.

2022 (Pub. L. 117–103), which included the NICS Denial Notification Act of 2022 (''NDNA''). The NDNA requires the Attorney General to report to applicable State, local, or Tribal law enforcement and, where practicable, the relevant State, local, or Tribal prosecutors, if a person has attempted to acquire a firearm and been denied pursuant to a NICS background check. NICS must provide such a report within 24 hours after NICS denies a firearm transfer and include the Federal, State, local or Tribal prohibition, the date and time of the notice, the location of the licensee where the attempted firearm transfer was sought, and the person's identity. This direct final rule incorporates relevant portions of the new statutory language into existing ATF regulations to account for the addition of State, local, and Tribal law enforcement reporting requirements in the NDNA.

In summary, this direct final rule makes conforming updates to ATF regulations to incorporate many of the firearm-related statutory changes made by the BSCA and the NDNA to ensure that the regulations are consistent with the statutes and can be relied upon by the public. The Department has also published a separate proposed ATF rulemaking, ''Definition of 'Engaged in the Business' as a Dealer in Firearms,'' that proposed implementing the BSCA provisions related to what it means to be ''engaged in the business'' as a wholesale or retail firearms dealer (RIN 1140–AA58; 88 FR 61993 (Sept. 8, 2023)). The Department published the final rule, ''Definition of 'Engaged in the Business' as a Dealer in Firearms,'' in the **Federal Register** of April 19, 2024 (FR Doc. 2024–07838). In addition, the Department anticipates issuing three rules that implement BSCA and NDNA provisions related to FBI's operations.[6]

II. Direct Final Rule

With the enactment of the BSCA on June 25, 2022, a number of amendments to the GCA went into effect. This rule updates ATF's corresponding regulatory provisions within title 27, Code of Federal Regulations, part 478, to conform with the new statutory amendments. It also makes minor revisions to incorporate the NDNA's State, local, and Tribal law enforcement authority notification requirements.

A. Changes To Disqualifying Criteria and Civil Penalty Provisions in Conformity With 18 U.S.C. 922(d) and (t)

18 U.S.C. 922(d) provides that it is unlawful for any person to sell or otherwise dispose of a firearm or ammunition to another person if the transferor knows, or has reasonable cause to believe, that the prospective transferee is disqualified as specified in that subsection. As amended by the BSCA, 18 U.S.C. 922(d) now specifies that events occurring when the person was a juvenile are disqualifying, except that the prohibition against the sale or disposition of firearms and ammunition to persons who have been adjudicated as a ''mental defective,'' *see* GCA, Public Law 90–618, sec. 102, 82 Stat. 1213, 1220 (1968), or committed to any mental institution applies only to persons who were adjudicated or committed at 16 years of age or older, 18 U.S.C. 922(d)(4).

To conform to the statutory changes in the BSCA, this rule adds the phrase ''including as a juvenile'' to the end of the introductory language in 27 CFR 478.32(d) and 478.99(c). This rule is also adding the phrase ''at 16 years of age or older'' to the end of paragraph (d)(4) of § 478.32 and the end of paragraph (c)(4) of § 478.99. Paragraph (d) of § 478.32 mirrors 18 U.S.C. 922(d) and prohibits the sale and disposition of firearms and ammunition to persons meeting certain criteria. Paragraph (c) of § 478.99 also mirrors 18 U.S.C. 922(d) and sets forth prohibitions against sales or deliveries by FFLs to prohibited categories of persons. Because of the BSCA amendments to 18 U.S.C. 922(d), the Department is amending both corresponding regulatory provisions. These revisions bring the existing language in the regulations into conformity with the revised statutory provisions they mirror.

The BSCA added new offenses for ''straw purchasing of firearms'' and ''trafficking in firearms'' at 18 U.S.C. 932 and 933, respectively (discussed in detail under Section II.C of this preamble), which are accompanied by additions to the list of prohibitions under 18 U.S.C. 922(d) as new paragraphs (10) and (11). These additional prohibitions make it unlawful to sell or otherwise dispose of firearms or ammunition to persons who intend to sell or otherwise dispose of the firearms or ammunition in furtherance of a ''felony,'' a ''Federal crime of terrorism,'' or a ''drug trafficking offense,'' as those terms are defined in 18 U.S.C. 932(a), or who intend to sell or otherwise dispose of the firearms or ammunition to a person disqualified by any of the criteria listed under 18 U.S.C. 922(d). As a result of these additions to 18 U.S.C. 922(d), the Department is adding the same prohibitions as new 27 CFR 478.32(d)(10) and (11) and 478.99(c)(10) and (11). As noted above, paragraph (d) of § 478.32 mirrors 18 U.S.C. 922(d) and prohibits the sale and disposition of firearms and ammunition to persons meeting certain criteria. Paragraph (c) of § 478.99 also mirrors 18 U.S.C. 922(d) and sets forth prohibitions against sales or deliveries by FFLs to prohibited categories of persons. Because of the BSCA amendments to 18 U.S.C. 922(d), the Department is also adding to 27 CFR 478.11 new definitions of ''drug trafficking crime,''[7] ''Federal crime of terrorism,''[8] and ''felony''[9] to mirror the definitions enacted by the BSCA in 18 U.S.C. 932(a). These revisions bring the existing language in the regulations into conformity with the revised statutory provisions they mirror.

The Department is also making minor revisions to the civil penalty provisions in 27 CFR 478.73(a) to reflect the statutory amendments to 18 U.S.C. 922(d) discussed above, as well as changes the BSCA made to 18 U.S.C. 922(t). Section 922(t) sets forth the requirement that FFLs initiate a background check with NICS before they transfer firearms (the process is discussed in more detail in Section II.D of this preamble). Although NICS is operated by the FBI, which has promulgated regulations on NICS use and request processes, ATF regulations (1) set forth the requirement that licensees must conduct background checks before transferring firearms, and (2) establish when they may subsequently transfer a firearm. These ATF regulations are affected by the BSCA changes regarding prohibited persons, background checks, and timing of transfers in under-21 transactions. This rule is updating the ATF regulations, and the FBI is updating its corresponding NICS regulations in separate rules.

[6] *See* DOJ, *Statement of Regulatory Priorities* 8–10 (Fall 2023), *http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202310/Statement_1100_DOJ.pdf* (outlining the Department's semiannual regulatory agenda).

[7] ''Drug trafficking crime'' means ''(a) Any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or 46 U.S.C. chapter 705; and (b) Any felony punishable under the law of a State for which the conduct constituting the offense would constitute a felony punishable under the statutes cited in paragraph (a) of this definition.'' *See* 18 U.S.C. 932(a)(1) (citing 18 U.S.C. 924(c)(2)).

[8] ''Federal crime of terrorism has the meaning given that term in 18 U.S.C. 2332b(g)(5).'' *See* 18 U.S.C. 932(a)(2).

[9] ''Felony'' means ''[a]ny offense under Federal or State law punishable by imprisonment for a term exceeding 1 year.'' *See* 18 U.S.C. 932(a)(3).

Prior to the enactment of the BSCA, a unique identification number would be provided if NICS determined that the receipt of a firearm would not violate subsections 922(g) or (n), which prohibit certain qualifying persons from shipping, transporting, or receiving firearms. Relevant to this rulemaking, the BSCA revised subsection 922(t)(2) to state that NICS will provide a unique identification number for a transfer if the system determines that ''transfer or'' receipt of a firearm would not violate 18 U.S.C. 922(d) in addition to 922(g) and (n). And, consistent with 922(t)(2) as amended, the BSCA also revised subsection 922(t)(5), which authorizes the Attorney General to impose civil penalties when an FFL knowingly fails to comply with the background check requirements in subsection 922(t)(1), to refer to the ''transfer'' of a firearm and to 922(d). In addition, the NDNA added that, as a condition of NICS issuing a unique identification number, receipt of a firearm must not violate local or Tribal law. The Department is revising 27 CFR 478.73(a), which sets forth the basis for civil penalty actions against FFLs, to conform to these changes to the statute.

The BSCA also includes criminal penalty provisions that amend 18 U.S.C. 924(h) and (k). As revised by the BSCA:

- 18 U.S.C. 924(h) makes it unlawful for a person to transfer or receive a firearm or ammunition—or attempt or conspire to do so—knowing or having reasonable cause to believe that it will be used to commit any felony, a Federal crime of terrorism, a drug trafficking crime (as such terms are defined in 18 U.S.C. 932(a)), or a crime under the Arms Export Control Act (22 U.S.C. 22751 *et seq.*), the Export Control Reform Act of 2018 (50 U.S.C. 4081 *et seq.*), the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 *et seq.*). Under this provision, persons who engage in such unlawful actions, as described, are subject to fines under title 18 of the United States Code, or imprisonment for not more than 15 years, or both.
- 18 U.S.C. 924(k) makes it illegal for a person to smuggle or knowingly bring into the United States a firearm or ammunition with intent to engage in or promote conduct that is punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951, *et seq.*) or under 46 U.S.C. chapter 705 (pertaining to Maritime Drug Law Enforcement); or that constitutes any felony, a Federal crime of terrorism, or a drug trafficking crime (as defined in 18 U.S.C. 932(a)). This offense also includes smuggling or knowingly taking a firearm or ammunition out of the United States with intent to engage in or promote conduct punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951, *et seq.*) or under 46 U.S.C. chapter 705 (pertaining to Maritime Drug Law Enforcement), if the conduct had occurred within the United States; or that would constitute a felony or a Federal crime of terrorism (as such terms are defined in 18 U.S.C. 932(a)) for which the person may be prosecuted in a court of the United States, if the conduct had occurred within the United States. Under this provision, persons who engage in such unlawful actions are subject to fines under title 18 of the United States Code, or imprisonment for not more than 15 years, or both.

Existing ATF regulations do not include every criminal provision of the GCA, and as a result, the Department is not currently amending its regulations to reflect these particular criminal provisions in the BSCA and is including them in this discussion solely for the public's awareness.

B. Misdemeanor Crimes of Domestic Violence

The BSCA revises pre-existing prohibitions against selling or disposing of a firearm or ammunition to a person who has been convicted of a misdemeanor crime of domestic violence, and against such a person receiving or possessing a firearm or ammunition. *See* 18 U.S.C. 921(a)(33), 922(d)(9), and 922(g)(9). Previously, the domestic violence prohibitions applied only to persons convicted of crimes committed by a current or former spouse, parent, or guardian of the victim; by a person sharing a child in common with the victim; by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian; or by a person ''similarly situated'' to a spouse, parent, or guardian of the victim. 18 U.S.C. 921(a)(33) (2020). This left open the so-called ''boyfriend loophole,'' because convictions for misdemeanor crimes of domestic violence against a non-married dating partner who did not cohabitate or otherwise share a spouse-like relationship with the victim did not preclude the convicted person from receiving or possessing firearms or ammunition.

The BSCA narrows this gap by including within these prohibitions persons who are, or were recently, in a dating relationship with the victim and who have been convicted of a misdemeanor crime of domestic violence after June 25, 2022. The statute defines ''dating relationship'' to mean a relationship between persons who have or have recently had a continuing serious relationship of a romantic or intimate nature. 18 U.S.C. 921(a)(37)(A). It also provides factors that must be considered when determining whether a relationship constitutes a dating relationship: the length of the relationship, the nature of the relationship, and the frequency and type of interaction between the persons involved in the relationship. *Id.* 921(a)(37)(B). A ''casual acquaintanceship or ordinary fraternization in a business or social context'' is not a dating relationship. *Id.* 921(a)(37)(C).

A person will not be considered to have been convicted of a misdemeanor crime of domestic violence against a person in a dating relationship if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored, unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms. In addition, the statutory prohibition does not apply to persons who have only one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship if five years have elapsed from the later of their conviction or the completion of their custodial or supervisory sentence (if any), provided that the person has not subsequently been convicted of (a) another such offense, (b) a different offense that has as an element the use or attempted use of physical force or the threatened use of a deadly weapon, or (c) any other offense that would disqualify the person from purchasing or possessing firearms under 18 U.S.C. 922(g). More than one conviction for an offense of domestic violence against a person in a dating relationship committed since June 25, 2022, regardless of whether with the same or a different partner, disqualifies the person under Federal law from purchasing or possessing firearms and precludes the person from restoration pursuant to 18 U.S.C. 921(a)(33)(C).

To incorporate the BSCA amendments relating to these provisions, the Department is amending ATF regulations to add a definition of ''dating relationship'' to 27 CFR 478.11. This definition mirrors the language that the BSCA added to 18 U.S.C. 921(a)(37). In addition, the Department is adding to the end of the definition of ''misdemeanor crime of domestic violence,'' paragraph (a)(3), the phrase ''or by a person who has a current or recent former dating relationship with the victim.'' This language is identical

to the language in 18 U.S.C. 921(a)(33)(A)(ii). In that same definition, the Department is making minor technical edits to paragraph (a)(3) to bring this part of the definition into direct alignment with the revised statutory language at 18 U.S.C. 921(a)(33)(C), which was added by the BSCA and specifically lists Federal, State, Tribal and local offenses. Further, the Department is revising paragraph (a)(1) of the regulatory definition to expressly align the regulation with the existing statutory language in 18 U.S.C. 921(a)(33)(A)(i), which also explicitly states that the definition of a ''misdemeanor crime of domestic violence'' involves a misdemeanor under Federal, State, Tribal, or local law. Notably, the NDNA specifically amended section 921(a)(33)(A)(i) to include misdemeanors under local law. Currently, paragraph (a)(1) of the regulatory definition provides that the term includes an offense under Federal and State law and only includes a parenthetical that less directly incorporates Tribal convictions. These changes to the definition of ''misdemeanor crime of domestic violence'' bring the regulatory language into alignment with 18 U.S.C. 921(a)(33)(A)(i) and (C), as amended by the BSCA and the NDNA.

The Department is also adding a new paragraph (d) to the regulatory definition of ''misdemeanor crime of domestic violence'' to reflect the statutory changes discussed above as to when a person will, or will not, be considered convicted of a misdemeanor crime of domestic violence against a person in a dating relationship. *See* 18 U.S.C. 921(a)(33)(C).

C. Straw Purchasing and Firearms Trafficking

The BSCA creates two new criminal offenses, for ''straw purchasing of firearms'' and for ''trafficking in firearms,'' as mentioned in Section II.B of this preamble. *See* 18 U.S.C. 932 and 933. The ''straw purchasing'' offense makes it illegal for any person to knowingly purchase, or conspire to purchase, a firearm on behalf of another person knowing or having reasonable cause to believe the person for whom they are making the purchase:

- is prohibited under 18 U.S.C. 922(d);
- intends to use, carry, possess, sell, or dispose of the firearm in furtherance of any felony, a Federal crime of terrorism, or a drug trafficking crime (as those terms are defined in 18 U.S.C. 932(a)); or
- intends to sell or dispose of the firearm to a section 922(d)-prohibited person or a person intending to use, carry, possess, sell, or dispose of the firearm in furtherance of any felony, a Federal crime of terrorism, or a drug trafficking crime (as those terms are defined in 18 U.S.C. 932(a)).

The ''firearms trafficking'' offense makes it illegal for any person to (1) ship, transport, cause to be transported, transfer, or otherwise dispose of a firearm knowing or having reasonable cause to believe that the use, carrying, or possession of a firearm by the recipient would constitute a felony (as defined in 18 U.S.C. 932(a)); or (2) receive a firearm from another person knowing or having reasonable cause to believe the receipt would constitute such a felony. The ''firearms trafficking'' offense also makes it illegal for a person to attempt or conspire to transfer or receive a firearm in the manners just described. Accordingly, this regulation further amends 27 CFR 478.32 to add new paragraphs (g) and (h) and further amends 27 CFR 478.99 to add new paragraphs (f) and (g) that mirror 18 U.S.C. 932 and 933. In addition, the Department is adding the word ''purchases'' into the headings of both provisions because the prohibition on straw purchasing in 18 U.S.C. 932 prohibits certain firearms purchases.

As mentioned above, the BSCA establishes criminal penalties for the new ''straw purchases'' and ''firearms trafficking'' offenses. Both the ''straw purchases'' and ''firearms trafficking'' offenses are subject to broad criminal forfeiture provisions that provide that any person convicted of either offense shall forfeit any proceeds or property obtained, directly or indirectly, as the result of such offenses, as well as any property used or intended to be used, in any manner, to facilitate the violation. 18 U.S.C. 934. Such property may include firearms and ammunition, in which case section 924(d) applies.[10] *Id.* The BSCA also provides that a defendant who derives profits or other proceeds from a straw purchase or firearms trafficking offense under 18 U.S.C. 932 or 933 may be fined not more than the greater of the fine otherwise authorized under part I of title 18 of the United States Code or the amount equal to twice the gross profits or other proceeds of the offense. 18 U.S.C. 934(b).

To incorporate these BSCA seizure and forfeiture provisions into ATF regulations, the Department is amending ATF regulations at 27 CFR 478.152, which governs seizure and forfeiture, to add paragraphs (d) and (e). This rule is adding paragraphs (d) and (e) to incorporate and mirror the statutory provisions on fines and the forfeiture of firearms, ammunition, and other property or proceeds used in, derived from, constituting, or intended to be used to commit or facilitate commission of ''straw purchases'' or ''firearms trafficking'' and the seizure of profits provisions of the new ''straw purchases'' and ''firearms trafficking'' offenses in 18 U.S.C. 934.

In addition, the BSCA establishes the maximum term of imprisonment for a ''straw purchase'' offense at 25 years, 18 U.S.C. 932(c), and for ''trafficking in firearms'' at 15 years, 18 U.S.C. 933(b), and all other unlawful transfer and possession of firearms offenses under 18 U.S.C. 922(d) and 922(g) now carry a maximum term of not more than 15 years' imprisonment, 18 U.S.C. 924(a)(8). As previously mentioned, existing ATF regulations do not include every criminal provision of the GCA and, as a result, the Department is not currently amending its regulations to reflect these particular criminal provisions in the BSCA. The Department provides a discussion above on these amendments to the statutory penalty provisions solely to inform the public that they apply in this context.

D. Under-21 Transactions

The BSCA made changes to 18 U.S.C. 922(t) and 34 U.S.C. 40901(*l*) to expand the records searched for background checks involving persons under the age of 21 that could preclude approval of a firearm or ammunition transfer to such persons. Related to this amendment, possibly disqualifying juvenile records are subject to further investigation, and the BSCA provides an additional investigatory period, if needed, for NICS to conduct the enhanced records checks for criminal, mental health, or other relevant juvenile records. As discussed in Section II.B of this preamble, the FBI operates NICS and FBI regulations govern NICS use and request processes, while ATF regulations (1) set out the requirement that licensees must conduct

[10] 18 U.S.C. 924(d) authorizes seizure and forfeiture of any firearm or ammunition involved or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of 18 U.S.C. 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 18 U.S.C. 922(l), or knowing violation of 18 U.S.C. 924, 932, or 933, or willful violation of any other provision of chapter 44 of title 18 of the U.S. Code, or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States. It also authorizes seizure and forfeiture of any firearm or ammunition intended to be used in any offense listed in section 924(d)(3) (which includes sections 932 (straw purchasing of firearms) and 933 (trafficking in firearms)). Section 924(d) also provides that all provisions of the Internal Revenue Code of 1986 relating to seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall apply.

background checks before transferring firearms and (2) establish when they may subsequently transfer a firearm. These regulatory provisions are outdated in light of the BSCA changes to the GCA regarding background checks and timing of transfers in under-21 transactions. The Department is updating ATF's regulations on FFL responsibilities with regard to NICS through this rule, and is also updating the related FBI NICS regulations in separate rules. For purposes of understanding the regulatory revisions the Department is making in this rule, the Department is providing a synopsis of the BSCA changes affecting NICS.

When a NICS transaction is initiated, regardless of the age of the prospective transferee, NICS searches three FBI systems, as noted above, to determine if the person is disqualified from possessing or receiving firearms under 18 U.S.C. 922(d), (g), or (n), or under State, local, or Tribal law. If a possibly disqualifying record results from the search, NICS provides a ''Delayed'' status and advises the FFL that the transfer should not proceed pending receipt of a follow-up ''Proceed'' response from NICS or the expiration of three business days, whichever occurs first. *See* 28 CFR 25.6. State, local, or Tribal laws may impose a separate waiting period—or require a ''Proceed'' response—before an FFL can lawfully transfer a firearm.

The BSCA now requires enhanced NICS background checks on transactions for which the prospective firearm transferee is under 21 years of age.[11] With respect to these enhanced background checks of under-21 transactions, Congress imposed two overarching requirements upon NICS via the BSCA. First, in addition to the traditional NICS check of relevant FBI systems, NICS is required to conduct additional outreach to three specified types of State and local entities to determine whether the prospective transferee has a ''possibly disqualifying juvenile record'' under 18 U.S.C. 922(d). *See* 34 U.S.C. 40901(*l*).

Second, beyond the possibility of a three-business-day investigatory period already allowed for a NICS transaction as noted above, the BSCA provides for an additional investigatory period, if needed, as part of an under-21 transaction, up to a total of ten business days (the traditional three business days described above plus up to an additional seven business days for further investigation), before an FFL may transfer a firearm to a person under 21. *See* 18 U.S.C. 922(t)(1)(C), 34 U.S.C. 40901(*l*)(3). The additional investigatory period applies if NICS determines that there is cause to further investigate whether the prospective transferee has a possibly disqualifying juvenile record under 18 U.S.C. 922(d). *See* 18 U.S.C. 922(t)(1)(C); 34 U.S.C. 40901(*l*)(3). NICS is required to notify the FFL no later than the end of the third business day if the additional investigatory period is needed. *See* 34 U.S.C. 40901(*l*)(2).

The BSCA amended 18 U.S.C. 922(t) to provide that, for under-21 transactions, where cause exists (in the first three business days) to investigate further whether the prospective transferee has a possibly disqualifying juvenile record under 18 U.S.C. 922(d), and the FFL is notified that such cause exists, the FFL may not transfer a firearm to the prospective transferee during the investigatory period without receiving a follow-up ''Proceed'' response from the system, or allowing the elapse of up to ten business days from the date the background check was initiated, whichever occurs first. The permissible transfer date for an under-21 transaction on which the FFL has been notified that there is cause for further investigation, therefore, is now the day after the tenth business day, in the absence of a follow-up ''Proceed'' response.

Accordingly, the Department is making amendments to conform ATF's regulations that instruct FFLs on the requirement to conduct NICS checks and when they may subsequently transfer a firearm with the above-described provisions of the BSCA for under-21 transactions. The Department is amending 27 CFR 478.102(a)(2) and (3) by adding information on a possible further investigatory response from NICS for transferees under 21 years old, how that affects the timing of the possible transaction, and revising the examples to distinguish between the standard background check investigatory period and a potential additional investigatory period for a transferee who is under 21 years old.

E. Updates to Recordkeeping Requirements

The Department is also amending 27 CFR 478.124(c)(1) to reflect the BSCA and NDNA statutory amendments by adding additional information requirements for transaction records. Section 478.124 covers firearms transaction records that licensees are required to keep for transactions with nonlicensees. Paragraph (c)(1) of § 478.124 establishes that, for each transaction, the licensee must have a transferee fill out a Form 4473 with information relevant to conducting a background check as well as recording the transfer and certifying that the transferee is not a prohibited person. In accordance with the new ''straw purchase'' and ''firearms trafficking'' prohibitions and additional transfer prohibitions included in the BSCA, the Department is adding language to the transferee certification portion of the form, whereby the transferee will certify that they do not intend to purchase or acquire a firearm for sale or other disposition to a prohibited person or in furtherance of a felony, Federal crime of terrorism, or a drug trafficking offense. These provisions requiring that the Form 4473 reflect this information implement new subsections (d)(10) and (d)(11) of 18 U.S.C. 922, which make it unlawful for a person to transfer a firearm to another if the transferor has reasonable cause to believe the transferee intends to sell or otherwise dispose of the firearm to a prohibited person or in furtherance of a felony, Federal crime of terrorism, or a drug trafficking offense. These BSCA provisions were already incorporated into the certification on ATF Form 4473, as described above.

The NDNA requires the Attorney General to report when NICS issues a denial of a firearm transfer pursuant to 18 U.S.C. 922(t) to the local law enforcement authorities (as defined in 18 U.S.C. 921(a)(36)) of the State or Tribe where the person sought to acquire the firearm, or, if different, the local law enforcement authorities of the State or Tribe where the person resides. Moreover, as discussed in Section II.D of this preamble, the BSCA requires NICS to contact certain State and local authorities when a licensee contacts NICS regarding a proposed transfer of a firearm to a person under 21 years old. The Department is amending § 478.124(c)(1) to require additional information on the transferee's residence address (to add whether they reside in city limits or not) as necessary to identify the record locations that must be searched pursuant to the BSCA and NDNA, and, as necessary, for NICS to notify the ''local law enforcement authority'' where the transferee resides when a transfer is denied, pursuant to the NDNA (18 U.S.C. 925B). The revised Form 4473 already includes a question requesting this city limits information from potential transferees; this rule will require FFLs to collect that information from potential transferees on the Form 4473.

The NDNA requirements for NICS background checks of, and reports to,

[11] Under Federal law, persons who are at least 18 years of age are of lawful age to purchase shotguns and rifles; however, some States set a higher minimum age under State law. *See* 18 U.S.C. 922(b).

local and Tribal law enforcement also include a new definition of ''local law enforcement authority'' added to 18 U.S.C. 921(a)(36), and the Department is adding this definition to 27 CFR 478.11 as well. The Department is also including a minor technical revision to 27 CFR 478.124(c)(1) to update references to ''INS'' to references to ''DHS.'' Although the relevant statute refers to the INS, that agency no longer exists, and the Department is therefore taking this opportunity to update the regulation to refer to DHS, the successor agency for that function.

Because of the BSCA and NDNA changes described above, the Department is also making technical revisions to paragraph (f) of § 478.124, which requires nonlicensees, among other provisions, to submit a Form 4473 to an FFL if they are acquiring firearms by other than an over-the-counter transaction as permitted by 18 U.S.C. 922(c). The regulations refer to the same Form 4473 whether the person is acquiring a firearm under § 478.124(c) or (f); therefore, the technical revisions the Department is making to § 478.124(f) that describe what the Form 4473 must show as submitted by the transferee are the same as those described for § 478.124(c)(1). As described above, these technical changes to conform with the BSCA and NDNA include that the Form 4473 reflect the transferee's residence address (including county or similar political subdivision and whether they reside within the city limits) and certification that the transferee does not intend to purchase or acquire a firearm for sale or other disposition to a prohibited person or in furtherance of a felony, Federal crime of terrorism, or a drug trafficking offense. Other minor revisions to § 478.124(f) include adding ''sex,'' ''transferee's country of citizenship,'' ''the transferee's DHS-issue alien number or admission number'' and ''the transferee's State of residence'' to the list of information that the Form 4473 must include when submitted by the transferee. These changes are to ensure parity between § 478.124(c)(1) and (f).

III. Statutory and Executive Order Review

A. Executive Orders 12866, 13563, and 14094

Executive Order 12866 (''Regulatory Planning and Review'') directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (''Improving Regulation and Regulatory Review'') emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094 (''Modernizing Regulatory Review'') amends section 3(f) of Executive Order 12866.

OMB has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, as amended by Executive Order 14094, and it is not a significant action under section 3(f)(1) of Executive Order 12866.

The BSCA requires enhanced background checks for firearm purchasers under 21 years old, clarifies Federal firearms license requirements, authorizes funding for State red flag laws and other crisis intervention programs, creates new Federal offenses for arms trafficking and straw purchases, and partially closes the ''boyfriend loophole,'' which previously excluded domestic violence offenses involving dating relationships from firearms restrictions equivalent with those involving a spouse. The NDNA requires the Attorney General to report to State, local, and Tribal law enforcement when NICS provides a notice pursuant to 18 U.S.C. 922(t) that the receipt of a firearm by a person seeking to receive a firearm in their jurisdiction (or living in their jurisdiction and seeking a firearm from elsewhere) would violate 18 U.S.C. 922(g) or (n). This direct final rule merely incorporates the new statutory provisions into existing ATF firearms regulations (the related revisions to the FBI NICS regulations will be implemented in separate rules). Upon review of these new provisions, ATF has determined that costs associated with this rule are largely costs associated with updating ATF Form 4473 to align the questions and information regarding background checks on that form with the new statutory requirements. ATF Form 4473 was updated through OMB to align with the new requirements in December 2022 and the form was approved for another three years in August 2023. This rule does not require further updates to the form.

B. Executive Order 13132

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (''Federalism''), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (''Civil Justice Reform'').

D. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 603, 604, and 605(b), a Regulatory Flexibility Analysis is not required for this direct final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

E. Unfunded Mandates Reform Act of 1995

This direct final rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (as adjusted for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48.

F. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501–3521, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This direct final rule does not impose any new reporting or recordkeeping requirements under the PRA. OMB has approved the existing Form 4473 information collection under OMB Control Number 1140–0020.

G. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–808, OMB's Office of Information and Regulatory Affairs has determined that this direct final rule is not a ''major rule,'' as defined in 5 U.S.C. 804(2).

H. Direct Final Rulemaking

Under the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b)(B), an agency may, for good cause, find that the usual requirements of prior notice and comment are impracticable, unnecessary, or contrary to the public interest. The notice-and-comment requirements also do not apply to ''interpretive rules,'' meaning those that ''remind parties of existing statutory or regulatory duties, or 'merely track[ ]'

preexisting requirements and explain something the statute or regulation already required.'' *POET Biorefining, LLC* v. *EPA,* 970 F.3d 392, 407 (D.C. Cir. 2020) (quotation marks omitted); *see also United States* v. *Kriesel,* 508 F.3d 941, 945 (9th Cir. 2007) (a regulation that ''mirror[s] the statute'' is a ''classic interpretive rule''). As described above, this direct final rule simply incorporates statutory changes into existing regulatory provisions that already mirrored preexisting statutory language. These conforming updates to ATF regulations in part 478 are to ensure that ATF regulations are consistent with the statutes and can be relied upon by the public. In the absence of this rule, however, the relevant statutes provide an adequate basis for enforcement action. Therefore, because this rulemaking is limited to directly incorporating statutory provisions, which can already be enforced absent this rule, notice and comment on this rule is unnecessary and not practical to implement the BSCA and NDNA. Were ATF to receive an adverse comment on the statutory requirements, the Department would not be able to alter those requirements in response to comments because it cannot change the statutory provisions enacted by Congress. For these reasons, the Department has determined that publishing a notice of proposed rulemaking and providing opportunity for comment is unnecessary under the good cause and interpretive rule exceptions to the APA's notice-and-comment requirements. *See* 5 U.S.C. 553(b)(4).

Nonetheless, the Department is providing the public a 90-day delayed effective date and an opportunity to comment in accordance with Recommendation 95–4, Procedures for Noncontroversial and Expedited Rulemaking, issued by the Administrative Conference of the United States (''ACUS''). ACUS has described direct final rulemaking as an appropriate procedure where the ''unnecessary'' prong of the good cause exemption is available, in order to expedite promulgation of rules that are non-controversial and that are not expected to generate significant adverse comment. *See* 60 FR 43108, 43108 (Aug. 18, 1995).

Under direct final rulemaking, an agency may issue a rule that it believes to be non-controversial ''without having to go through the review process twice . . . while at the same time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.'' *Id.* at 43110. If the agency determines that it has received a significant adverse comment the direct final rule will be withdrawn before its effective date. *Id.* Recommendation 95–4 also provides that, in determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process. *Id.*

As this rulemaking is limited to directly incorporating statutory provisions (rather than effecting a substantive or discretionary change in existing law pursuant to the Department's congressional delegation of authority), direct final rulemaking is appropriate here because the Department does not expect ATF to receive any significant adverse comments.[12] As discussed in more detail in Section IV of this preamble, ATF could receive adverse comments on the assessment that the rulemaking is non-controversial.

In sum, although the Department has determined that prior notice and comment and a delayed effective date are ''unnecessary'' in accordance with the APA's good cause and interpretive rule exceptions in 5 U.S.C. 553(b)(4), the Department is providing that the rule will take effect 90 days after publication and is allowing a 30-day period for submission of significant adverse comments for the reasons described above. Therefore, unless ATF receives a significant adverse comment by May 20, 2024, this rule will become effective on July 18, 2024. If ATF receives any timely significant adverse comments, the Department will publish notification in the **Federal Register**, withdrawing this direct final rule before its effective date. See the section on ''Public Participation'' in this preamble for a description of a significant adverse comment.

IV. Public Participation

A. Comments Sought

ATF accepts comments from all interested persons. Pertinent to this direct final rule, a significant adverse comment is a comment in which the commenter explains why the rule, rather than the statutory language that the Department is incorporating into ATF's regulations, is controversial or would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is significant and adverse if:

(1) The comment opposes the Department's assessment regarding the non-controversial nature of the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response may be required when:

(a) The comment causes the Department to reconsider its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the Department;

(2) The comment proposes a salient change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition; or

(3) The comment causes the Department to make a change (other than editorial or administrative) to the rule.

Comments that raise concerns regarding the underlying statutory provisions that this rule is incorporating into existing regulations will not be considered significant adverse comments. Those statutory provisions were enacted by Congress and cannot be altered by the Department. Accordingly, the Department is unable to provide a substantive response to such comments.

All comments must reference this document's docket number ATF 2022R–09 and be legible. Commenters are encouraged to include the commenter's complete first and last name and contact information. If submitting a comment through the Federal eRulemaking portal, as described below in Section IV.C of this preamble, commenters should carefully review and follow the instructions on that website on submitting comments. If submitting a comment by mail, commenters should review Section IV.B (''Confidentiality'') of this preamble regarding proper submission of PII. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity. ATF will retain comments containing profanity as part of this direct final rule's administrative record but will not publish such documents on *www.regulations.gov.* ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if ATF cannot read your

[12] To the extent that the APA and 18 U.S.C. 926(b)'s procedural requirements may apply to this rule, ATF is complying with those requirements by providing a 90-day delayed effective date and an opportunity for the public to submit comments in accordance with ACUS Recommendation 95–4.

comment due to technical difficulties and cannot contact you for clarification, ATF may not be able to consider your comment.

B. Confidentiality

ATF will make all comments meeting the requirements of Section IV, whether submitted electronically or on paper, available for public viewing at ATF and on the internet through the Federal eRulemaking portal, and subject to the Freedom of Information Act (5 U.S.C. 552) (''FOIA''). Commenters who submit by mail and who do not want their name or other PII posted on the internet should submit their comments along with a separate cover sheet containing their PII. Both the cover sheet and comment must reference this docket number (ATF 2022R–09). For comments submitted by mail, information contained on the cover sheet will not appear when posted on the internet but any PII that appears within the body of a comment will not be redacted by ATF and it will appear on the internet. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit such PII from the body of their comment or in any uploaded attachments.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter must place any portion of a comment that is proprietary or confidential business information under law on pages separate from the balance of the comment with each page prominently marked ''PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION'' at the top of the page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it receives, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under FOIA. In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal processes.

C. Submitting Comments

Submit comments using either of the two methods below (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

• *Federal eRulemaking portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at *www.regulations.gov* and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.

• *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's first and last name and full mailing address, be signed, and may be of any length. See also Section IV.B (''Confidentiality'') of this preamble.

Disclosure

Copies of this direct final rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for RIN 1140–AA57), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, the Department amends 27 CFR part 478 as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–931; 44 U.S.C. 3504(h).

■ 2. Amend § 478.11 as follows:
■ a. Add, in alphabetical order, definitions for ''Dating relationship,'' ''Drug-trafficking crime,'' ''Federal crime of terrorism,'' ''Felony,'' and ''Local law enforcement authority''; and
■ b. In the definition of ''Misdemeanor crime of domestic violence'':
■ i. Redesignate paragraphs (a) introductory text and (a)(1) through (3) as paragraphs (1) introductory text and (1)(i) through (iii), respectively;
■ ii. Revise newly redesignated paragraphs (1)(i) and (iii);
■ iii. Redesignate paragraphs (b) introductory text, (b)(1) and (2), (b)(3) introductory text, and (b)(3)(i) and (ii) as paragraphs (2) introductory text, (2)(i) and (ii), (2)(iii) introductory text, and (2)(iii)(A) and (B), respectively;
■ iv. Redesignate paragraph (c) as paragraph (iii); and
■ v. Add paragraph (iv).

The revisions and additions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Dating relationship. A relationship between individuals who have or have recently had a continuing serious relationship of a romantic or intimate nature. A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a dating relationship. Whether a relationship constitutes a dating relationship shall be determined based on consideration of—

(1) The length of the relationship;

(2) The nature of the relationship; and

(3) The frequency and type of interaction between the individuals involved in the relationship.

* * * * *

Drug trafficking crime. (1) Any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or 46 U.S.C. chapter 705; and

(2) Any felony punishable under the law of a State for which the conduct constituting the offense would constitute a felony punishable under the statutes cited in paragraph (1) of this definition.

* * * * *

Federal crime of terrorism. Any offense as defined under 18 U.S.C. 2332b(g)(5).

* * * * *

Felony. Any offense under Federal or State law punishable by imprisonment for a term exceeding one year.

* * * * *

Local law enforcement authority. A bureau, office, department, or other authority of a State or local government or Tribe that has jurisdiction to investigate a violation or potential violation of, or enforce, a State, local, or Tribal law.

* * * * *

Misdemeanor crime of domestic violence. (1) * * *

(i) Is a misdemeanor under Federal, State, Tribal, or local law or, in States which do not classify offenses as misdemeanors, is an offense punishable

by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a ''misdemeanor'' or as a ''misdemeanor crime of domestic violence.'' The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

* * * * *

(iii) Was committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (*e.g.,* the equivalent of a ''common law'' marriage even if such relationship is not recognized under the law); by a person similarly situated to a spouse, parent, or guardian of the victim (*e.g.,* two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse); or by a person who has a current or recent former dating relationship with the victim.

* * * * *

(iv)(A) Subject to paragraphs (iv)(B) and (C) of this definition, a person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored, unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(B) In the case of a person who has not more than one conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under 18 U.S.C. chapter 44, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under 18 U.S.C. chapter 44 if:

(*1*) Five years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any; and

(*2*) The person has not subsequently been convicted of another such offense, or any misdemeanor under Federal, State, local, or Tribal law that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under 18 U.S.C. 922(g).

(C) Restoration under paragraph (iv)(B) of this definition only removes the disqualification from shipping, transport, possession, receipt, or purchase of a firearm under this part. Restoration under paragraph (iv)(B) is not available for a current or former spouse, parent, or guardian of the victim; a person with whom the victim shares a child in common; a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or a person similarly situated to a spouse, parent, or guardian of the victim.

* * * * *

■ 3. Amend § 478.32 as follows:
■ a. Revise the section heading and paragraph (d) introductory text;
■ b. Remove the comma at the end of paragraphs (d)(1) through (3) and add in its place a semicolon;
■ c. Revise paragraph (d)(4);
■ d. Remove the comma at the end of paragraphs (d)(5)(ii)(D) and (d)(6) and (7) and add in its place a semicolon;
■ e. Remove '', or'' at the end of paragraph (d)(8)(ii)(B) and add in its place a semicolon;
■ f. Remove the period at the end of paragraph (d)(9) and add in its place a semicolon; and
■ g. Add paragraphs (d)(10) and (11), (g), and (h).

The revisions and additions read as follows:

§ 478.32 Prohibited shipment, transportation, possession, purchase, or receipt of firearms and ammunition by certain persons.

* * * * *

(d) No person may sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile:

* * * * *

(4) Has been adjudicated as a mental defective or has been committed to a mental institution at 16 years of age or older;

* * * * *

(10) Intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; or

(11) Intends to sell or otherwise dispose of the firearm or ammunition to a person described in any of paragraphs (d)(1) through (10) of this section.

* * * * *

(g) No person may knowingly purchase or conspire to purchase any firearm in or otherwise affecting interstate or foreign commerce for, or on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe that such other person:

(1) Meets the criteria of 1 or more subsections of 18 U.S.C. 922(d);

(2) Intends to use, carry, possess, or sell or otherwise dispose of the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or

(3) Intends to sell or otherwise dispose of the firearm to a person described in paragraph (g)(1) or (2) of this section.

(h) No person may:

(1) Ship, transport, transfer, cause to be transported, or otherwise dispose of, any firearm to another person in or otherwise affecting interstate or foreign commerce, knowing or having reasonable cause to believe that it would constitute a felony for the recipient to use, carry, or possess a firearm;

(2) Receive from another person any firearm in or otherwise affecting interstate or foreign commerce if the recipient knows or has reasonable cause to believe that receiving the firearm would constitute a felony; or

(3) Attempt or conspire to commit the conduct described in paragraph (h)(1) or (2) of this section.

§ 478.73 [Amended]

■ 4. Amend § 478.73 in paragraph (a) by removing ''demonstrating that the transferee's receipt of a firearm would violate 18 U.S.C. 922(g) or 922(n) or State law'' and adding in its place ''demonstrating that transfer to the transferee or their receipt of a firearm would violate 18 U.S.C. 922(d), 922(g), or 922(n) (as applicable), or State, local, or Tribal law''.

■ 5. Amend § 478.99 as follows:
■ a. Revise the section heading and paragraphs (c) introductory text and (c)(4);
■ b. Remove '', or'' at the end of paragraph (c)(8)(ii)(B) and add in its place a semicolon;
■ c. Remove the period at the end of paragraph (c)(9) and add in its place a semicolon; and
■ d. Add paragraphs (c)(10) and (11), (f), and (g).

The revisions and additions read as follows:

§ 478.99 Certain prohibited sales, purchases, or deliveries.

* * * * *

(c) *Sales or deliveries to prohibited categories of persons.* No person may sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe

that such person, including as a juvenile:

* * * * *

(4) Has been adjudicated as a mental defective or has been committed to a mental institution at 16 years of age or older;

* * * * *

(10) Intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; or

(11) Intends to sell or otherwise dispose of the firearm or ammunition to a person described in any of paragraphs (c)(1) through (10) of this section.

* * * * *

(f) *Purchase for, or conspire to purchase for, or sell or otherwise dispose of firearms to certain prohibited persons.* It is unlawful for any person to knowingly purchase, or conspire to purchase, any firearm in or otherwise affecting interstate or foreign commerce for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe that such other person:

(1) Meets the criteria of one or more subsections of 18 U.S.C. 922(d);

(2) Intends to use, carry, possess, or sell or otherwise dispose of, the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or

(3) Intends to sell or otherwise dispose of the firearm to a person described in paragraph (f)(1) or (2) of this section.

(g) *Transfer, otherwise dispose of, or attempt or conspire to dispose of, ship, transport, or cause to be transported, firearms when use, carrying, possession, or receipt constitutes a felony.* It shall be unlawful for any person to:

(1) Transfer, otherwise dispose of, ship, transport, or cause to be transported, any firearm to another person in or otherwise affecting interstate or foreign commerce, knowing or having reasonable cause to believe that it would constitute a felony for the recipient to use, carry, or possess a firearm;

(2) Receive any firearm in or otherwise affecting interstate or foreign commerce if the recipient knows or has reasonable cause to believe that receiving the firearm would constitute a felony; or

(3) Attempt or conspire to commit the conduct described in paragraph (g)(1) or (2) of this section.

■ 6. Amend § 478.102 as follows:

■ a. Revise paragraphs (a)(2) and (3);

■ b. Remove the example following paragraph (a)(3); and

■ c. Redesignate examples 1 through 3 to paragraph (c) as examples 3 through 5.

The revisions read as follows:

§ 478.102 Sales or deliveries of firearms on and after November 30, 1998.

(a) * * *

(2) The licensee has verified the identity of the transferee by examining the identification document presented in accordance with the provisions of § 478.124(c); and

(3) NICS has responded to the licensee with one of the following results, or has not responded to the licensee and the required investigatory period has elapsed:

(i) *Notification.* NICS provides the licensee with a ''Proceed'' notification and a unique identification number, at which time the transfer may proceed.

(ii) *Initial investigatory period.* If NICS does not respond to the licensee as described in paragraph (a)(3)(i) of this section, the licensee must not proceed with the transfer for three business days (days on which State offices are open). If three business days have elapsed from the date the licensee contacted NICS, and NICS has not provided the licensee with a ''Denied'' notification, the licensee may proceed with the transfer unless the transferee is under 21 years old and paragraph (a)(3)(iii) of this section applies.

Example 1 to paragraph (a)(3)(ii): A licensee contacts NICS on Thursday and gets a ''Delayed'' response. The licensee does not get a further response from NICS of any kind. If State offices are not open on Saturday and Sunday, three business days would have elapsed on the following Tuesday. The licensee may transfer the firearm on the next day, Wednesday.

(iii) *Additional investigatory period in the case of a transferee who is under 21 years old (applies through September 30, 2032).* In the case of a transferee under 21 years of age, if NICS notifies the licensee within three business days from the date the licensee contacted NICS that cause exists for further investigation, the licensee may not proceed with the transfer until they receive a follow-up ''Proceed'' response from NICS or until another seven business days have expired, exclusive of the day on which the query is made (up to ten business days in total), whichever occurs first. If ten business days have elapsed from the date the licensee contacted NICS, and NICS has not notified the licensee that transfer to, or receipt of the firearm by, the transferee is ''Denied,'' the transfer may proceed.

Example 2 to paragraph (a)(3)(iii): A licensee contacts NICS on Thursday, the 10th and gets a ''Delayed'' response. If State offices are not open on Saturdays and Sundays, three business days would elapse on the following Tuesday, the 15th. If the transferee is a person 21 years of age or older, the FFL may transfer the firearm at 12:01 on Wednesday, the 16th. However, if the transferee is a person less than 21 years of age, and NICS notifies the licensee by Tuesday, the 15th, that cause exists for further investigation of a possibly disqualifying juvenile record, the licensee may not transfer the firearm the next day, the 16th. If the licensee does not get a further response from NICS by the end of the tenth business day denying the transfer, the licensee may transfer the firearm the next day. Ten business days would elapse on the Thursday of the following week, the 24th. The licensee may transfer the firearm on the next day, Friday, the 25th.

* * * * *

■ 7. Amend § 478.124 by revising paragraphs (c)(1) and (f) to read as follows:

§ 478.124 Firearms transaction record.

* * * * *

(c)(1) Prior to making an over-the-counter transfer of a firearm to a non-licensee who is a resident of the State in which the licensee's business premises is located, the licensed importer, licensed manufacturer, or licensed dealer so transferring the firearm shall obtain a Form 4473 from the transferee showing the transferee's name, sex, residence address (including county or similar political subdivision and whether they reside within city limits), and date and place of birth; the height, weight, and race of the transferee; the transferee's country of citizenship; the transferee's DHS-issued alien number or admission number; the transferee's State of residence; certification by the transferee that the transferee is not prohibited by the Act from transporting or shipping a firearm in interstate or foreign commerce or receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce; and certification that the transferee does not intend to purchase or acquire any firearm for sale or other disposition to a person so prohibited or in furtherance of any felony or other offense punishable by imprisonment for a term of more than one year, a Federal crime of terrorism, or a drug trafficking offense.

* * * * *

(f) Form 4473 shall be submitted, in duplicate, to a licensed importer, licensed manufacturer, or licensed dealer by a transferee who is purchasing or otherwise acquiring a firearm by other than an over-the-counter transaction, who is not subject to the provisions of § 478.102(a), and who is a resident of the State in which the licensee's business premises are located. The Form 4473 shall show the transferee's name, sex, residence address (including county or similar political subdivision and whether they reside within city limits), and date and place of birth; the height, weight, and race of the transferee; the transferee's country of citizenship; the transferee's DHS-issued alien number or admission number; the transferee's State of residence; and the title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered. The transferee shall also certify on the Form 4473 that the transferee does not intend to purchase or acquire any firearm for sale or other disposition to a person so prohibited or in furtherance of any felony or other offense punishable by imprisonment for a term of more than one year, a Federal crime of terrorism, or a drug trafficking offense. The licensee shall identify the firearm to be transferred by listing in the Forms 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm to be transferred. Where no manufacturer name has been identified on a privately made firearm, the words ''privately made firearm'' (or abbreviation ''PMF'') shall be recorded as the name of the manufacturer. The licensee shall prior to shipment or delivery of the firearm to such transferee, forward by registered or certified mail (return receipt requested) a copy of the Form 4473 to the principal law enforcement officer named in the Form 4473 by the transferee, and shall delay shipment or delivery of the firearm to the transferee for a period of at least 7 days following receipt by the licensee of the return receipt evidencing delivery of the copy of the Form 4473 to such principal law enforcement officer, or the return of the copy of the Form 4473 to the licensee due to the refusal of such principal law enforcement officer to accept same in accordance with U.S. Postal Service regulations. The original Form 4473, and evidence of receipt or rejection of delivery of the copy of the Form 4473 sent to the principal law enforcement officer, shall be retained by the licensee as a part of the records required to be kept under this subpart.

* * * * *

■ 8. Amend § 478.152 by adding paragraphs (d) and (e) to read as follows:

§ 478.152 Seizure and forfeiture.

* * * * *

(d) Any person convicted of a violation of section 932 or 933 of the Act shall forfeit to the United States, irrespective of any provision of State law—

(1) Any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and

(2) Any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation, except that for any forfeiture of any firearm or ammunition pursuant to this section, 18 U.S.C. 924(d) shall apply.

(e) A defendant who derives profits or other proceeds from an offense under section 932 or 933 of the Act may be fined not more than the greater of—

(1) The fine otherwise authorized by part I of title 18 of the U.S. Code; or

(2) The amount equal to twice the gross profits or other proceeds of the offense under section 932 or 933.

Dated: April 12, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–08339 Filed 4–18–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

28 CFR Part 106

[JMD Docket No. 157; A.G. Order No. 5922–2024]

RIN 1105–AB71

Implementation of HAVANA Act of 2021

AGENCY: Department of Justice.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule provides implementation by the Department of Justice of the HAVANA Act of 2021. The HAVANA Act authorizes agency heads to provide payments to certain individuals who have incurred qualifying injuries to the brain. This rule covers current and former Department of Justice employees and their dependents.

DATES: This interim final rule is effective on May 20, 2024.

Comments: Electronic comments must be submitted, and written comments must be postmarked, on or before June 18, 2024. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: If you wish to provide comments regarding this interim final rule, you must submit comments, referencing RIN 1105–AB71 or JMD Docket No. 157, by one of the two methods below:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the website instructions for submitting comments.
- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of an electronic submission, please direct the mail/shipment to: General Counsel, Justice Management Division, U.S. Department of Justice, Two Constitution Square (2CON), 145 N St. NE, Suite 8E.500, Washington, DC 20530. To ensure proper handling, please reference the agency name and RIN 1105–AB71 or JMD Docket No. 157 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

FOR FURTHER INFORMATION CONTACT: Morton J. Posner, General Counsel, Justice Management Division, (202) 514–3452.

SUPPLEMENTARY INFORMATION: This rule implements the HAVANA Act of 2021, Public Law 117–46, 135 Stat. 391 (2021) (codified at 22 U.S.C. 2680b(i)).

Background and Authority—§ 106.1

In 2016, Department of State employees stationed in Havana, Cuba, began reporting a sudden onset of symptoms, including headaches, pain, nausea, disequilibrium, and hearing loss, in conjunction with sensory events. Federal agencies have called such incidents Anomalous Health Incidents (''AHIs''). Since 2016, Federal employees in numerous countries reported suspected AHIs. On December 20, 2019, Congress authorized the Department of State to pay benefits to employees and their dependents for injuries suffered after January 1, 2016, in the Republic of Cuba, the People's Republic of China, or other foreign countries designated by the Secretary of State, in connection with war, insurgency, hostile acts, or terrorist activity, or in connection with other incidents designated by the Secretary of State. *See* Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. J, title IX, section 901, 133

Stat. 2534, 3079–81 (2019) (codified as amended at 22 U.S.C. 2680b). These benefits were limited to State Department employees only (*i.e.,* not other employees under Chief of Mission (''COM'') authority).

On January 1, 2021, Congress amended this law to authorize other Federal Government agencies to provide benefits to their own employees under COM authority if they suffered similar injuries. National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, section 1110, 134 Stat. 3388, 3892–93 (2021).

On October 8, 2021, Congress passed the Helping American Victims Affected by Neurological Attacks or the HAVANA Act of 2021, Public Law 117–46, 135 Stat. 391 (2021) (''HAVANA Act''). In the HAVANA Act, Congress authorized Federal Government agencies to compensate affected current employees, former employees, and their dependents for qualifying injuries to the brain. The HAVANA Act also omitted the previous law's requirement that the qualifying injury must occur in the Republic of Cuba, the People's Republic of China, or another foreign country designated by the Secretary of State. The scope of coverage now includes a qualifying injury that occurs in any foreign or domestic location. The HAVANA Act requires Federal agencies who make payments under the HAVANA Act to prescribe implementing regulations not later than 180 days after the effective date of the Act. Section 9216 of the National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263, 136 Stat. 2395, 3877 (2022) (codified at 22 U.S.C. 2680b(j)), provided agencies with authority to designate incidents affecting employees or dependents who are not under the security responsibility of the Secretary of State.

This rule implements section 3 of the HAVANA Act as it applies to the Department of Justice (the ''Department''). This rule only applies to current and former employees of the Department and their dependents, as defined in § 106.2 of this rule.

On June 30, 2022, the Department of State published an interim final rule to implement its requirements under the HAVANA Act, with an effective date of August 15, 2022. 87 FR 38981 (June 30, 2022) (codified at 22 CFR part 135). The Department of State subsequently published a final rule that became effective on January 25, 2023. 88 FR 4722 (Jan. 25, 2023) (codified at 22 CFR part 135). The Department of Justice has independently reviewed the approach implemented by the Department of State in these rules and has determined that its approach is reasonable and well considered. Accordingly, the Department of Justice plans to adopt that approach as appropriate in its regulations to ensure consistency of benefits among Federal employees and their dependents. In particular, the Department has based its interim final rule on the Department of State's definitions and process for the payment of benefits.

Definitions—§ 106.2

The rule defines those who are eligible to receive payments: covered employees (including current and former employees) and covered dependents who on or after January 1, 2016, experience a qualifying brain injury. A ''covered employee'' includes all Department employees, including employees on Limited Non-Career Appointments, employees on Temporary Appointments, personnel hired on Personal Services Contracts, and students providing volunteer services under 5 U.S.C. 3111.

An employee's family member is a covered dependent if, on or after January 1, 2016, the family member experiences a qualifying injury. The rule defines the family members who are eligible as certain children, parents residing with the employee sponsor, dependent siblings, or spouses.

For the purposes of this rule, the Department also adopts the Department of State's definition of ''qualifying injury to the brain.'' 22 CFR 135.2. The Department has determined that the Department of State definition is reasonable and well considered. The Department of State consulted with the chief medical officers at other Federal agencies and experts at civilian medical centers of excellence. There is no diagnostic code or criteria for AHIs in the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD–10–CM). Because of the varied symptoms and still nascent understanding of how to test or otherwise screen for AHI impacts, the standard adopted is broadly inclusive of the types of injuries that have been reported to date.

The definition of ''qualifying injury to the brain'' is based on current medical practices related to brain injuries. The individual must have: (1) an acute injury to the brain such as a concussion, a penetrating injury, or an injury as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies or electroencephalogram (''EEG''); (2) a medical diagnosis of a traumatic brain injury that required active medical treatment for 12 months or more; or (3) the acute onset of new, persistent, disabling neurologic symptoms, as demonstrated by confirming correlative findings on imaging studies, EEG, a physical exam, or other appropriate testing, that required active medical treatment for 12 months or more.

The first component of the definition of ''qualifying injury to the brain'' set forth in § 106.2(d)(2)(i) accounts for a variety of observable impacts to an individual, including a concussion or a penetrating injury or, absent either of those, permanent alterations in brain function as confirmed by a board-certified physician's review of a variety of forms of medical imaging evidence. The goal with this standard is to ensure there is some documented evidence of impact to the brain, while minimally circumscribing what that impact entails. The second and third components of the definition (paragraphs (d)(2)(ii) and (iii)) are intended to provide alternative avenues for demonstrating sustained, long-term impact to the individual. This benefit is intended for individuals who experience long-term consequences, potentially including an inability to gainfully work, as a result of a suspected AHI.

The standard is consistent with that employed by other agencies, including the Department of State. A 12-month threshold of active medical treatment is indicative of a long-term injury. For example, the Centers for Disease Control and Prevention (''CDC'') broadly defines chronic diseases ''as conditions that last 1 year or more and require ongoing medical attention or limit activities of daily living or both.'' CDC, *About Chronic Diseases, https://www.cdc.gov/chronicdisease/about/index.htm* (last reviewed July 21, 2022). The Department notes that applicants who have suffered kinetic or external, physically caused injuries to the brain such as the head striking an object, the brain undergoing an acceleration or deceleration movement, or brain injuries from events such as a blast or explosion, including penetrating injuries, may be eligible if the injuries satisfy the other requirements of this rule.

Under the HAVANA Act, the injury must have occurred ''in connection with war, insurgency, hostile act, terrorist activity, or other incidents designated by the Secretary of State,'' and cannot have been ''the result of the willful misconduct'' of the covered individual. 22 U.S.C. 2680b(e)(4)(A)(ii)–(iii), (e)(4)(B)(ii)–(iii), (i)(1)(D). The Department will work with an applicant upon the applicant's submission of the DS–4316, ''Eligibility Questionnaire for

HAVANA Act Payments,'' to determine whether their alleged incident qualifies.

The definition of ''other incident'' is a new onset of physical manifestations that cannot otherwise be readily explained and that is designated under 22 U.S.C. 2680b. The Department will review available information on the reported incident. If a physician does not indicate that there is a credible alternative explanation for the individual's symptoms, and if the information the Department has regarding the incident does not provide a credible alternative explanation for the incident, that incident will be recommended for designation. Incidents for which an alternative explanation has been identified will not be recommended for designation. For incidents affecting employees or dependents who are not under the security responsibility of the Secretary of State, the Department will determine whether to designate such incidents.

Eligibility for Payments—§ 106.3

The Department will make available to its workforce information on the regulations and the process to apply for HAVANA Act payments. Current employees, former employees, and dependents (as defined in this rule) can apply for consideration. Applicants will be required to provide the necessary documentation so the Department may determine whether they qualify for payment. The DS–4316, ''Eligibility Questionnaire for HAVANA Act Payments,'' is the form associated with developing the necessary evidence to submit a claim, and it will be available upon request with instructions on how to apply for a HAVANA Act payment. A portion of the form must be filled out by a qualified physician; the rule specifies certain board certification requirements for physicians who can evaluate a qualifying injury to the brain.

The Department has determined that the payment scheme set forth in the Department of State's HAVANA Act regulations, 22 CFR 135.3, is well reasoned and provides an effective means of compensating covered employees. Accordingly, the Department has adopted it for purposes of this rulemaking. Pursuant to this interim final rule, the Department, in its discretion, may authorize a one-time, non-taxable, lump sum payment based on Level III of the Executive Schedule. *See* 5 U.S.C. 5311 *et seq.* The payment is non-taxable pursuant to 22 U.S.C. 2680b(g). Payment eligibility and the amount of the payment will be at the Department's discretion. The maximum should only be awarded where a condition has a consistent, sustained, and exceptionally severe impact on a victim's quality of life or prevents a victim from successfully performing their work-related duties. The purpose is to compensate individuals only for qualifying brain injuries that meet the criteria set forth in this rule. The following factors will be taken into account to determine the amount of the payment to be authorized: (1) the applicant's responses on the eligibility form; and (2) whether the Department of Labor (Office of Workers' Compensation Programs) has determined that the applicant has no reemployment potential, the Social Security Administration (''SSA'') has approved the applicant for Social Security Disability Insurance or Supplemental Security Income benefits, or the applicant's board-certified physician has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence in Activities of Daily Living.

The award thresholds are based on Level III of the Executive Schedule. A Base payment will be 75 percent of Level III pay, and a Base+ payment will be 100 percent of Level III pay. The specific use of Level III of the Executive Schedule sets the compensation at the maximum annual salary potentially available to most of the Federal workforce. The Department believes this amount is the most it can reasonably compensate each applicant while ensuring funds for the total number of applicants it believes will likely receive payments. If the applicant meets any of the criteria for severe impacts, the applicant will be eligible to receive a Base+ payment. Applicants whose board-certified physician confirms that the definition of qualifying injury to the brain has been met, but who have not met any of the criteria for severe impacts, will be eligible to receive a Base payment.

The criteria established for severe impacts are reflective of the Department's objective of ensuring that the individuals most severely affected by AHIs (as indicated by a lack of reemployment potential, an inability to engage in substantial gainful activity, or the need for a full-time caregiver) receive additional payment. The use of the Department of Labor's or the SSA's determination is to ensure that both Federal employees as well as their dependents have access to a mechanism for this determination. The Department recognizes that the criteria the Department of Labor and SSA use in their determinations are distinct, as well as the fact that the procedural timelines for seeking and receiving approval may be different between these agencies. The third option, that a board-certified physician certify that the individual requires a full-time caregiver for activities of daily living, provides an alternative mechanism for all individuals. Finally, the Department notes that if an applicant who received a Base payment later meets any of the criteria listed for severe impacts, the applicant may apply for an additional payment that will be the difference between the Base and Base+ payment. As the payments are tied to the Executive Schedule payment levels, the amounts will change over time based on changes to the Federal salary schedule. Payments will be based on the Executive Schedule in effect at the time the payment was approved.

While payments under the HAVANA Act may be in addition to other leave benefits, disability benefits, or workers' compensation payments that the applicant may be receiving or may be entitled to receive that also help augment any loss of income, the Department believes this is an appropriate additional payment. This payment scheme is also consistent with what is being offered by other Federal agencies and will ensure consistency of benefits among affected individuals.

The Department notes that payments may only be made using amounts appropriated in advance specifically for this purpose in the relevant fiscal year, unless Congress specifies otherwise. Therefore, payments are contingent on appropriated funds, and all payments will be paid out on a first-come, first-served basis.

Consultations With the Department of State—§ 106.4

Under the rule, the Department's procedures for determining whether an incident has been designated under 22 U.S.C. 2680b include, where appropriate, consultation with the Secretary of State. *See* 22 U.S.C. 2680b(i)(1)(D) (cross-referencing subparagraph 2680b(e)(4)).

Procedures—§ 106.5

Each Federal agency is responsible for (1) processing applications for the HAVANA Act payments; (2) determining or, as necessary, consulting with the Secretary of State to determine, whether the incident causing the injury may be deemed a designated incident under the statute, *see* 22 U.S.C. 2680b(j); *id.* 2680b(i)(1)(D) (cross-referencing subparagraph 2680b(e)(4)); (3) determining eligibility for the benefit, determining the amount of the benefit, and processing payment of the benefit; and (4) notifying applicants upon

receipt of their applications and when a decision has been made whether to authorize payment.

The Executive Assistant Director, Human Resources Branch, Federal Bureau of Investigation (''FBI''), is authorized to approve HAVANA Act payments to FBI employees or their dependents. The Deputy Assistant Attorney General, Human Resources and Administration, Justice Management Division (''JMD''), is authorized to approve HAVANA Act payments for all other Department employees or their dependents. If payment is denied by the designated FBI or JMD official, the applicant may direct an appeal to the Assistant Attorney General for Administration within 60 days of the notification of denial, but decisions on the amount of payment are not appealable.

Regulatory Analysis

Administrative Procedure Act

This rule is being published as an interim final rule. Because this rule is a matter relating to public benefits, it is exempt from requirements for notice-and-comment rulemaking. *See* 5 U.S.C. 553(a)(2). Because the rule is exempt from section 553 of title 5 of the United States code, the provisions of section 553(d) do not apply. Nevertheless, the rule will go into effect 30 days after publication. However, the Department is seeking comment from interested persons on the provisions of this rule and will consider all relevant comments in determining whether additional rulemaking is warranted under the provisions of the HAVANA Act.

Congressional Review Act

This rule is not a major rule as defined by 5 U.S.C. 804 for the purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801–808.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Regulatory Flexibility Act: Small Business

A regulatory flexibility analysis is not required under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because the Department was not required to issue a notice of proposed rulemaking.

Executive Order 12866 and Executive Order 13563

The Department provided this interim final rule to the Office of Management and Budget for its review. The Office of Information and Regulatory Affairs has designated this rule as ''significant'' under Executive Order 12866. The Department has also reviewed the rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and finds that the benefits of the rule (in providing mechanisms for individuals to obtain compensation for certain injuries) outweigh any costs to the public, which are limited, given the anticipated small number of individuals with qualifying injuries. The Department has also considered this rulemaking in light of Executive Order 13563 and affirms that this proposed regulation is consistent with the guidance therein.

Executive Order 12988

The Department has reviewed this rule in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationships between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act

This rulemaking is related to an information collection for the DS–4316, ''Eligibility Questionnaire for HAVANA Act Payments,'' OMB Control Number 1405–0250.

List of Subjects in 28 CFR Part 106

Government employees, Federal retirees, Health care.

■ Accordingly, for the reasons stated in the preamble, the Department adds part 106, title 28, Code of Federal Regulations, to read as follows:

PART 106—IMPLEMENTATION OF THE HAVANA ACT OF 2021

Sec.

Authority: 22 U.S.C. 2680b.

§ 106.1 Authority.

(1) Under section 3 of the HAVANA Act of 2021, Public Law 117–46, 135 Stat. 391 (2021) (codified at 22 U.S.C. 2680b(i)), the Attorney General or other agency heads may provide a payment to a covered employee or covered dependent who experiences a qualifying injury to the brain on or after January 1, 2016. The authority to provide such payments is at the discretion of the Attorney General or the Attorney General's designees.

(2) These regulations are issued in accordance with 22 U.S.C. 2680b(i)(4) and apply to covered employees (current and former employees) and covered dependents.

§ 106.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Covered employee.* (1) A current or former employee of the Department who, on or after January 1, 2016, became injured by reason of a qualifying injury while they were employed by the Department.

(2) The following are considered covered employees for the purposes of this rule: Department of Justice employees as defined in 5 U.S.C. 2105, including employees on Limited Non-Career Appointments, employees on Temporary Appointments, personnel hired on Personal Services Contracts, and students providing volunteer services under 5 U.S.C. 3111.

(3) The following are not considered employees of the Department for purposes of this rule: employees or retired employees who were employed by other agencies at the time of the injury.

(b) *Covered dependent.* A family member, as defined in paragraph (c) of this section, of a current or former employee of the Department who, on or after January 1, 2016, became injured by

reason of a qualifying injury while their relative was an employee of the Department in a position listed in paragraph (a)(2) of this section.

(c) *Family member.* For purposes of determining who is a ''covered dependent,'' a family member is defined as follows:

(1) Children who at the time of the injury are unmarried and under 21 years of age or, regardless of age, are unmarried and due to mental or physical limitations are incapable of self-support. The term ''children'' includes natural offspring; stepchildren; adopted children; those under permanent legal guardianship, or comparable permanent custody arrangement, of the employee, spouse, or domestic partner as defined in 5 CFR 875.101 when dependent upon and normally residing with the guardian or custodial party; and U.S. citizen children placed for adoption if a U.S. court grants temporary guardianship of the child to the employee and specifically authorizes the child to reside with the employee in the country of assignment before the adoption is finalized;

(2) Parents (including stepparents and legally adoptive parents) of the employee or of the spouse or of the domestic partner as defined in 5 CFR 875.101, when normally residing with the employee at the time of the injury;

(3) Sisters and brothers (including stepsisters or stepbrothers, or adoptive sisters or brothers) of the employee or the spouse when at the time of the injury such sisters and brothers are at least 51 percent dependent on the employee or spouse for support, unmarried and under 21 years of age, or, regardless of age, are physically or mentally incapable of self-support; and

(4) Spouse or domestic partner at the time of the injury.

(d) *Qualifying injury to the brain.* (1) An injury to the brain that occurred in connection with war, insurgency, hostile act, terrorist activity, or other incidents designated under 22 U.S.C. 2680b, and that was not the result of the willful misconduct of the covered employee or covered dependent.

(2) The individual must have:

(i) An acute injury to the brain such as a concussion, a penetrating injury, or an injury as the consequence of an event that leads to permanent alterations in brain function where such alterations are demonstrated by confirming correlative findings on imaging studies (including computed tomography scan (CT) or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG);

(ii) A medical diagnosis of a traumatic brain injury that required active medical treatment for 12 months or more; or

(iii) Acute onset of new, persistent, disabling neurologic symptoms, as demonstrated by confirming correlative findings on imaging studies (including CT or MRI), EEG, physical exam, or other appropriate testing, that required active medical treatment for 12 months or more.

(e) *Other incident.* A new onset of physical manifestations that cannot otherwise be readily explained and that is designated under 22 U.S.C. 2680b.

§ 106.3 Eligibility for payments by the Department of Justice.

(a) The Department may, in its discretion, provide a payment to an employee, covered dependent, or former employee if that person suffered a qualifying injury to the brain that was assessed and diagnosed in person by a physician who is currently a neurologist certified by the American Board of Psychology and Neurology (ABPN) or a physician certified by the American Osteopathic Board of Neurology and Psychiatry (AOBNP), the American Board of Physical Medicine and Rehabilitation (ABPMR), or the American Osteopathic Board of Physical Medicine and Rehabilitation (AOBPMR); occurred on or after January 1, 2016; and, for an employee or former employee, occurred while the employee or former employee was a covered employee of the Department or, for a covered dependent, occurred while the covered dependent's relative was an employee of the Department in a position listed in § 106.2(a)(2).

(b) Payment for a qualifying injury to the brain will be a non-taxable, one-time lump sum payment, unless a second payment is authorized under paragraph (d) of this section.

(c) The amount of the payment is at the Department's discretion. The Department will determine the amount paid to each eligible person based on the following factors:

(1) The responses on the ''Eligibility Questionnaire for HAVANA Act Payments'' form; and

(2) Whether the Department of Labor (Office of Workers' Compensation Programs) has determined that the applicant has no reemployment potential, or the Social Security Administration has approved the applicant for Social Security Disability Insurance or Supplemental Security Income benefits, or the applicant's ABPN-certified neurologist or the applicant's AOBNP-, ABPMR-, or AOBPMR-certified physician has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence in Activities of Daily Living.

(d) The award thresholds are based on Level III of the Executive Schedule: Base will be 75 percent of Level III pay, and Base+ will be 100 percent of Level III pay. If the applicant meets any of the criteria listed in paragraph (c)(2) of this section, the applicant will be eligible to receive a Base+ payment. Applicants whose board-certified physician (as described in paragraph (a) of this section) confirms that the definition of ''qualifying injury to the brain'' has been met, but who have not met any of the criteria listed in paragraph (c)(2) of this section, will be eligible to receive a Base payment. If an applicant who received a Base payment later meets any of the criteria listed in paragraph (c)(2) of this section, the applicant may apply for an additional payment that will be the difference between the Base and Base+ payment.

§ 106.4 Consultation.

When a covered employee or covered dependent seeks payment for an incident that occurred overseas under Chief of Mission security responsibility, the Department will coordinate with the Department of State as appropriate in evaluating whether the incident is an ''other incident'' under the HAVANA Act or should be so designated.

§ 106.5 Procedures.

(a) *Application.* (1) A covered employee or covered dependent may apply for a HAVANA Act payment if the covered individual has sustained a qualifying injury to the brain on or after January 1, 2016. To apply for the benefit, the applicant must submit the ''Eligibility Questionnaire for HAVANA Act Payments'' claim form to the appropriate email address or fax number set forth in this paragraph (a). The claim form must be completed by a person eligible to file a claim under the HAVANA Act or by that person's legal guardian and must be signed by a currently certified physician as listed in § 106.3(a) of this part. The claim form must be emailed or faxed to the following address: *HRD_AHI_QUESTIONNAIR@FBI.GOV* or fax number (202) 323–9420 (covered FBI employees and dependents) or *HavanaActClaims@usdoj.gov* or fax number (202) 616–3200 (covered DOJ employees and dependents).

(2) The applicant must furnish additional documentation upon request.

(3) Copies of the claim form, as well as the regulations and other information, may be obtained by

requesting the document or publications via an email to *HRD_AHI_QUESTIONNAIR@FBI.GOV* (covered FBI employees and dependents) or *HavanaActClaims@usdoj.gov* (covered DOJ employees and dependents).

(b) *Review.* For FBI covered employees and dependents, the Human Resources Division (HRD) of the FBI is responsible for reviewing the applications to determine their completeness. For other DOJ covered employees and dependents, the Justice Management Division (JMD) is responsible for reviewing the applications to determine their completeness.

(c) *Other incident.* The Department will determine whether a covered employee or covered dependent has a qualifying injury to the brain as set forth in § 106.2, and whether the incident causing the injury was in connection with war, insurgency, hostile act, or terrorist activity. The Department will as appropriate or necessary make a recommendation to the Secretary of State that the incident should be deemed an ''other incident designated by the Secretary of State'' for purposes of 22 U.S.C. 2680b(i)(1)(D) (cross-referencing subparagraph 2680b(e)(4)); or, for incidents affecting employees or dependents who are not under the security responsibility of the Secretary of State, the Department will as appropriate or necessary designate such incidents, under authority set forth in 22 U.S.C. 2680b(j).

(d) *Decisions.* For FBI covered employees and covered dependents, the Executive Assistant Director, Human Resources Branch, FBI, in their discretion may approve payments under the HAVANA Act. For all other Departmental covered employees and covered dependents, the Deputy Assistant Attorney General, Human Resources and Administration, JMD, in their discretion may approve payments under the HAVANA Act.

(e) *Appeals.* In the event of a decision to deny an application for payment under the HAVANA Act, the Department will notify the applicant in writing. Applicants may direct an appeal to the Assistant Attorney General for Administration within 60 days of the date of the notification of the denial. However, decisions concerning the amount paid are not subject to appeal. The Department will notify the applicant in writing of the decision on appeal.

Dated: April 15, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–08336 Filed 4–18–24; 8:45 am]

BILLING CODE 4410–AR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0314]

RIN 1625–AA00

Safety Zone; Corpus Christi Ship Channel, Corpus Christi, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain navigable waters of the Corpus Christi Ship Channel. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the removal of pipeline from the floor of the Corpus Christi Ship Channel near mile markers 55 and 56. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Corpus Christi or a designated representative.

DATES: This rule is effective from April 22, 2024, through May 31, 2024. It will be subject to enforcement each and every day, between the hours of 8 p.m. of one day to 6 a.m. of the next day.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0314 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Commander Anthony Garofalo, Sector Corpus Christi Waterways Management Division, U.S. Coast Guard; telephone 361–939–5130, email *Anthony.M.Garofalo@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port, Sector Corpus Christi
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to 5 U.S.C. 553(b). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. This safety zone must be in place by April 22 to protect personnel, vessels, and the marine environment from potential hazards associated with removal of the pipelines and there is insufficient time between now and April 22 to provide notice of a proposal to create these safety zones, consider comments received, and publish a final rule.

In addition, the Coast Guard finds that good cause also exists under 5 U.S.C. 553(d)(3) for making this rule effective less than 30 days after publication in the **Federal Register** because the safety zone must be in effect less than 30 days from now to serve their purpose and it would be contrary to the public interest to delay its effective date until after the hazardous activities begin.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port, Sector Corpus Christi (COTP) has determined that hazards inherent in blocking the channel for pipeline removal activities necessitate provisions to protect personnel, vessels, and the marine environment while those activities are taking place. The activities giving rise to these hazards include the deployment of heavy equipment which will obstruct vessel traffic, continuous diving operations, and various other activities which create underwater hazards while people are working.

IV. Discussion of the Rule

This rule is subject to overnight enforcement, starting from 8 p.m. of the first day, to 6 a.m., of the next day, each and every day, from April 22, 2024 through May 31, 2024. No vessel or person will be permitted to enter the temporary safety zones during the period in which the rule is subject to enforcement without obtaining permission from the COTP or a designated representative, who may be contacted on Channel 16 VHF–FM

(156.8 MHz) or by telephone at 1–800–874–2143. The Coast Guard will issue Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, and duration of the safety zones. The safety zones cover less than 0.5 square mile area of the Corpus Christi Ship Channel in Texas. The temporary safety zones will be subject to enforcement for a period of 9 consecutive hours, from April 22, 2024 through May 31, 2024. The rule does not completely prohibit vessel traffic within the waterway and it allows mariners to request permission to enter the zones.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f) and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a temporary safety zone for navigable waters in the Corpus Christi Bay. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by pipeline removal activities that may include deployment of heavy equipment which will obstruct vessel traffic, continuous diver's operations, and various other activities which create underwater hazards while people are working. It is categorically excluded from further review under paragraph L60(a), in Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–0314 to read as follows:

§ 165.T08–0314 Safety Zone; Corpus Christi Ship Channel, Corpus Christi, TX

(a) *Location.* The safety zone will be within the following area: All navigable waters of the Corpus Christi Ship Channel, from the surface to bottom, encompassed by a line connecting the following points beginning at Point 1: 27°48′47.41″ N, 97°16′49.55″ W, thence to Point 2: 27°48′46.55″ N, 97°16′54.8″ W, thence to Point 3: 27°48′28.48″ N, 97°16′58.94″ W, thence to Point 4: 27°48′28.04″ N, 97°16′51.42″ W. These coordinates are based on World Geodetic System (WGS) 84.

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

(c) *Enforcement period.* This section will be subject to enforcement from 8 p.m. to 6 a.m. of the next day, on each day, from April 22, 2024 through May 31, 2024.

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into the temporary safety zones described in paragraph (a) of this section are prohibited unless authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative. They may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 1–800–874–2143.

(2) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(e) *Information broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

Dated: April 15, 2024.

Jason Gunning,

Captain, U.S. Coast Guard, Captain of the Port, Sector Corpus Christi.

[FR Doc. 2024–08411 Filed 4–18–24; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2024–0064; FRL–11722–02–R7]

Air Plan Approval; Iowa; State Implementation Plan and State Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Iowa State Implementation Plan (SIP) and the Operating Permit Program for the State of Iowa. The revisions update incorporations by reference to EPA methods for performance testing (stack testing), update the definitions, and adopt the most recent National Ambient Air Quality Standards (NAAQS) for ozone. These revisions do not impact the stringency of the SIP or have an adverse effect on air quality. The EPA's approval of this rule revision is being done in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on May 20, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2024–0064. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Bethany Olson, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7905; email address: *olson.bethany@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA.

Table of Contents

I. What is being addressed in this document?

The EPA is approving revisions to the Iowa SIP and the Operating Permits Program received on March 29, 2023. The revisions incorporate recent changes to Iowa Administrative Code. The following chapters are impacted:

- Chapter 20, ''Scope of Title—Definitions;''
- Chapter 22, ''Controlling Pollution;''
- Chapter 25, ''Measurement of Emissions;'' and
- Chapter 28, ''Ambient Air Quality Standards.''

The revisions update incorporations by reference to EPA methods for performance testing (stack testing) and adopt the most recent National Ambient Air Quality Standards (NAAQS) for ozone. As explained in detail in the EPA's proposed rule, EPA finds these revisions meet the requirements of the Clean Air Act, do not impact the stringency of the SIP, and do not adversely impact air quality (89 FR 12291, February 16, 2024). The full text of these changes can be found in the State's submission, which is included in the docket for this action.

Sections 111 and 112 of the Clean Air Act (CAA) allow EPA to delegate authority to states for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPs). EPA has delegated authority to Iowa for approved portions of these sections of the CAA. Changes made to Iowa's Chapter 23 pertaining to new and revised NSPS and NESHAPs are not directly approved into the SIP, but rather, are adopted by reference. Thus, EPA is not approving the changes to Chapter 23 of the Iowa Administrative Code into the state's SIP.

II. Have the requirements for approval of a SIP and the operating permit plan revisions been met?

The State submission has met the public notice requirements for SIP

submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from November 2, 2022, to December 5, 2022, and held a public hearing on December 5, 2022. The State received no comments. In addition, as explained above, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

III. The EPA's Response to Comments

The public comment period on the EPA's proposed rule opened February 16, 2024, the date of its publication in the **Federal Register** and closed on March 18, 2024. During this period, EPA received one comment. The comment is available for review in the docket for this action.

Comment 1: The commenter stated the date the state public comment period opened was incorrect in section V. of the proposed rule. The proposed rule incorrectly stated that the state provided public notice on the SIP revision from November 22, 2022, to December 5, 2022. The correct date the state public comment period opened is November 2, 2022.

Response 1: The EPA acknowledges that the proposed rule used an incorrect date for the opening of the state public comment period. While the error does not have a substantive impact on EPA's proposed action, EPA has changed the date the state public comment period opened in the final rulemaking.

IV. What action is the EPA taking?

The EPA is finalizing its proposal to approve revisions to the Iowa SIP and the Operating Permits Program at IAC 567–20.2, 567–25.1, 567–28.1, and 567–22.100.

V. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Iowa rules 567–20.2, Definitions, which provides definitions for air quality regulations; 567–25.1, Testing and Sampling of New and Existing Equipment, which regulates testing and sampling of equipment; 567–28.1, Statewide Standards, which regulates ambient air quality standards; and 22.100, Definitions for Title V Operating Permits, which provides definitions for state operating permits. The state effective date of these rules is March 15, 2023. The EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

VI. Statutory and Executive Order

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

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

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

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

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

[1] 62 FR 27968, May 22, 1997.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 18, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects

40 CFR Part 52

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

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: April 11, 2024.

Meghan A. McCollister,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR parts 52 and 70 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart Q—Iowa

■ 2. In § 52.820, the table in paragraph (c) is amended by revising the entries ''567–20.2,'' ''567–25.1,'' and ''567–28.1'' to read as follows:

§ 52.820 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED IOWA REGULATIONS

Iowa citation	Title	State effective date	EPA approval date	Explanation
Iowa Department of Natural Resources Environmental Protection Commission [567]				
Chapter 20—Scope of Title—Definitions				
*	*	*	*	*
567–20.2	Definitions	3/15/2022	4/19/2024, [insert **Federal Register** citation].	The definitions for ''anaerobic lagoon,'' ''odor,'' ''odorous substance,'' ''odorous substance source'' are not SIP approved.
*	*	*	*	*
Chapter 25—Measurement of Emissions				
567–25.1	Testing and Sampling of New and Existing Equipment.	3/15/2023	4/19/2024, [insert **Federal Register** citation].	
*	*	*	*	*
Chapter 28—Ambient Air Quality Standards				
567–28.1	Statewide standards	3/15/2023	4/19/2024, [insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

PART 70—STATE OPERATING PERMIT PROGRAMS

■ 3. The authority citation for part 70 continues to read as follows:

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

■ 4. Appendix A to part 70 is amended by adding paragraph (z) under ''Iowa'' to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Iowa

* * * * *

(z) The Iowa Department of Natural Resources submitted for program approval revisions to rule 567–22.100 on March 29, 2023. The state effective date is March 15, 2023. This revision is effective May 20, 2024.

* * * * *

[FR Doc. 2024–08281 Filed 4–18–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 10

[Docket No. 2021–0004]

RIN 0906–AB28

340B Drug Pricing Program; Administrative Dispute Resolution Regulation

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

ACTION: Final rule.

SUMMARY: The Health Resources and Services Administration administers section 340B of the Public Health Service (PHS) Act, which is referred to as the ''340B Drug Pricing Program'' or the ''340B Program.'' This final rule will apply to all drug manufacturers and covered entities that participate in the 340B Program. The final rule sets forth the requirements and procedures for the 340B Program's administrative dispute resolution (ADR) process. This final rule revises the 340B administrative dispute resolution process set forth in the Code of Federal Regulations.

DATES: This final rule is effective June 18, 2024.

FOR FURTHER INFORMATION CONTACT: Michelle Herzog, Deputy Director, Office of Pharmacy Affairs, HRSA, 5600 Fishers Lane, Mail Stop 08W12, Rockville, MD 20857; email: *340badr@hrsa.gov;* telephone: 301–594–4353.

SUPPLEMENTARY INFORMATION:

I. Background

Section 340B of the PHS Act entitled ''Limitation on Prices of Drugs Purchased by Covered Entities,'' was created under section 602 of Public Law 102–585, the ''Veterans Health Care Act of 1992,'' and codified at 42 U.S.C. 256b. The 340B Program is intended to enable covered entities ''to stretch scarce Federal resources as far as possible, reaching more eligible patients and providing more comprehensive services.'' H.R. Rep. No. 102–384(II), at 12 (1992). The Secretary of Health and Human Services (Secretary) has delegated the authority to administer the 340B Program to the HRSA Administrator, who has further delegated authority to the Office of Pharmacy Affairs (OPA), within HRSA, which oversees the 340B Program. Eligible covered entity types are defined in section 340B(a)(4) of the PHS Act, as amended. Section 340B(a)(1) of the PHS Act instructs HHS to enter into pharmaceutical pricing agreements (PPAs) with manufacturers of covered outpatient drugs. Under section 1927(a)(5)(A) of the Social Security Act, a manufacturer must enter into an agreement with the Secretary that complies with section 340B of the PHS Act ''[i]n order for payment to be available under section 1903(a) or under part B of title XVIII of the Social Security Act for covered outpatient drugs of a manufacturer.'' When a drug manufacturer signs a PPA, it agrees that the prices charged for covered outpatient drugs to covered entities will not exceed statutorily defined 340B ceiling prices. 340B ceiling prices are based on quarterly pricing reports that manufacturers must provide to the Secretary through the Centers for Medicare & Medicaid Services (CMS) and are calculated and verified by HRSA.

Section 7102 of the Patient Protection and Affordable Care Act (Pub. L. 111–148), as amended by section 2302 of the Health Care and Education Reconciliation Act (Pub. L. 111–152), jointly referred to as the ''Affordable Care Act,'' added section 340B(d)(3) to the PHS Act, which requires the Secretary to promulgate regulations establishing and implementing a binding 340B ADR process for certain disputes arising under the 340B Program. Under the 340B statute, the purpose of the 340B ADR process is to resolve (1) claims by covered entities that they have been overcharged for covered outpatient drugs by manufacturers and (2) claims by manufacturers, after a manufacturer has conducted an audit as authorized by section 340B(a)(5)(C) of the PHS Act, that a covered entity has violated the prohibition on diversion or duplicate discounts.

The 340B ADR process is an *administrative* process designed to assist covered entities and manufacturers in resolving disputes regarding overcharging, duplicate discounts, or diversion, as outlined in statute. This 340B ADR process is also designed to provide stakeholders the opportunity to have disputes evaluated in a timely, consistent, and fair and equitable manner.

Historically, HHS has encouraged manufacturers and covered entities to work with one another to attempt to resolve disputes in good faith. HHS recognizes that most disputes that occur between individual parties are resolved in a timely manner without HRSA's involvement. The 340B ADR process is not intended to replace these good faith efforts and should be considered only when good faith efforts to resolve disputes independently have been exhausted and failed.

In 2020, HHS issued a final rule ((85 FR 80632, Dec. 14, 2020) herein referred to as the 2020 final rule), which was codified at 42 CFR 10.20 through 10.24. HRSA began implementing the 2020 final rule when it became effective on January 13, 2021, by accepting claims through the 340B ADR process. HRSA encountered policy and operational challenges with implementation of the 2020 final rule and issued a notice of proposed rulemaking (NPRM) on November 30, 2022 (87 FR 73516), to propose a revision to the 340B ADR process.

HHS is issuing this final rule to revise the current ADR process by modifying the regulations issued under the 2020 final rule. As HHS has indicated in the 2022 NPRM, the 2020 final rule poses policy and operational challenges that are described in this section.

First, HHS is finalizing that the 340B ADR process be revised to be more accessible, administratively feasible and timely than the 2020 final rule. The 340B statute at section 340B(d)(3)(B)(ii) of the PHS Act, requires the establishment of deadlines and procedures that ensure that claims are resolved fairly, efficiently, and expeditiously. This ADR process should be an expeditious and less formal process for parties to resolve disputes than the 2020 final rule. An ADR process governed by the Federal Rules of Evidence (FRE) and Civil Procedure (FRCP), as envisioned in the 2020 final rule, does not advance these goals. For example, potential petitioners, many of whom are safety net providers in under-resourced communities, may lack the resources to undertake ADR even if it would be in their best interest to do so. In addition, reliance on the FRE and FRCP could create unnecessary delays in what is intended to be a timely decision-making process. Finally, it is challenging to assign ADR Panel members with expertise in the FRE or FRCP. In implementing the 2020 final rule, HRSA received questions from stakeholders about the formality of the ADR process and the legal requirements under the FRCP for submitting a petition and accompanying documents, *e.g.,* whether the filings submitted must conform to the FRCP, which added to the complexity and difficulty of the ADR process.

HHS is finalizing an ADR process that is designed to assist covered entities and manufacturers in resolving disputes regarding overcharging, duplicate discounts, or diversion, as set forth in the 340B statute. HHS believes that for the ADR process to be workable, it needs to be accessible. HHS recognizes that many covered entities are small,

community-based organizations with limited means. These covered entities may not have the financial resources to hire an attorney to navigate the complex FRCP and FRE requirements and engage in a lengthy, trial-like process, as envisioned in the 2020 final rule. The 340B statute does not compel such a process. The 2020 final rule also institutes a minimum threshold of $25,000 or where the equitable relief sought will likely have a value of more than $25,000 to be met before the petition could be filed. Given the smaller, community-based nature of many covered entities, HHS believes that flexibility should be maintained with respect to the amount of damages and is therefore not finalizing a minimum threshold for accessing the ADR process. However, covered entities and manufacturers should carefully evaluate whether the ADR process is appropriate for minor or *de minimis* claims given the time and resource investment required of the parties involved. After deliberate consideration of these issues and review of the comments, HHS is finalizing rule provisions that create a more accessible process where stakeholders have equal access to the ADR process and can easily understand and participate in it without having legal expertise or expending significant resources.

Second, the 2020 final rule states that the Secretary of HHS shall establish a 340B ADR Board that consists of at least six members appointed by the Secretary with equal numbers from HRSA, CMS, and the HHS Office of the General Counsel (OGC). It also requires the HRSA Administrator to select three members from the ADR Board to form a 340B ADR Panel and that each 340B ADR Panel include one ex-officio, non-voting member (appointed by the Secretary) from OPA to assist the 340B ADR Panel. The 2020 final rule states that HRSA and CMS ADR Board members must have relevant expertise and experience in drug pricing or drug distribution and that the OGC ADR Board members must have expertise and experience in handling complex litigation. While the 340B Program is related to drug pricing and drug distribution, it is a distinct program that requires knowledge of the 340B statute and specific 340B Program operations. Few OGC, CMS, and HRSA employees (outside of OPA) have both the required expertise as well as the availability (in addition to their day-to-day responsibilities) to serve on such 340B ADR Panels.

Therefore, HHS is finalizing rule provisions requiring that 340B ADR Panel members should be subject matter experts from OPA to ensure Panel members have specific knowledge of the authorizing statute and the operational processes of the 340B Program (*e.g.,* registration and program integrity efforts) and the ability to dedicate a portion of their time to ADR Panel service. Moreover, decisions by subject matter experts from OPA are less likely to conflict with current 340B policy. All members on the 340B ADR Panel will undergo an additional screening prior to reviewing a specific claim to ensure that the 340B ADR Panel member was not involved in previous agency actions related to the claim (including previous 340B ADR Panel decisions).

Third, HHS is finalizing final rule provisions stating that prior to initiating the ADR process, parties must undertake good-faith efforts to resolve the disputed issues. Historically, HRSA has encouraged parties to work in good faith and covered entities, and manufacturers have not had significant numbers of disputes due to the success of these good-faith-resolution efforts. 340B Program administrative improvements have narrowed the areas where parties had, in the past, disagreed over 340B Program issues. For example, HRSA released the pricing component of the 340B Office of Pharmacy Affairs Information System (340B OPAIS) in February 2019, which, for the first time, provided 340B ceiling prices to authorized covered entity users. OPAIS implementation has provided the necessary transparency to decrease disputes specific to the 340B ceiling price and its calculation. Outside of an issue involving some manufacturers placing restrictions on certain covered entities use of contract pharmacies, OPA has only received three covered entity overcharge complaints since making 340B ceiling prices available to covered entities through 340B OPAIS. Of additional note, prior to the 2020 final rule, stakeholders were able to utilize an informal dispute resolution process to resolve disputes between covered entities and manufacturers (61 FR 65406, Dec. 12, 1996) (''1996 guidelines''). There have been only four informal dispute resolution requests since the publication of the 1996 guidelines. Of the four informal dispute resolution requests received, two were terminated by HRSA due to non-participation by one of the parties, another was dismissed due to lack of sufficient evidence, and the last was terminated because the parties disputed each other's attempts of good faith resolution. The relatively small number may also be attributed to the parties' successful attempts to resolve issues in good faith. With this very small number of past informal disputes, the increased transparency in 340B pricing data, and HRSA's encouragement that parties work to resolve issues in good faith, HHS is finalizing final rule provisions that include an ADR process more closely aligned with the process that was established in the 1996 guidelines, and less trial-like and resource-intensive—for both the participants and HHS—than that established in the 2020 final rule.

Also, in the time since Congress enacted the 340B ADR statutory provision, HRSA implemented its extensive audit program in 2012, which ensures that participating covered entities and manufacturers can demonstrate compliance with all 340B Program requirements. On average, HRSA conducts 200 covered entity audits each fiscal year including child/associate sites and contract pharmacies associated with the covered entities, and issues findings in three areas: eligibility, diversion, and duplicate discounts. These findings vary in terms of severity—from covered entities not having the correct information in the 340B OPAIS to the diversion of 340B drugs to individuals who are not patients of the covered entity. HRSA conducts approximately five manufacturer audits each year and makes findings related to manufacturers charging above the 340B statutorily required ceiling price and manufacturers not reporting the required 340B pricing data to HRSA. Since HRSA began auditing covered entities and manufacturers, HRSA has identified 340B compliance concerns that would have previously been disputed. In addition to the extensive audit program, HRSA has also developed a comprehensive program integrity strategy to ensure compliance among all stakeholders participating in the 340B Program. These activities include quarterly checks of 340B Program eligibility, a self-disclosure and allegation process, which involves communication between OPA and the stakeholders regarding the compliance issue, and spot checks of covered eligibility documentation including contracts with State and local governments and contract pharmacy agreements.

Further, manufacturers are required to audit a covered entity prior to filing an ADR claim pursuant to section 340B(d)(3)(B)(iv) of the PHS Act. Since November 2022, HRSA has received two final audit reports from the manufacturers. The infrequency of finalized manufacturer audit reports along with the requirement that

manufacturers audit covered entities prior to filing an ADR claim suggests that the number of manufacturer ADR claims will be low.

HRSA's impartial facilitation of good faith resolution efforts have allowed parties to take advantage of opportunities for open communication to better understand each other's positions and come to an agreement, without need for formal intervention by HRSA (*e.g.,* through a HRSA targeted audit).

Fourth, the ADR process should be reserved for those disputes set forth in the statutory ADR provision (overcharge, diversion, or duplicate discount). For example, a manufacturer that audited a covered entity may report its findings of alleged duplicate discounts identified by specific purchasing patterns over a period of time. The covered entity may disagree with the audit assessment of purchases. In this example, the matter would be best resolved through the ADR process as it involves an alleged duplicate discount violation.

This final rule aligns with the statutory provisions by outlining the specific types of claims that can be brought forth through the ADR process—claims for overcharge, diversion or duplicate discounts.

Fifth, HHS believes that there should be an opportunity for dissatisfied parties to seek reconsideration of the 340B ADR Panel's decision by HRSA. The 2020 final rule did not include such a process. This final rule establishes an appeals or reconsideration process option that would be made available to either party.

Therefore, based on these issues with the 2020 final rule, HHS is finalizing in this rule to (1) establish a more accessible ADR process that is reflective of an administrative process rather than a trial-like proceeding; (2) revise the structure of the 340B ADR Panel so that it is comprised of 340B Program subject-matter experts; (3) ensure that the parties have worked in good faith before proceeding through the ADR process; (4) more closely align the ADR process with the provisions set forth in the 340B statute (diversion, duplicate discounts, and overcharges); and (5) include a reconsideration process for parties dissatisfied with a 340B ADR Panel's decision.

HRSA received 112 non-duplicative comments and, after consideration of the comments received, HHS has developed this final rule.

II. Summary of Proposed Provisions and Analysis and Responses to Public Comments

Part 10 of title 42 of the Code of Federal Regulations has been revised to incorporate changes to the 340B ADR process, which is described below in conjunction with the comments received to each such section.

General Comments

Comments received during the comment period addressed general issues that were raised in the preamble of the NPRM. We have summarized these general comments and have provided a response below.

Comment: The 2020 final rule instituted a minimum threshold of $25,000 or where the equitable relief sought would likely have a value of more than $25,000 as an ADR petition prerequisite. In the NPRM, HHS did not propose a minimum threshold for accessing the 340B ADR process. Many covered entity comments favored eliminating the threshold and argued that the 340B ADR process would be more accessible and would help ensure all providers could seek relief through the 340B ADR process. Most manufacturer comments were against eliminating the minimum threshold and argued that *de minimis* claims and frivolous claims would be filed through the 340B ADR process.

Response: Many 340B covered entities are small, rural or health care providers in underserved areas. The 340B ADR process should be accessible and available to these and all other stakeholders regardless of their volume of purchases or sales, and that flexibility should be maintained with respect to the amount of damages demonstrated when filing a 340B ADR claim; therefore, HHS is finalizing this provision as proposed without a minimum threshold for accessing the 340B ADR process. As noted above, HHS recognizes that most disputes that occur between individual parties are resolved in a timely manner without HRSA's involvement. The 340B ADR process should be considered only when good faith efforts to resolve disputes have been exhausted and failed.

Comment: The 2020 final rule established the 340B ADR process as reliant on the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE). These rules govern civil proceedings and the introduction of evidence at civil and criminal trials in Federal courts. In the NPRM, HHS proposed removing reliance on these rules as the statute does not compel reliance on the FRCP and FRE and many covered entities lack the expertise in these legal rules as well as the resources to hire outside counsel to navigate them. Conflicting comments were received related to removal of reliance on the FRCP and FRE for the 340B ADR process. Some covered entity stakeholders appreciated the proposal to make the process more accessible and administrative rather than trial-like. Most manufacturer commenters raised concerns that HHS had not proposed an alternative procedural framework or evidentiary standards in the absence of the Federal Rules asserting that without standards, the ground rules would be subject to dispute in each case.

Response: HHS believes the new 340B ADR process will be a more accessible process, especially for covered entities with fewer resources, and will not require legal expertise during the claim resolution process. This approach will be more accessible to stakeholders and will use fewer stakeholder and government resources to resolve disputes. As such, this final rule sets up an accessible and comprehensible process without needing to invoke the more elaborate procedures available under the FRCP and FRE.

Comment: Some covered entity commenters approved of the proposal to automatically transfer claims under the 2020 final rule to the new process.

Other commenters disagreed that claims should be automatically transferred to the new process. These commenters specifically argued that HHS should proceed to handle the claims that are currently in the queue under the 2020 final rule as opposed to automatically transferring them to the new process. Further, one covered entity commenter generally stated that it was unclear whether HHS would be permitted under administrative law principles to transfer claims to the new process. The commenter suggested that such a transfer would conflict with the general principle that agencies must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding.

Most manufacturer commenters disagreed, arguing that all pending ADR claims should be dismissed upon issuance of a final rule, and claimants should be required to refile claims if they wished to initiate new ADR proceedings.

Response: After consideration of the comments received, HHS is finalizing this provision as proposed to provide for the automatic transfer of any pending claims to the new process. The decision to automatically transfer any

claims that were submitted pursuant to the 2020 final rule and that are pending will minimize burden on all parties involved. For petitioners, it will mean that they do not have to resubmit claims under the new process. It will ensure the continuity of the 340B ADR process for the stakeholders involved in claims under the 2020 final rule, despite the new process as envisioned in this final rule.

In particular, we disagree that automatically transferring claims to the new process will run afoul of any administrative law principles. The general presumption that agencies apply the law in effect at the time a decision was made is of no moment here, because nothing in this final rule changes the substantive law governing disputes covered by the 340B ADR process. Transferring pending claims to the new process ''takes away no substantive right but simply changes the tribunal that is to hear the case''; in such a situation, ''[p]resent law normally governs.'' *Landgraf* v. *USI Film Prod.,* 511 U.S. 244, 274 (1994) (cleaned up). As the Supreme Court has explained, a law ''govern[ing] the transfer of an action instituted prior to that statute's enactment'' may ''be applied in suits arising before their enactment without raising concerns about retroactivity.'' *Id.* at 275. ''Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule [is] instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.'' *Id.*

This rule modifies procedural requirements for the 340B ADR process. It does not impair any rights possessed by parties when they acted, increase or affect their liability for past conduct, or impose new duties on the parties for already completed transactions. The changes in this final rule do not affect the substance of claims at issue for the ADR panel and accordingly could not be considered to have retroactive application that affects potential consequences understood by the parties when they began the 340B ADR process.

Claims that are automatically transferred will be first in the queue to be reviewed once this final rule becomes effective. Within a specified time period, HHS will allow petitioners of claims submitted under the 2020 final rule to submit additional information or revise their petition, as necessary, in support of their original claim. Petitioners will also be able to withdraw their pending claims. HRSA will work with affected parties to the extent that additional information is needed as part of the process outlined in this final rule. Details concerning this automatic transfer of claims will be provided to affected parties once this final rule becomes effective.

Comment: Many manufacturer commenters requested that HHS revise the 1996 manufacturer audit guidelines before it issues regulations on ADR. They stated that the guidelines are problematic because they impose onerous and unnecessary barriers on a manufacturer's ability to audit a covered entity for 340B compliance.

Response: Revisions to the 1996 manufacturer audit guidelines are outside the scope of this final rule. The requirement for a manufacturer to conduct an audit prior to initiating the 340B ADR process is a statutory requirement (section 340B(d)(3)(B)(iv) of the PHS Act). This rule is not meant to address how a manufacturer should conduct the audit—only that a manufacturer does conduct the audit prior to initiating the ADR process. Multiple manufacturers have utilized the 1996 manufacturer audit guidelines to conduct audits of covered entities. In the last 5 years, six have followed the guidelines to request audits of covered entities. During that same time frame, HRSA has not denied a request for a manufacturer audit of a covered entity, thereby, demonstrating the guidelines are not overly burdensome or present any barriers to a manufacturer's ability to perform an audit of a covered entity. Further, the guidelines present a clear and transparent process that may decrease burden on both parties with open dialogue and present an objective review of a covered entity's compliance.

Comment: Several manufacturer commenters raised that HHS has failed to establish procedures for manufacturers to issue refunds to covered entities for overcharges. They explained that this is a prerequisite to the 340B ADR process in order for it to be fair, efficient, and expeditious. Relatedly, they stated that there is a need for HHS to address refund procedures that permit offsets of covered entity overpayments and underpayments to a manufacturer.

Response: Specific procedures for refunds are outside the scope of this final rule, as the authority for this final rule directly relates to the development of an administrative process for the resolution of claims as described in section 340B(d)(3) of the PHS Act.

Subpart A—General Provisions

Section 10.3 Definitions

In the NPRM, HHS sought to add or revise the following definitions: ''Administrative Dispute Resolution Panel (340B ADR Panel),'' ''340B Administrative Dispute Resolution Process,'' ''claim,'' ''consolidated claim,'' ''joint claim,'' and ''Office of Pharmacy Affairs.'' HHS did not receive substantive comments on this section, and we are finalizing this section as proposed. HHS received numerous comments on defining the types of claims that could be adjudicated through the 340B ADR process, and HHS addresses those comments in § 10.21.

Subpart C—Administrative Dispute Resolution

Section 10.20 340B Administrative Dispute Resolution Panel

(a) Members of the 340B ADR Panel

The 2020 final rule states that the Secretary shall establish a 340B ADR Board consisting of at least six members appointed by the Secretary with equal numbers from HRSA, CMS, and the HHS OG C. It also requires the HRSA Administrator to select three members from the ADR Board to form a 340B ADR Panel and that each 340B ADR Panel include one ex-officio, non-voting member (appointed by the Secretary) from OPA to assist the 340B ADR Panel. HHS proposed to revise the composition of the 340B ADR Panel that would review and make decisions for claims filed by covered entities and manufacturers. In the NPRM, HHS proposed that the Secretary appoint a roster of no fewer than 10 eligible individuals (Roster) consisting of OPA staff to serve on the 340B ADR Panels. Under the proposed rule, the OPA Director, or designee, selects at least three members for each 340B ADR Panel from the Roster of appointed staff; has the authority to remove an individual from the 340B ADR Panel and replace such individual; selects replacement members should a 340B Panel member be removed or resign; and screens for any potential conflicts of interests. After consideration of the comments received, HHS is finalizing this provision as proposed. HHS has addressed specific comments with respect to this section below.

Comment: Several covered entity commenters favored the proposal to have OPA staff serve as the 340B ADR Panel members, because the staff understand the intricacies of the 340B Program. They explained that the 340B Program is complex and it is important that individuals understand the complexities of the 340B Program to adjudicate these disputes in order to ensure a fair outcome. Some concerns were raised that the workload may be too much for a small OPA staff, and that

an insufficient number of available panelists could lead to delayed decisions. Some covered entity commenters who favored OPA staff serving on 340B ADR Panels also recommended that other staff within HRSA could serve on 340B ADR Panels, such as staff working on programs with grantees that participate in the 340B Program.

Response: HHS agrees with the commenters that OPA staff should serve on 340B ADR Panels given their specialized knowledge and expertise of the 340B Program. Therefore, HHS is finalizing this provision as proposed. HHS also appreciates the commenters' concerns regarding the workload of OPA staff and the suggestion to include other HRSA staff that work with grantees participating in the 340B Program. However, as stated in the preamble of the proposed rule, OPA staff are subject matter experts and have years of experience with complex 340B matters involving covered entities and manufacturers. Given this expertise, HHS continues to believe that OPA staff are best suited to serve on 340B ADR Panels to ensure that the process is efficient and that claim reviews are handled in a timely fashion. This final rule limits 340B ADR Panel participation to OPA staff who have daily exposure to the complex issues facing both covered entities and manufacturers, to ensure there will be equitable, consistent, and fair 340B ADR adjudications. In addition, the OPA Director is aware of the workload of each OPA staff member and will be able to appropriately assign 340B ADR Panel members taking into consideration existing workload demands and priorities.

Comment: Some manufacturer commenters opposed OPA staff serving on 340B ADR Panels. These commenters argued that all OPA staff are involved in audits of covered entities and manufacturers, and with at least 10 staff planned to be on the ADR Roster under the proposed rule, there may be too many conflicts of interests and, in turn, the possibility and perception of bias may arise. Moreover, manufacturers opposing this policy were concerned that, given OPA's regular and extensive involvement in the day-to-day administration of the 340B Program, it may be difficult for OPA staff to approach adjudications without the appearance that they may be predisposed to particular views on relevant issues. Some commenters suggested Administrative Law Judges be the adjudicators of the 340B ADR process because they have the professional background, legal training and independence needed to resolve claims in a fair, consistent, and well-reasoned manner.

Response: HHS continues to believe that a Panel of OPA staff members who are steeped in 340B knowledge and experience and who can provide a consistent application of 340B policies will ensure a more efficient ADR adjudication process. As such, HHS is finalizing this provision as proposed. OPA staff members work to provide oversight of the 340B Program without bias—working with both manufacturers and covered entities in a manner that is impartial to the stakeholders involved. In addition, staff members work toward the goal of ensuring the integrity of the 340B Program and they do so without prejudice toward particular stakeholders. Those serving as 340B ADR Panel members will be fair and make consistent decisions in a well-reasoned manner using the 340B statute, applicable regulations, policies, and guidance documents. OPA staff have demonstrated their ability to follow the principles of fairness, consistency, transparency of applicable statute, regulations, policies, and guidance in their performance of covered entity and manufacturer audits. The breadth of experience, which we believe far outweighs any risks of perceived bias, among the OPA staff members serving on a 340B ADR Panel will ensure fairness, consistency, and transparency in ADR decisions. In addition, the OPA Director, in consultation with government ethics officials, will consider financial interest(s), current or former business or employment relationship(s), or other involvement of a prospective panel member or close family member who is either employed by or otherwise has a business relationship with an involved party, subsidiary of an involved party, or particular claim(s) expected to be presented to the prospective panel member.[1]

In addition, specialized legal knowledge or training is not necessary for 340B ADR Panel members to effectively function in their role as the 340B ADR process is an administrative process that is best served by having 340B subject matter experience rather than legal experience. HHS disagrees with the recommendation that Administrative Law Judges should be appointed as adjudicators of the 340B ADR process.

The 340B ADR process is different, as it is designed as a process to resolve disputes between covered entities and manufacturers and in this final rule, HHS is establishing 340B ADR Panels comprised of OPA staff, who are uniquely suited to handle the complexities of the 340B Program, given their day-to-day administration of the Program. Processes are well established to provide staff opportunity for continuous learning and training on program implementation and oversight. OPA staff also have distinct knowledge of the 340B statute, laws, and policies as they apply that subject matter expertise throughout the work that is conducted on a daily basis to oversee the program and therefore will be able to handle such disputes effectively and efficiently.

Comment: Some manufacturer commenters argued that the new proposed rule has the same Appointments Clause and structural constitutional defects as the 2020 final rule. They stated that there is no mechanism for review of a 340B ADR Panel decision by a principal officer, appointed by the President with Senate confirmation, before that decision becomes ''final agency decision.''

Response: HHS disagrees. Under this final rule, the Secretary will appoint a roster of eligible individuals (Roster) consisting of staff within OPA to serve on a 340B ADR Panel. When a 340B ADR claim is presented, the OPA Director will select three members from the Roster to serve on a 340B ADR Panel to review claims and make final agency decisions that will be binding on the parties involved, unless invalidated by an order of a Federal court. As discussed further in § 10.20(c), the Secretary, who is appointed by the President and Senate-confirmed, has the authority to intervene in the 340B ADR process at any time, including the ability to remove any individual from the Roster of 340B ADR Panelists for any reason. The Secretary had inherent authority to take these same actions under the 2020 final rule, and the codified regulatory text now explicitly addresses this authority. Specifically, as outlined further below, any 340B Panel decision or reconsideration decision regarding a 340B ADR Panel's decision will be effective 30 business days from issuance and serve as the final agency decision unless within 30 business days of issuance, the Secretary makes a determination that the Secretary will review the decision.

(b) Conflicts of Interest

In the NPRM, HHS proposed that the OPA Director would ensure that each 340B ADR Panel member is screened prior to reviewing a claim and that there

[1] ''Confidential Financial Disclosure Guide: OGE 450.'' U.S. Office of Government Ethics. October 2023.

are no conflicts of interest between the parties involved in the dispute and the 340B ADR Panel member. The conflict-of-interest review includes financial interest(s), current or former business or employment relationship(s), or other involvement of a prospective panel member or close family member who is either employed by or otherwise has a business relationship with an involved party, subsidiary of an involved party, or particular claim(s) expected to be presented to the prospective panel member. Under the proposed rule, members of the 340B ADR Panel will also undergo additional screening prior to reviewing a specific claim to ensure that the 340B ADR Panel member was not involved in the previous agency action, including previous 340B ADR Panel decisions, concerning the specific issue in the claim. HHS received several comments on this provision, which are summarized below. After a review and analysis of the comments, HHS is clarifying the additional conflict of interest screening as discussed in more detail below.

Comment: Both manufacturer and covered entity commenters agreed that HHS should evaluate conflicts of interest with regard to a 340B ADR Panel member; however, they recommended that the parties should have the ability to make objections to a proposed panelist. Some commenters mentioned the small size of the OPA staff may make having too broad of screening for conflict of interest, such as having worked on an audit, difficult to fill a panel with subject matter experts. Commenters also requested the policies and procedures for screening panel members be publicly outlined.

Response: HHS will inform the parties involved in the ADR of Panel members for that specific claim. The OPA Director has full knowledge of a Panel member's workload and will select Panel members for each claim, which will also be based on the OPA Director's awareness of any potential conflicts of an OPA staff member, including financial interest conflicts, current or former business relationships or other involvement. We believe that the process sufficiently addresses the need to screen for conflicts and allowing the parties to object to proposed panelists or the specific policies or procedures for screening panel members would unduly lengthen the 340B ADR process. To the extent a conflict arises regarding an assigned panelist, the OPA Director is authorized to make changes to the panel composition. The commenters also raised concern about whether the additional conflict of interest screenings would make it difficult to fill 340B ADR Panel positions, given the small staff within OPA. In order to make this process fair, efficient and transparent, HHS is retaining the policy that a conflict of interest screening will be conducted on all 340B ADR Panel members to ensure there is no conflict of interest with respect to financial conflicts or current/former business relationships or other involvement of a prospective panel member or close family member who is either employed by or otherwise has a business relationship with an involved party, subsidiary of an involved party in an 340B ADR claim. However, based on the comments received, HHS is clarifying that the additional screening in § 10.20(b)(2) will be conducted to ensure that a 340B ADR Panel member was not directly involved in a decision concerning the specific issue of the ADR claim as it relates to the specific covered entity or manufacturer involved, including previous 340B ADR Panel decisions. This clarification responds to the concerns of the commenters and balances the fact that 340B ADR Panel members will be selected from a relatively small staff. Indirect or tangential involvement in matters affecting a specific covered entity or manufacturer will not be considered a conflict of interest.

To the extent that any significant conflict issue is raised outside of those specifically addressed in § 10.20(b), the OPA Director or the Secretary still have the discretion to remove a 340B ADR Panel member (as addressed in § 10.20(a) and (c) of this final rule, respectively).

(c) Secretarial Removal Power

The NPRM proposed to codify in regulatory text the Secretary's authority to remove any individual from the Roster of 340B ADR Panelists for any reason, including from any 340B ADR Panel to which the individual has already been assigned. After a review of the comments received, HHS is modifying this provision by clarifying the Secretary's role in the 340B ADR process.

To respond to commenter requests for transparency, HHS commits to publishing these policies and procedures for screening panel members on a HRSA public-facing website within 120 calendar days of the publication of this final rule and, likewise, in the event that these policies and procedures are modified, HHS commits to publishing these policies and procedures for screening panel members on a HRSA public-facing website within 120 calendar days of such modification.

Comment: Many manufacturers argued that while the preamble to the proposed rule suggests that the Secretary would have the inherent authority to review and reverse or alter the 340B ADR Panel's decision, it was not explicitly included in the proposed regulatory text. Further, they stated that the Secretary does not exercise sufficient control over ADR panelist decisions.

Response: There are no restrictions on the Secretary's oversight or supervision over the 340B ADR process. The Secretary has the authority to intervene in the 340B ADR process at any time, has the authority to remove Panel members from the Roster, and has the authority to review, reverse, or alter any decision made by the 340B ADR Panel or any reconsideration decision made by the HRSA Administrator as outlined in § 10.24. In consideration of the comments received, HHS is modifying this provision to make explicit that the Secretary has the authority to review, alter, reverse, or uphold any 340B ADR Panel or reconsideration decision. Specifically, as outlined further below, any 340B Panel decision or reconsideration decision regarding a 340B ADR Panel's decision will be effective 30 business days from issuance and serve as the final agency decision unless within 30 business days of issuance, the Secretary makes a determination that the Secretary will review the decision. If the Secretary reviews and reverses, alters, or upholds any 340B ADR Panel or reconsideration decision, the Secretary's decision will serve as the final agency decision and will be binding upon the parties involved in the dispute, unless invalidated by an order of a Federal court.

(d) Duties of the 340B ADR Panel

The proposed rule outlined the duties of the 340B ADR Panel, which included:

(1) reviewing and evaluating claims, including consolidated and joint claims, and documents and information submitted by covered entities and manufacturers;

(2) reviewing and possibly requesting additional documentation, information, or clarification of an issue from any or all parties to make a decision;

(3) evaluating claims based on information received, unless, at the 340B ADR Panel's discretion, the nature of the claim necessitates that a meeting with the parties be held;

(4) consulting with other Federal agencies while reviewing the claim, at the 340B ADR Panel's discretion; and

(5) making decisions on each claim.

There were no substantial comments received on this provision; therefore, HHS is finalizing the provision as proposed.

Section 10.21 Claims

(a) Claims Permitted

In accordance with section 340B(d)(3) of the PHS Act, 340B ADR claims may include: (1) claims by a covered entity that it has been overcharged by a manufacturer for a covered outpatient drug; and (2) claims by a manufacturer, after it has conducted an audit of a covered entity pursuant to section 340B(a)(5)(C) of the PHS Act, that the covered entity has violated section 340B(a)(5)(A) of the PHS Act, regarding the prohibition of duplicate discounts, or section 340B(a)(5)(B) of the PHS Act, regarding the prohibition of the resale or transfer of covered outpatient drugs to a person who is not a patient of the covered entity. The NPRM proposed that all claims must be specific to the parties identified in the claims. Based on the comments received, HHS is finalizing this provision as proposed. HHS has also decided to provide an illustrative but not exhaustive list of examples of the types of overcharges, diversion, and duplicate discount claims that may be eligible for the 340B ADR process.

Comment: Several covered entity commenters argued that manufacturers should not be allowed to bring claims related to a covered entity's eligibility and suggested that manufacturers cannot pursue claims alleging Medicaid managed care duplicate discount violations. These commenters believe that these types of claims are outside those permitted under the ADR statute.

Response: Generally, HHS agrees with the exclusion of claims regarding covered entity eligibility but disagrees with the commenters on claims related to duplicate discounts in Medicaid managed care. This final rule aligns claims to those expressly set forth in section 340B(d)(3) of the PHS Act: (1) claims by covered entities that they have been overcharged by manufacturers for drugs purchased under this section and (2) claims by manufacturers, after a manufacturer has conducted an audit of a covered entity, as authorized by section 340B(a)(5)(C) of the PHS Act, that a covered entity has violated the prohibitions against duplicate discounts and diversion (sections 340B(a)(5)(A) and (B) of the PHS Act). As duplicate discounts can occur with drugs subject to rebates under both Medicaid fee-for-service and Medicaid managed care, HHS declines to exclude Medicaid managed care claims from the 340B ADR process. In addition, although the eligibility of a covered entity is generally outside of the scope of the 340B ADR process; if resolution of a diversion claim depends in whole or in part on whether a claimant is an eligible covered entity, then that claim may proceed through the 340B ADR process, given that the 340B statute permits claims for overcharges, diversion, and duplicate discounts. In this final rule, the role of the 340B ADR Panel is to independently review and apply the 340B statute and applicable regulations, policies, and guidance documents to the case-specific factual circumstances at issue in an overcharge, diversion, or duplicate discount dispute.

Comment: Some covered entity commenters urged HHS to reinstate language from the 2020 final rule to make clear that covered entities may bring an overcharge claim in situations in which a manufacturer has limited the covered entity's ability to purchase a covered outpatient drug at or below the 340B ceiling price.

Response: HHS agrees and has modified § 10.21(a)(1) to further explain that an overcharge claim generally includes claims that a manufacturer has limited the covered entity's ability to purchase covered outpatient drugs at or below the 340B ceiling price.

Comment: Some covered entity commenters recommended that the final rule include a definition for the term ''overcharge,'' to mean an attempt to collect a price in excess of the 340B price for a covered outpatient drug, any attempt to cause a drug wholesaler to decline to offer 340B pricing on a covered outpatient drug to a covered entity, and any refusal by a manufacturer to sell a covered outpatient drug at 340B pricing.

Response: When an overcharge claim is presented before a 340B ADR Panel, the Panel will follow the 340B statute, relevant case law, all applicable regulations, and consider 340B policies and guidance documents when evaluating 340B ADR claims. One example of an overcharge claim in the 340B ADR process would be a claim that a manufacturer has limited the covered entity's ability to purchase covered outpatient drugs at or below the 340B ceiling price or the manufacturer does not offer the 340B ceiling price. We do not believe that an explicit definition of the term ''overcharge'' is needed in light of the process discussed above for addressing an overcharge claim.

Comment: Many manufacturer commenters objected to the lack of an explicit definition in the proposal for the terms ''patient'' or ''diversion.'' They explained that covered entities are prohibited from selling or otherwise transferring drugs purchased under the 340B Program to a person who is not a patient of the entity in accordance with section 340B(a)(5)(B) of the PHS Act. These commenters believe that HRSA should revise and clarify its current guidance (61 FR 55156 (Oct. 24, 1996)), to strengthen administration of the 340B Program, including the 340B ADR process and the parties' ability to work together to resolve disputes in good faith as proposed in § 10.21(b).

Response: Revision of the 1996 patient definition guidance is outside the scope of this rule. When a diversion claim is presented before a 340B ADR Panel, the Panel will follow the 340B statute and all applicable regulations, and consider 340B policies and guidance documents when evaluating 340B ADR claims. Examples of a diversion claim that may be submitted (after a manufacturer has conducted an audit of a covered entity), include but are not limited to: (1) transferring of covered outpatient drugs to a patient where there was no record of the individual's health care or no provider relationship or (2) transferring covered outpatient drugs to an individual who is an inpatient. Similarly, examples of a duplicate discount claim include but are not limited to: (1) if it is found after an audit of a covered entity that the covered entity billed Medicaid without the site being listed on the Medicaid Exclusion File and the manufacturer paid a State rebate or (2) if it is found after an audit of a covered entity that the manufacturer paid a State rebate and the covered entity had incomplete or inaccurate information on the Medicaid Exclusion File.

(b) Requirements for Filing a Claim

As proposed in the NPRM, a covered entity or manufacturer must file a 340B ADR claim in writing to OPA within 3 years of the date of the alleged violation. HHS also proposed that any file, document, or record associated with the claim that is the subject of a dispute must be maintained by the covered entity and manufacturer until the date of the final agency decision. Before filing a claim, each stakeholder must provide appropriate documentation, including documentation of communication with the opposing party to resolve the matter in good faith. In the case of a covered entity, the covered entity must provide documentation to support that it has been overcharged by a manufacturer, in addition to any other documentation requested by OPA. Covered entities are not permitted to file a claim against multiple manufacturers.

A manufacturer must provide documents that show it audited the covered entity and that are sufficient to support its claim that a covered entity has violated the prohibition on diversion and/or duplicate discounts, in addition to any other documentation as may be requested by OPA. HHS received several comments on these provisions and considered them carefully. For the reasons detailed below, HHS is finalizing these provisions as proposed.

Comment: Some covered entities commenters requested clarification that the 3-year records limitation period begins on the date of sale or payment at issue except when the manufacturer issues a restatement of the average manufacturer price (AMP), best price, customary prompt pay discounts, nominal prices, or other data that affects the 340B ceiling prices. Some of these commenters recommended that HHS include an undue hardship exemption to the 3-year limitation on claims to benefit small rural covered entities. They explain that small rural providers may submit ADR claims without outside counsel. Further, they state that alongside other challenges that a covered entity could be facing, pulling together the needed documentation to file a claim could be burdensome for covered entities.

Some manufacturer commenters expressed that because of the manufacturer audit requirement, which may take significant time to complete, the final rule should ''toll'' the 3-year period for manufacturer ADR claims from the point when a manufacturer first seeks to conduct an audit until the audit concludes with the completion of the audit report.

Response: While HHS believes that the 3-year limit is sufficient, there may be times when the initial reviewer will account for extenuating circumstances. For example, the timeline for manufacturer audits of covered entities depends on a variety factors, which may affect when they are finalized. Another example is when data affecting the 340B ceiling price are revised, such as where AMP or best price are corrected or restated, an alleged violation would have not occurred until the data were revised. These examples are not exhaustive but illustrate situations that may warrant flexibilities. In addition, under the current ADR process, the 3-year time period has proved to be sufficient for the parties. Noting these flexibilities, HHS is finalizing the provision as proposed.

Comment: Most commenters were generally supportive of the proposal that documentation of ''good faith'' efforts is required before a party can initiate a claim through the 340B ADR process. However, some manufacturer commenters believe that HHS should specify the types of documents required to evidence ''good faith'', including, but not limited to, documentation demonstrating that the covered entity has contacted the manufacturer about the potential issue and has given the manufacturer sufficient notice of a potential claim before initiating 340B ADR process.

Some covered entity commenters recommend that HHS remove the ''good faith'' requirement before filing a claim. Specifically, they argue that the act of overcharging a covered entity could not be an act of good faith and engaging with the manufacturer would be futile and cause unnecessary delay. These commenters argue that a ''good faith effort'' prerequisite to filing a claim requires the agency to make difficult determinations regarding whether an attempt at resolution was made in ''good faith.''

Response: After consideration of the comments received, HHS is finalizing this provision as proposed. Given the resources required to pursue an ADR claim, HHS encourages covered entities and manufacturers to work in good faith to resolve disputes. Good faith attempts include for example, at least one instance of written documentation demonstrating that the initiating party has made attempts to contact the opposing party regarding the specific issues cited in the ADR claim. The requirement to engage in good faith efforts may resolve disputes before the need to file a petition in many cases. In addition, HHS has historically encouraged manufacturers and covered entities to work with each other to attempt to resolve disputes in good faith, and most disputes have been resolved in a timely manner without needing HRSA's involvement. Also, the 340B ADR process is not intended to replace these good faith efforts and should be considered only when good faith efforts to resolve disputes have been exhausted and failed.

Good faith efforts and documentation can include communication between parties to obtain clarifications or to provide explanations that may not be readily apparent and may provide perspective to either party that may help mitigate concerns. For example, HRSA currently has a process in place when a covered entity is unable to obtain a 340B price from a manufacturer. In this case, HRSA can facilitate good faith efforts between the parties, and oftentimes help them resolve disputes, which typically are as a result of an error or misunderstanding.

Comment: Some manufacturer commenters encouraged HHS to protect the proprietary and confidential components of all parties' information throughout the 340B ADR process. They explained that for the 340B ADR process to work efficiently, parties need assurances that the proprietary and confidential information that they disclose will not be made publicly available.

Response: HHS will work to protect the proprietary and confidential information of the parties to the maximum extent that it is able to pursuant to current law.

(c) Combining Claims

The NPRM proposed that two or more covered entities may jointly file claims of overcharges by the same manufacturer for the same drug. The NPRM also provided that an association or organization may file on behalf of one or more covered entities representing their interests pertaining to overcharging by a single manufacturer for the same drug(s). The proposed rule provided specific parameters for covered entities filing joint claims and for associations/organizations filing claims on behalf of one or more covered entities, including that each covered entity meets the requirements for filing the ADR claim and that there is documentation of each covered entity's consent.

The NPRM also proposes that a manufacturer or manufacturers may request to consolidate claims brought by more than one manufacturer against the same covered entity if each manufacturer could individually file a claim against the covered entity, consents to the consolidated claim, meets the requirements for filing a claim, and the 340B ADR Panel determines that such consolidation is appropriate and consistent with the goals of fairness and economy of resources. The statutory authority for implementing the 340B ADR process does not address consolidated claims on behalf of manufacturers by associations or organizations representing their interests. After a careful review and consideration of the comments received, HHS is finalizing this provision as proposed.

Comment: Many covered entities commenters indicated that the NPRM improperly limits claims brought by associations and organizations representing covered entities to only those covered entities that consent to the claim being asserted on their behalf. These commenters argued that the

criteria for inclusion in an organizational claim in the 340B statute is merely membership in the organization. Representation by associations, regardless of whether the entity consents, allows covered entities to access the process more easily. They argued that requiring consent from each member of an organization introduces unnecessary resource and time burden—and could significantly delay the filing of claims that are sometimes time sensitive.

Response: An ADR claim could substantively affect a covered entity's ability to recover for 340B overcharges, as well as a covered entity's relationship with a manufacturer. However, after consideration of the comments, HHS, will permit associations or organizations filing a claim on behalf of its members to submit an attestation, rather than submitting signatures from each individual covered entity, that they have confirmed that all of the individual covered entities have agreed to be part of the ADR claim.

As part of the initial review of the claim, OPA will review the attestation statement submitted by the organization or association. If attestation documentation is missing, OPA will follow-up to obtain the attestation.

Comment: A few manufacturer commenters requested that HHS prohibit covered entities or manufacturers from asserting any individual claim that overlaps with a consolidated claim or joint claim. Commenters also urged HHS to clarify that the requirement for a joint claim by covered entities must involve the ''same drug or drugs,'' which would mean that the alleged overcharges must involve substantially the same national drug code (NDC) and quarters.

Response: As part of the initial claim review, OPA will evaluate whether an individual claim would overlap with a consolidated claim or joint claim. If an overlap exists, OPA will contact the parties involved and request that they resolve the discrepancy. In addition, the review will also ensure that the alleged overcharge involves the same NDCs for joint claims.

Comment: Several manufacturer commenters argued that HHS should recognize manufacturers' ability to pursue claims through a trade association or agent of their choice. The statute required HHS to allow the combining of claims and permit claims to be brought on behalf of covered entities by associations or organizations—however, commenters assert that the statute does not preclude HHS from extending this ability to manufacturers. Commenters also argued that few manufacturers will utilize the 340B ADR process due to the onerous requirements of the 2020 final rule and the audit requirement placed on them. They explained that this requirement would further preclude manufacturers from accessing the 340B ADR process by requiring them to wait several years for each manufacturer to audit a covered entity before bringing a consolidated claim.

Response: Section 340B(d)(3)(B) of the PHS Act permits associations to file joint ADR claims on behalf of covered entities; however, it does not include similar language for associations to file consolidated claims filed on behalf of manufacturers. In addition, due to the requirement that a manufacturer must first audit a covered entity before submitting an ADR claim, it would be difficult to have each manufacturer of the association or organization conduct an audit of a covered entity before filing a claim. Therefore, HHS is finalizing this provision as proposed. Regarding the commenter's argument about the audit requirements, HHS does not have the authority to waive this statutory requirement. Section 340B(d)(3)(B)(iv) of the PHSA requires that a manufacturer conduct an audit of a covered entity pursuant to subsection (a)(5)(C) as a prerequisite to initiating the 340B ADR process against a covered entity.

(d) Deadlines and Procedures for Filing a Claim

The proposed rule set forth the deadlines and procedures for filing a claim, including that OPA would conduct an initial review to determine whether the claim meets certain requirements as set forth by the statute and regulations. HHS proposed that OPA staff reviewing the initial claim review may not be appointed to serve on the 340B ADR Panel reviewing the specific claim. Additionally, under the proposed rule, OPA could request additional information of the initiating party and the party would have 20 business days from the receipt of the request to respond and if the party does not respond (or request and receive an extension to respond during that time period), the claim would not move forward to the 340B ADR Panel for review. The proposed rule also indicates that a written response would be sent to the initiating party once the claim is complete and OPA would send that verification of completion to the opposing party with instructions regarding the 340B ADR process, including timelines and information on how to submit their response as outlined in § 10.21(e). Once OPA receives the opposing party's response, OPA would notify both parties, either advising that the claim would move forward for the 340B ADR Panel for review or that OPA determined the claim did not meet the requirements as set forth in § 10.21(b) and the reasons why. HHS proposed that for any claim that did not proceed to review by the 340B ADR Panel, the claim could be revised and refiled if there were new information to support the alleged statutory violation and the claim meets the criteria set forth in the statute and the regulation. HHS received several comments related to this provision and is finalizing this provision as proposed.

Comment: Several commenters suggested that HHS clarify that OPA's initial review of the claim is limited to determining whether the claim meets all the information requirements to file a claim and does not involve a factual or legal review of the claim. They state that at this stage, OPA should only be requesting additional information to satisfy the filing requirements. The determination as to whether a claim is substantiated should be reserved exclusively for the 340B ADR Panel.

Response: During the initial claim review, OPA will review a claim only for completeness, and not make any determinations whether a claim is substantiated. That determination will be reserved for the 340B ADR Panel.

(e) Responding to a Submitted Claim

When responding to a submitted claim, the NPRM proposed that the opposing party would have 30 business days to submit a written response to OPA upon receipt of notification that the claim is deemed complete. The proposed rule indicated that the opposing party may request an extension of the initial 30 business days to respond. Once the opposing party's response is received, OPA would provide a copy to the initiating party as indicated in § 10.21(d). The proposed rule also explained that if the opposing party's response was not received or the party elects not to participate in the 340B ADR process, OPA would notify both parties that the claim has proceeded to 340B ADR Panel review, and the 340B ADR Panel will render its decision after review of the information submitted in the claim. HHS carefully considered the comments received, which are summarized below, and is finalizing the provision as proposed.

Comment: Some commenters suggested that HHS adopt a timeframe of 60 calendar days (with the possibility of extensions) for opposing parties to respond to claims. These commenters are concerned with the proposal to

allow 340B ADR Panels to draw an adverse inference if the opposing party does not respond. They argued the proposed rule does not contain any standard that would ensure that adverse inferences are drawn against a party only in narrow circumstances. Finally, commenters noted that the final rule should recognize that an ''adverse inference'' is an extraordinary sanction, and there should be clear standards for when such a sanction is appropriate.

Response: HHS is revising this rule to remove references to adverse inferences, but otherwise finalizing this rule as proposed. Consistent with the statutory goals of efficiency, fairness and timeliness, we believe a response in 30 days is an adequate amount of time. However, HHS recognizes that there may be instances that require time beyond the stated deadlines, such as availability of key personnel. Depending on the circumstances presented, the 340B ADR Panel may exercise its discretion in granting additional time if warranted.

In addition, if a non-responsive party fails to respond before the deadline, the 340B ADR Panel will render its decision based on the information available to it during the adjudication process. If a party chooses not to respond, the 340B ADR Panel will move forward with its decision and there is a possibility that the decision may not be in favor of the non-responsive party.

Section 10.22 Covered Entity Information and Document Requests

Under the proposed rule and in accordance with section 340B(d)(3)(B)(iii) of the PHS Act, covered entities may discover or obtain information and documents from manufacturers and third parties relevant to a claim that the covered entity has been overcharged by a manufacturer. The NPRM proposed that the covered entity submit a written request within 20 business days of the receipt from OPA that the claim was forwarded to the 340B ADR Panel for review. The NPRM proposed that such covered entity document requests be facilitated by the 340B ADR Panel, including a review of the information/document request and notifying the covered entity if the request is not reasonable, not relevant or beyond the scope of the claim, and would permit the covered entity to resubmit a revised request if necessary.

The manufacturer (and any affiliated third-party agents of the manufacturer—wholesalers or other third parties) must respond to the request within 20 business days of receiving the request. The manufacturer must fully respond, in writing, to an information/document request from the 340B ADR Panel by the response deadline. An extension will be granted by notifying the 340B ADR Panel in writing within 15 business days of receipt of the request. The NPRM proposed that if a manufacturer fails to fully respond to an information request, the 340B ADR Panel shall draw an adverse inference and proceed with the facts that the 340B ADR Panel has determined have been established in the proceeding.

Many commenters recommended changes to the proposed provision allowing parties to request and receive information during the 340B ADR process, including allowing a manufacturer to submit an information request—which was not contemplated by the statute. HHS carefully reviewed the comments received, which are summarized below, and is finalizing this provision as proposed.

Comment: Commenters argued HHS should establish a process for manufacturers to directly request additional information from covered entities during an ADR proceeding. These commenters requested that HHS extend the timeframe for manufacturers to respond to additional information and document requests from 20 business days to 60 calendar days (with the possibility of reasonable extensions).

Response: Section 340B(d)(3)(B)(iii) of the PHS Act requires a process whereby a covered entity may discover or obtain information and documents from manufacturers and third parties relevant to a claim that the covered entity has been overcharged by a manufacturer. The statute does not have a similar provision for manufacturers and manufacturers have the ability to gather needed information through the audits they are required to conduct prior to filing ADR claims. As such, the provision will be finalized as proposed.

In addition, HHS believes a response from manufacturers for additional information and document requests in 20 business days is an adequate amount of time. Any such additional time will unduly delay the 340B ADR process and run counter to the goals of fairness, efficiency, and timeliness. This final rule also contains a provision through which manufacturers may request an extension of this deadline.

Section 10.23 340B ADR Panel Decision Process

Aligned with section 340B(d)(3)(B)(ii) of the PHS Act, HHS has sought to ensure that the 340B ADR decision process would ensure that its review and decision of the claim is conducted in a fair, efficient, and expeditious manner. HHS proposed that the 340B ADR Panel would conduct an initial review of the claim to determine if the specific issue that would be brought forth in a claim is the same as or similar to an issue that is pending in Federal court. If this determination is made, the 340B ADR Panel would suspend review of the claim until such time as the issue is no longer pending in Federal court. If no such issue exists, the proposed rule explained that the 340B ADR Panel would review the documents submitted by the parties and determine if there is adequate support to conclude that an overcharge, diversion, or a duplicate discount has occurred in the specific case at issue. As discussed in more detail below and after consideration of the comments received on this proposal, HHS is removing this proposed provision from this final rule to allow claims on issues pending in Federal court to proceed through the 340B ADR process.

In addition, the NPRM proposed that the 340B ADR Panel would prepare a decision that would represent the determination of a majority of the 340B ADR Panel members' findings and include an explanation regarding each finding. Once the letter has been transmitted to the OPA Director and the parties involved, either party may request that the HRSA Administrator reconsider the 340B ADR Panel decision or the HRSA Administrator may decide to initiate a reconsideration without such a request as outlined in § 10.24. Under the NPRM, after 20 business days of the issuance of the 340B ADR Panel decision, there is no request for reconsideration from either party and the HRSA Administrator has not initiated a reconsideration, the 340B ADR Panel's decision letter will serve as the final agency decision and will be binding upon the parties involved in the dispute, unless invalidated by an order of a Federal court. The NPRM proposed that the OPA Director would then determine any necessary corrective action or consider whether to take enforcement action, and the form of that action, based on the final agency decision. Based on comments received and as discussed in detail below, HHS is modifying this proposal in this final rule by including a timeframe by which the 340B ADR Panel decisions will be issued to ensure that 340B ADR claims are resolved in a timely manner. Finally, HHS will address the OPA Director's role in making determinations for corrective action in future guidance and other clarifications as discussed below.

Comment: The NPRM proposed that if the ADR Panel determines that a specific issue in a claim is the same as,

or similar to an issue pending in Federal court, the ADR Panel would suspend review of the claim until such time the issue is no longer pending in Federal court. The NPRM expressly solicited comments from stakeholders on this issue and HHS received significant comments. Some commenters favor suspending claims until they are resolved in Federal court as it would limit the risk of using limited ADR resources on complex legal questions that would also be considered by the courts. Without a suspension of claims, they argue there could be a risk that the ADR Panel decision would be superseded by a Federal court ruling.

In contrast, other commenters strongly oppose the proposal and argue why the provision should not be finalized. In general, the commenters raised the following arguments:

- Commenters opposing the policy expressed that an issue relevant to an ADR proceeding may be pending in several district courts and the court decisions may diverge and not achieve a final consistent resolution on the issue. They stated it is unclear how an ADR Panel would decide after the rulings and whether the ruling would be based on the outcome of the Federal court decision, and if so, which court decision would control in the case of conflicts.
- Commenters also argued that Congress created the 340B ADR process since covered entities have limited options for bringing legal claims against manufacturers. They asserted that suspending claims is a divergence from the statute, as the statute vests the ADR Panel with authority to issue final agency decisions that are binding on the parties involved through adjudication of 340B disputes. They argued that the provision violates the 340B statute and the Administrative Procedure Act (APA) as it prevents the 340B ADR Panel from resolving a claim for an indefinite period of time based solely on the determination that a Federal lawsuit is addressing an issue that is the same or similar to the one included in an ADR claim.
- Commenters also expressed that the NPRM did not include rules that would govern the 340B ADR Panel's determination that it would not review a claim nor is there any mechanism for a covered entity or manufacturer to contest a 340B ADR Panel's determination to suspend review.
- Commenters cited the 2011 U.S. Supreme Court ruling in *Astra* (*Astra USA, Inc.* v. *Santa Clara County,* 563 U.S. 110 (2011)) that determined that covered entities do not have a cause of action to sue manufacturers for 340B violations, but noted that covered entities do have the option of pursuing recourse through the 340B ADR process.
- Finally, commenters opposing the policy explain that the suspension of the 340B ADR Panel review may lead a 340B ADR Panel to defer to a Federal court's decision on a 340B compliance issue, thereby abrogating the 340B ADR Panel's duty to interpret 340B statutory requirements. These commenters stated that this is contradictory to the role of the 340B ADR Panel envisioned by the NPRM, which is to independently review and apply 340B law and policy to the case-specific factual circumstances at issue.

Response: After review of the comments received, HHS is removing the provision at § 10.23 in the NPRM that would suspend review of ADR claims if the issue is the same as or similar to an issue that is pending in Federal court. By allowing claims that are the same as or similar to those pending in Federal court to move through the 340B ADR process, HHS is proceeding consistent with the *Astra* decision and meeting its statutory mandate to establish and implement a 340B ADR process including the establishment of such deadlines and procedures to ensure that claims involving certain 340B disputes are resolved fairly, efficiently, and expeditiously. Therefore, this final rule will remove the proposed § 10.23(a) and revise § 10.23(b) to allow for a claim to proceed through the 340B ADR process, regardless of whether it is the same as or similar to one that is pending in Federal court.

Comment: Many commenters argued that HHS should impose a timeframe for ADR Panel decisions to ensure that 340B ADR claims are resolved in a timely manner. Some suggested 45, 90, 120, or 180 days. Some explained that 120 days is longer than the 90-day timeframe that Medicare administrative law judges are subject to for Medicare claims appeals and would be a sufficient amount of time. Commenters assert that HHS should clarify that if an ADR panel has not issued a decision within 120 days, a claimant should be able to bypass the 340B ADR process and proceed to Federal court. Most commenters agreed that the decision should be rendered no later than within one year.

Response: Based on the comments received, HHS is clarifying that the expectation is that the 340B ADR Panel will make a decision on a claim within one year of receiving the claim for review. However, HHS recognizes that this general timeframe may not be suitable in every situation, as there may be complexities that warrant additional time beyond the one year timeframe. Additional time may be necessary, for example, if a claim is submitted and the 340B ADR Panel requires additional material, must determine whether there are overlapping claims, must determine whether a covered entity consented to an organizational claim, or seeks to consult with, as appropriate or necessary, other staff within OPA, other HHS offices, other Federal agencies, or with outside parties. Depending on the complexity of the issue, this timeframe may exceed the one year timeframe set forth in this final rule.

HHS does not believe it possible to list out every possible exception in this final rule as there may be situations that are beyond the control of the 340B ADR Panel and cannot be anticipated or predicted in this final rule; however, these examples serve to illustrate circumstances when it may take longer than one year for a 340B ADR Panel to render a decision. In any event, HHS does not believe that many claims that are submitted under this final rule will take longer than a year to resolve. As such, HHS is clarifying that the expectation is the 340B ADR Panel decisions will be issued within a one year time period; however, the 340B ADR Panel will inform the parties, no later than 1 year from the date a claim is deemed complete, if the forthcoming decision will exceed that one year timeframe and provide an explanation as to why the decision on the claim will exceed one year.

Comment: Many commenters requested there be the option for an in-person hearing before the 340B ADR Panel, if requested by either party. The commenters explain that ADR claims may often involve factual questions and the 340B ADR Panel may benefit from the ''adversarial input'' of the parties involved.

Response: The NPRM did not contemplate in-person hearings as part of the 340B ADR process, as HHS proposed a process that would be more accessible than the 2020 final rule, by making it more expeditious and less trial-like for all parties to resolve disputes. HHS believes adding in-person hearings to the process could be arduous, could create disadvantages to under-resourced parties, and could create unnecessary delays. For example, smaller or rural covered entities, including those with limited resources, could have significant difficulties complying with such a requirement compared to larger and better resourced parties.

Comment: Some commenters appreciated HHS' proposed removal of

language indicating that 340B ADR Panel decisions are precedential. They argued that the 2020 final rule gave the 340B ADR Panel the ability to set and change policy on fundamental program issues, such as who qualifies as a 340B-eligible patient—and they argued that such language was inconsistent with the 340B statute, which does not support making 340B ADR Panel decisions precedential.

Conversely, other commenters disagreed and believed that ADR decisions should be precedential because, otherwise, it would be difficult to adequately assess the viability of a claim prior to submitting it to the 340B ADR Panel. They explained that by ensuring that decisions are precedential, it would impact how well entities are able to evaluate whether the 340B ADR process is appropriate for a given claim based on the time and resource investment required of the parties involved.

Response: Section 340B(d)(3)(C) of the PHS Act states that the administrative resolution of a claim shall constitute final agency decision and will be binding on the parties involved, unless invalidated by an order of a court of competent jurisdiction. The 340B statute does not expressly state that the 340B ADR Panel decision or a subsequent reconsideration decision be precedential. As set forth in §§ 10.21 and 10.23, the 340B ADR Panel will follow the 340B statute, regulations, and all policies governing the 340B Program when reviewing and evaluating 340B ADR claims and HHS is finalizing as proposed.

Comment: Most commenters urged wider transparency and requested that HHS publish 340B ADR Panel decisions on HRSA's website and require 340B ADR Panel decisions to include the 340B ADR Panel's factual and legal conclusions, including the HRSA policy on which the decision is based. They reasoned that this would ensure ADR decisions are consistent with current 340B policies and that 340B stakeholders are able to understand and apply HRSA's rule and compliance expectations.

Response: HHS values and supports transparency in the outcome of any 340B ADR Panel decision. For HRSA audits of covered entities and manufactuers, HRSA publishes its audit findings in summary format as full audit reports may include proprietary and/or sensitive business information (for example, under the statute, 340B ceiling prices themselves cannot be publicly disclosed). Consistent with this approach, HRSA will publish 340B ADR final agency decisions on a HRSA public-facing website within 120 calendar days of issuance.

Comment: Some commenters suggest that HHS revise this section to require the 340B ADR Panel or OPA to inform the parties of their reconsideration rights when the 340B ADR Panel's decision is communicated to the parties.

Response: HHS agrees and is finalizing this rule to include a provision that would ensure that parties are informed of their reconsideration rights at the time the 340B ADR Panel's decision is communicated to the parties.

Comment: HHS received several comments recommending that HHS revise this section to require manufacturers or covered entities to repay the other party within a specified time-period (*e.g.,* 60 days) of the date 340B ADR Panel's decision letter or the HRSA Administrator's reconsideration decision.

Response: The NPRM explained that once the parties have been notified of the final agency decision and no request for reconsideration has been made in accordance with § 10.24, the OPA Director will consider whether to take enforcement action to ensure corrective action to the extent allowed under the 340B statute. For example, based on the final agency decision, the OPA Director may require a covered entity to repay an affected manufacturer in a timely manner. In addition, in the case of a 340B ADR Panel decision involving an overcharge, the OPA Director may require that the manufacturer refund or issue a credit to the impacted covered entity. Such an enforcement decision may include the time frame and manner of such remedies.

Section 10.24 340B ADR Panel Decision Reconsideration Process

The NPRM proposed a process for either party to initiate a reconsideration request within 20 business days of the date of the 340B ADR Panel's decision letter. The HRSA Administrator, or their designee, may initiate the process without such a request. The NPRM also proposed that a reconsideration process may only be granted when a party demonstrates that the 340B ADR Panel decision may have been inaccurate or flawed. As proposed, the reconsideration process would involve the HRSA Administrator, or designee, reviewing the record and the 340B ADR Panel's decision, and either issuing a revised decision to be effective 20 business days from issuance or declining to issue a revised decision. Finally, the NPRM proposed that the reconsideration decision or the 340B ADR Panel decision (in the event of a declination) will serve as the final agency decision and will be binding upon the parties involved in the dispute, unless invalidated by an order of a Federal court. The proposed rule indicates that the OPA Director will determine any necessary corrective action, or consider whether to take enforcement action, and the form of any such action, based on the final agency decision. There were several comments received on the reconsideration process, and HHS is finalizing this provision with some clarifications as discussed below.

Comment: The majority of comments received support a reconsideration process by the HRSA Administrator. Some suggest that HHS clarify the timeline for a reconsideration decision.

Response: HHS appreciates the comments received in support of a reconsideration process conducted by the HRSA Administrator. Regarding a timeline for the HRSA Administrator's reconsideration and after review of the comments, the HRSA Administrator will make efforts to issue a reconsideration decision within 180 calendar days from the initiation of the reconsideration process. HHS is finalizing, as proposed, that if a reconsideration decision is rendered, the reconsideration decision, unless altered or reversed (after review) by the Secretary, will serve as the final agency decision and will be binding on the parties involved in the dispute, unless invalidated by an order of a Federal court.

Comment: Some commenters recommend that HHS lengthen the amount of time for parties to request a reconsideration. The NPRM contemplates that a request for reconsideration must be made within 20 business days of the date of the 340B ADR Panel's decision letter. Commenters urged HHS to revise this timeline to either 30 or 60 business days to allow for more time to (1) determine that they believe the reconsideration is necessary and (2) file the request in a timely manner.

Response: HHS agrees with the commenters and is finalizing § 10.24(b) to lengthen the time that a request for reconsideration can be made from the proposed 20 business days to 30 business days. This will allow a requestor additional time to obtain consent in the case of a joint or consolidated claim for a reconsideration request as indicated in § 10.24(b)(3). In the event that no request for reconsideration is received by either party after the 30-day period, the 340B ADR Panel decision or any such alteration or reversal by the Secretary (after review) will serve as the final

agency decision and will be binding on the parties involved in the dispute, unless invalidated by an order of a Federal court.

Comment: Some commenters request that HHS clarify that new facts or information may not be submitted as part of the reconsideration process. They argue that new legal or policy arguments may be warranted in light of the 340B ADR Panel's decision and should not be prohibited.

Response: HHS has clarified in § 10.24 to state that no new ''facts,'' information, or legal or policy arguments may be submitted as part of the reconsideration process in order to remain consistent with the content reviewed by the 340B ADR Panel in reaching their decision.

Comment: Several commenters request that HHS remove the proposed provision at § 10.24(b)(3), which would require that in the case of joint or consolidated claims, the requestor for reconsideration submit documentation showing consent to the reconsideration process, including signatures of the individuals representing each covered entity or manufacturer. They state that it is unclear why consent should be required for a reconsideration request when the covered entity or manufacturer previously consented to joint/consolidated representation as part of the 340B ADR process as outlined in § 10.21(c).

Response: After consideration of the comments, HHS will permit associations or organizations filing a claim on behalf of its members to submit an attestation that they have confirmed that all covered entities have agreed to be part of the reconsideration process. Also, as discussed above, HHS is modifying the proposal to lengthen the time for a party to initiate a reconsideration request from 20 business days to 30 business days.

Comment: A few commenters recommended that HHS clarify the HRSA Administrator's standard of review used when analyzing the 340B ADR Panel's decision and further clarify that the 340B ADR Panel's decision is held in abeyance until the HRSA Administrator issues a decision on reconsideration.

Response: The standard that the HRSA Administrator will use in reviewing any reconsideration request will be the same for each request. The HRSA Administrator will review the record, including the 340B ADR Panel decision, and determine whether there was an error in the 340B ADR Panel's decision, including any deviation from policy, guidance or statute. HHS has made this clear in this final rule. HHS will also clarify in § 10.24 that in the event of a reconsideration request, the 340B ADR Panel's decision is held in abeyance until the HRSA Administrator modifies or sustains the 340B ADR Panel's decision. Any such reconsideration decision letter will be effective 30 business days from issuance and serve as the final agency decision unless within 30 business days of issuance, the Secretary makes a determination that the Secretary will review the decision. The final agency decision will be binding upon the parties involved in the dispute unless invalidated by an order of a Federal court.

Section 10.25 Severability

In this final rule, we adopt modifications to 42 CFR part 10 that support a unified scheme for review of 340B ADR claims. While the unity and comprehensiveness of this scheme maximizes its utility, we clarify that its constituent elements operate independently of each other. Were a provision of this regulation stayed or invalidated by a reviewing court, the provisions that remain in effect would continue to provide a process for review of 340B claims. For example, this final rule contains a number of requirements to be fulfilled prior to review by the 340 ADR Panel, such as providing evidence of good faith efforts and evidence that each covered entity consents to the combining of the claims for a joint claim. To the extent that these provisions were no longer in effect, the remainder of the final rule could still function without these provisions.

To best serve these purposes, we have addressed severability in the regulations to make clear that the provisions of 42 CFR part 10 are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision or any of its subparts should not affect the remainder of the provisions.

III. Regulatory Impact Analysis

A. Regulatory Impact Analysis

HHS has examined the effects of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 on Modernizing Regulatory Review (April 6, 2023), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354), the Unfunded Mandates Reform Act of 1995 (UMRA; Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999). HHS did not receive any substantive comments on this section of the proposed rule and is therefore finalizing this section as proposed.

B. Overall Impact

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, harmonizing rules, and promoting flexibility.

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. *See* 58 FR 51735 (Oct. 4, 1993). Section 1(b) of E.O. 14094 amended sec. 3(f) of E.O. 12866 to define a ''significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product) or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. *See* 88 FR 21879 (Apr. 11, 2023). OIRA has determined that this final rule is a significant regulatory action, although not a significant regulatory action under sec. 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this final rule.

This final rule would modify the framework for HHS to resolve certain disputed claims regarding manufacturers overcharging covered entities and disputed claims of diversion and duplicate discounts by covered entities audited by

manufacturers under the 340B Program. HHS does not anticipate the modification of the 340B ADR process to result in significant economic impact. Because this rule only updates an existing process, there is no additional economic impact. In addition, the parties involved already have the information that will reported through the 340B ADR process; therefore, we do not anticipate any additional impact. This is also consistent with a similar determination in the 2020 final rule that ''HHS does not anticipate the introduction of an ADR process to result in significant economic impacts.'' Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

C. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) and the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), which amended the RFA, requires HHS to analyze options for regulatory relief of small businesses. If a rule has a significant economic effect on a substantial number of small entities, HHS must specifically consider the economic effect of this rule on small entities and analyze regulatory options that could lessen the impact of this rule. HHS will use a RFA threshold of at least a 3 percent impact on at least 5 percent of small entities.

This final rule's requirements would affect drug manufacturers (North American Industry Classification System code 325412: Pharmaceutical Preparation Manufacturing). The small business size standard for drug manufacturers is 750 employees. Approximately 700 drug manufacturers participate in the 340B Program. While it is possible to estimate the impact of this final rule on the industry as a whole, the data necessary to project the impact of changes on specific manufacturers or groups of manufacturers is not available, as HRSA does not collect the information necessary to assess the size of an individual manufacturer that participates in the 340B Program. This final rule would also affect health care providers. For purposes of the RFA, HHS considers all health care providers to be small entities either by virtue of meeting the Small Business Administration (SBA) size standard for a small business, or for being a nonprofit organization that is not dominant in its market. The current SBA size standard for health care providers ranges from annual receipts of $8 million to $41.5 million. As of April 1, 2023, 14,134 covered entities participate in the 340B Program.

This final rule would modify the ADR mechanism for reviewing claims by manufacturers that covered entities have violated certain statutory obligations and claims by covered entities alleging overcharges for 340B covered outpatient drugs by manufacturers. This 340B ADR process would require submission of documents that manufacturers and covered entities are already required to maintain as part of their participation in the 340B Program. HHS expects that this documentation would be readily available prior to submitting a claim. Therefore, the collection of this information would not result in an economic impact or create additional administrative burden on these businesses.

By design of this final rule, the 340B ADR process will resolve claims in a fair, efficient, and expeditious manner in accordance with section 340B(d)(3)(B)(ii) of the PHS Act. This final rule provides an option to join or consolidate claims by similar situated entities, and covered entities may have claims asserted on their behalf by associations or organizations which could reduce costs. HHS has determined, and the Secretary certifies, that this final rule would not have a significant economic impact on a substantial number of small health care providers or a significant impact on the operations of a substantial number of small manufacturers; therefore, HHS is not preparing an analysis of impact for the purposes of the RFA. HHS estimates that the economic impact on the less than 5 percent of small entities and small manufacturers participating in the 340B Program would be minimal and less than a 3 percent economic burden and therefore does not meet the RFA threshold of 3 percent.

D. Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 UMRA requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year.'' In 2023, that threshold is approximately $177 million. HHS does not expect this rule to exceed the threshold.

E. Executive Order 13132—Federalism

HHS has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have federalism implications. This final rule would not ''have substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The final rule would also not adversely affect the following family elements: family safety, family stability, marital commitment; parental rights in the education, nurture, and supervision of their children; family functioning, disposable income, or poverty; or the behavior and personal responsibility of youth, as determined under section 654(c) of the Treasury and General Government Appropriations Act of 1999.

F. Collection of Information

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. This final rule would not impact the current reporting and recordkeeping burden for manufacturers or covered entities under the 340B Program. Because the 340B ADR process provides the mechanism and procedures for an administrative action or investigation involving an agency against specific individuals or entities, pursuant to 44 U.S.C. 3518(c), the 340B ADR process is exempt from Paperwork Reduction Act requirements. In addition, participants in the 340B Program are already required to maintain the necessary records to submit an ADR claim.

List of Subjects in 42 CFR Part 10

Biologics, Business and industry, Diseases, Drugs, Health, Health care, Health facilities, Hospitals, 340B Drug Pricing Program.

Dated: April 12, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 42 CFR part 10 as follows:

PART 10—340B DRUG PRICING PROGRAM

■ 1. The authority citation for part 10 continues to read as follows:

Authority: Sec. 340B of the Public Health Service Act (42 U.S.C. 256b) (PHSA), as amended.

■ 2. Amend § 10.3 by:
■ a. Removing the definition for *Administrative Dispute Resolution (ADR) Process* and dding the definition *340B Administrative Dispute Resolution (ADR) process* in its place;
■ b. Revising the definitions for *Administrative Dispute Resolution Panel (340B ADR Panel), Claim, Consolidated claim,* and *Joint claim;* and
■ c. Adding in alphabetical order the definition for *Office of Pharmacy Affairs (OPA).*

The revisions and additions read as follows:

§ 10.3 Definitions.

* * * * *

340B Administrative Dispute Resolution (ADR) process means a process used to resolve the following types of claims, including any issues that assist the 340B ADR Panel in resolving such claims:

(1) Claims by covered entities that may have been overcharged for covered outpatient drugs purchased from manufacturers; and

(2) Claims by manufacturers of 340B drugs, after a manufacturer has conducted an audit of a covered entity (pursuant to section 340B(a)(5)(C) of the Public Health Service Act (PHS Act)), that a covered entity may have violated the prohibitions against duplicate discounts or diversion.

Administrative Dispute Resolution Panel (340B ADR Panel) means a decision-making body within the Health Resources and Services Administration's Office of Pharmacy Affairs that reviews and makes decisions for claims filed through the 340B ADR process.

* * * * *

Claim means a written allegation filed by or on behalf of a covered entity or by a manufacturer for resolution under the 340B ADR process.

* * * * *

Consolidated claim means a claim resulting from combining multiple manufacturers' claims against the same covered entity.

* * * * *

Joint claim means a claim resulting from combining multiple covered entities' claims (or claims from their membership organizations or associations) against the same manufacturer for the same drug or drugs.

* * * * *

Office of Pharmacy Affairs (OPA) means the office, or any successor office assigned to administer the 340B Program, within the Health Resources and Services Administration, or any successor agency, that oversees the 340B Program.

* * * * *

■ 3. Revise subpart C to read as follows:

Subpart C—Administrative Dispute Resolution

Sec.

Subpart C—Administrative Dispute Resolution

§ 10.20 340B Administrative Dispute Resolution Panel.

The Secretary shall appoint a roster of eligible individuals (Roster) consisting of staff within OPA, to serve on a 340B ADR Panel, as defined in § 10.3. The OPA Director, or the OPA Director's designee, shall select at least three members from the Roster to form a 340B ADR Panel to review and make decisions regarding one or more claims filed by covered entities or manufacturers.

(a) *Members of the 340B ADR Panel.* (1) The OPA Director shall:

(i) Select at least three members for each 340B ADR Panel from the Roster of appointed staff;

(ii) Have the authority to remove an individual from the 340B ADR Panel and replace such individual; and

(iii) Select replacement 340B ADR Panel members should an individual resign from the panel or otherwise be unable to complete their duties.

(2) No member of the 340B ADR Panel may have a conflict of interest, as set forth in paragraph (b) of this section.

(b) *Conflicts of interest.* (1) All members appointed by the Secretary to the Roster of individuals eligible to be selected for a 340B ADR Panel will be screened for conflicts of interest prior to reviewing a claim. In determining whether a conflict exists, the OPA Director, in consultation with government ethics officials, will consider financial interest(s), current or former business or employment relationship(s), or other involvement of a prospective panel member or close family member who is either employed by or otherwise has a business relationship with an involved party, subsidiary of an involved party, or particular claim(s) expected to be presented to the prospective panel member.

(2) All members of the 340B ADR Panel will undergo an additional screening prior to reviewing a specific claim to ensure that the 340B ADR Panel member was not directly involved in a decision concerning the specific issue of the ADR claim as it relates to the specific covered entity or manufacturer involved, including previous 340B ADR Panel decisions.

(c) *Secretarial authority in the 340B ADR process.* The Secretary may remove any individual from the Roster of 340B ADR Panelists for any reason, including from any 340B ADR Panel to which the individual has already been assigned. The Secretary has the authority to review and reverse, alter, or uphold any 340B ADR Panel or reconsideration decision as outlined in §§ 10.23 and 10.24. Any such decision of the Secretary will serve as the final agency decision and will be binding upon the parties involved in the dispute, unless invalidated by an order of a Federal court.

(d) *Duties of the 340B ADR Panel.* The 340B ADR Panel will:

(1) Review and evaluate claims, including consolidated and joint claims, and documents and information submitted by (or on behalf of) covered entities and manufacturers;

(2) Review and may request additional documentation, information, or clarification of an issue from any or all parties to make a decision (if the 340B ADR Panel finds that a party has failed to respond or fully respond to an information request, the 340B ADR Panel may proceed with facts that the 340B ADR Panel determines have been established in the proceeding);

(3) Evaluate claims based on information received, unless, at the 340B ADR Panel's discretion, the nature of the claim necessitates that a meeting with the parties be held;

(4) At its discretion, consult with others, including staff within OPA, other HHS offices, and other Federal agencies while reviewing a claim; and

(5) Make decisions on each claim.

§ 10.21 Claims.

(a) *Claims permitted.* All claims must be specific to the parties identified in the claims and are limited to the following:

(1) Claims by a covered entity that it has been overcharged by a manufacturer for a covered outpatient drug, including claims that a manufacturer has limited the covered entity's ability to purchase covered outpatient drugs at or below the 340B ceiling price; and

(2) Claims by a manufacturer, after it has conducted an audit of a covered entity pursuant to section 340B(a)(5)(C) of the PHS Act, that the covered entity has violated section 340B(a)(5)(A) of the PHS Act, regarding the prohibition of duplicate discounts, or section 340B(a)(5)(B) of the PHS Act, regarding the prohibition of the resale or transfer of covered outpatient drugs to a person who is not a patient of the covered entity.

(b) *Requirements for filing a claim.* (1) Absent extenuating circumstances, a covered entity or manufacturer must file a claim under this section in writing to OPA within 3 years of the date of the alleged violation. Any file, document, or record associated with the claim that is the subject of a dispute must be maintained by the covered entity and manufacturer until the date of the final agency decision.

(2) A covered entity filing a claim described in paragraph (a)(1) of this section must provide the basis, including all available supporting documentation, for its belief that it has been overcharged by a manufacturer, in addition to any other documentation as may be requested by OPA. A covered entity claim against multiple manufacturers is not permitted.

(3) A manufacturer filing a claim under paragraph (a)(2) of this section must provide documents sufficient to support its claim that a covered entity has violated the prohibition on diversion and/or duplicate discounts, in addition to any other documentation as may be requested by OPA.

(4) A covered entity or manufacturer filing a claim must provide documentation of good faith efforts, including for example, documentation demonstrating that the initiating party has made attempts to contact the opposing party regarding the specific issues cited in the ADR claim.

(c) *Combining claims.* (1) Two or more covered entities may jointly file claims of overcharges by the same manufacturer for the same drug or drugs if each covered entity consents to the jointly filed claim and meets the filing requirements.

(i) For covered entity joint claims, the claim must list each covered entity, its 340B ID and include documentation as described in paragraph (b) of this section, which demonstrates that each covered entity meets all of the requirements for filing the ADR claim.

(ii) For covered entity joint claims, a letter requesting the combining of claims must accompany the claim at the time of filing and must document that each covered entity consents to the combining of the claims, including signatures of individuals representing each covered entity and a point of contact for each covered entity.

(2) An association or organization may file on behalf of one or more covered entities representing their interests if:

(i) Each covered entity is a member of the association or the organization representing it and each covered entity meets the requirements for filing a claim;

(ii) The joint claim filed by the association or organization must assert overcharging by a single manufacturer for the same drug(s); and

(iii) The claim includes a letter from the association or organization attesting that each covered entity agrees to the organization or association asserting a claim on its behalf, including a point of contact for each covered entity.

(3) A manufacturer or manufacturers may request to consolidate claims brought by more than one manufacturer against the same covered entity if each manufacturer could individually file a claim against the covered entity, consents to the consolidated claim, meets the requirements for filing a claim, and the 340B ADR Panel determines that such consolidation is appropriate and consistent with the goals of fairness and economy of resources. Consolidated claims filed on behalf of manufacturers by associations or organizations representing their interests are not permitted.

(d) *Deadlines and procedures for filing a claim.* (1) Covered entities and manufacturers must file claims in writing with OPA, in the manner set forth by OPA.

(2) OPA will conduct an initial review of all information submitted by the party filing the claim and will make a determination as to whether the requirements in paragraph (b) of this section are met. The OPA staff conducting the initial review of a claim may not be appointed to serve on the 340B ADR Panel reviewing that specific claim.

(3) Additional information to substantiate a claim may be submitted by the initiating party and may be requested by OPA. If additional information is requested, the initiating party will have 20 business days from the receipt of OPA's request to respond. If the initiating party does not respond to a request for additional information within the specified time frame or request and receive an extension, the claim will not move forward to the 340B ADR Panel for review.

(4) OPA will provide written notification to the initiating party that the claim is complete. Once the claim is complete, OPA will also provide written notification to the opposing party that the claim was submitted. This written notification will provide a copy of the initiating party's claim, and additional instructions regarding the 340B ADR process, including timelines and information on how to submit their response in accordance with the procedures for responding to a claim as outlined in paragraph (e) of this section.

(5) If OPA finds that the claim meets the requirements described in paragraph (b) of this section, and once OPA receives the opposing party's response in accordance with the procedures outlined in paragraph (e) of this section, additional written notification will be sent to both parties advising that the claim will be forwarded to the 340B ADR Panel for review.

(6) If OPA finds that the claim does not meet the requirements described in paragraph (b) of this section, written notification will be sent to both parties stating the reasons that the claim did not move forward.

(7) For any claim that does not move forward for review by the 340B ADR Panel, the claim may be revised and refiled if there is new information to support the alleged statutory violation and the claim meets the criteria set forth in this section.

(e) *Responding to a submitted claim.* (1) Upon receipt of notification by OPA that a claim is deemed complete and has met the requirements in paragraph (b) of this section, the opposing party in alleged violation will have 30 business days to submit a written response to OPA.

(2) A party may submit a request for an extension of the initial 30 business days response period and OPA will make a determination to approve or disapprove such request and notify both parties.

(3) OPA will provide a copy of the opposing party's response to the initiating party and will notify both parties that the claim has moved forward for review by the 340B ADR Panel.

(4) If an opposing party does not respond or elects not to participate in the 340B ADR process, OPA will notify both parties that the claim has moved forward for review by the 340B ADR Panel and the 340B ADR Panel will render its decision after review of the information submitted in the claim.

§ 10.22 Covered entity information and document requests.

(a) To request information necessary to support its claim from an opposing party, a covered entity must submit a written request for additional

information or documents to the 340B ADR Panel within 20 business days of the receipt from OPA that the claim was forwarded to the 340B ADR Panel for review. The 340B ADR Panel will review the information/document request and notify the covered entity if the request is not reasonable, not relevant or beyond the scope of the claim, and will permit the covered entity to resubmit a revised request if necessary.

(b) The 340B ADR Panel will transmit the covered entity's information/document request to the manufacturer who must respond to the request within 20 business days of receipt of the request.

(c) The manufacturer must fully respond, in writing, to an information/document request from the 340B ADR Panel by the response deadline.

(1) A manufacturer is responsible for obtaining relevant information or documents from any wholesaler or other third party that may facilitate the sale or distribution of its drugs to covered entities.

(2) If a manufacturer anticipates that it will not be able to respond to the information/document request by the deadline, it can request one extension by notifying the 340B ADR Panel in writing within 15 business days of receipt of the request.

(3) A request to extend the deadline must include the reason why the specific deadline is not feasible and must outline the proposed timeline for fully responding to the information/document request.

(4) The 340B ADR Panel may approve or disapprove the request for an extension of time and will notify all parties in writing of its decision.

(5) If the 340B ADR Panel finds that a manufacturer has failed to fully respond to an information/document request, the 340B ADR Panel will proceed with the facts that the 340B ADR Panel has determined have been established in the proceeding.

(6) If a manufacturer believes an information request to a covered entity is necessary for the 340B ADR Panel's review, it may make a request to the 340B ADR Panel to make the request to the covered entity.

§ 10.23 340B ADR Panel decision process.

(a) The 340B ADR Panel will conduct a review of the claims. The 340B ADR Panel will review all documents gathered during the 340B ADR process to determine if a violation as described in § 10.21(a)(1) or (2) has occurred.

(b) The 340B ADR Panel will prepare a decision letter based on its review. The 340B ADR Panel's decision letter will be completed within one year of receiving a complete claim for review, except to the extent that there are situations beyond the control of the 340B ADR Panel that may affect the ability to issue a decision on a claim within one year. If the issuance of a 340B ADR Panel decision will exceed one year, the 340B ADR Panel must provide notice to the parties involved. The 340B ADR Panel decision letter will represent the determination of a majority of the 340B ADR Panel members' findings regarding the claim and include an explanation regarding each finding. The 340B ADR Panel will transmit its decision letter to all parties and to the OPA Director.

(c) The 340B ADR Panel decision letter will inform the parties involved of their rights for reconsideration as described in § 10.24. Either party may request reconsideration of the 340B ADR Panel decision or the Health Resources and Service Administration (HRSA) Administrator may decide to initiate a reconsideration without such a request. The final agency decision will be binding upon the parties involved in the dispute unless invalidated by an order of a Federal court. The 340B ADR Panel's decision letter will be effective 30 business days from issuance and serve as the final agency decision unless:

(1) Within 30 business days of issuance, reconsideration occurs under § 10.24; or

(2) Within 30 business days of issuance, the Secretary makes a determination that the Secretary will review the decision.

(d) The OPA Director will determine any necessary corrective action or consider whether to take enforcement action, and the form of any such action, based on the final agency decision.

§ 10.24 340B ADR Panel decision reconsideration process.

(a) Either party may initiate a reconsideration request, or the HRSA Administrator may decide to initiate the process without such a request. In the event of a reconsideration request, the 340B ADR Panel's decision is held in abeyance until such time the HRSA Administrator makes a reconsideration decision of the 340B ADR Panel decision (or in the event of a declination). A reconsideration decision will affirm or supersede a 340B ADR Panel decision.

(b) The request for a reconsideration of the 340B ADR Panel's decision must be made to the HRSA Administrator within 30 business days of the date of the 340B ADR Panel's decision letter.

(1) The request for reconsideration must include a copy of the 340B ADR Panel decision letter, and documentation indicating why a reconsideration is warranted.

(2) New facts, information, legal arguments, or policy arguments may not be submitted as part of the reconsideration process in order to remain consistent with the facts that were reviewed by the 340B ADR Panel in determining their decision.

(3) In the case of joint or consolidated claims, the reconsideration request must include an attestation confirming that all of the entities have agreed to be part of the reconsideration process.

(c) The standard for review of the reconsideration request by the HRSA Administrator, or their designee, will include a review of the record, including the 340B ADR Panel decision, and a determination of whether there was an error in the 340B ADR Panel's decision. The HRSA Administrator, or designee, may consult with other HHS officials, as necessary.

(d) The HRSA Administrator, or their designee, will make a determination based on the reconsideration request by either issuing a revised decision or declining to issue a revised decision.

(e) The reconsideration decision letter will be effective 30 business days from issuance and serve as the final agency decision unless within 30 business days of issuance, the Secretary makes a determination that the Secretary will review the decision. The final agency decision will be binding upon the parties involved in the dispute unless invalidated by an order of a Federal court.

(f) The OPA Director will determine any necessary corrective action, or consider whether to take enforcement action, and the form of any such action, based on the final agency decision.

§ 10.25 Severability.

If any provision of this subpart is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 23–203; FCC 24–29; FR ID 211518]

All-In Pricing for Cable and Satellite Television Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) implements the ''all-in'' rule, requiring cable operators and direct broadcast satellite (DBS) providers to state an aggregate price for the video programming that they provide as a clear, easy-to-understand, and accurate single line item on subscribers' bills, including on bills for legacy or grandfathered video programming service plans. The ''all-in'' rule also requires cable operators and DBS providers that communicate a price for video programming in promotional materials to state the aggregate price for the video programming in a clear, easy-to-understand, and accurate manner.

DATES:

Effective date: This rule is effective April 19, 2024.

Compliance date: Compliance with 47 CFR 76.310 is not required until the Commission has published a document in the **Federal Register** announcing the compliance date.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Joseph Price, *Joseph.Price@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–1423.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (*Order*), FCC 24–29, adopted on March 14, 2024, and released on March 19, 2024. The full text of this document is available at *https://docs.fcc.gov/public/attachments/FCC-24-29A1.pdf* and via ECFS at *https://www.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. 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), 1–844–4–FCC–ASL (1–844–432–2275) (videophone).

Synopsis

1. In the Report and Order (*Order*), we take action to benefit video consumers by requiring cable operators and direct broadcast satellite (DBS) providers to specify the ''all-in'' price for video programming in their promotional materials that include pricing information and on subscribers' bills. Our action today enables consumers to make purchasing decisions with access to clear, easy-to-understand, and accurate information disclosing the price of video programming. We believe that an ''all-in'' price for video service also will increase transparency and have a positive effect on competition in the video programming marketplace by allowing consumers to make better informed choices among the ranges of video programming service options available to them.

2. Sections 335 and 632 of the Communications Act of 1934, as amended (the Act), authorize the Commission to adopt public interest regulations for DBS providers and direct the Commission to adopt cable operator customer service requirements, respectively.[1] In 2019, Congress adopted the Television Viewer Protection Act of 2019 (TVPA), which bolstered the consumer protection provisions of the Act by adding specific consumer protections.[2] The TVPA revised the Act to add section 642, which, among other things, requires greater transparency in subscribers' bills.[3] As Congress explained then, and we observe today, consumers face ''unexpected and confusing fees when purchasing video programming,'' including ''fees for broadcast TV [and] regional sports.'' [4]

3. On June 20, 2023, the Commission released a notice of proposed rulemaking (*NPRM*) (88 FR 42277, June 20, 2023), observing that consumers who choose a video service based on an advertised monthly price may be surprised by unexpected fees that cable operators and DBS providers charge and list in the fine print separately from the top-line listed service price. The Commission found that such fees can be potentially misleading and make it difficult for consumers to compare the prices of competing video service providers.[5] In the *NPRM,* the Commission proposed to enhance pricing transparency by requiring cable operators and DBS providers to provide the ''all-in'' price for video programming in their promotional materials and on subscribers' bills.[6] The Commission sought comment on whether the proposal is sufficient to ensure that subscribers and potential subscribers have accurate information about the cost for video service for which they will be billed. Specifically, the Commission sought comment on (i) the specifics of the proposed requirement for increased marketing and billing transparency, (ii) existing Federal, state, and local requirements related to truth-in-billing, (iii) the marketplace practices regarding advertising and billing, and (iv) the Commission's legal authority to adopt this proposal.[7] The Commission also included a request for comment on the costs and benefits of the proposal, as well as the effects that the proposal could have on equity and inclusion.[8] The Commission received comments and *ex parte* filings from individuals, consumer advocates, cable, DBS, broadcast industry members, trade associations, state and local governments, and franchising authorities.[9] A number of comments

[1] 47 U.S.C. 335, 552.

[2] Television Viewer Protection Act of 2019, Public Law 116–94, 133 Stat. 2534 (2019). The TVPA was enacted as Title X of the ''Further Consolidated Appropriations Act, 2020'' (H.R. 1865, 116th Cong.) (2019–20).

[3] 47 U.S.C. 562. Section 642 provides four main areas of consumer protection related to billing: (1) before entering into a contract with a consumer, a multichannel video programming distributor (MVPD) must provide the consumer the total monthly charge for MVPD service, whether offered individually or as part of a bundled service, including any related administrative fees, equipment fees, or other charges, (2) not later than 24 hours after contracting with a consumer, an MVPD must provide the total monthly charge that a consumer can expect to pay and permit the consumer to cancel without fee or penalty for 24 hours, (3) with respect to electronic bills, MVPDs must include an itemized statement that breaks down the total amount charged for MVPD service and the amount of all related taxes, administrative fees, equipment fees, or other charges; the termination date of the contract for service between the consumer and the provider; and the termination date of any applicable promotional discount, and (4) MVPDs and fixed broadband internet service providers must not charge a consumer for using their own equipment and also must not charge lease or rental fees to subscribers to whom they do not provide equipment. *Id.*

[4] H.R. Rep 116–329, at 6 (2019).

[5] *All-In Pricing for Cable and Satellite Television Service,* MB Docket No. 23–203, FCC 23–52, Notice of Proposed Rulemaking, 2023 WL 4105426 at *1, para. 2 (rel. June 20, 2023) (*NPRM*).

[6] *Id.* at *2, para. 5.

[7] *Id.*

[8] *Id.*

[9] *See* Letter from Mary Beth Murphy, Vice President/Deputy General Counsel, NCTA—The Internet & Television Ass'n, to Marlene H. Dortch, Esq., Secretary, FCC (filed Oct. 2, 2023) (NCTA Oct. 2 *Ex Parte*); Letter from Leora Hochstein, Vice President, Government Public Policy and Government Affairs, Verizon, to Marlene H. Dortch, Esq., Secretary, FCC (filed Nov. 13, 2023) (Verizon Nov. 13 *Ex Parte*); Letter from Michael Nilsson Counsel to DIRECTV, to Marlene H. Dortch, Esq., Secretary, FCC (filed Jan. 31, 2024) (DIRECTV *Ex Parte*); Letter from Mary Beth Murphy, Vice President and Deputy General Counsel, NCTA—The Internet & Television Ass'n, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 23–203 (filed Feb. 14, 2023) (NCTA Feb. 14 *Ex Parte*); Letter from Charles Dudley, Florida Internet & Television Ass'n;

describe general consumer frustration with unexpected ''fees'' (for example, for broadcast television programming and regional sports programming [10] charges listed separately from the monthly subscription rate for video programming) that are actually charges for the video programming for which the subscriber pays.[11]

Discussion

4. In the *Order,* we adopt the proposal in the *NPRM* to require that cable operators and DBS providers provide the ''all-in'' price of video programming as a prominent single line item on subscribers' bills and in promotional materials that state a price.[12] We find that the record demonstrates that charges and fees for video programming provided by cable and DBS providers are often obscured in misleading promotional materials and bills, which causes significant and costly confusion for consumers. We, therefore, adopt the ''all-in'' rule to promote pricing transparency and to complement existing consumer protections and practices of cable operators and DBS providers.

5. First, we describe current marketplace practices and conclude that the ''all-in'' rule is well-tailored to address the need for consumers to have accurate information about the cost of video service. Next, we consider issues related to implementation of the ''all-in'' rule, including how the rule applies to bundled services and billing material (including for currently-offered and grandfathered or legacy plans) and promotional material (including national and regional marketing where charges to consumers vary by geography and promotional discounts). We discuss the legal authority we rely upon to implement the ''all-in'' rule. We conclude that section 642 of the Act (the TVPA), section 632 of the Act (covering cable operators), section 335 of the Act (covering DBS providers), as well as ancillary authority, provide ample authority for the ''all-in'' rule. We also conclude that the ''all-in'' rule is consistent with the First Amendment. We consider existing local, state, and voluntary consumer protections adopted and implemented by cable operators and DBS providers, as well as existing Federal requirements stemming from the TVPA applicable to multichannel video programming distributors (MVPDs), that relate to transparency and disclosure of pricing information. We conclude that the ''all-in'' rule will complement existing protections by further mitigating consumer confusion about the aggregate cost of video programming. Finally, we consider the potential competitive effects of the ''all-in'' rule and conclude that increased consumer access to clear, easy-to-understand, and accurate information likely encourages price competition, innovation, and the provision of high-quality services.

6. *Need for the ''All-In'' Rule.* Based on the record, we find that there is a need for the ''all-in'' rule so that consumers can make better informed decisions about their service and can comparison shop among video programming providers without having to ''read fine print or try to determine which 'fees' or 'surcharges' are really charges related to video programming services that might raise the monthly cost compared to other offers they are considering.'' [13] In the *NPRM,* the Commission sought comment on whether consumers encounter misleading promotions or receive misleading bills, and on current industry practices regarding pricing categorization.[14] As described below, individuals, consumer protection organizations, state and local governments, and franchise authorities report that consumers experience ''considerable'' confusion and surprise when unanticipated charges and fees for cable and satellite video programming are not included in the advertised price in promotional materials and are separately listed on bills.[15]

7. Consumer protection groups describe significant, recurring issues with consumer access to clear, easy-to-understand, and accurate information about the price of cable operator and DBS provider video programming. Truth in Advertising, for example, contends that ''several cable and satellite service companies [are] engaged in deceptive pricing practices, including the use of unexpected fees.'' [16] Truth in

Andy Blunt, MCTA—The Missouri Internet & Television Ass'n; David Koren, Ohio Cable Telecommunications Ass'n; and Walt Baum, Texas Cable Ass'n, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 5, 2024) (State Cable Ass'ns Mar. 5 *Ex Parte*); Letter from Leora Hochstein, Vice President, Government Public Policy and Government Affairs, Verizon, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 6, 2024) (Verizon Mar. 6 *Ex Parte*); Letter from Mary Beth Murphy, Vice President/Deputy General Counsel, NCTA—The Internet & Television Ass'n, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 6, 2023) (NCTA Mar. 6 *Ex Parte*); Letter from Stacy Fuller, SVP, External Affairs, DIRECTV, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 7, 2024) (DIRECTV Mar. 7 *Ex Parte*); Letter from Brian Hurley, ACA Connects, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 7, 2024) (ACA Connects Mar. 7 *Ex Parte*); Letter from Keith J. Leitch, President, One Ministries, Inc. (KQSL), to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 7, 2024); Letter from Leora Hochstein, Vice President, Government Public Policy and Government Affairs, Verizon, to Marlene H. Dortch, Esq., Secretary, FCC (filed Mar. 8, 2024) (Verizon Mar. 8 *Ex Parte*); Letter from Michael Nilsson, Counsel to ACA Connects, to Marlene H. Dortch, Secretary, FCC (filed Mar. 8, 2024) (ACA Connects Mar. 8 *Ex Parte*).

[10] *See generally Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746, Appx. A at 121 (2010) (defining ''Regional Sports Network''); *Altitude Sports & Entm't, LLC* v. *Comcast Corp.,* No. 19–cv–3253–WJM–MEH, 2020 WL 8255520 at *1 (D. Colo. Nov. 25, 2020) (defining the ''relevant product market'' for regional sports programming).

[11] *See, e.g.,* Comments of Truth in Advertising, Inc. (Truth in Advertising Comments); Daniel Drake Comments at 1; Jonathan Bates Comments at 1; Maureen Comments at 1; M Mondesir Comments at 1; Kenneth Lubar Comments at 1; Mitchel Bakke Comments at 1; Matt Mann Comments at 1.

[12] *NPRM,* 2023 WL 4105426 at *2, para. 6.

[13] Comments of the City of Oklahoma City, Oklahoma; City of Minneapolis, Minnesota; Metropolitan Area Communications Commission; Northwest Suburbs Cable Communications Commission; North Metro Telecommunications Commission; South Washington County Telecommunications Commission; North Suburban Communications Commission; City of Edmond, Oklahoma; City of Coon Rapids, Minnesota; and City of Aumsville, Oregon, at 6 (Local Franchise Authorities Comments). *See also* Comments of the Texas Coalition of Cities For Utility Issues, City of Boston, Massachusetts, the Mt. Hood Cable Regulatory Commission, Fairfax County, Virginia and National Association of Telecommunications Officers and Advisors (NATOA), at 10 (Local Government Comments) (stating their belief ''that a robust disclosure requirement that works alongside local consumer protection regulation will be a welcome addition to the cable sector and improve prices and competition for consumers'').

[14] *NPRM,* 2023 WL 4105426 at *2–4, paras. 7–10.

[15] *See, e.g.,* Reply Comments of the City of Oklahoma City, Oklahoma; City of Minneapolis, Minnesota; Metropolitan Area Communications Commission; Northwest Suburbs Cable Communications Commission; North Metro Telecommunications Commission; South Washington County Telecommunications Commission; North Suburban Communications Commission; City of Edmond, Oklahoma; City of Coon Rapids, Minnesota; City of Aumsville, Oregon; and City of Mustang, Oklahoma (the Local Franchise Authorities), at 3 (Local Franchise Authorities Reply Comments) (concluding the all-in rule is needed to resolve the ''[c]onsiderable confusion among consumers regarding 'junk fees' '' on subscribers' bills); Reply Comments of the Colorado Communications and Utility Alliance at 2 (asserting that ''cable operators and DBS television providers have been using fees associated with 'broadcast television' and 'regional sports' to obfuscate the true price of cable television service''); Comments of Kenneth Lubar (stating that ''[t]he advertised fees [of cable companies] are misleading and hinder effective comparison of true costs''); Consumer Reports (with Public Knowledge) Comments at 5 (Consumer Reports and Public Knowledge Comments) (observing that hidden fees ''enable cable companies to camouflage price increases, confounding consumer efforts to comparison shop and to maintain household budgets''); Comments of the National Association of Broadcasters at 5 (NAB Comments) (''Current advertising and billing methods used by MVPDs can lead consumers to believe that retransmission consent fee payments are somehow different from all the other inputs into MVPDs' programming packages or that retransmission consent payments to broadcasters constitute a tax or governmental regulatory fee.'').

[16] Truth in Advertising Comments at 2.

Advertising discusses a 2019 analysis by Consumer Reports of 800 cable bills, revealing the cable industry generates $450 per customer, per year, from company-imposed fees, and that nearly 60% of Americans who encounter these unexpected or hidden fees report the fees caused them to exceed their budget.[17] Consumer Reports examined hundreds of cable and satellite television bills collected in 2018 and made several findings in the 2019 report, ''including that consumers pay significantly more than the advertised price for video programming . . . because of the addition of various fees, surcharges, and taxes.'' [18] According to Consumer Reports, fees are ''often imposed or increased with little notice, and are often listed among a dizzying array of other charges, including government-imposed fees and taxes'' while cable companies ''continue advertising relatively low base rates.'' [19] Further, a 2018 ''Secret Shopper Investigation'' conducted by Consumer Reports found that consumers were provided with inaccurate or confusing fee-related information by customer service representatives of cable and DBS providers on a number of occasions.[20] This included customer service representatives portraying certain company-imposed fees as government-imposed taxes and fees; failing to mention fees; or offering incomplete fee information.[21]

8. Comments filed by individual consumers as well as state and local governments and franchise authorities likewise detail concerns about misleading promotional materials and bills for cable and DBS service and urge the Commission to adopt an ''all-in'' rule to protect consumers. The record indicates that approximately 24 to 33 percent of a consumer's bill is attributable to company-imposed fees such as ''Broadcast TV Fees,'' ''Regional Sports Surcharges,'' ''HD Technology Fees,'' and others,[22] and that the ''dollar amount of company-imposed fees has skyrocketed.'' [23] However, consumers too often lack transparent information about fees that significantly increase the cost of advertised and billed video services and how they will affect their total cost and bottom-line budget.[24] Increases in fees relating to video programming during the term of the service agreement are sources of consumer surprise and confusion, and it is ''especially notable . . . that these fees are being raised by cable companies even while many consumers are locked into supposed 'fixed-rate' contracts.'' [25] As the Local Government Commenters emphasize, these fees disproportionately impact lower-income households.[26]

9. Misinformation and misunderstandings about how much subscribing to video programming service costs lead to subscriber complaints, disputed bills, and litigation. Consumer Reports observed that since 2016, state attorneys general in Massachusetts, Minnesota, and Washington have ''launched investigations and/or filed lawsuits accusing Comcast, one of the nation's largest cable operators, of fee-related fraud.'' [27] Truth in Advertising describes eight class-action lawsuits initiated by consumers challenging unexpected charges and fees.[28] The Local Government Commenters report that ''[c]lass action lawsuits or suits brought by state Attorneys General have resulted in settlements when companies impose fees that exceed its promise of a fixed price.'' [29] Local franchising authorities from several states also report a variety of complaints they are receiving, and the types of questions they respond to, in support of ''subscribers who are confused'' about the charges on bills from cable operators and DBS providers.[30]

10. On the other hand, cable and DBS commenters dispute the characterization of their advertising and billing practices as misleading to consumers and argue that there is no need for the Commission to adopt an ''all-in'' rule. NCTA—The Internet & Television Association (NCTA) contends that ''[p]roviding accurate and transparent pricing information to consumers is a marketplace necessity'' given fierce competition for consumers in the video programming market.[31] According to NCTA, ''[i]n the course of a prospective customer's consideration of which service package to buy (the 'buy-flow') and on customers' bills, our members clearly disclose the specific amounts of the fees that will apply and the total amount customers will pay for service, thereby ensuring that customers are not 'surprised by unexpected fees.'' [32] In addition, NCTA argues that there is no need for the Commission to adopt an ''all-in'' requirement because the existing transparency in billing requirements of the TVPA sufficiently address this issue.[33] DIRECTV submits that an ''all-in'' rule could complicate ''apples-to-apples'' comparison shopping because it (i) would require the disclosure of only one variable in a service offering—price—rather than specific channels or other aspects of the video programming service that the provider offers, thus ''creat[ing] confusion in a world where the content and other terms of the service offering differ dramatically among providers''; (ii) would apply only to cable and DBS and not other providers of video programming, including online video distributors; and (iii) would require a single price in national advertising even though actual prices differ depending on where a customer lives.[34]

11. Although industry commenters assert that the practice of separating certain elements of the price for video programming and listing them as ''fees'' does not deceive consumers,[35] we believe that the weight of evidence in the record as detailed above suggests otherwise and that efforts to address these issues will benefit from a robust ''all-in'' rule. As Local Government Commenters contend, ''[m]ore clarity and transparency are needed to help consumers understand their cable bills and make informed decisions about their services,'' and ''consumers should know what their video programming services will cost, including all charges cable operators add to those services.'' [36] We agree that an ''all-in'' rule serves the dual purposes of helping consumers

[17] *Id.* at 4–5 (citing CR Cable Bill Report 2019).

[18] Consumer Reports and Public Knowledge Comments at 2–3 (citing CR Cable Bill Report 2019). *See also NPRM,* 2023 WL 4105426 at *1, para. 4 (citing Consumer Reports and Public Knowledge Reply Comments, MB Docket No. 21–501, at 2 (filed Mar. 7, 2022)).

[19] Consumer Reports and Public Knowledge Comments at 5.

[20] *Id.* at 14–15.

[21] *Id.* at 15, 19 (concluding ''that providers seldom acknowledge that company-imposed fees are in fact imposed at the discretion of the cable companies, and, further, that they frequently state or suggest the exact opposite: that the company has no choice but to charge these fees'').

[22] *See id.* at 3–4, 10.

[23] *Id.* at 6.

[24] *See* Consumer Reports and Public Knowledge Comments at 6.

[25] *Id.* at 5.

[26] Local Government Comments at 6. *See also infra* section III.G (Digital Equity and Inclusion).

[27] *Id.* at 15–17 (citing Assurance of Discontinuance, *In the Matter of Comcast Cable Commc'ns LLC,* No. 18–3514 (Mass. Super. Ct. Nov. 9, 2018)).

[28] These include class action lawsuits against Cox, Frontier, AT&T, DIRECTV, CenturyLink, Comcast, DISH Network, and Charter Communications. Truth in Advertising Comments at 2–3.

[29] Local Government Comments at 5.

[30] *See* Local Franchise Authorities Comments at 1–7.

[31] Comments of NCTA—The Internet & Television Association at 3 (NCTA Comments).

[32] NCTA Comments at 2–3.

[33] *Id.* at 4–7. *See infra* section III.D.2 (discussing the TVPA).

[34] Comments of DIRECTV at ii, 9–12 (DIRECTV Comments).

[35] *See, e.g.,* NCTA Reply Comments at 2–3; NCTA Oct. 2 *Ex Parte* at 1–2.

[36] Local Franchise Authorities Comments at 5.

comparison shop among video programming providers when looking at promotional materials and helping subscribers recognize when the price for video service has changed when looking at their bills.[37] As we found in the *NPRM,* unexpected fees related to the cost of video programming, and how those fees are disclosed, can ''make it difficult for consumers to compare the prices of video programming providers.'' [38] An ''all-in'' price that lets consumers know the exact amount that they pay for video programming will give consumers a clear, easy-to-understand, and accurate price-point to consider.[39] We disagree that requiring cable operators and DBS providers to present consumers with honest pricing information without addressing other variables of video programming service will complicate comparison shopping. The ''all-in'' rule does not prohibit additional information that may highlight or compare a service feature (for example, the number, quality, or types of video programming channels available). Instead, it simply prohibits deceptive pricing practices. We also find, based on the record, that the ''all-in'' rule will benefit consumers, notwithstanding its application only to cable and DBS providers, considering the specific issues raised in the record with respect to these services.

12. *The ''All-In'' Rule.* We adopt the proposal in the *NPRM* to require cable operators and DBS providers to provide the ''all-in'' price for video programming service in both their promotional materials and on subscribers' bills.[40] As noted in the *NPRM* and confirmed by the record in this proceeding, the public interest requires that cable operators and DBS providers represent their subscription charges transparently, accurately, and clearly. While commenters representing the cable and DBS industry object to the proposal, the record otherwise reflects a broad swath of support for adoption of an ''all-in'' price rule.

13. *General Implementation.* In accordance with this requirement, cable operators and DBS providers must aggregate the cost of video programming (that is, any and all amounts that the cable operator or DBS provider charges the consumer for video programming, including for broadcast retransmission consent, regional sports programming, and other programming-related fees) as a prominent single line item in promotional materials (if a price is included in those promotional materials) and on subscribers' bills.[41] We do not require every cable or DBS advertisement to provide an ''all-in'' price where pricing is not otherwise included in the ad; but when a price is included in promotional materials, the ''all-in'' rule applies.[42] This aggregate price must include the full amount of the charge the cable operator or DBS provider charges (or intends to charge) the customer in exchange for video programming, including costs relating to broadcast television retransmission, and sports and entertainment programming. We agree with commenters that requiring cable and DBS providers to include these video programming charges in the ''all-in'' price will help consumers ''better distinguish between operator-imposed charges and government-imposed taxes or fees''; as the record indicates, by separating out these charges, cable operators and DBS providers mislead consumers into believing such charges are government-imposed fees when they are nothing of the sort. Instead, such video programming charges are part of the aggregate cost for video programming in their promotional and billing material.[43]

14. Consistent with the Commission's proposal in the *NPRM,*[44] amounts beyond those charged to the consumer for the video programming itself, such as taxes, administrative fees, equipment fees,[45] and franchise fees,[46] or other such charges, are excluded from the ''all-in'' rule.[47] Commenters discussed the potential benefits and downsides of extending the ''all-in'' rule to cover charges and fees not directly related to the provisioning of video programing. Consumer Reports and Public Knowledge, for example, support a broad application of the ''all-in'' rule, including where ''fees might be variable,'' such as equipment costs, because, if not, the advertised price ''is not the real price a consumer will eventually pay.'' [48] The Local Franchise Authorities, on the other hand, suggest ''the Commission should be clear that an all-in price that includes government-imposed taxes or fees does not satisfy the rule.'' [49] We are convinced, at this time, to focus the ''all-in'' rule on the issues identified in the record regarding the disclosure of charges associated with the video programming itself. We also are mindful of pragmatic difficulties of complying with the ''all-in'' rule when certain costs for *each consumer* (not for *each market*) vary more than others.[50] Compliance with the ''all-in'' rule could be complicated, for example, by taxes that may vary by location; and decisions on whether there is a need to purchase equipment and on the number and type of devices, which vary for each household.

15. As proposed in the *NPRM,* we are persuaded that service providers subject to the ''all-in'' requirement may provide

[37] *Id.*

[38] *NPRM,* 2023 WL 4105426 at *1, para. 2.

[39] Thus, we disagree with industry commenters that suggest that an ''all-in'' rule will lead to less transparency because it addresses only one variable in a video service offering—price. *See, e.g.,* DIRECTV Comments at 9–12. Commenters point to the success of the recently adopted broadband consumer label that also ''offers helpful guidance for the Commission in adopting a consistent and clear obligation for cable services and DBS'' and suggest the all-in rule should include factors similar to those required in a broadband consumer label. Local Government Comments at 10–11.

[40] *NPRM,* 2023 WL 4105426 at *2, para. 5.

[41] *Id.* at *2, para. 6.

[42] For purposes of the ''all-in'' rule, promotional material includes communications to consumers such as advertising and marketing.

[43] Local Franchise Authorities Comments at 7–8; Consumer Reports and Public Knowledge Comments at 5, 15, 19; Local Government Comments at 5; NCTA Reply Comments at 3.

[44] *NPRM,* 2023 WL 4105426 at *2, para. 6 (stating that the Commission ''intend[s] for this aggregate amount to include the full amount the cable operator or satellite provider charges (or intends to charge) the customer in exchange for video programming service (such as broadcast television, sports programming, and entertainment programming), but nothing more (that is, no taxes or charges unrelated to video programming).''

[45] *See id.* at *2, para. 6 n.10 (declining to propose ''to require that cable operators and DBS providers include equipment costs in the 'all-in' price listed on promotional materials and bills, as these costs are variable for each subscriber, and some subscribers use their own equipment and therefore do not incur such charges from the provider'').

[46] For purposes of this proceeding, we will consider Public, Educational, and Governmental Access Support Fees (PEG Fees) as part of franchise fees, consistent with prior Commission findings. *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05–311, 34 FCC Rcd 6844, 6860–62, paras. 28–30 (2019) (84 FR 44725, Aug. 27, 2019) (finding that the definition of franchise fee in section 622(g)(1) encompasses PEG-related contributions).

[47] *Id.* at *7, para. 16 (concluding, tentatively, that ''the terms 'taxes,' 'administrative fees,' 'equipment fees,' or 'other charges' cannot reasonably include separate charges for various types of video programming (*e.g.,* amounts paid for retransmission consent rights or rights to transmit regional sports programming or any other programming)'' (citing 47 U.S.C. 542(c)).

[48] Consumer Reports and Public Knowledge Comments at 10–11 (arguing ''the fact that [equipment] fees might be variable is not a reason to exclude them in the aggregate price'').

[49] Local Franchise Authorities Comments at 8 (''[T]o ensure full transparency, the Commission should be clear that an all-in price that includes government-imposed taxes or fees does not satisfy the rule. Including government-imposed taxes and fees in the all-in price will continue to obscure cable operators' decisions regarding pricing and additional charges.'' (citing *NPRM,* 2023 WL 4105426 at *2, para. 7)).

[50] Consumer Reports and Public Knowledge Comments at 11 (arguing that ''even if minor variations were present, tailoring an advertised price to reflect different prices does not strike us as overly burdensome'').

their subscribers and potential subscribers with itemized information about how much of their subscription payments are attributable to specific costs relating to providing video programming or other items that contribute to the bill.[51] Thus, consistent with sections 622(c) and 642 of the Act,[52] cable operators and DBS providers may complement the prominent aggregate cost line item with an itemized explanation of the elements that compose that aggregate cost.[53] Information in addition to the ''all-in'' price may be included, so long as the cable operator or DBS provider portrays the video programming-related costs as part of the ''all-in'' price for service.[54] Additional communications (the customer subscription and billing processes, for example) may also include information about other attributable costs with even more granularity, but may not be a substitute for, or obscure, compliance with the ''all-in'' price. The ''all-in'' rule, for example, does not prevent the additional disclosure of costs relating to retransmission consent fees incurred by cable operators and DBS providers. The record describes issues cable operators and DBS providers incur by recouping retransmission costs, which some providers would like to avoid entirely or inform their customers of, and there is a lack of evidence indicating that additional disclosures that the industry supports causes consumer confusion.[55] Our decision does not prohibit additional disclosures or separate line items, including those required by section 642 of the Act or permitted under 622(c) of the Act.[56] We also decline at this time to ''reform the retransmission consent marketplace,'' as some commenters have requested, as it is beyond the scope of this proceeding and the focus of the Commission in other dockets.[57]

16. In the *NPRM,* the Commission sought comment on whether the ''all-in'' proposal should differentiate between residential, small business, and enterprise subscribers.[58] We agree with commenters asserting that the ''all-in'' rule should apply to all residential customer services provided by cable and DBS operators, including residents in multiple tenant or dwelling unit environments served by such operators.[59] However, we are also persuaded that services provided and marketed to enterprise customers and bulk purchasers of non-residential video programming service should be exempt from the rule because, as NCTA explains, ''[s]uch customers subscribe to video services under customized or individually negotiated plans and thus receive all of the relevant information during the customization or negotiation process.'' [60]

17. We decline to impose more specific requirements for how to present an ''all-in'' price to consumers beyond our finding that it must be a prominent single line item in promotional materials and on subscribers' bills. In the *NPRM,* the Commission sought comment on whether the term ''prominent'' is specific enough to ensure that cable operators and DBS providers present consumers with easy-to-understand ''all-in'' subscription price, or whether we need to provide more detail about how the price for service must be communicated.[61] We do not at this time impose a ''service nutrition-style label,'' specific font size, or disclosure proximity requirement to comply with the ''all-in'' rule. Comments submitted on this point support a clear, easy-to-understand, and accurate statement of the total cost of video programming, while service providers suggest flexibility. We find that the clear, easy-to-understand, and accurate communication of the aggregate price of video service that the cable operator or DBS provider charges best achieves our goal of promoting transparency in promotional and billing material.

18. *Compliance Date.* The ''all-in'' rule must be fully implemented within nine months of release of the Report and Order or after the Office of Management and Budget completes review of any information collection requirements that may be required under the Paperwork Reduction Act of 1995 (PRA),[62] whichever is later, with the exception of small cable operators which will have 12 months to come into compliance. In

[51] *See NPRM,* 2023 WL 4105426 at *3, para. 8; 47 U.S.C. 562; NTCA—The Rural Broadband Association Comments at 5. We note that in some instances this itemization may be required, as well as compliance with the ''all-in'' rule. *See* 47 U.S.C. 562(b)(1) (requiring bill in electronic formats to include ''an itemized statement that breaks down the total amount charged for or relating to the provision of the [MVPD] service by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges'').

[52] 47 U.S.C. 542(c) (permitting cable operators to identify franchisee fees, public, educational, and governmental access (PEG) fees, and other fees, taxes, assessments, or other charges imposed by the government ''as a separate line item on each regular bill of each subscriber''); 47 U.S.C. 562(b)(1) (requiring MVPD consumer bills to include an ''itemized statement that breaks down the total amount charged for or relating to the provision of the covered service by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges'').

[53] ACA Connects Comments at 9, 15.

[54] *See id.* at 6–7 (describing how some ACA Connects members ''explicitly pass through retransmission consent fees and [regional sports] fees as line items on subscriber bills'' to promote transparency and ''help customers understand the source of . . . increases'').

[55] *See, e.g., id.* at 6–7 (''To be clear, our Members would prefer to help their video customers by reducing prices or at least curbing price increases, but the dictates of the retransmission consent regime make this impossible. The best they can do is transparency: by explicitly identifying the programming fees that are driving up cable bills, they can at least help customers understand the source of these increases.'').

[56] *See NPRM,* 2023 WL 4105426 at *3, para. 8 (discussing that cable operators may identify certain charges imposed by the government ''as a separate line item on each regular bill of each subscriber,'' 47 U.S.C. 542(c), and the MVPD electronic format billing requirement to include an itemized statement that breaks down the total amount charged, 47 U.S.C. 562(b)(1)).

[57] *See* ACA Connects Comments at 9, 15 (urging the Commission to ''to refocus its efforts on finding ways to reform the retransmission consent marketplace for the benefit of consumers''). The Commission has and is addressing issues regarding retransmission consent in other dockets, and we continue to believe those issues should be addressed separate from the ''all-in'' rule. *See, e.g., Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10–71, Report and Order (79 FR 28615, May 19, 2014) and Further Notice of Proposed Rulemaking (79 FR 19849, April 10, 2014), 29 FCC Rcd 3351 (2014) (seeking comment on the Commission's retransmission consent rules); *Reporting Requirements for Commercial Television Broadcast Station Blackouts,* Notice of Proposed Rulemaking, MB Docket No. 23–437, FCC 23–115, 2023 WL 8889607 (Dec. 21, 2023) (89 FR 5184, Jan. 26, 2024) (proposing a reporting framework that ''would require public notice to the Commission of the beginning and resolution of any blackout and submission of information about the number of subscribers affected''); *Customer Rebates for Undelivered Video Programming During Blackouts,* Notice of Proposed Rulemaking, MB Docket No. 24–20, FCC 24–2, 2024 WL 212126 (Jan. 17, 2024) (89 FR 8385, Jan. 7, 2024) (seeking comment on whether to require cable operators and DBS providers to rebate subscribers for programming blackouts that result from failed retransmission consent negotiations or failed non-broadcast carriage negotiations); Federal Communications Commission, Retransmission Consent, *https://www.fcc.gov/media/policy/retransmission-consent* (last updated Sept. 27, 2021).

[58] *See NPRM,* 2023 WL 4105426 at *3, para. 9. Enterprise customers include bulk purchasers (such as multiple dwelling unit (MDU) or multiple tenant environment (MTE) owners) and typically do not include small business or residential customers. *See* NCTA Comments at 8.

[59] *See* Local Government Reply Comments at 9 (''[R]esidents of multi-dwelling units (MDUs) can often be the most vulnerable consumers and should not be excluded from the proposed rule's protections.'').

[60] *See* NCTA Comments at 8 (''[E]nterprise customers and bulk purchasers (such as multiple dwelling unit (MDU) or multiple tenant environment (MTE) owners) should not be covered by the proposed rule.''); DIRECTV Comments at 16–17 (suggesting the Commission not regulate business services, as enterprise customers are sophisticated entities that do not need the Commission's protection).

[61] *See NPRM,* 2023 WL 4105426 at *2, para. 7.

[62] Public Law 104–13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

the *NPRM,* we sought comment on what would be a reasonable implementation period for providers to update their systems to reflect any changes if we were to adopt the ''all-in'' price.[63] Verizon has suggested the Commission ''allow at least six months for providers to comply and ensure 'a reasonable implementation period for providers to update their system,' [and] an additional six months for parties to comply with any rules that affect legacy plans.[64] NCTA contends that ''given the scope of changes that could be necessary to implement an all-in pricing rule, the Commission should grant at least 12 months for operators to come into compliance.'' [65] ACA Connects likewise argues that the Commission should provide at least twelve months for providers to implement any requirements, particularly for smaller cable operators that use software platforms from third-party vendors.[66] We conclude that a nine-month implementation period will be sufficient to fully implement the ''all-in'' rule, which will afford time to affect operating systems and address legacy plan billing. We note that Congress afforded MVPDs six months to implement the billing requirements of the TVPA and conclude that nine months for most providers is a time period that will similarly benefit consumers when implementing the ''all-in'' rule.[67] However, given the concerns raised by ACA Connects, we give small cable operators, *i.e.,* those with annual receipts of $47 million or less, an additional three months to come into compliance.[68]

19. *Bundled Services.* The ''all-in'' rule requires clear, easy-to-understand, and accurate disclosure of the aggregate cost of video programming when a cable operator or DBS provider promotes or bills for video programming that is part of a bundle. Bundled services are increasingly popular among consumers. We agree with Verizon that bundles can be economically efficient and benefit consumers, and allow video programming service providers to distinguish themselves.[69] As part of the *NPRM,* the Commission asked for comment on whether to apply the ''all-in'' rule in circumstances where the cable operator or DBS provider bundles video programming with other services like broadband internet service.[70] The Commission also inquired as to whether it was possible to provide an ''all-in'' price, as Verizon explains, ''where the video component has not been priced or itemized separately from the bundle as a whole.'' [71]

20. The record raises issues with how bundled service offerings disclose and bill for the costs of video programming, particularly when charges and fees for the video programming element of the bundle increase due to a promotion schedule or otherwise. Consumer Reports argues ''the video portion of a bundled offering should reflect the required prominent all-in price of the equivalent stand-alone video offering.'' [72] Truth in Advertising notes ''deceptive pricing tactics'' and comments that the rule should specifically address bundled and related services.[73] The Connecticut Office of State Broadband submits that consumers would benefit from application of the ''all-in'' rule to the marketing and billing of oftentimes complicated bundles that include video programing service with other services, like phone and internet.[74] They discuss consumer reports of deceptive pricing specifically related to bundled services and are in favor of applying the ''all-in'' rule for the video programming portion of a bundled offering, ''because many bundles are discounted'' [75] and ''the advertised prices for such bundles often omit fees that consumers are ultimately charged,'' including video programming charges that unexpectedly increase the bottom-line monthly price of the bundled service.[76]

21. Verizon and NCTA argue that applying the ''all-in'' rule to bundled packages that include video programming removes flexibility necessary to offer competitive packages, while potentially adding to consumer confusion. Verizon contends that the ''all-in'' rule ''threaten[s] to undermine this flexibility, by potentially requiring carriers to advertise and bill for a stand-alone price where none exists—that is, where the video component has not been priced or itemized separately from the bundle as a whole.'' [77] As NCTA explains, video programming is ''frequently bundled with other services, such as broadband . . . and voice services, resulting in service packages that offer consumers a wide range of choices but do not easily lend themselves to apples-to-apples comparisons between providers.'' [78] ''[R]equiring an all-in price for video for bundled customers is also likely to increase customer confusion, not reduce it,'' especially where the ''consumers have been purchasing the plans for many years,'' [79] Verizon asserts.

22. We find that application of the ''all-in'' rule is warranted when video programing service is offered and billed as part of a bundle of services. Our

[63] *NPRM,* 2023 WL 4105426 at *3, para. 9.

[64] Verizon Nov. 13 *Ex Parte* at 2 (quoting *NPRM,* 2023 WL 4105426 at *3, para. 9).

[65] NCTA Feb. 14 *Ex Parte* at 3. *See also* DIRECTV Mar. 7 *Ex Parte* at 2 (suggesting that the Commission ''either extend[ ] the overall deadline to twelve months or maintain[ ] the current nine-month deadline for advertisements but allow[ ] an additional six months for billing'').

[66] As ACA explains, ''smaller operators are dependent on third-party vendors that serve many customers, and smaller systems often have to 'wait in line' behind larger ones when implementing any changes to their billing systems.'' ACA Connects Mar. 8 *Ex Parte* at 2. This is similar to the delays that small operators face in obtaining equipment that complies with our rules. *See TiVo Inc.'s Request for Clarification and Waiver of the Audiovisual Output Requirement of Section 76.640(b)(4)(iii), etc.,* MB Docket No. 12–230, etc., Memorandum Opinion and Order, 27 FCC Rcd 14875, 14884, para. 17 (observing that ''small cable operators have, in the past, experienced difficulty obtaining compliant devices in the same time frame as larger operators'') (2012).

[67] Television Viewer Protection Act of 2019, Public Law 116–94, 133 Stat. 2534 (2019), sec. 1004(b) (''Section 642 of the [Act] . . . shall apply beginning on the date that is 6 months after the date of the enactment of this Act. The [Commission] may grant an additional 6-month extension if [it] finds that good cause exists for such . . . extension.''). The Commission granted a six-month extension due to ''the national emergency concerning the COVID–19 pandemic.'' *Implementation of Section 1004 of the Television Viewer Protection Act of 2019,* Order, 35 FCC Rcd 3008, 3009, para. 3 (MB 2020).

[68] *See* 13 CFR 121.201, NAICS Code 516210 (classifying ''Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers'' with annual receipts of $47 million or less as small). *See also NPRM,* 2023 WL 4105426 at para. 20 (seeking comment on whether there are ways to limit any potential compliance burdens on providers, including ''on small cable operators, as that term is defined by the Small Business Administration'' and citing 13 CFR 121.201, NAICS Code 516210).

[69] Verizon Comments at 11–12; Local Government Reply Comments at 11 (describing how ''most streaming services offer very different products from cable and DBS providers'').

[70] *NPRM,* 2023 WL 4105426 at *2, para. 7.

[71] *Id.;* Verizon Comments at 11.

[72] Consumer Reports and Public Knowledge Comments at 12.

[73] Truth in Advertising Comments at 6, 8 (''TINA.org supports the Commission's commencement of a rulemaking proceeding to address . . . deceptive pricing tactics, and also urges the FCC to explicitly address bundled—and related—services in the text of the proposed rule.'').

[74] Connecticut Office of State Broadband Comments at 5 (explaining that ''because so many of the cable subscribers bundle their video service with other services like phone and internet, the All-In rules need to be tailored to ensure that bundled services are not exempted'').

[75] Consumer Reports and Public Knowledge Comments at 12.

[76] Truth in Advertising Comments at 6, 7–8; Connecticut Office of State Broadband Comments at 5–6.

[77] *Id.* at 11–12 (explaining that some bundled offerings ''contain no standalone price of video service or any separate video-specific discount, so providers would be forced into an arbitrary allocation of the discount among the bundled services '' and how Verizon has provided a breakdown of separate prices and discounts for each service so customers can readily identify the portion of the bill attributable to video service).

[78] NCTA Comments at 7.

[79] Verizon Comments at 12.

driving intent is to inform and enable consumers with information regardless of the type of service agreement they have with a provider, including agreements for bundles of services. Thus, in circumstances in which a cable operator or DBS provider promotes or bills for a bundled service that includes video programming as part of a bundle that will result in a charge to a consumer, compliance with the ''all-in'' rule requires clear, easy-to-understand, and accurate disclosure of the aggregate customer fees and charges specific to video programming,[80] and, if applicable, either the length of time that a promotional discount will be charged or the date on which a time period will end that will result in a price change for video programming. If a cable operator or DBS provider charges (or will charge) for a cost related to video programming in whole or in part (for example, charge for costs related to local broadcast programming), then disclosure of those costs must comply with the ''all-in'' rule. And if a discount is applied, it also must be presented in clear, easy-to-understand, and accurate terms, which includes any expiration date, if applicable, for example.[81] In that manner, consumers will be better informed about an element of the service bundle that may lead to an unexpected charge or fee. Providers are free to describe in their promotional materials the value of bundling, including the discounts associated with bundling various services.

23. *Specific Implementation Issues Raised in the Record, Billing Materials: Pricing Disclosures and Billing Material.* The ''all-in'' rule requires providers to state the aggregate monthly (or regularly occurring) price for video programming on billing material so that consumers know the charges they will incur during the term of service and when.[82] We find requiring an ''all-in'' price on billing material further enables consumers access to important information about the cost of video programming, including increases in prices during the term of service. DIRECTV contends that, as an alternative to the ''all-in'' rule, the Commission could require that bills be ''accurate'' and ''disclose key information regarding programming-related fees clearly and conspicuously and in close proximity to pricing.'' [83] We do not, however, accept that as an alternative to the ''all-in'' rule, as this proposal is a more subjective alternative that would be difficult to enforce and does not address issues identified in the record specific to charges related to video programming. Thus, subscriber billing material for video programming, standalone or otherwise, requires inclusion of the aggregate monthly amount the subscriber's video programming will ultimately cost including all video programming related fees.[84] If a price is introductory or limited in time, for example, then the ''all-in'' rule requires customer billing to include clear, easy-to-understand, and accurate disclosure of the date the promotional rate ends (by stating either the length of a promotional period or the date on which it will end), and the post-promotion ''all-in'' rate (*i.e.,* the roll-off rate) 60 and 30 days before the end of any promotional period (as is necessary when offering a varying rate in promotional material, discussed below).[85]

24. *Grandfathered Service Plans.* We are persuaded that the ''all-in'' rule should apply to billing materials for legacy or grandfathered service plans that cable operators and DBS providers no longer offer to subscribers and when promotional material is used to market legacy plans that are being renewed by customers. In the *NPRM,* the Commission sought comment on whether the proposal should apply to existing customers with legacy plans that are no longer available,[86] and industry commenters raise concern with how the ''all-in'' rule would apply to existing subscribers with legacy or grandfathered plans.[87] Verizon suggests we exempt legacy or grandfathered plans that are no longer available to new customers as the Commission did with the Broadband Nutrition Labels required of broadband internet service providers. According to DIRECTV, ''[a]t a minimum, the Commission should not seek to regulate bills for legacy offers not available to new subscribers,'' which would have a ''substantially diminished benefit for purposes of comparison shopping.'' [88] Consumer Reports disagrees, citing consumer benefits of pricing disclosures and suggests the ''task need not be more complicated than a simple case of addition'' of the ''all-in'' price.[89]

25. We are persuaded that consumers of legacy plans benefit as much as consumers of available plans and that the benefits of providing an ''all-in'' price outweigh burdens described by industry.[90] It is a complicated process, according to Verizon, for it to apply an ''all-in'' rule across a wide variety of pricing plans and content packages that have changed over time to adapt to market forces, and we appreciate the difficulties involved with changing various billing formats all at once.[91] We disagree, however, that inclusion of the ''all-in'' price on billing material for legacy plans will ''cause unnecessary confusion.'' [92] To the contrary, application of the ''all-in'' rule to the billing of legacy service plans, including potentially long-term or renewable agreements, will benefit consumers' knowledge of how much their video programming service costs. As for

[80] Because our intent is to inform consumers about the price they are paying specifically for video programming and enable them to comparison shop, we disagree with NCTA's contention that a provider should have the option of complying with the ''all-in'' rule by stating the full price of the bundle, inclusive of all video programming related fees. *See* NCTA Mar. 6 *Ex Parte* at 3.

[81] Consumer Reports and Public Knowledge Comments at 12 (supporting disclosure of ''clear and concise terms, including any expiration date''); *see generally Empowering Broadband Consumers Through Transparency,* CG Docket No. 22–2, Report and Order (87 FR 76959, Dec. 16, 2022) and Further Notice of Proposed Rulemaking (87 FR 77048, Dec.16, 2022), FCC 22–86, 37 FCC Rcd 13686, 13695, para. 25 (rel. Nov. 17, 2022) (*Broadband Transparency Order*) (discussing benefits of requiring the broadband label to ''clearly disclose either the length of the introductory period or the date on which the introductory period will end'')).

[82] *See generally id.* at 13695, para. 27.

[83] DIRECTV Comments at 2.

[84] *See* 47 U.S.C. 562(a)(1)–(3) (''Consumer Rights in Sales'').

[85] The ''roll-off rate'' is the rate as calculated at the time it is provided and does not require projections or estimates of what the rate will be at the time the promotional rate expires. *See* NCTA Mar. 6 Ex Parte at 2 (discussing how ''cable operators do not know what their post-promotional rate will be, as rates are impacted by a variety of factors not under their exclusive control''). We recognize that rates may fluctuate during the term of the promotional period, and as such, disclosure of the post-promotional rate does not ''effectively freeze the rates that an operator can charge during the promotional period,'' as NCTA posits. *Id.* To the extent that a provider subject to this requirement has multiple or graduated roll-off periods, the operator will need to provide the roll-off rate 60 and 30 days before the end of each promotional period. *See* NCTA Mar. 6 Ex Parte at 2 n.7 (discussing disclosure of promotions that ''include graduated roll-off prices'').

[86] *See NPRM,* 2023 WL 4105426 at *3, para. 9.

[87] We refer to the terms ''legacy'' and ''grandfathered'' plans interchangeably; Verizon, for example, refers to legacy plans, while the Commission considered similar issues in the *Broadband Transparency Order* when discussing grandfathered plans. *See Broadband Transparency Order,* 37 FCC Rcd at 13718–19, paras. 100–04.

[88] DIRECTV Comments at 17 (citing *Broadband Transparency Order,* 37 FCC Rcd at 13718, para. 100).

[89] Consumer Reports and Public Knowledge Comments at 12.

[90] *See* DIRECTV Comments at 17; Verizon Comments at 4; USTelecom Comments at 2–3 (citing DIRECTV Comments at 17; Verizon Comments at 7).

[91] Verizon Comments at 8 (''In addition, regulation of legacy plans could provide an incentive for providers to eliminate them, which would lead to further consumer disruption.'').

[92] Verizon Reply Comments at 6 (''Requiring changes to these customers' legacy bills would cause unnecessary confusion, especially when they have been purchasing the same plans for many years and are therefore fully aware of the total costs of the services to which they subscribed.'').

promotional materials, grandfathered plans are not available to new consumers by definition, and therefore we expect that cable operators and DBS providers will not be marketing the services in a way that would trigger the ''all-in'' rule. But if the operator or provider issues promotional material used to inform or market a legacy plan to existing customers that are subscribed to such plans, then that material must include the ''all-in'' price.[93] By applying the ''all-in'' rule in this manner, we avoid unnecessary confusion to customers, while enabling subscriber access to information that is key to their understanding of the services they are purchasing under the grandfathered plans and ability to comparison shop.[94]

26. *Promotional Materials. Time-Limited Promotional Discounts.* The ''all-in'' rule applies to promotional materials that state a price, including in circumstances involving a promotional discount when the amount billed to the customer by the cable operator or DBS provider may change (for example, at the end of a promotional period). And if a discount is applied, it also must be presented in clear, easy-to-understand, and accurate terms, which includes any expiration date, if applicable, for example. According to NCTA, consumers ''do not jump immediately from advertising to bills,'' rather they typically go through the ''sales process during which providers disclose the total price that the consumer would pay, inclusive of the relevant fees.'' [95] The record, however, indicates that the onboarding sales process has not proven to be entirely effective.[96] The record includes evidence indicating persistent confusion over the price for video programming, particularly with how the price for video programming is described in promotional material and when the price may vary over the term of the service agreement.

27. We disagree that applying the ''all-in'' rule to promotional rates will undermine transparency and potentially discourage the use of promotions altogether.[97] We find that knowledge of how a time-limited discounted price will increase to the ultimate price the consumer will be charged for video programming service gives consumers a reliable idea of what they will pay each month that incorporates pricing variables, and does so in a way that is uniform among providers and enables comparison shopping. Compliance with the ''all-in'' rule therefore includes disclosing the base (or standalone) rate with a subtracted amount (the amount after application of any promotional discount) in a way that enables consumers to know the amount they will be required to pay each month (each billing cycle) during the term of the service agreement.[98] If, for example, a promotion or other circumstance includes an introductory offer of free or discounted channels and the ''all-in'' price will change at the conclusion of the promotional period, then the cable operator or DBS provider must state in promotional materials the current cost of video programming service that the consumer will pay initially and state the ''all-in'' price that applies following the introductory period or promotion.[99] To the extent that a provider subject to this requirement has multiple or graduated roll-off periods, the operator must, at a minimum, provide the initial promotional rate and the final rate after all promotional discounts have expired. Consumers must simply be enabled to know what amount they can expect to find as a charge on their bill, particularly when the amount is scheduled to change due to promotions or other circumstances.

28. *Regional And National Promotional Material.* We conclude that the ''all-in'' rule applies to regional and national promotions of cable operators and DBS providers. Service providers raise concerns with how an ''all-in'' pricing requirement would affect regional and national promotional efforts.[100] In the *NPRM,* the Commission asked how it should account for national, regional, or local advertisements, where the actual price may not be the same for all consumers receiving the promotional materials due to market-specific price variation.[101] DIRECTV argues that the ''all-in price proposal *cannot* account for national advertising.'' [102] DIRECTV predominantly advertises nationally, but ''charges different [regional sports] fees in different markets based on the differing fees it pays for access to those [regional sports networks].'' [103] According to DIRECTV, a single, ''all-in'' price afforded to everybody could ''provide inaccurate information for most subscribers and potential subscribers no matter what price DIRECTV may choose to provide.'' [104] Likewise, NCTA states that there is a potential that the ''all-in'' requirement ''would not give consumers an accurate estimate of the all-in price for video programming services available in their areas given the variation in these fees.'' [105] DIRECTV reports it may have to calculate a price using the most expensive regional sports programming fees, which ''could artificially encourage customers and potential customers in markets without [regional sports networks] or with lower-priced [regional sports networks] to take service from one of DIRECTV's competitors, particularly its unregulated online competitors.'' [106]

29. We find these arguments merely support the need for Commission action. A number of services and commodities are promoted and sold at nationwide or regional prices that include varying local costs, including services of cable operators and DBS providers.[107] These arguments support our conclusion that the manner in which promotional and billing information is being communicated with consumers currently is susceptible to costly misunderstandings. The separation of programming fees (such as the cost of regional sports programming fees) from the bottom-line, ''all-in'' price has been described as a leading contributor to customer confusion we seek to address. Costs may vary depending upon franchise area, as the NCTA, DIRECTV, and ACA explain, but the exclusion of any and all amounts charged to the consumer for video programming leads to significant issues,

[93] As we discuss below, we apply the ''all-in'' rule to promotional material to further our principal goal of allowing consumers to comparison shop among services, but new customers comparison shopping do not benefit from an ''all-in'' rule price for service that is not available to them. *See generally Broadband Transparency Order,* 37 FCC Rcd at 13718, para. 101 (''And such labels may even confuse consumers if those plans are not actually available to them.'').

[94] Consumer Reports and Public Knowledge Comments at 7–8.

[95] NCTA Comments at 4–6.

[96] *See* Local Governments Reply Comments at 1–2.

[97] DIRECTV Comments at 12.

[98] As discussed above, this is the rate as calculated at the time it is provided and does not require projections or estimates of what the rate will be at the time the promotional rate expires. *See supra* note 97.

[99] *See generally Broadband Transparency Order,* 37 FCC Rcd at 13695, para. 25 (''We agree with those commenters that argue that the label should also clearly disclose either the length of the introductory period or the date on which the introductory period will end.''). We decline to act on other issues, such as the City of Seattle's contention that cable operators should not be able to increase broadcast TV and regional sports fees during the promotional period, considering our focus on the core issues identified in the record relating to the disclosure of fees. City of Seattle Comments at 6. We find this proposal goes beyond the scope of this proceeding.

[100] NCTA Reply Comments at 4.

[101] *See NPRM,* 2023 WL 4105426 at *3, para. 9.

[102] DIRECTV Comments at 11.

[103] *Id.*

[104] *Id.*

[105] NCTA Comments at 5.

[106] DIRECTV Comments at 11–12.

[107] *See, e.g.,* Thomas T. Nagle, John E. Hogan, Joseph Zale, The Strategy and Tactics of Pricing (5th ed. 2011).

as described in the record by individuals, organizations, and state and local governments. We disagree, therefore, that programming fees should be excluded from the ''all-in'' rule for regional or national promotions.[108]

30. To address the fact that certain costs vary by region, our rule requires any advertised price to include all video programming fees that apply to all consumers in the market that the advertisement is targeted to reach. Providers may opt to provide a ''starting at'' price, or a range of prices that account for the fluctuation in video programming fees in the locations that the advertisement is intended to reach. In this case, when an aggregate ''all-in'' price is not stated due to pricing fluctuation that depends on service location, the provider must state where and how consumers may obtain their subscriber-specific ''all-in'' price (for example, online at the provider's website or by contacting a customer service or sales representative). At the time the potential consumer provides location information, online or otherwise, then the provider must state the ''all-in'' price. Providers also may state time-limited introductory prices that are available to all potential customers the advertisement is targeted to reach,[109] if the advertised price includes the video programming fees that apply to all consumers in the targeted market and the consumer has the ability to obtain an ''all-in'' price before ordering video programming, as discussed above.[110] This allows flexibility for service providers to highlight information in promotional and billing material while providing transparency to promotional material that reduces consumer confusion and enables comparison shopping with a budgets in mind. Our goal is to enable consumers to know the amount they will be billed for the service offered.

31. *Legal Authority.* We conclude that the TVPA, section 632 of the Act (covering cable operators), and section 335 of the Act (covering DBS providers), in addition to ancillary authority, provide ample authority for the ''all-in'' rule.[111] We also conclude that the ''all-in'' rule is consistent with the First Amendment. In the *NPRM,* the Commission asked ''whether we should consider expanding the requirements of this proceeding to other types of [MVPDs] and on our authority to do so.'' [112] We decline to extend the ''all-in'' rule to other entities at this time given the lack of record evidence concerning the billing and advertising practices of non-cable and non-DBS video services.[113]

32. *Section 642 of the Act,* 47 U.S.C. 562 *(Television Viewer Protection Act of 2019 (TVPA)).* The Commission derives authority for the ''all-in'' rule from the TVPA requirements as it applies to electronic billing. Section 642 of the Act, as added by the TVPA, requires MVPDs to bill subscribers transparently when the MVPD sends an electronic bill, and specifically requires MVPDs to include in their bills ''an itemized statement that breaks down the total amount charged for or relating to the provision of the covered service by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges.'' [114] As mandated by this statutory directive, the ''all-in'' rule requires cable operators and DBS providers to provide consumers with the total charge for all video programming and will ensure that consumers are provided complete and accurate information about the ''amount charged for the provision of the service itself,'' as Congress intended.[115] Such costs make up the charges for the ''provision of the service itself'' because broadcast channels, regional sports programming, and other programming track the statutory definition of ''video programming'' (that is, all are programming provided by, or generally considered comparable to programming provided by, a television broadcast station),[116] and video programming is, by definition, the service that an MVPD makes available for purchase.[117] Listing such costs as below-the-line fees potentially results in confusion for consumers about the ''amount charged for the provision of the service itself,'' because the word ''itself'' suggests a single charge for the total service rather than one charge for one portion of the service and then a separate charge for other programming provided. This contravenes Congress's core purpose for enacting the legislation: to curb MVPDs' practice of charging ''unexpected and confusing fees,'' but the record, including recent press reports, suggest that this practice continues.[118]

33. We observe that the TVPA provides for the disclosure of a second group of costs on electronic bills—*i.e.,* ''the amount of all related taxes, administrative fees, equipment fees, or other charges.'' [119] Charges and fees relating to video programming (including broadcast channels, regional sports programming, and other programming) do not fall within this category because video programming, by definition, is the service that an MVPD makes available for purchase—in other words, the ''service itself.'' [120] Thus, the most reasonable reading of the statute is that the terms ''taxes,'' ''administrative fees,'' ''equipment fees,'' or ''other charges'' do not include separate charges for various types of video programming (*e.g.,* amounts paid for retransmission consent rights or rights to transmit regional sports programming or any other programming).[121] We

[108] NCTA Comments at 5–6 (citing H.R. Rep. No 116–329, at 6).

[109] NCTA Mar. 6 *Ex Parte* at 2.

[110] *See* Consumer Reports and Public Knowledge Comments at 2 (discussing issues with prices increased outside of a '''locked-in' promotional rate''). *See generally Broadband Transparency Order,* 37 FCC Rcd at 13695, para. 25 (''conclud[ing] that if a provider displays an introductory rate in the label, it must also display the rate that applies following the introductory period'').

[111] 47 U.S.C. 335, 552.

[112] *NPRM,* 2023 WL 4105426 at *1, para. 3.

[113] *See* NCTA Comments at 12; NCTA Reply Comments at 7; ACA Connects Comments at 16; DIRECTV Comments at 10–11.

[114] *NPRM,* 2023 WL 4105426 at *7, para. 16; 47 U.S.C. 562(b)(1), (d)(3) (defining ''covered service'' as ''service provided by a multichannel video programming distributer [sic], to the extent such distributor is acting as a multichannel video programming distributor''); NCTA Reply Comments at 3 (noting that the TVPA addresses transparency of payment by ''requiring electronic bills to include an itemized statement that breaks down the total amount charged for or relating to the provision of [video] service'').

[115] 47 U.S.C. 562(b)(1).

[116] *Id.* Section 522(20) (''the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station'').

[117] *Id.* Section 522(13) (''the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming'').

[118] Congress expressed specific concern that consumers face ''unexpected and confusing fees when purchasing video programming,'' including ''fees for broadcast TV,'' and noted that the practice of charging these fees began in the late 2000s. H.R. Rep 116–329, at 6 (2019). We reject the claim that the ''only authority that the TVPA gave the Commission'' was to grant MVPDs an additional six months to comply with the statute. State Cable Ass'ns Mar. 5 *Ex Parte* at 4 n.19. The courts have affirmed the Commission's authority to promulgate rules implementing a section of the Communications Act without an explicit delegation to the Commission to interpret that particular statutory section. *See Alliance for Community Media* v. *FCC,* 529 F.3d 763, 773 (6th Cir. 2008) (affirming the Commission's jurisdiction to promulgate rules implementing section 621(a)(1) of the Communications Act even in the absence of an explicit delegation of rulemaking power to the Commission in that statutory section).

[119] 47 U.S.C. 562(b)(1).

[120] *Id.* Section 522(13).

[121] The ''all-in'' rule is explicit that cable operators and DBS providers may list certain discrete costs. 47 U.S.C. 542(c) (Cable operators may identify, ''as a separate line item on each regular bill of each subscriber, . . . [t]he amount of the total bill assessed to satisfy any requirements

accordingly reject NCTA's argument that programming fees (such as retransmission consent fees) fall within this ''second group'' of costs on electronic bills.[122]

34. *Section 632 of the Act,* 47 U.S.C. 552 *(Cable Operators).* We conclude that section 632 of the Act provides us with authority to adopt the ''all-in'' rule as it will apply to cable operators.[123] Section 632(b) of the Act provides the Commission authority to establish customer service standards regarding billing practices and other communications with subscribers, and the Commission has relied on that authority for decades to regulate in this area.[124] Section 632(b)(3) also supports the Commission adopting customer service requirements regarding, among other enumerated topics, ''communications between the cable operator and the subscriber (including standards governing bills and refunds).'' [125] The legislative history of section 632 provides that ''[p]roblems with customer service have been at the heart of complaints about cable television,'' and indicates Congress' belief that ''strong mandatory requirements are necessary.'' [126] Congress expected ''the FCC, in establishing customer service standards to provide standards addressing . . . billing and collection practices; disclosure of all available service tiers, [and] prices (for those tiers and changes in service) . . . .'' [127] Our ''all-in'' rule addresses cable operators' billing practices, *i.e.,* requiring clear, easy-to-understand, and accurate price information in customer bills for video programming service, and, therefore, is a customer service matter within the meaning of section 632(b)(3). In addition, the statute identifies the specific areas for the Commission to act as the ''minimum'' standards.[128] Thus, by its terms, section 632(b) gives the Commissions broad authority to adopt customer service standards that go beyond those enumerated in the statute.[129] We find that the ''all-in'' rule is also authorized under our general authority in section 632(b) to establish ''customer service'' standards. The term ''customer service'' is not defined in the statute. In 1984, when Congress first enacted section 632 authorizing franchising authorities to establish customer service requirements, the legislative history defined the term ''customer service'' to mean ''in general'' ''the direct business relation between a cable operator and a subscriber,'' and goes on to explain that ''customer service requirements include . . . the provision to customers (*or potential customers*) of information on billing or services.'' [130] In 1992, Congress retained this term when amending section 632 to require the FCC to adopt ''customer service'' standards.[131] The ''all-in'' rule imposes requirements on billing information provided to potential customers in promotional materials, which, as reflected in the legislative history, is a customer service matter.[132] Accordingly, billing communications in customer bills as well as promotional materials and advertising aimed at potential customers are precisely the type of customer service concerns that Congress meant to address when it enacted section 632.[133] Thus, the ''all-in'' rule covering bills, advertisements and promotional materials is within the statute's grant of authority.

35. We thus reject commenters' argument that covering ''non-subscribers'' or ''potential subscribers'' under the ''all-in'' rule renders it a ''consumer protection'' law under section 632(d) and thus falls ''outside'' the Commission's authority, as evidenced by section 632's title, which distinguishes between customer service and consumer protection.[134] As mentioned above, the ''all-in'' rule, which covers both current and potential subscribers, is a customer service requirement that is authorized under section 632(b). Moreover, section 632(d) does not place any limitation on the Commission's authority; rather it preserves States' and local governments' ability to enact and enforce consumer protection laws and customer service requirements that are not specifically preempted by the Cable Act.[135] We likewise reject commenters' argument that the text of the statute—which ''uses the terms 'customer' and 'subscriber', and refers to 'installations, outages, and service calls', and discusses 'bills and refunds' ''—indicates that section 632 only addresses ''interactions between the cable operators and current and former subscribers'' but ''not potential subscribers.'' [136] Those statutory terms are found in subsection (b)'s list of specific areas for the Commission to address—areas the statute makes clear are ''minimum'' requirements.[137] Commenters' statutory-narrowing argument essentially reads out of the provision the Commission's general grant of authority in subsection (b) to ''establish standards by which cable operators may fulfill their customer service requirements.'' [138] Moreover, we are not persuaded by commenters' argument that the use of the generic

imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.'').

[122] NCTA Comments at 6–7.

[123] 47 U.S.C. 552.

[124] *See, e.g., Cable Service Change Notifications; Modernization of Media Regulation Initiative; Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket Nos. 19–347, 17–105, 10–71, Report and Order, 35 FCC Rcd 11052, 11057, para. 8 (2020) (85 FR 656, Jan. 7, 2020); *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992; Consumer Protection and Customer Service,* MB Docket Nos. 92–263, Report and Order, 8 FCC Rcd 2892, 2906–07, paras. 65–66 (1993) (58 FR 21107, April 19, 1993).

[125] 47 U.S.C. 552(b).

[126] *See* S.Rep. No. 92, 102nd Cong. 1st Sess. 1991 at 21–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1153; City of Local Franchise Authorities Reply Comments at 6 (noting that Congress found that ''customer service requirements include requirements related to . . . 'provision[s] to customers (or potential customers) of information on billing services''' (quoting H.R. Rep. No. 98–934, at 79 (1984)).

[127] *See* S.Rep. No. 92, 102nd Cong. 1st Sess. 1991 at 21–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1153.

[128] *Id.*

[129] *Id.* (''The Commission shall . . . establish standards by which cable operators may fulfill their customer service requirements''); *see, e.g., Cablevision* v. *FCC,* 649 F.3d 695, 705–06 (D.C. Cir. 2011) (by requiring mandatory ''minimum'' regulations, Congress established ''a floor rather than a ceiling,'' leaving the Commission with authority to issue rules that go beyond those specified in the statute); *NCTA* v. *FCC,* 567 F.3d 659, 664–65 (D.C. Cir. 2009) (by describing the ''minimum contents of regulation'' the statutory structure indicates that ''Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem'').

[130] H.R. Rep. 98–934, at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716 (emphasis added).

[131] *See* S.Rep. No. 92, 102nd Cong. 1st Sess. 1991 at 21–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1153.

[132] H.R. Rep. 98–934, at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716 (emphasis added).

[133] Local Franchise Authorities Comments at 3–4 (''The Commission has statutory authority to establish additional customer service standards for cable operators, including standards for prospective subscribers'' under section 632 of the Act, as ''[t]he proposed rule fits squarely in this provision with respect to cable operators' billing standards for current subscribers.'').

[134] NCTA Reply Comments at 6.

[135] 47 U.S.C. 552(d).

[136] NCTA Reply Comments at 6; *see also* NCTA Comments at 8–9 (arguing that section 632(b) ''gives the Commission *no authority* to adopt rules for advertisements and promotional materials addressed to *prospective subscribers* among the general population, who are plainly not 'subscribers,' have no direct business relationship with the cable operator, and do not receive the 'bills and refunds' mentioned in the text of the statute'') (emphasis in original); Cable Company Reply Comments at 4–6 (arguing that section 632(b) does not give the Commission authority to ''regulate communications with the general public or 'potential subscribers''''; rather, section 632(b) uses the terms 'customer' and 'subscriber'. . . all of which only address interactions between cable operators and current and former subscribers'').

[137] 47 U.S.C. 552(b)(1)–(3).

[138] *Id.* section 552(b).

term ''subscriber'' means ''actual cable subscribers'' and excludes ''potential subscribers'' from the authority granted under subsection (b).[139] We find that the better reading of the statute is that the term ''subscriber'' is not limited to current subscribers because ''the term [subscriber] is sufficiently ambiguous to include those considering a subscription,'' as well as current subscribers considering renewal and reviewing promotional material.[140] Indeed, those commenters arguing for a narrow construction concede that the term ''subscriber'' used in subsection (b) can be read to cover both ''current and *former* subscribers.'' [141] And their argument ignores the legislative history, which, as discussed above, indicates Congressional intent to cover under subsection (b) billing information provided to both current and *potential* customers.[142] This language from the legislative history—including the expectation that the Commission would adopt standards regarding ''disclosure of all available service tiers, [and] prices''—suggests that Congress granted the Commission authority over how cable operators disclose their prices to consumers, including prices for services to which consumers may have not yet subscribed.[143]

36. *Section 4(i) of the Act,* 47 U.S.C. 154(i). Applying the ''all-in'' rule's to the promotional materials of cable operators for video programming is also a proper exercise of our authority under section 4(i) of the Act.[144] The Commission is specifically delegated authority under the Communications Act to adopt standards governing communications between the cable operator and subscriber regarding bills.[145] Extending the ''all-in'' requirement to promotional material when a price for video programming is offered is necessary to achieve customer service standards in light of issues raised in the record. Otherwise, consumers might be misled by confusing or misleading pricing information from promotional material and enter into long-term contracts with higher charges than understood would be due. This would undermine the very purpose of the ''all-in'' rule as applied to bills, which aims to ensure consumers receive clear, easy-to-understand, and accurate pricing information.

37. *Section 335 of the Act,* 47 U.S.C. 335 *(Direct Broadcast Service Providers).* Section 335 of the Act provides the Commission with authority to adopt the ''all-in'' rule as it will apply to direct broadcast satellite (DBS) providers.[146] Our action is supported, specifically, by section 335(a), which provides the Commission with authority to impose ''public interest or other requirements for providing video programming'' on DBS providers.[147] We conclude that the ''all-in'' rule is a public interest requirement that falls squarely within our authority under section 335(a).[148]

38. The Commission has previously confirmed, and we agree, that the public interest includes consumer access to clear, easy-to-understand, and accurate information about charges for service, which benefits a well-functioning marketplace.[149] The record reveals how promotional and billing materials are critical to a consumer's understanding of fees and charges relating to video programming, and that misunderstandings from promotional material lead to subscribers going over budget and billing disputes, often while locked into long-term agreements.[150] In addition to billing, we focus on the demonstrated start of the customer's understanding of the pricing of video services, and adopt the ''all-in'' rule to ensure consumers have accurate and understandable information about the monthly cost in order to choose an MVPD service that best suits his or her needs.[151]

39. DIRECTV's description of the limits of the Commission's jurisdiction is inconsistent with the broad authority granted by Congress in section 335(a), which grants authority to impose on DBS providers ''public interest or other requirements for providing video programming.'' [152] We do not read the reference in section 335(a) to adopt requirements for ''providing video programming'' as limiting our authority to cover only public service carriage or programming requirements on DBS providers, as DIRECTV contends,[153] and we disagree with DIRECTV that our interpretation ''is inconsistent with the text, structure and legislative history of the provision.'' [154] Section 335(a) directs the Commission to impose on providers of DBS service ''public interest or other requirements for providing video programming.'' On its face, this language is broad in scope. And the regulation we are adopting here is precisely the type of regulation covered under the statute, *i.e.,* our rule serves the public interest by requiring DBS operators in ''providing video programming'' to ensure consumers have clear, easy-to-understand, and accurate information about the charges for service. DIRECTV, on the other hand, argues that what Congress really intended was to grant the Commission limited authority over public interest *carriage* requirements, such as carriage of political advertising, educational programming, and other public service uses.[155] However, there is no ''carriage'' limitation in the statutory text. Although section 335(a) specifies certain topics that must be addressed by the Commission (including political advertising requirements in sections 312(a)(7) and 315 of the Act), the list is not exhaustive. Because section 335(a) states that the regulations must address these topics ''at a minimum,'' [156] the Commission has authority to adopt public interest requirements beyond those enumerated in the statute. DIRECTV also argues that reading section 335(a) to authorize the ''all-in'' rule would render ''redundant'' the ''prices, terms and conditions'' provision in section 335(b)(3) covering carriage obligations for noncommercial, educational programming.[157] We reject this argument. Our rule does not impose requirements on ''reasonable prices, terms, and conditions,'' as directed under section 335(b)(3). Rather our rule is a public interest requirement directed at ensuring DBS providers are *transparent* about the price *they* have chosen to charge for their service. Thus, there is no redundancy.

40. To be sure, the legislative history suggests that when enacting section

[139] NCTA Comments at 8; NCTA Reply Comments at 6.

[140] Consumer Reports and Public Knowledge Reply Comments at 7–8 (discussing how ''the term 'subscriber' need not be limited to current subscribers [and] is sufficiently ambiguous to include those considering a subscription (as well as those who have terminated their subscription'').

[141] NCTA Comments at 8 (emphasis added).

[142] H.R. Rep. 98–934, at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716.

[143] *See* S.Rep. No. 92, 102nd Cong. 1st Sess. 1991 at 21–22, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1153.

[144] *See* 47 U.S.C. 154(i).

[145] *See* 47 U.S.C. 552(b)(3).

[146] 47 U.S.C. 335.

[147] *Id.* Section 335(a). *See also id.* section 303(v) (granting the Commission ''exclusive jurisdiction to regulate the provision of direct-to-home satellite services'').

[148] *See* 47 U.S.C. 335.

[149] *See Broadband Transparency Order,* 37 FCC Rcd at 13687, para. 1.

[150] *NPRM,* 2023 WL 4105426 at *5, para. 13.

[151] *See FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 596 (1981) (''[T]he Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference.'').

[152] 47 U.S.C. 335(a). *See also* 47 U.S.C. 303(v) (granting the Commission ''exclusive jurisdiction to regulate the provision of direct-to-home satellite services'').

[153] *See* 47 U.S.C. 335.

[154] DIRECTV Comments at 2. *See also* DIRECTV Mar. 7 *Ex Parte* at 1–2.

[155] *See id.* at 4.

[156] 47 U.S.C. 335(a).

[157] DIRECTV Comments at 4–5.

335(a), Congress was focused on potential requirements to be placed on DBS providers with respect to public service programming.[158] However, ''rarely have [courts] relied on legislative history to constrict the otherwise broad application of a statute indicated by its text.'' [159] Contrary to DIRECTV's assertion,[160] the legislative history cannot overcome the clearest and most common sense reading of the language of the statute, which does not limit our authority only to national educational programming.[161] The ''all-in'' rule is a ''public interest or other requirement[]'' for providing video programming that we find falls within our jurisdiction under section 335(a).[162] The ''all-in'' rule is not an imposition of ''sweeping new authority over DBS,'' [163] nor is the Commission ''assert[ing] that [section 335(a) of the Act] confers power to regulate virtually all other terms and conditions of service as well,'' including general regulation of terms, conditions, and pricing for DBS service.[164] Our prior invocation of section 335(b) to reserve channel capacity for noncommercial programming of an educational or informational nature does not preclude targeting non-carriage related problems when they arise under section 335(a), as the ''all-in'' rule does with a specific public interest problem raised in the record.[165] Moreover, the requirement we adopt for DBS providers here as necessary to protect consumers from misleading pricing information, is a proper exercise of the Commission's other authority in Title III, which courts have found endow the Commission with ''expansive powers'' and a ''comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.' '' [166]

41. DIRECTV analogizes the authority granted to the Commission in section 335 with statutes conferring administration authority to the Department of Health and Human Services (Department) that the D.C. Circuit found did not support its regulation of advertisements of certain pharmaceuticals.[167] The circumstances of that decision are distinguishable. In *Merck & Co.,* the Department argued that its regulation was '' 'necessary' to [a pharmaceutical] programs' 'administration,' '' and the court found that ''the Secretary must demonstrate an actual and discernible nexus between the rule and the conduct or management of Medicare and Medicaid programs.'' [168] The nexus was too attenuated, the court concluded, ''stray[ing] far off the path of administration for four reasons.'' [169] The authority granted under section 335, on the other hand, does not provide ''general administrative authority'' to the Commission.[170] Under section 335, a rule must further a ''public interest or other requirement[ ] for providing video programming,'' which the ''all-in'' rule does: it protects the public interest by requiring truth in billing and advertisements for video programming.[171]

42. *Section 4(i) of the Act,* 47 U.S.C. 154(i). In addition, we find authority to extend the ''all-in'' rule to DBS providers under section 4(i) of the Act.[172] The Commission is specifically delegated authority under the Communications Act to adopt standards governing communications between the cable operator and subscriber.[173] Extending the ''all-in'' requirement imposed on cable operators to DBS is necessary for our exercise of this specifically delegated power. Otherwise, consumers might opt for DBS service based on confusing or misleading pricing information over service offered by cable operators that are required to be transparent about the price they are charging. This would undermine the very purpose of the ''all-in'' rule that we are imposing on cable operators. Thus, by extending our rule to DBS providers, we will ensure uniformity of regulation between and among cable operators (regulated under Title VI and by various state consumer protection laws and local franchising provisions) and DBS providers (under Title III).[174]

[158] *See id.* at 5 (citing H.R. Rep. No. 102–862, 100 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1282).

[159] *Consumer Electronics Ass'n* v. *FCC,* 347 F.3d 291, 298 (D.C. Cir. 2003) (citations omitted). The court further noted that ''the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application.'' *Id.* (citing *New York* v. *FERC,* 1225 S. Ct. 1012, 1025 (2002) (''where Congress uses broad language, evidence of a specific 'catalyz[ing] force for the enactment 'does not define the outer limits of the statute's coverage' ''); *PGA Tour, Inc.* v. *Martin,* 532 U.S. 661, 689 (2001) (''[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'')).

[160] *See* DIRECTV Comments at 4–5 (arguing that the legislative history of section 335 is specific to educational programming, and not broader authority and discussing the ''Conference Report explain[ing] that the purpose . . . was to 'define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming,' as well as the 'capacity to be allotted' to 'noncommercial public service uses' '' (citing H.R. Rep. No 102–10–862, 100 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1282)), 5–6 (arguing that necessary ancillary jurisdiction for the Commission to regulate DBS bills and advertising, such jurisdiction would require: (1) the Commission's general jurisdictional grant under Title I covering the regulated subject; and (2) that the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities (citing *American Library Ass'n* v. *FCC,* 406 F.3d 689, 691–92 (D.C. Cir. 2005)).

[161] Consumer Reports and Public Knowledge Reply Comments at 6 (noting legislative history does not accurately reflect Congress's intent ''especially where such an interpretation would mark a radical departure from the general structure of the Act'') (citing *National Petroleum Refiners Ass'n* v. *FTC,* 482, F.2d 672, 693 (D.C. Cir. 1973); *American Hosp. Ass'n* v. *NLRB,* 499 U.S. 606, 613–14 (1991)).

[162] DIRECTV Comments at 3 (citing the Television Viewer Protection Act of 2019, Pub. L. 116–94, 133 Stat. 2534 (2019)).

[163] *Id.* at 3–7 (acknowledging that section 335 of the Act confers authority to the Commission to impose public interest or other requirements for providing video programming, while arguing that ''[p]roperly understood, the statute confers authority to impose public service *carriage* or *programming* requirements on DBS providers but provides no authority to mandate specific terms or conditions of service''); Consumer Reports and Public Knowledge Reply Comments at 8 (arguing that section 335(a) did not create new authority, but obligated the Commission to ''use existing authority—with a deadline of 180 days to complete an initial rulemaking'').

[164] *Id.* at 7.

[165] *See* 47 U.S.C. 335. *See also* DIRECTV Comments at 4 (arguing that section 335 limits the Commission's authority to ''specific public interest *carriage* requirements (that is, carriage of political advertising, educational programming, and other public service uses), not general regulation of terms and conditions of DBS service''), 7 (''The Commission cannot rely on a single clause in a decades-old provision about carriage requirements to assert sweeping new authority over DBS.'').

[166] *Cellco Partnership* v. *FCC,* 700 F.3d 534, 542 (D.C. Cir. 2012). Thus, we rely on other delegations of authority in Title III for adoption of the ''all-in'' rule, including sections 303(b) (which directs the Commission, consistent with the public interest, to ''[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class), 303(r) (which supplements the Commission's ability to carry out its mandates via rulemaking), and 316 (which enables the Commission to alter the term of existing licenses by rulemaking). 47 U.S.C. 303(b), (r), 316. *See also* Consumer Reports and Public Knowledge Reply, at 5 (''Even if DIRECTV were correct with regard to the limitation of Section 335, the Commission has ample authority to impose the proposed rule under its general authority to set service rules for wireless licensees under Sections 303(b) and 303(r)'').

[167] DIRECTV Comments at 8–9 (citing *Merck & Co., Inc.* v. *U.S. Dep't of Health & Human Svcs.,* 962 F.3d 531 (D.C. Cir. 2020)).

[168] *Merck & Co.,* 962 F.3d at 539.

[169] *Id.* at 539, 541 (''hold[ing] only that no reasonable reading of the Department's general administrative authority allows the Secretary to command the disclosure to the public at large of pricing information that bears at best a tenuous, confusing, and potentially harmful relationship to the Medicare and Medicaid programs'').

[170] *Merck & Co.,* 962 F.3d 541.

[171] DIRECTV Comments at 3 (citing the Television Viewer Protection Act of 2019, Pub. L. 116–94, 133 Stat. 2534 (2019)).

[172] 47 U.S.C. 154(i).

[173] 47 U.S.C. 552.

[174] *See, e.g., Mobile Comm'ns Corp.* v. *FCC,* 77 F.3d 1399, 1405–06 (D.C. Cir. 1996) (upholding reliance on 4(i) for the Commission to adjust the terms of preferences to reduce the gulf between recipients of preferences (who would otherwise receive a free license) and other license aspirants (who, under the new auction regime, would have to pay for a license)).

43. *Other Federal Statutes.* Contrary to arguments raised by industry commenters, the TVPA does not preclude the ''all-in'' rule.[175] We recognize that Congress did not include ''language in the original version of the TVPA that would have required all-in pricing in advertisements and other marketing.'' [176] The lack of such a requirement in the TVPA, however, does not preclude the Commission from exercising its powers outside the TVPA (*i.e.,* under Titles III, VI, and section 4(i)) over promotional materials including advertising.[177] With the TVPA, Congress addressed a specific customer service issue, but there is no indication that Congress intended to restrict other authority of the Commission to address these types of issues.[178] First, Congress enacted the TVPA in 2019 to address a specific issue relating to basic protections to consumers when purchasing MVPD services.[179] There is nothing in the TVPA to demonstrate that Congress intended to repeal, supplant or otherwise disturb the Commission's existing statutory authority over cable customer service provided under section 632 or public interest requirements for DBS providers under section 335. Legislative history also makes clear that the TVPA was ''provid[ing] basic protections'' targeted at a particular concern of Congress, but nowhere does it suggest Congress's intent to repeal, supplant or otherwise disturb the Commission's other existing authority.[180] Second, the TVPA's focus is on electronic billing, but we do not rely on the TVPA to apply the ''all-in'' rule to promotional materials. Rather, we rely on other authority (sections 632 (cable operators) of the Act, 335 (DBS providers), and 4(i) (ancillary jurisdiction) [181]) to implement customer service obligations that are not foreclosed by the TVPA.

44. *The First Amendment.* We affirm the Commission's tentative conclusion in the *NPRM* that the proposed ''all-in'' rule is consistent with the First Amendment.[182] When adopting truth-in-billing, advertising, and labeling rules in similar contexts, the Commission has found that ''[c]ommercial speech that is misleading is not protected speech and may be prohibited,'' and ''commercial speech that is only potentially misleading may be restricted if the restrictions directly advance a substantial governmental interest and are no more extensive than necessary to serve that interest.'' [183] The same is true here. The speech implicated here is information in bills and promotional materials about the cost of video programming service offered by cable operators and DBS providers, which the record shows consumers currently find misleading. Thus, our proposed rule simply prevents misleading commercial speech, which is afforded no protection under the First Amendment.[184]

45. In the alternative, even if our ''all-in'' rule regulates only potentially misleading speech, regulations involving commercial speech [185] that require a disclosure of factual information (such as the disclosure of the total cost for video programming service that the ''all-in'' rule would require) are entitled to more lenient review from courts than regulations that limit speech.[186] A speaker's commercial speech rights are adequately protected as long as disclosure requirements are reasonably related to the government's interest in preventing deception of consumers.[187] We conclude that we have met this standard. As an initial matter, for promotional materials, the rule applies only when the cable or DBS provider chooses to state information about price. The rule we adopt does not mandate pricing information if the cable or DBS provider decides not to state information about price. In those cases where the cable or DBS operator chooses to state information about price, the ''all-in'' rule requires only that the operator disclose accurate information about the total cost for video programming service, and the disclosure requirement is reasonably related to the government's interest in preventing an oftentimes costly deception of consumers.[188] The rule does not prevent cable operators and DBS providers from conveying any additional information. A cable operator's or DBS provider's constitutionally protected interest in not providing the cost a subscriber will be

[175] NCTA Comments at 6 (''If anything, the TVPA's mandate that MVPDs itemize all applicable charges on bills if the MVPDs add them to the price of the package *precludes* the Commission's proposal to require'' an all-in price.), 9 (arguing that ''the TVPA provides no authority for the adoption of the proposed rule and in fact militates against adoption'').

[176] *Id.* at 5 (citing the Television Viewer Protection Act of 2019, H.R. 5035, 116th Cong., sec. 4 (2019)), 6 (arguing ''the TVPA's mandate that MVPDs itemize all applicable charges on bills if the MVPDs add them to the price of the package precludes the Commission's proposal to require'' all-in pricing), 9–10 (''The express decision to omit statutory authority to impose an all-in pricing rule for advertising and promotional materials in Congress' most recent legislative enactment on consumer disclosures strongly suggests that the Commission lacks such authority.''); *See also* State Cable Ass'ns Mar. 5 *Ex Parte* at 3–4.

[177] *See* Consumer Reports and Public Knowledge Reply Comments at 5 (''Where Congress has not provided direct instruction to the Commission on how to proceed, the Commission may act pursuant to its general rulemaking power and the grant of authority inherent in an ambiguous statute.'') (citing *Alliance for Community Media* v. *FCC,* 529 F.3d 763, 773–75 (6th Cir. 2008)).

[178] *See* NCTA Comments at 5.

[179] *Id.* at 15; H.R. Rep 116–329, at 1 (2019) (''The purpose of this legislation is to address two provisions of law expiring at the end of 2019 that facilitate the ability of consumers to view broadcast television stations over [MVPD] services and to provide basic protections to consumers when purchasing MVPD services and certain broadband equipment.'').

[180] H.R. Rep 116–329, at 1 (2019).

[181] 47 U.S.C. 552, 335, 154(i).

[182] *NPRM,* 2023 WL 4105426 at *8, para. 17. *See generally Broadband Transparency Order,* 37 FCC Rcd at 13725, para. 122 (citing *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (''Cramming''), Consumer Information and Disclosure, Truth-in-Billing, and Billing Format,* CG Docket Nos. 11–116, 09–158, CC Docket No. 98–170, Report and Order (77 FR 30915, May 24, 2012) and Further Notice of Proposed Rulemaking (77 FR 30972, May 24, 2012), 27 FCC Rcd 4436, 4482–84, paras. 129–35 (2012) (applying *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626 (1985); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York,* 447 U.S. 557 (1980); *Restoring Internet Freedom Order,* WC Docket No. 17–108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 448–50, paras. 235–38 (2017) (83 FR 7852, Feb. 22, 2018) (concluding that the Commission need not resolve whether *Zauderer* or *Central Hudson* applied because the transparency rule satisfied even the *Central Hudson* standard); Local Government Reply Comments at 18 (''Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.'' (citing *American Meat Inst.* v. *U.S. Dept. of Agric.,* 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (quoting *Zauderer,* 471 U.S. at 650)).

[183] *See NPRM,* 2023 WL 4105426 at *8, para. 17 (citing *Truth-in-Billing and Billing Format,* CC Docket No. 98–170, First Report and Order (64 FR 34488, June 25, 1999) and Further Notice of Proposed Rulemaking (64 FR 34499, June 25, 1999), 14 FCC Rcd 7492, 7530–31, para. 60 (1999) (citing *Central Hudson,* 447 U.S. at 563–64, 566 (''The government may ban forms of communication more likely to deceive the public than to inform it.'')). *See also Broadband Transparency Order,* 37 FCC Rcd at 13725–26, para. 123; Consumer Reports and Public Knowledge Reply Comments at 9 (''Rules to prohibit advertising and billing practices that mislead and confuse consumers are not constitutionally protected.'').

[184] *Central Hudson,* 447 U.S. at 563 (''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity'' and ''[t]he government may ban forms of communication more likely to deceive the public than to inform it'') (citations omitted).

[185] *Id.* at 561 (explaining ''commercial speech'' as ''expression related solely to the economic interests of the speaker and its audience'').

[186] *See Zauderer,* 471 U.S. at 651–52. *See also Milavetz, Gallop, & Milavetz* v. *U.S.,* 559 U.S. 229, 249–50 (2010); Consumer Reports and Public Knowledge Reply Comments at 10 (arguing that regulations involving commercial speech that require a disclosure of factual information (like the all-in cost of service) ''are entitled to more lenient review from courts than regulations that limit speech'').

[187] *Zauderer,* 471 U.S. at 651.

[188] *See, e.g.,* Truth in Advertising Comments at 4.

charged for video programming service is ''minimal.'' [189]

46. Further, as the Commission discussed in the *NPRM,* even if our rule is subject to the more stringent test of commercial speech (*i.e.,* intermediate scrutiny), we find that the rule passes that three-prong test that the Supreme Court established in *Central Hudson:* first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be ''narrowly drawn.'' [190] We have a longstanding substantial interest in ensuring that consumers receive sufficient information to understand the full cost of video programming to which they subscribe, and make informed purchasing decisions as they consider competing cable and DBS service options. Our ''all-in'' rule advances this interest by requiring cable operators and DBS providers to identify the cost for video programming as a clear, easy-to-understand and accurate line-item on consumer bills and promotional materials, allowing consumers to identify the full cost of video programming. Finally, the ''all-in'' rule is narrowly drawn to focus on misleading (and potentially misleading) information, without effect on other speech.

47. Thus, as we explain above and as stated in the *NPRM,* we believe the ''all-in'' rule we adopt is consistent with the requirements described in *Zauderer,* as well as *Central Hudson* (assuming arguendo that the *Central Hudson* standard is applicable).[191] NCTA disagrees, arguing that the ''all-in'' rule fails under the standard of *Zauderer* and the test for commercial speech articulated in *Central Hudson.*[192] According to NCTA, ''[h]ere, a mandate to provide an all-in price in advertising and promotional materials would be unduly burdensome, particularly for national companies that offer a national base price but have additional charges that vary by state or locality.'' [193]

48. We disagree that requiring clear, easy-to-understand, and accurate information regarding the price of video programming in promotional material and billing imposes an unreasonable burden or comparative disadvantage.[194] We mitigate potential burdens on cable operators and DBS providers complying with the ''all-in'' rule by applying it responsively to issues identified in the record (as discussed above). For example, if promotional material is intended for a variety of locations, or is nationwide, our ''all-in'' price requirement will be satisfied if the promotion includes a range of prices that include the highest ''all-in'' price a consumer could be charged, or includes more than a single ''all-in'' price with ability for the consumer to determine his or her ''all-in'' price.[195] We also were persuaded to add flexibility for marketing of grandfathered serviced plans.

49. NCTA argues that, with regard to the *Central Hudson* inquiry required by courts, ''the Commission's proposed rule is woefully underinclusive to serve its supposed substantial interest.'' [196] NCTA claims that regulating only cable and DBS providers would hinder consumer choice ''given that other MVPDs would have greater flexibility in how they present pricing information.'' [197] We disagree that our effort to restrict misleading promotional and billing material contravenes the test of *Central Hudson,* assuming, *arguendo, Central Hudson* is applicable. Under authority granted to the Commission to prevent the types of consumer harm identified in the record, the ''all-in'' rule simply prevents misleading commercial messages that do not accurately inform current and potential subscribers about the price of video programming service, which is afforded no protection under the First Amendment.[198]

50. *Existing Consumer Protections.* We find the ''all-in'' rule complements existing state, local, and Federal laws and regulations and voluntary consumer protections. The promotional and billing information of competing video programming service providers can be subject to different laws and regulations, depending upon how and where the service is promoted and provided. We share bifurcated authority with state and local governments.[199] For most services provided by cable operators and DBS providers, customer service issues are generally addressed by Federal and state governments with shared authority under the Act. The Commission sets baseline customer service requirements at the Federal level,[200] and state and local governments tailor more specific customer service regulations based on

[189] *Zauderer,* 471 U.S. at 651.

[190] *Central Hudson,* 447 U.S. at 564–65 (finding ''the First Amendment mandates that speech restrictions be 'narrowly drawn' '').

[191] *See Zauderer,* 471 U.S. 626; *Central Hudson,* 447, U.S. 557.

[192] NCTA Comments at 10–11.

[193] *Id.* at 11.

[194] *See id.* (arguing that the *Zauderer* test is not met because: ''The Commission does not offer any explanation for how its proposed rule would apply to national marketing without substantially hobbling it, or without putting national providers at a significant disadvantage with respect to what they can advertise as compared to competitors who are not similarly restricted.'').

[195] *Id.*

[196] *Id.* at 11–12 (citing *Nat'l Inst. of Family and Life Advocates* v. *Becerra,* 138 S. Ct. 2361, 2375 (2018)).

[197] *Id.* at 12; ABC Television Affiliates Association Reply Comments at 7 (''Fair treatment of consumers should not be based on the technology used to deliver video services, but, rather, on the clear risk to consumers posed by manipulative and unfair advertising and billing practices that are pervasive in the market today.'').

[198] *NPRM,* 2023 WL 4105426 at *8, para. 18 (citing *Central Hudson,* 447 U.S. at 563 (holding ''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity'' and ''[t]he government may ban forms of communication more likely to deceive the public than to inform it'') (citations omitted)). One commenter made a passing reference to the possibility of ''heightened First Amendment scrutiny'' applying because the rule applies only to ''certain participants in the video marketplace'' thus creating a ''speaker-based distinction.'' *See* NCTA Comments at 10. We reject this argument. The all-in rule does not single out cable operators or DBS providers for different treatment based on content or their viewpoint, such that it might be argued we are imposing a content-based regulation of speech. Nor has any commenter shown that to be the case. Rather, the all-in rule applies to cable operators and DBS operators because the record reveals that these operators, which account for the overwhelming majority of MVPD subscribers, have engaged in misleading pricing information leading to consumer confusion. Most available data does not track other providers, including OVS and MMDS. Based on S&P and other available data, we estimate that cable and DBS combined constitute between 96 and 99 percent of all MVPD subscribership. *See, e.g.,* S&P Global, *U.S. Multichannel Industry Benchmarks* (providing data on subscribers to cable, DBS, and total MVPD subscribers); S&P Global, *Q4'21 leading US video provider rankings* (Apr. 8, 2022); Brian Bacon, S&P Global, *Consumer Insights: US SVOD user trends and demographics, Q1'22* (Apr. 7, 2022); *2022 Communications Marketplace Report,* 37 FCC Rcd 15552, paras. 218 (discussing Multichannel Video Programming Distributors (MVDS) (citing S&P Global, *U.S. Multichannel Industry Benchmarks*), 328 (discussing AVOD (citing Seth Shafer, S&P Global, *Economics of Internet: State of US online video: AVOD 2021* (Nov. 30, 2021)). To the extent information is brought to the Commission's attention about other entities engaging in misleading pricing practices, we will not hesitate to consider appropriate action.

[199] 47 U.S.C. 552 (Consumer protection and customer service).

[200] 47 U.S.C. 542. *See also Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05–311, Second Report and Order, 22 FCC Rcd 19633, 19646, para. 27 (2007) (72 FR 65670, Nov. 23, 2007) (''The statute's explicit language [in section 632] makes clear that Commission standards are a floor for customer service requirements, rather than a ceiling, and thus do not preclude [Local Franchise Authorities (LFAs)] from adopting stricter customer service requirements.''). *See also* Local Government Comments at 8 (discussing ''authority to adopt customer service requirements as part of their cable franchise authority, 47 U.S.C. 552(a), and . . . their police power to regulate consumer protection, 47 U.S.C. 552(d)''); NCTA Comments at 3–4 (citing 47 CFR 76.1602(b), 76.1603(b), 76.1619, 47 U.S.C. 552(d)(2)).

their communities' needs.[201] Aside from legal requirements, we recognize that video programming service providers also ''have incentives to provide promotional and billing material clearly to consumers,'' which is especially true for subscribers with plans that allow them to cancel at any time.[202]

51. *State and Local Requirements.* We find that the ''all-in'' rule complements existing consumer protection efforts by targeting issues raised in the comments about consumer confusion due to misleading pricing, and in a way that state and local governments support. In support of the ''all-in'' rule, the Local Franchise Authorities explain that many cable service bills do not currently meet what they consider to be basic standards of presenting clear, easy-to-understand, and accurate charges, despite the TVPA, existing Commission rules, and other formal and informal consumer protections. The Local Government Commenters explain that state and local governments ''that adopt consumer protection rules typically adopt, at a minimum, requirements mandating that cable operators provide advance notice, typically 30 days, to consumers for any price change, or publicly available rate card or schedule outlining current prices.'' [203] In Connecticut, for example, the line items that appear to represent retransmission consent fees, the Connecticut Office of State Broadband explains, are often confusing to consumers, and could be difficult to predict or substantiate.[204] The ''all-in'' rule addresses these issues by complementing state and local requirements to inform consumers of which costs relate specifically to the provision of video programming service.

52. *The Television Viewer Protection Act of 2019,* 47 U.S.C. 562 *(TVPA) and Other Federal Requirements.* Contrary to some commenters' arguments, we find that the Television Viewer Protection Act of 2019 (TVPA) does not render the ''all-in'' rule unnecessary; rather, we find that the rule complements the TVPA's consumer protections. Some industry commenters argue that an ''all-in'' rule is unnecessary because, in addition to other laws and regulations,[205] the TVPA ''already requires [MVPDs] to disclose the all-in price for multichannel video programming services, including non-governmental fees and charges, both at the point of sale and in writing within 24-hours of entering a contract for service, and to provide customers with an opportunity to cancel without penalty.'' [206] ACA asserts the TVPA is ''working effectively.'' [207] Industry also asserts that the TVPA provides flexibility that allows individual cable operators to implement how much video programming costs ''in a way that best suits their customers and existing sales and billing systems.'' [208]

53. According to the industry commenters, consumers greatly benefit from the TVPA and service providers regularly meet and exceed its requirements.[209] Members of NCTA and ACA, for example, ''disclose in promotional materials that the price for video service may include additional fees, typically dependent on what customers purchase and where they live,'' [210] and service providers have ''every incentive to provide prospective and existing customers with the best experience possible, including by communicating with them clearly and effectively.'' [211] However, the record also reveals common and widespread frustration from consumers, which reflects that there continue to be significant issues in the marketplace regarding the provision of information about fees and charges associated with video programming.

54. We find the ''all-in'' rule complements how cable operators and DBS providers comply with the TVPA.[212] The TVPA requires certain consumer protection disclosures be made at the point of sale,[213] as NCTA emphasizes, but the record does not support the conclusion ''that consumers are fully informed.'' [214] We, therefore, disagree that the issues raised by commenters have ''already been explicitly addressed and resolved by Congress'' and that our action implementing the ''all-in'' rule is ''arbitrary and capricious.'' [215] Congress, with the TVPA, did not limit the Commission's ability to address consumer issues that are within the scope of the Act, but beyond the requirements of the TVPA.

55. Notably, the TVPA does not address promotional materials that include a price for video programming, as the ''all-in'' rule does, which we find will address many issues described in the record.[216] The City of Seattle reports, for example, that in their local experience, ''even with the congressional oversight and subsequent

[201] For example, local franchises often require refunds, prompt credits for service outages, local consumer offices, customer service standards for cable operator personnel, billing practices disclosures, call center hours, response times to repair calls, and procedures for unresolved complaints, and collect data regarding cable operator responses to customers.'' Local Government Comments at 9.

[202] Verizon Comments at 9 n.21.

[203] Local Government Comments at 9 (citing Boston/Comcast Cable Television agreement (May 15, 2021), Sections 7.4 7.5, 12, *https://www.boston.gov/sites/default/files/file/2022/03/Comcastlicensesanssides20211005.pdf;* and Fairfax County Code, Chapter 9.2 § 9.2–9–9(b) through (d), *https://www.fairfaxcounty.gov/cableconsumer/sites/cableconsumer/files/assets/documents/pdf/cprd/fairfax-county-code-chapter-9.2.pdf*).

[204] Connecticut Office of State Broadband Comments at 7 (explaining that ''the amount itemized on the bill may be an unsubstantiated number . . . [and] neither the Commission nor any state has ever confirmed that the line item is an accurate reflection of what the owners of the local stations collectively charge of any given billing statement'').

[205] NCTA Comments at 4 (citing 15 U.S.C. 45(a); 16 CFR 310.3(a)(1)); NCTA Reply Comments at 2.

[206] NCTA Comments at 4 (citing 47 U.S.C. 562(a)); ACA Connects Comments at 8 (describing ''robust, existing mechanisms, including sales and billing disclosure requirements enacted as part of the [TVPA] that ensure that consumers signing up for video service understand the rates they will pay'').

[207] *See* ACA Connects Comments at 11 (''With the TVPA and other safeguards in place, there is no indication of any gap in transparency that the proposed 'all-in' price requirement is necessary to fill.'').

[208] NCTA Comments at 1.

[209] *See* NCTA Reply Comments at 3 (charactering claims that cable operators are not complying ''with the law or are otherwise hiding fees from consumers are flatly incorrect and rely either on data from before the enactment of the TVPA or misrepresentations of current industry practices'').

[210] NCTA Comments at 2; ACA Connects Comments at 8 (describing the success with implementing the ''robust, existing mechanisms, including sales and billing disclosure requirements enacted as part of the [TVPA] that ensure that consumers signing up for video service understand the rates they will pay'').

[211] NCTA Comments at 3; Verizon Reply Comments at 8 (describing how many providers, such as Verizon, '''have adopted the practice of breaking out retransmission consent fees and other video programming fees on subscriber bills—not to mislead their customers, but to help them understand the root cause of soaring prices for cable service' '' (quoting ACA Connects Comments at 17)).

[212] As Consumer Reports explains, ''Sections 642(a)(2) and 642(b) [(the TVPA)] both refer to situations where a consumer has signed a contract with a provider, thus becoming a 'subscriber,' '' and it would be ''odd to argue that providers must show the all-in price when the subscriber has the right to cancel within the 24 hour period under Section 642(a), or when a provider provides an electronic bill under Section 642(b), or when a subscriber renews their subscription, but that the provider may lure the consumer into the store or onto its website with a misleading price.'' Consumer Reports and Public Knowledge Comments at 7.

[213] *See* 47 U.S.C. 562.

[214] *See* NCTA Comments at 5; Local Government Reply Comments at 16 (''A disclosure at the time of purchase will be less effective pursuant to the TVPA if the consumer has already been confused by misleading and inaccurate advertising that led up to a consumer's decision to subscribe.'').

[215] NCTA Comments at 5; NCTA Reply Comments 7–8 (arguing that applying the ''all-in'' rule ''just to cable and DBS providers but not to similarly situated competitors in the video marketplace would be all the more legally suspect'').

[216] Consumer Reports and Public Knowledge Reply Comments at 3 (''[T]he TVPA does nothing with respect to the price MVPDs can advertise, preserving the practice of promoting a low teaser rate, with the increasingly expensive raft of fees hidden in the fine print to be revealed later . . . and it does not clear up any confusion about what these fees are and who is charging them.'').

2019, the practice of separating obligatory programming costs from the service price, and listing them separately as fees continues making it difficult for consumers to find clear service and pricing information and to compare options within a provider or among other providers,'' especially where customers ''expect to use websites to find current service and price options.'' [217] The ''all-in'' rule addresses this issue in a way the TVPA does not, and enables awareness of programming fees that consumers will find helpful to understand the sources that ''are driving up cable bills.'' [218]

56. ACA argues that there is the potential for confusion about the ''true'' ''all-in'' price because that ''is not the all-in price that any subscriber will actually pay.'' [219] According to ACA, that amount will include programming fees and ''also 'taxes and other fees unrelated to programming,' including equipment fees.'' [220] ACA maintains that in other contexts, the '''all-in' price of a communications service would include such taxes and fees.'' [221] We recognize that other customer service or consumer protections may require disclosure of a total price that includes fees and charges unrelated to video programming, such as taxes. The ''all-in'' price complements those requirements, including the TVPA, by addressing the source of misunderstandings about the costs of video programming that will be inclusive of the larger, total price, that includes charges and fess unrelated to video programming.

57. *The Federal Trade Commission (FTC).* DIRECTV argues that compliance with the ''all-in'' price rule could cause tension with FTC directives, ''particularly with nationwide advertisements advertising across localities with different [regional sports programming] fees.'' [222] DIRECTV complains that seeking to comply with ''at least two sets of potentially overlapping and perhaps conflicting regulation (not to mention state-by-state FTC-like regulation) could present ''complications'' and ''challenges'' and could result in an ''overly clunky advertisement or bill, likely to be both confusing and ineffective.'' [223] DIRECTV, however, does not identify any actual regulations that overlap or conflict with the ''all-in'' pricing rule we adopt here. In the absence of any evidence of an actual conflict, we decline to refrain from adopting an ''all-in'' rule based simply on vague, general, and conclusory burden claims. If in the future there arises a concrete conflict, parties can seek clarification or waiver at that time.

58. *Competitive Effects.* We find that the ''all-in'' rule will increase transparency and enhance competition. As the Commission recently explained, ''[c]onsumer access to clear, easy-to-understand, and accurate information is central to a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality services.'' [224] The record demonstrates that the ''all-in'' rule will serve consumers and promote competition by giving consumers access to information so they can shop among various video services providers more effectively.

59. We disagree that competition among service providers has supplanted the need for the ''all-in'' rule or outweigh its competitive benefits. The Commission's authority in this area is not limited or less beneficial to consumers confronting unexpected charges because the marketplace is now more competitive. Although we recognize that significant entry into the video marketplace has benefited consumers, we do not rely on entry alone, consistent with Congress' directive to protect consumers purchasing services when warranted.[225] The authority for the ''all-in'' rule, on which we rely, was not solely concerned with competition, but with protecting consumers.

60. *Cost/Benefit Analysis.* We adopt the ''all-in'' requirement having considered the costs and benefits associated with adopting the proposal. The purpose of this proceeding is to reduce confusion, in an effective and narrow way that complements current consumer protections, and mitigates the cost of unexpected charges and fees for consumers. No commenter submitted a rigorous economic cost/benefit analysis, but we note that certain commenters argued that an ''all-in'' rule ''would create confusion—not clarity—for consumers, and impose undue burdens on the Companies without any countervailing public benefit.'' [226] We disagree. The ''all-in'' rule will address consumer confusion identified in the record that has led to household budget issues, billing disputes, and litigation. Requiring clear, easy-to-understand, and accurate pricing disclosure empowers consumer choice, possibly improving customer satisfaction,[227] and increases competition in the video marketplace.

61. *Digital Equity and Inclusion.* The ''all-in'' rule furthers our continuing effort to advance digital equity for all,[228] including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality. As part of the *NPRM,* the Commission invited ''comment on any equity-related considerations [229] and benefits (if any) that may be associated with the'' ''all-in'' rule and related issues and, specifically, on how the ''all-in'' rule ''may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the

[217] City of Seattle Comments at 4–5 (discussing images of prospective subscribers' chats with customer service agents, who were unable to provide a local rate or price information by providing their zip code), 11–12.

[218] ACA Connects Comments at 6–7; ABC Television Affiliates Association Reply Comments at 4 (reporting that increases in MVPD rates have risen ''more than three times the rate of inflation'').

[219] ACA Connects Comments at 15.

[220] *Id.*

[221] *Id.*

[222] DIRECTV Comments at 13.

[223] *Id.*

[224] *See Broadband Transparency Order,* 37 FCC Rcd at 13687, para. 1.

[225] *See, e.g.,* 47 CFR 64.2401 (Truth-in-Billing Requirements); *Truth-in-Billing and Billing Format,* CC Docket No. 98–170, Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7501, para. 14 (1999) (''We emphasize that one of the fundamental goals of our truth-in-billing principles is to provide consumers with clear, well-organized, and non-misleading information so that they may be able to reap the advantages of competitive markets.'').

[226] Cable Company Reply Comments at 2; ACA Connects Comments at 7. *Cf.* ABC Television Affiliates Association Reply Comments at 1 (''The Affiliates Associations fully support the comments of the [NAB], which persuasively explain the public interest benefits that would flow from adoption of new ''all-in pricing'' requirements.'' (citing NAB Comments)); NAB Comments at 1.

[227] The American Customer Satisfaction Index 2023 ranked subscription TV series 40th of 43 industries surveyed in terms of customer satisfaction. American Customer Satisfaction Index, *ACSI Telecommunications Study 2022–2023* (June 6, 2023), *https://theacsi.org/news-and-resources/press-releases/2023/06/06/press-release-telecommunications-study-2022-2023/.*

[228] Section 1 of the Communications Act of 1934 as amended provides that the FCC ''regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.'' 47 U.S.C. 151.

[229] The term ''equity'' is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See* E.O. 13985, 86 FR 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

Commission's relevant legal authority.'' [230] We agree with the Local Governments Commenters that the ''all-in'' rule promotes equity by addressing unexpected fees and charges that disproportionately impact lower-income households.[231]

Procedural Matters

62. *Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA),[232] requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' [233] Accordingly, we have prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of rule changes contained in the *Report and Order* on small entities. The FRFA is set forth in Appendix C of the *Report and Order.*

63. *Final Paperwork Reduction Act Analysis.* This document may contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).[234] Any such requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the information collection requirements contained in this proceeding. The Commission will publish a separate document in the **Federal Register** at a later date seeking these comments. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002 (SBPRA),[235] we requested specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[236]

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

Final Regulatory Flexibility Act

65. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[237] an Initial Regulatory Flexibility Act Analysis (IRFA) was incorporated into the *All-In Pricing for Cable and Satellite Television Service, Notice of Proposed Rulemaking* (*NPRM*) released in June 2023.[238] The Federal Communications Commission (Commission) sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. No comments were filed addressing the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[239]

66. *Need for, and Objectives of, the Report and Order.* The *Report and Order* (*Order*) reflects the Commission's effort to enhance pricing transparency by requiring cable operators and direct broadcast service (DBS) providers to provide the ''all-in'' price for video programming service in their promotional materials and on subscribers' bills. The Commission received comments and *ex parte* filings from individuals, consumer advocates, cable operators, DBS providers, broadcast industry members, trade associations, state and local governments, and franchising authorities. A number of comments describe general consumer frustration with unexpected ''fees'' (for example, for broadcast television programming and regional sports programming charges listed separately from the monthly subscription rate for video programming service) that are actually charges for the video programming service for which the subscriber pays.

67. The *Order* largely adopts the rule proposed in the *NPRM,* with certain limited exceptions or modifications, in response to comments in the record. In the *Order,* we adopt the proposal in the *NPRM* to require that cable operators and DBS providers provide the ''all-in'' cost of video programming service as a prominent single line item on subscribers' bills and in promotional materials. We require compliance with the ''all-in'' rule when the price for video programming increases during the term of the subscriber's service agreement and to national and regional promotional materials where charges to consumers varies by geography. We also acknowledge limitations that apply when the customer has a residential legacy or grandfathered plan, and recognize that how providers comply with the ''all-in'' rule may vary, if the price for video programming is clear, easy-to-understand, and accurate.

68. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

69. *Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration.* Pursuant to the Small Business Jobs Act of 2010, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[240]

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

71. *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply.* The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[241] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [242] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act (SBA).[243] A small business

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[230] *NPRM,* 2023 WL 4105426 at * 9, para. 21.

[231] Local Government Comments at 6 (''Equity concerns arise with these undisclosed fees. . . . Regardless of whether vulnerable households are more likely to pay junk fees, the same level fee will account for a disproportionate share of a lower-income household's total funds than that of a higher-income household.'').

[232] 5 U.S.C. 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[233] 5 U.S.C. 605(b).

[234] The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[235] The Small Business Paperwork Relief Act of 2002 (SBPRA), Public Law 107–198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.). *See* 44 U.S.C. 3506(c)(4).

[236] *NPRM,* 2023 WL 4105426 at * 11, para. 26 (''seek[ing] specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees''). No commenter addressed SBPRA.

[237] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[238] *See All-In Pricing for Cable and Satellite Television Service,* MB Docket No. 23–203, FCC 23–52, Notice of Proposed Rulemaking, 2023 WL 4105426 (rel. June 20, 2023) (88 FR 42277, June 20, 2023) (*NPRM*).

[239] 5 U.S.C. 604.

[240] *Id.* section 604(a)(3).

[241] *Id.* section 604(a)(4).

[242] *Id.* section 601(6).

[243] *Id.* section 601(3) (adopting by reference the definition of ''small business concern'' in 15 U.S.C. 632(a)(1)). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[244]

72. The rule adopted in the *Order* will directly affect small cable systems operators and DBS providers. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

73. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.[245] The broadcast programming is typically narrowcast in nature (*e.g.,* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources.[246] The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.[247] The SBA small business size standard for this industry classifies firms with annual receipts less than $47 million as small.[248] Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year.[249] Of that number, 149 firms operated with revenue of less than $25 million a year and 44 firms operated with revenue of $25 million or more.[250] Based on this data, the Commission estimates that a majority of firms in this industry are small.

74. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide.[251] Based on industry data, there are about 420 cable companies in the U.S.[252] Of these, only seven have more than 400,000 subscribers.[253] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[254] Based on industry data, there are about 4,139 cable systems (headends) in the U.S.[255] Of these, about 639 have more than 15,000 subscribers.[256] Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

75. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a ''small cable operator,'' which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [257] For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator.[258] Based on industry data, only six cable system operators have more than 498,000 subscribers.[259] Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note, however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[260] Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

76. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS is included in the Wired Telecommunications Carriers industry which comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks.[261] Transmission facilities may be based on a single technology or combination of technologies.[262] Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services.[263] By exception, establishments providing satellite television distribution services using

which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''*Id.*

[244] 15 U.S.C. 632.

[245] U.S. Census Bureau, *2017 NAICS Definition,* ''*515210 Cable and Other Subscription Programming,*'' *https://www.census.gov/naics/?input=515210&year=2017&details=515210.*

[246] *Id.*

[247] *Id.*

[248] 13 CFR 121.201, NAICS Code 515210 (as of 10/1/22, NAICS Code 516210).

[249] U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017,* Table ID: EC1700SIZEREVFIRM, NAICS Code 515210, *https://data.census.gov/cedsci/table?y=2017&n=515210&tid=ECNSIZE2017EC1700SIZEREVFIRM&hidePreview=false.* The US Census Bureau withheld publication of the number of firms that operated for the entire year to avoid disclosing data for individual companies (see Cell Notes for this category).

[250] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue in all categories of revenue less than $500,000 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in these categories). Therefore, the number of firms with revenue that meet the SBA size standard would be higher than noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, *see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.*

[251] 47 CFR 76.901(d).

[252] S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

[253] S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, Multichannel Video Subscriptions, Top 10 (April 2022).

[254] 47 CFR 76.901(c).

[255] S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

[256] S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q (*last visited May 26, 2022).

[257] 47 U.S.C. 543(m)(2).

[258] *FCC Announces Updated Subscriber Threshold for the Definition of Small Cable Operator,* Public Notice, DA 23–906 (MB 2023) (*2023 Subscriber Threshold PN*). In this Public Notice, the Commission determined that there were approximately 49.8 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* This threshold will remain in effect until the Commission issues a superseding Public Notice. *See* 47 CFR 76.901(e)(1).

[259] S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, Multichannel Video Subscriptions, Top 10 (Apr. 2022).

[260] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission's rules. *See* 47 CFR 76.910(b).

[261] *See* U.S. Census Bureau, *2017 NAICS Definition,* ''*517311 Wired Telecommunications Carriers,*'' *https://www.census.gov/naics/?input=517311&year=2017&details=517311.*

[262] *Id.*

[263] *See id.* Included in this industry are: broadband internet service providers (*e.g.,* cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed-circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

facilities and infrastructure that they operate are included in this industry.[264]

77. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small.[265] U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year.[266] Of this number, 2,964 firms operated with fewer than 250 employees.[267] Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data, however, only two entities provide DBS service—DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation.[268] DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

78. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.* The *Order* requires cable operators and DBS providers to state the aggregate cost for video programming service in bills and any promotional material that presents a cost for service as clear, easy-to-understand, and accurate information.

79. The ''all-in'' rule must be fully implemented no later than (i) 9 months after release of the *Report and Order* or (ii) when the Commission announces an effective date in the **Federal Register** pursuant to the Paperwork Reduction Act, whichever is later; except that compliance with this section is required no later than (i) 12 months after release of the *Report and Order* or (ii) when the Commission announces an effective date in the **Federal Register** pursuant to the Paperwork Reduction Act, whichever is later, for small cable operators. For the purpose of the rule, small cable operators are defined as those with annual receipts of $47 million or less, consistent with the SBA's small business size standards. We find that this is a reasonable amount to time based upon prior experience with how the industry has implemented TVPA billing requirements.[269] The record does not include a sufficient cost/benefit analysis that would allow us to quantify the costs of compliance for small entities, including whether it will be necessary for small entities to hire professionals to comply with the adopted rules. However, the transparent pricing requirements of the ''all-in'' rule will benefit competition for small and other video programming providers by providing consumers with more clarity when comparing costs for video programming services.

80. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to provide, ''a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.'' [270]

81. As explained in the *Order,* the ''all-in'' rule is necessary to equip consumers to make informed decisions about their service and comparison shop among video programming providers with clear, easy-to-understand, and accurate information about the charges related to video programming.[271] This rule includes flexibility that should make it easier for small and other entities to comply. For example, the Commission does not limit compliance with the ''all-in'' rule to a specific manner to disclose the aggregate price when charges for video programming are part of a bundled service or when video programming is marketed regionally or nationally, other than requiring a clear, easy-to-understand, and accurate ''all-in'' price. We also considered whether the ''all-in'' rule should differentiate between residential, small business, and enterprise subscribers, and determined that it should not apply to bulk purchasers of non-residential services or enterprise customers because those are typically customized, individually negotiated pricing plans. We believe the rule will protect consumers from deceptive bills and advertising with minimized costs and burdens on small and other entities. In the absence of evidence to the contrary in the record, the Commission does not expect the adopted requirements to have a significant economic impact on small entities. Finally, we provide small cable operators, defined as those with annual receipts of $47 million or less, with an additional three months to come into compliance with the rule.

82. *Report to Congress.* The Commission will send a copy of the *Order,* including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[272] In addition, the Commission will send a copy of the *Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.[273]

Ordering Clauses

83. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 4(i), 303, 316, 335(a), 632(b), and 642 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303, 316, 335(a), 552(b), and 562, the *Report and Order is adopted*, and part 76 of the Commission's rules, 47 CFR part 76, *is amended* as set forth in the Appendix of the *Report and Order.*

84. *It is further ordered* that the *Report and Order shall be effective* thirty (30) days after the date of publication in the **Federal Register**. Compliance with § 76.310, 47 CFR 76.310, which may contain new or modified information collection requirements, will not be required until (i) nine months after the release of the *Report and Order* or (ii) after the Office of Management and Budget completes review of any information collection requirements that the Media Bureau determines is required under the Paperwork Reduction Act, whichever is later; with the exception of small cable operators, which will have (i) twelve months after the release of the *Report and Order* or (ii) after the Office of Management and Budget completes review of any information collection requirements that the Media Bureau determines is required under the Paperwork Reduction Act, whichever is later, to come into compliance. The Commission directs the Media Bureau to announce the compliance date for § 76.310 by subsequent Public Notice and to cause § 76.310 to be revised accordingly. The Commission's rules *are hereby amended* as set forth in the Appendix of the *Report and Order.*

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[264] *Id.*

[265] 13 CFR 121.201, NAICS Code 517311 (as of 10/1/22, NAICS Code 517111).

[266] U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017,* Table ID: EC1700SIZEEMPFIRM, NAICS Code 517311, *https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFIRM&hidePreview=false.*

[267] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[268] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report,* Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

[269] *See* Television Viewer Protection Act of 2019, Public Law 116–94, 133 Stat. 2534 (2019), section 1004(b) (requiring a six month implementation requirement).

[270] 5 U.S.C. 604(a)(6).

[271] *Order* at para. 6.

[272] 5 U.S.C. 801(a)(1)(A).

[273] *Id.* section 604(b).

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

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

List of Subjects in 47 CFR Part 76

Television.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 to read as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 is revised to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 335, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 562, 571, 572, 573.

■ 2. Add § 76.310 to read as follows:

§ 76.310 Truth in billing and advertising.

(a) Cable operators and direct broadcast satellite (DBS) providers shall state an aggregate price for the video programming that they provide as a clear, easy-to-understand, and accurate single line item on subscribers' bills, including on bills for legacy or grandfathered video programming service plans. If a price is introductory or limited in time, cable and DBS providers shall state on subscribers' bills the date the price ends, by disclosing either the length of time that a discounted price will be charged or the date on which a time period will end that will result in a price change for video programming, and the post-promotion rate 60 and 30 days before the end of any introductory period. Cable operators and DBS providers may complement the aggregate line item with an itemized explanation of the elements that compose that single line item.

(b) Cable operators and DBS providers that communicate a price for video programming in promotional materials shall state the aggregate price for the video programming in a clear, easy-to-understand, and accurate manner. If part of the aggregate price for video programming fluctuates based upon service location, then the provider must state where and how consumers may obtain their subscriber-specific ''all-in'' price (for example, electronically or by contacting a customer service or sales representative). If part or all of the aggregate price is limited in time, then the provider must state the post-promotion rate, as calculated at that time, and the duration of each rate that will be charged. Cable operators and DBS providers may complement the aggregate price with an itemized explanation of the elements that compose that aggregate price. The requirement in this paragraph (b) shall not apply to the marketing of legacy or grandfathered video programming service plans that are no longer generally available to new customers. For purposes of this section, the term ''promotional material'' includes communications offering video programming to consumers such as advertising and marketing.

(c) This section may contain information collection and/or recordkeeping requirements. Compliance with this section will not be required until this paragraph (c) is removed or contains compliance dates. The Commission will publish a document in the **Federal Register** announcing the compliance dates and revising or removing this paragraph (c) accordingly.

[FR Doc. 2024–07404 Filed 4–18–24; 8:45 am]

BILLING CODE 6712–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412–AA87

USAID Acquisition Regulation (AIDAR): Security and Information Technology Requirements

Correction

In rule document 2024–05748, appearing on pages 19754–19760 in the issue of Wednesday, March 20, 2024, make the following corrections:

§ 739.106 Contract clauses [Corrected].

■ On page 19758, in the second column, on the fifty-fourth line, the term ''Project websites'' should read ''Project Websites''.

§ 752.239–70 Information Technology Authorization [Corrected].

■ On page 19759, in the first column, on the fifty-ninth line, the paragraph designation ''(d)'' should read ''(a)''.

§ 752.239–72 USAID-Financed Project Websites [Corrected].

■ On page 19760, in the first column, on the fourteenth line, the term ''Project website'' should read ''Project Website''.

■ On the same page, in the second column, on the fourth line, the term ''Project website'' should read ''Project Website''.

■ On the same page, in the same column, on the twentieth line, the term ''Project website'' should read ''Project Website''.

[FR Doc. C1–2024–05748 Filed 4–17–24; 8:45 am]

BILLING CODE 0099–10–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 240415–0107]

RTID 0648–XD112

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Harvest Specifications for the Central Subpopulation of Northern Anchovy

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

ACTION: Final rule.

SUMMARY: NMFS is issuing this final rule to revise the overfishing limit (OFL) and acceptable biological catch (ABC) for the central subpopulation of northern anchovy (CSNA) in the U.S. exclusive economic zone (EEZ) off the West Coast under the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) to 243,779 metric tons (mt) and an 60,945 mt, respectively. This final rule also maintains an annual catch limit (ACL) of 25,000 mt for CSNA. Under current regulations, if the ACL for this stock is reached or projected to be reached in a fishing year (January 1–December 31), then the fishery will be closed until it reopens at the start of the next fishing year. This rulemaking is intended to conserve and manage CSNA off the U.S. West Coast.

DATES: Effective May 20, 2024.

FOR FURTHER INFORMATION CONTACT: Katie Davis, West Coast Region, NMFS, (323) 372–2126, *Katie.Davis@noaa.gov.*

SUPPLEMENTARY INFORMATION: The CPS fishery in the U.S. EEZ off the West Coast is managed under the CPS FMP in coordination with the Pacific Fishery Management Council (Council). The CPS FMP was developed pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*). The CPS FMP is implemented by regulations at 50 CFR part 660, subpart I. This final rule adopts, without changes, the CSNA harvest specifications in NMFS's proposed rule published on December 27, 2023 (88 FR 89358). CSNA is managed using ACLs implemented for multiple years, and quantitative or qualitative reviews of available abundance data without required regular stock assessments or required annual adjustments to target harvest levels. Further background on CSNA management and the formulas for calculating the revised reference points in this action was published in the proposed rule and is not repeated here.

Final Reference Points

This final action revises the OFL and ABC, and maintains the ACL, for CSNA in the U.S. EEZ off the West Coast, based on recommendations from the Council. NMFS is implementing multi-year annual reference points for CSNA including an OFL of 243,779 mt and an ABC of 60,945 mt. The OFL and ABC are increasing from 119,153 mt and 28,788 mt, respectively (December 31, 2020, 85 FR 86855). NMFS is maintaining, as proposed, an ACL of 25,000 mt. NMFS has determined that the OFL and ABC implemented by this action are supported by the best scientific information available, comply with the CPS FMP, and will prevent overfishing. Although these values deviate from the default calculations described in the CPS FMP, as described in the proposed rule, they are supported by the most recent stock assessment and recommendations from the Council's Scientific and Statistical Committee and are robust enough to remain in place for multiple years and still prevent overfishing.

Upon taking effect, these annual reference points will apply to the current and following calendar years (January 1–December 31), remaining in place until new scientific information warrants revising them. Any catch that has already occurred in calendar year 2024 will apply to the 2024 ACL. Because this ACL value is already in place (see 50 CFR 660.511(k)), no regulatory changes are necessary.

All sources of catch will be accounted for against the ACL, including any fishing occurring as part of an exempted fishing permit, the live bait fishery, and other minimal sources of harvest (*e.g.,* incidental catch in CPS and non-CPS fisheries and minor directed fishing). Under current regulations at 50 CFR 660.509(a), if catch reaches the ACL, the NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** to announce the closure of the fishery until the commencement of the next fishing season (January 1). Additionally, to ensure that the regulated community is informed of any closure, NMFS will make announcements through other means available, including emails to fishermen, processors, and state fishery management agencies.

Public Comment and Response

On December 27, 2023, NMFS published a proposed rule for this action and solicited public comments (89 FR 12810) with a public comment period that ended on January 26, 2024. NMFS received one comment letter on the proposed rule. The letter was submitted jointly by two environmental non-governmental organizations, Oceana and Earthjustice, containing several comments and requests. With respect to the proposed reference points, the commenters expressed support for an ACL of 25,000 mt and noted that the proposed OFL and ABC are consistent with the Council's recommendation. The remaining comments and requests in the comment letter are beyond the scope of this rulemaking. For instance, the comment letter included a recommendation that NMFS direct the Council to develop a substantive amendment to the CPS FMP that would incorporate the Council's anchovy management framework into the CPS FMP, develop an ACL control rule for CSNA, and establish a minimum stock size threshold for CSNA, but such measures are not within the scope of this rulemaking. Therefore, NMFS does not provide a response to those comments. However, Oceana and Earthjustice may continue to bring these requests to the Council as appropriate. Additionally, as noted earlier, Oceana and Earthjustice stated support for the ACL, but also requested NMFS limit the effectiveness of the ACL to 2 years. This request is also outside the scope of this rulemaking. Pursuant to 50 CFR 660.508, annual specifications for CPS are determined in accordance with the CPS FMP. Under the CPS FMP, reference points for CSNA are specified for multiple years until the species becomes managed under the general harvest control rule (based on annual estimates of biomass) or under a new species-specific control rule, or until new scientific information becomes available that warrants a change to the reference points.

NMFS made no changes to the proposed rule in response to the comments received.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule is not subject to the requirements of Executive Order 12866 because it is a routine rule that implements regulations for less than one year.

Pursuant to Executive Order 13175, this rulemaking was developed after meaningful consultation and collaboration with the tribal representative on the Council.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule (88 FR 89358, December 27, 2023) and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: April 15, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–08342 Filed 4–18–24; 8:45 am]

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Proposed Rules

Federal Register
Vol. 89, No. 77
Friday, April 19, 2024

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS–SC–23–0074]

Tart Cherries Grown in the States of Michigan, et al.; Free and Restricted Percentages for the 2023–24 Crop Year

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Cherry Industry Administrative Board (Board) to establish free and restricted percentages for the 2023–24 crop year under the Federal marketing order for tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. This action would establish the proportion of tart cherries from the 2023–24 crop which may be handled in commercial outlets. This action should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns.

DATES: Comments must be received by May 20, 2024.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237. Comments can also be sent to the Docket Clerk electronically by Email: *MarketingOrderComment@usda.gov* or via the internet at: *https://www.regulations.gov.* Comments should reference the document number, the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record and will be made available to the public and can be viewed at: *https://www.regulations.gov.* Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Steven W. Kauffman, Marketing Specialist, or Christian D. Nissen, Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, or Email: *Steven.Kauffman@usda.gov* or *Christian.Nissen@usda.gov.*

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

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries produced in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Part 930 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of growers and handlers of tart cherries operating within the production area, and a public member.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This proposed action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

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

This proposed rule has been reviewed under Executive Order 12988—Civil Justice Reform. Under the Order provisions now in effect, free and restricted percentages may be established for tart cherries for the 2023–24 crop year. This proposed rule would establish free and restricted percentages for the 2023–2024 crop year, beginning July 1, 2023, through June 30, 2024.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the U.S. Department of Agriculture (USDA) a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This proposed rule would establish the proportion of tart cherries from the 2023–24 crop which may be handled at 94 percent free and 6 percent restricted.

The Secretary of Agriculture (Secretary) has determined that designating free and restricted percentages of tart cherries for the 2023–24 crop year would effectuate the declared policy of the Act to stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. These recommendations were made by the Board at a meeting on September 14, 2023, and reaffirmed at a meeting on December 14, 2023.

Section 930.51(a) provides the Secretary authority to regulate volume by designating free and restricted percentages for any tart cherries acquired by handlers in a given crop year. Section 930.50 prescribes procedures for computing an optimum supply based on sales history and for calculating these free and restricted percentages. Free percentage volume may be shipped to any market, while restricted percentage volume must be held by handlers in a primary or secondary reserve, or be diverted, or used for exempt purposes as prescribed in §§ 930.159 and 930.162. Exempt purposes include, in part, the development of new products, sales into new markets, the development of export markets, and charitable contributions. Sections 930.55 through 930.57 prescribe procedures for inventory reserve. For cherries held in reserve, handlers would be responsible for storage and would retain title of the tart cherries.

Under section 930.52, only districts in which the average annual production of cherries over the prior three years has exceeded six million pounds are subject to volume regulation, and any district producing a crop that is less than 50 percent of its annual average processed production in the previous five years would be exempt from any volume regulation. The regulated districts for the 2023–24 crop year would be: District 1—Northern Michigan; District 2—Central Michigan; District 3—Southern Michigan; District 4—New York; District 7—Utah; District 8—Washington; and District 9—Wisconsin. Districts 5 and 6 (Oregon and Pennsylvania, respectively) would not be regulated for the 2023–24 season.

Demand for tart cherries and tart cherry products tends to be relatively stable despite the variance in production volume that industry may experience from year to year. Additionally, once processed, tart cherries can be stored and carried over from crop year to crop year, further impacting supply. The Board is aware of this economic relationship and focuses on using the volume control provisions in the marketing order to balance supply and demand to stabilize industry returns.

Pursuant to section 930.50, the Board meets on or about July 1 to review sales data, inventory data, current crop forecasts, and market conditions for the upcoming season and, if necessary, to recommend preliminary free and restricted percentages if anticipated supply would exceed demand. After harvest is complete, but no later than September 15, the Board meets again to update its calculations using actual production data, consider any necessary adjustments to the preliminary percentages, and determine if final free and restricted percentages should be recommended to the Secretary.

The Board uses sales history, inventory, and production data to determine whether a surplus exists and how much volume should be restricted to maintain optimum supply. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year. Optimum supply is defined as the average free sales of the prior three years plus desirable carry-out inventory. Desirable carry-out is the amount of fruit needed by the industry to be carried into the succeeding crop year to meet market demand until the new crop is available. Desirable carry-out is recommended by the Board after considering market circumstances and needs. Section 930.151(b) specifies that desirable carry-out can range from zero to a maximum of 100 million pounds.

In addition, § 930.50(g) specifies that in years when restricted percentages are established, the Board shall make available tonnage equivalent to an additional 10 percent of the average sales of the prior three years for market expansion. This requirement is in USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*https://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) which specifies that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved.

After the Board determines the optimum supply, desirable carry-out, and market growth factor, it must examine the current year's available volume to determine whether an oversupply might occur. Available volume includes carry-in inventory (any inventory available at the beginning of the season) along with that season's production. If production plus the carry-in inventory is greater than the optimum supply (3-year sales average plus the targeted carry-out), then the difference is considered surplus. The ten percent market expansion factor and any economic adjustments recommended by the Board are then subtracted from this surplus number to arrive at an adjusted surplus. This adjusted surplus tonnage is divided by the sum of production in the regulated districts to reach a restricted percentage. This percentage must be held in reserve or used for approved diversion activities, such as exports, new products, or new market activities.

The Board met on June 22, 2023, and computed an optimum supply of 279.2 million pounds for the 2023–24 crop year using the average of free sales for the three previous seasons plus the desirable carry-out. To determine the carry-out figure, the Board discussed a range of alternatives. One member recommended a carry-out value of 85 million pounds, noting he did not think 100 million pounds was necessary to keep the markets supplied. Another member suggested a 70-million-pound carry-out and stated the industry does not need all those cherries in inventory and there will be fewer growers in the future if the market is oversupplied. Other members were concerned that 70 million pounds was too low to satisfy the demand prior to the new crop being available. Discussion also included that the carryover should be enough to supply the needs of the industry in case of a disaster and that the carryover should also reflect the increased number of tart cherry products now supplied to the market. Other members noted that more supply is also needed due to new food safety requirements being implemented. After considering the alternatives, the Board determined a carry-out of 85 million pounds would be enough to supply the industry's needs at the beginning of the next season.

The Board subtracted the carry-in inventory available on June 1st of 137.2 million pounds from the optimum supply to calculate the production quantity needed from the 2023–24 crop to meet optimum supply. This number, 142 million pounds, was subtracted from the Board's estimated 2023–24 total production of 175.2 million pound (from regulated and unregulated districts) to calculate a surplus of 33.2 million pounds of tart cherries. The Board also complied with the market expansion factor requirement by removing 19.4 million pounds (average sales for prior three years of 194.2 million times 10 percent) from the surplus. The adjusted surplus of 13.8 million pounds was then divided by the expected production in the regulated districts (173.5 million pounds) to reach

a preliminary restricted percentage of 8 percent for the 2023–24 crop year.

The Board then discussed whether this calculation would supply enough cherries to grow sales and fulfill orders that have not yet shipped. Some members stated that the Board should account for some large late season demand purchases by the USDA, which would account for approximately 26 million pounds raw product equivalent. After discussing multiple motions for an economic adjustment ranging from 0 to 26 million pounds, the Board did not recommend a preliminary economic adjustment at the June meeting. Without an economic adjustment, the preliminary restricted percentage remained at 8 percent. With this relatively small restriction, the Board did not anticipate significant orchard diversion.

The Board met again on September 14, 2023, to consider final volume regulation percentages for the 2023–24 season. The final percentages are based on the Board's reported production figures and the supply and demand information available in September.

The total production for the 2023–24 season reported at the September meeting was 202.7 million pounds. This exceeded the Board's June production estimate by 27.5 million pounds. In addition, growers diverted 6.86 million pounds in the orchard, lowering the available production for market. As a result, 195.8 million pounds of production would be available to the market, 193.4 million pounds of which are in the districts subject to volume regulation. The Board accounted for the recommended desirable carry-out and economic adjustment, as well as the market growth factor, and recalculated the restricted percentage using the actual production numbers.

The Board subtracted the carry-in figure used in June of 137.2 million pounds, from the optimum supply of 279.2 million pounds to determine 142 million pounds of 2023–24 production would be necessary to reach optimum supply. The Board subtracted the 142 million pounds from the actual production of 202.7 million pounds, resulting in a surplus of 60.7 million pounds of tart cherries.

At its June meeting, the Board did not recommend making an economic adjustment of the optimum supply calculation to address unexpected factors that could have a bearing on the marketing of tart cherries. However, in September, following another discussion of a late seasonal purchase made by USDA, and the possible impact on the available supply, the Board recommended an economic adjustment of 30 million pounds to ensure sufficient inventory was available to meet demand.

The Board also discussed the impact of imported tart cherries on the domestic market. Imports have been an important topic of discussion for the Board when considering preliminary and final volume recommendations since the demand for tart cherries is inelastic. In June, the Board received a presentation indicating tart cherry imports were only approximately 1/7th of the volume previously reported. At the September meeting, AMS verified the industry report and confirmed that tart cherry imports were considerably less than previously reported. As a result, the Board did not recommend making an additional economic adjustment based on imports.

The calculated surplus was reduced by subtracting the economic adjustment of 30 million pounds from the September meeting and the market growth factor of 19.4 million pounds, resulting in an adjusted surplus of 11.25 million pounds. The Board then divided the adjusted surplus by the available production of 193.4 million pounds (202.66 million pounds minus 6.86 million pounds of in-orchard diversion minus 2.44 million pounds from unregulated districts) in the regulated districts to calculate a restricted percentage of 5.8 percent. The Board rounded this number up, and recommended a 6 percent restriction (11.6 million pounds) with a corresponding free percentage of 94 percent (181.8 million pounds) in the regulated districts for the 2023–24 crop year, as outlined in the following table from the September meeting:

	Millions of pounds
September Calculations:	
(1) Average sales of the prior three years	194.2
(2) Desirable carry-out	85
(3) Optimum supply calculated by the Board (item 1 plus item 2)	279.2
(4) Carry-in as of July 1, 2023	137.2
(5) Adjusted optimum supply (item 3 minus item 4)	142
(6) Board reported production	202.7
(7) Surplus (item 6 minus item 5)	60.7
(8) Total economic adjustments	30
(9) Market growth factor	19.4
(10) Adjusted Surplus (item 7 minus items 8 and 9)	11.25
(11) Production in regulated districts	200.2
(12) In-Orchard Diversion	6.86
(13) Production minus in-orchard diversion	193.4
Final Percentages:	Percent
Restricted (item 10 divided by item 13 × 100)	6
Free (100 minus restricted percentage)	94

The final restriction of 6 percent is lower than the preliminary restriction percentage of 8 percent. The change is due to the increase in production of 27.5 million pounds more in total production above the June estimate, and the 30-million-pound economic adjustment the Board made in September. The desired carry-out remained the same at 85 million pounds.

After the September meeting, industry reported an additional 3.24 million pounds of production that was not accounted for at the September meeting. The Board met again on December 14,

2023, and reviewed the impact of this additional production on the free and restricted percentages recommended at the September meeting. The inclusion of the additional 3.24 million pounds would increase the surplus from approximately 60.7 to 63.9 million pounds. Given no further changes to the other numbers incorporated in the September calculation, this surplus change would increase the restricted percentage to 7.4 percent.

The Board discussed maintaining the final restriction at 6 percent as recommended in September. Members recognized that this would relieve the industry from the burden of having to meet an increased reserve requirement of 1.4 percent more (7.4% − 6% = 1.4%). Since the industry makes business decisions based on the June estimates and the final recommendation from September, a late season increase to the reserve requirement could have a negative impact on some industry members. After discussing the possible impact of the increased production, the Board unanimously recommended increasing the economic adjustment by the 3.24 million pounds of additional production to offset its impact on available supply and to leave the percentages recommended in September in place with 94 percent free and 6 percent restricted for the 2023–24 season.

With these changes, the total production increased from 202.7 million pounds to 205.9 million pounds and the surplus rose to 63.9 million pounds. The economic adjustment shifted from 30 million pounds to 33.24 million pounds, balancing out the additional surplus. Using the new production number and the revised economic adjustment to recalculate the restricted percentage, and rounding up, results in a 6 percent restriction percentage as recommended at the September meeting, as outlined in the following table from the December meeting:

	Millions of pounds
Final Calculations:	
(1) Average sales of the prior three years	194.2
(2) Desirable carry-out	85
(3) Optimum supply calculated by the Board (item 1 plus item 2)	279.2
(4) Carry-in as of July 1, 2023	137.2
(5) Adjusted optimum supply (item 3 minus item 4)	142
(6) Board reported production	205.9
(7) Surplus (item 6 minus item 5)	63.9
(8) Total economic adjustments	33.24
(9) Market growth factor	19.4
(10) Adjusted Surplus (item 7 minus items 8 and 9)	11.25
(11) Production in regulated districts	203.46
(12) In-Orchard Diversion	6.86
(13) Production minus in-orchard diversion	196.6
Final Percentages:	Percent
Restricted (item 10 divided by item 13 × 100)	6
Free (100 minus restricted percentage)	94

Establishing free and restricted percentages is an attempt to bring supply and demand into balance. If the primary market is oversupplied with cherries, grower prices decline substantially. Restricted percentages have benefited grower returns and helped stabilize the market as compared to those seasons prior to the implementation of the Order. The Board, based on its discussion of this issue and the result of the above calculations, believes the available information indicates a restricted percentage should be established for the 2023–24 crop year to avoid oversupplying the market with tart cherries.

Consequently, the Board recommended final percentages of 94 percent free and 6 percent restricted by a vote of 12 in favor, and 4 opposed on September 14, 2023, but later unanimously recommended the same percentages at the meeting on December 14, 2023. The Board could meet during the crop year, and if conditions so warranted, recommend the release of additional volume. The Secretary finds, from the recommendation and supporting information supplied by the Board, that designating final percentages of 94 percent free and 6 percent restricted would tend to effectuate the declared policy of the Act, and so designates these percentages.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 400 growers of tart cherries in the regulated area and approximately 30 handlers of tart cherries who are subject to regulation under the Order. At the time this analysis was prepared, the Small Business Administration (SBA) defined small agricultural growers of tart cherries as those having annual receipts equal to or less than $3.5 million (NAICS code—111339, Other Noncitrus Fruit Farming), and small agricultural service firms, including handlers, are defined as those whose annual receipts are equal to or less than $34 million (NAICS code 11514, Postharvest Crop Activities). (13 CFR 121.201).

According to data from the National Agricultural Statistics Service (NASS), the 2022–2023 season average grower price for tart cherries utilized for processing was approximately $0.218

per pound. With total utilization for processing at 241.6 million pounds for the 2022–23 season, the total 2022–23 value of the crop utilized for processing is estimated at $52.7 million. Dividing the crop value by the estimated number of growers (400) yields an estimated average annual receipts per grower of approximately $132,000. This is well below the $3.5 million SBA threshold for small growers.

An estimate of the season average price per pound received by handlers for processed tart cherries was derived from USDA's purchases of dried tart cherries for feeding programs in 2023, which had an average price of $4.72 per pound. The dried cherry price was converted to a raw product equivalent price of $0.94 per pound at an industry recognized ratio of five to one. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this price by total processed utilization of 241.5 million pounds results in an estimated handler-level tart cherry value of $227 million. Dividing this figure by the number of handlers ($227 million divided by 30 handlers) yields estimated average annual receipts per handler of approximately $7.6 million, which is well below the SBA threshold of $34 million for small agricultural service firms. Assuming a normal distribution, the majority of growers and handlers of tart cherries may be classified as small entities.

The tart cherry industry in the United States is characterized by wide annual fluctuations in production. According to NASS, the pounds of tart cherry production utilized for processing for the years 2019 through 2022 were 234 million, 138 million, 171 million, and 241 million, respectively. Because of these fluctuations, supply and demand for tart cherries are rarely in balance.

Demand for tart cherries is inelastic, meaning changes in price have a minimal effect on total sales volume. However, prices are very sensitive to changes in supply, and grower prices vary widely in response to the large swings in annual supply. Grower prices per pound for processed utilization have ranged from a low of $0.07 in 1987 to a high of $0.59 per pound in 2012 when a weather event substantially reduced supply. Grower prices per pound for processed utilization over the most recent three years (2020 through 2022) were $0.38, $0.50, and $0.22, respectively.

Because of this relationship between supply and price, oversupplying the market with tart cherries would have a sharp negative effect on prices, driving down grower returns. Aware of this economic relationship, the Board focuses on using the volume control authority in the Order to align supply with demand and stabilize industry returns. This authority allows the industry to set free and restricted percentages to bring supply and demand into balance. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage volume must be held by handlers in reserve, diverted, or used for exempted purposes.

This proposal would establish 2023–24 crop year percentages of 94 percent free and 6 percent restricted. These percentages should stabilize marketing conditions by adjusting supply to meet market demand and help improve grower returns. The proposal would regulate tart cherries handled in Michigan, Utah, Washington, Wisconsin, and New York. The authority for this proposed action is provided in §§ 930.50, 930.51(a), and 930.52. The Board recommended this action at meetings on September 14, 2023, and December 14, 2023.

This proposal would result in some fruit being diverted from the primary domestic markets as authorized in the Order's marketing policy in § 930.50. However, as mentioned earlier, the USDA's ''Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders'' (*https://www.ams.usda.gov/publications/content/1982-guidelines-fruit-vegetable-marketing-orders*) specify that 110 percent of recent years' sales should be made available to primary markets each crop year per § 930.50(g), before recommendations for volume regulation are approved. Under this proposal, the available quantity of 324.4 million pounds (Free production of 184.8 million plus a carry-in of 137.2 million plus 2.4 million pounds unregulated) would be 167 percent of the average sales for the last three years (194.2 million pounds).

In addition, there are secondary uses available for restricted fruit, including the development of new products, sales into new markets, the development of export markets, and being placed in reserve. While these alternatives may provide different levels of return than the sales to primary markets, they play an important role for the industry. The areas of new products, new markets, and the development of export markets utilize restricted fruit to develop and expand the markets for tart cherries.

Placing tart cherries into reserves is also a key part of balancing supply and demand. Although handlers bear the handling and storage costs for fruit in reserve, reserves stored in large crop years can be used to supplement supplies in short crop years. The reserves help the industry to mitigate the impact of oversupply in large crop years, while allowing the industry to supply markets in years when production falls below demand. During the 2020–21 season, the Board voted to release all fruit in the reserve into the primary market to increase supply.

In considering the establishment of free and restricted percentages, the Board recommended a carry-out of 85 million pounds to help ensure sufficient product to meet demand until availability of the following year's crop and to allow for inventory to span the lead-time on processing new products. The Board also recommended a demand adjustment of 33.24 million pounds. These numbers, along with carry-in, production in the unregulated districts, and free tonnage from the regulated districts, would make 324.4 million pounds of fruit available for the domestic market. This amount exceeds the 317.4 million pounds available in the previous season when the industry did not regulate the volume on the market. Even with the recommended restriction, the domestic market would have an ample supply of tart cherries. Further, should marketing conditions change, and market demand exceed existing supplies, the Board could meet and recommend the release of additional reserves up to 11.8 million pounds of tart cherries. Consequently, it is not anticipated that this proposal would unduly burden growers or handlers.

While this proposal could result in some additional costs to the industry, these costs would be outweighed by the benefits. The purpose of setting restricted percentages is to attempt to bring supply and demand into balance. If the primary market (domestic) is oversupplied with cherries, grower prices decline substantially. Without volume control, the primary market would likely be oversupplied, resulting in lower grower prices.

An AMS econometric model used to assess the impact volume control has on the price growers receive for their product estimated that volume control would have a positive impact on grower returns for this crop year. With volume control, grower prices are estimated to be about nine tenths of a cent higher than without restrictions. In addition, absent volume control, the industry could start to build large amounts of unwanted inventories, which in turn, could have a depressing effect on grower prices.

Retail demand is assumed to be inelastic, which indicates changes in

price do not result in significant changes in the quantity demanded. Consumer prices largely do not reflect fluctuations in cherry supplies. Therefore, this proposal should have little or no effect on consumer prices and should not result in a reduction in retail sales.

The free and restricted percentages established by this proposal would provide the market with optimum supply and would apply uniformly to all regulated handlers in the industry, regardless of size. As the restriction represents a percentage of a handler's volume, the costs, when applicable, are proportionate and should not place an extra burden on small entities as compared to large entities.

The stabilizing effects of this proposal would benefit all handlers by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all growers and handlers by allowing them to better anticipate the revenues their tart cherries would generate. Growers and handlers, regardless of size, would benefit from the stabilizing effects of the volume restriction.

As noted earlier, the Board discussed several carry-out inventory alternatives, ranging from 70 million pounds to 100 million pounds. The Board noted if the carry-out number was too large, it could have a negative impact on grower returns, and if it was too small, it could negatively impact the supply processors need before the harvest next season. After consideration of the alternatives, the Board recommended a carry-out of 85 million pounds.

The Board also weighed alternatives when discussing the economic adjustment. At its June meeting, the Board did not recommend making an economic adjustment after considering alternatives that included making no economic adjustment or an economic adjustment of 26 million pounds. However, in September, the Board revisited the issue and after discussion, and considering the impact of purchases by the USDA on available supply, recommended an economic adjustment of 30 million pounds. Additionally, the Board met again on December 14, 2023, and unanimously recommended adding another 3.24 million pounds to the economic adjustment to reflect the additional production volume.

Given the concerns with regulation expressed by Board members and industry members in attendance, the Board also considered recommending no volume regulation. However, after considering the larger than expected harvest and the carry-in inventory adding to the available supply, the industry recommended a six percent restriction to the 2023–24 crop. Thus, the alternatives were rejected.

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the June, September, and December meetings were public meetings and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

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

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

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

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

After consideration of all relevant material presented, including the information and recommendations submitted by the Board and other available information, USDA has determined that this proposed rule is consistent with and would effectuate the purposes of the Act.

A 30-day comment period is provided to allow interested persons to comment on this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 930

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agriculture Marketing Services proposes to amend 7 CFR part 930 as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

■ 1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Revise § 930.256 and its heading title to read as follows:

§ 930.256 Free and restricted percentages for the 2023–24 crop year.

The percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2023, which shall be free and restricted, respectively, are designated as follows: Free percentage, 94 percent and restricted percentage, 6 percent.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–08149 Filed 4–18–24; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2023–0220]

RIN 3150–AL05

List of Approved Spent Fuel Storage Casks: FuelSolutions™ Spent Fuel Management System, Certificate of Compliance No. 1026, Renewal of Initial Certificate and Amendment Nos. 1 Through 4

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its spent fuel regulations by

revising the Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate and Amendment Nos. 1 through 4 to Certificate of Compliance No. 1026. The renewal of the initial certificate of compliance and Amendment Nos. 1 through 4 for 40 years would revise the certificate's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

DATES: Submit comments by May 20, 2024. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2023–0220, at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

You can read a plain language description of this proposed rule at *https://www.regulations.gov/docket/NRC-2023-0220.* For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: George Tartal, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–0016, email: *george.tartal@nrc.gov* and Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–1018, email: *yen-ju.chen@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0220 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0220. Address questions about NRC dockets to Dawn Forder, telephone: 301–415–3407, email: *Dawn.Forder@nrc.gov.* For technical questions contact the individuals 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, 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, Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC–2023–0220 in your comment submission. The NRC requests that you submit comments through the Federal rulemaking website at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is publishing this proposed rule concurrently with a direct final rule in the Rules and Regulations section of this issue of the **Federal Register**. The direct final rule will become effective on July 3, 2024. However, if the NRC receives any significant adverse comment by May 20, 2024, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments in a subsequent final rule. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule, certificate of compliance, or technical specifications (TS).

For a more detailed discussion of the proposed rule changes and associated analyses, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on January 16, 2001 (66 FR 3444), that approved the FuelSolutions™ Spent Fuel Management System design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance No.1026.

On August 28, 2007 (72 FR 49352), the NRC amended the scope of the general licenses issued under 10 CFR 72.210 to include the storage of spent fuel in an independent spent fuel storage installations (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 52. On February 16, 2011 (76 FR 8872), the NRC amended subparts K and L in 10 CFR part 72, to extend and clarify the term limits for certificates of compliance and revised the conditions for spent fuel storage cask renewals, including adding requirements for the safety analysis report to include time-limited aging analyses and a description of aging management programs. The NRC also clarified the terminology used in the regulations to use ''renewal'' rather than ''reapproval'' to better reflect that extending the term of a currently approved cask design is based on the cask design standards in effect at the time the certificate of compliance was approved rather than current standards.

IV. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). The NRC requests comment on the proposed rule with respect to clarity and effectiveness of the language used.

V. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	Adams Accession No./web link/ **Federal Register** Citation
Proposed Certificate of Compliance	
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 0	ML22354A265.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 1	ML22354A269.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 2	ML22354A273.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 3	ML22354A277.
Proposed Certificate of Compliance No. 1026, Renewed Amendment No. 4	ML22354A281.
Preliminary Safety Evaluation Report for Renewed Certificate of Compliance No. 1026, Amendments Nos. 0–4.	ML22354A285.
Preliminary Safety Evaluation Report	
Preliminary Safety Evaluation Report for Renewed Certificate of Compliance No. 1026, Amendments Nos. 0–4.	ML22354A266 (Word, draft, non-public).
Proposed Technical Specifications	
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 0.	ML22354A266.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 0.	ML22354A267.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 0.	ML22354A268.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 1.	ML22354A270.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 1.	ML22354A271.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 1.	ML22354A272.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 2.	ML22354A274.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 2.	ML22354A275.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 2.	ML22354A276.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 3.	ML22354A278.

Document	Adams Accession No./web link/ **Federal Register** Citation
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 3.	ML22354A279.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 3.	ML22354A280.
Proposed Technical Specifications Appendix A for Certificate of Compliance No. 1026, Renewed Amendment No. 4.	ML22354A282.
Proposed Technical Specifications Appendix B for Certificate of Compliance No. 1026, Renewed Amendment No. 4.	ML22354A283.
Proposed Technical Specifications Appendix C for Certificate of Compliance No. 1026, Renewed Amendment No. 4.	ML22354A284.
Environmental Documents	
''Environmental Assessment and Findings of No Significant Impact for the Final Rule Amending 10 CFR Part 72 License and Certificate of Compliance Terms.'' (2010).	ML100710441.
Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2) (2014).	ML14198A440 (package).
Westinghouse Electric Company LLC FuelSolutions™ Spent Fuel Management System Renewal Application Documents	
Westinghouse Electric Company LLC ''Submittal of FuelSolutions™ Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–20–64. (November 6, 2020).	ML20315A012 (package).
Westinghouse Electric Company LLC ''Reponses to Requests for Supplemental Information for the Application for the FuelSolutions™ Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–21–14 Revision 0. (March 30, 2021).	ML21090A201 (package).
Westinghouse Electric Company LLC ''Submittal of FuelSolutionsTM Spent Fuel Management System Certificate of Compliance (CoC) Renewal Application.'' Westinghouse letter LTR–NRC–22–27. (June 30, 2022).	ML22186A053 (package).
Westinghouse Electric Company LLC ''Submittal of Supplemental Response to NRC RAI A–RCS1.'' Westinghouse letter LTR–NRC–22–38. (September 13, 2022).	ML22256A285 (package).
Other Documents	
''Standard Review Plan for Renewal of Specific Licenses and Certificates of Compliance for Dry Storage of Spent Nuclear Fuel.'' NUREG–1927, Revision 1. Washington, DC. (June 2016).	ML16179A148.
''Managing Aging Processes in Storage (MAPS) Report.'' Final Report. NUREG–2214. Washington, DC. (July 2019).	ML19214A111.
''General License for Storage of Spent Fuel at Power Reactor Sites.'' (July 18, 1990)	55 FR 29181.
''List of Approved Spent Fuel Storage Casks: FuelSolutions Addition.'' (January 16, 2001)	66 FR 3444.
''License and Certificate of Compliance Terms.'' (February 16, 2011)	76 FR 8872.
''Agreement State Program Policy Statement; Correction.'' (October 18, 2017)	82 FR 48535.
Nuclear Energy Institute NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management.'' (December 2016).	ML16356A210.
Regulatory Guide 3.76, Revision 0, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals.'' (July 2021).	ML21098A022.
''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' (August 28, 2007)	72 FR 49352.
Presidential Memorandum, ''Plain Language in Government Writing.'' (June 10, 1998)	63 FR 31885.

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2023–0220. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2023–0220); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

Dated: April 8, 2024.

For the Nuclear Regulatory Commission.

Raymond Furstenau,

Acting Executive Director for Operations.

[FR Doc. 2024–08389 Filed 4–18–24; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 53

[REG–142338–07]

RIN 1545–BI33

Taxes on Taxable Distributions From Donor Advised Funds Under Section 4966; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; notice of hearing.

SUMMARY: This document provides a notice of public hearing on proposed regulations regarding excise taxes on taxable distributions made by a sponsoring organization from a donor advised fund (DAF), and on the agreement of certain fund managers to the making of such distributions.

DATES: The public hearing on these proposed regulations has been scheduled for Monday, May 6, 2024, at 10:00 a.m. ET and Tuesday, May 7, 2024, at 10:00 a.m. ET.

ADDRESSES: On Monday, May 6, 2024, the public hearing will be held in the Auditorium, at the Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC. Due to security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present a valid photo identification to enter the building. Because of access restrictions,

visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

On Tuesday, May 7, 2024, the public hearing will be held by telephone only.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, call Christopher A. Hyde at (202) 317–5800 (not a toll-free number); concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the public hearing, call Vivian Hayes (202–317–6901) (not a toll-free number) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–142338–07) that was published in the **Federal Register** on Tuesday, November 14, 2023, (88 FR 77922).

Persons who wished to present oral comments at the public hearing were required to submit an outline of the topics to be discussed as well as the time to be devoted to each topic by April 5, 2024. This due date for requests to testify has not been extended. Persons who made timely requests to testify will receive the telephone number and access codes for the public hearing.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing, and via the Federal eRulemaking Portal (*www.Regulations.gov*) under the title of Supporting & Related Material.

Individuals who want to attend the public hearing in person without testifying must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–142338–07 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–142338–07. Requests to attend the public hearing must be received by 5:00 p.m. ET on May 1, 2024.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–142338–07, and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG–142338–07. Requests to attend the public hearing must be received by 5:00 p.m. ET on May 1, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Section of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–6901 (not a toll-free number) by 5:00 p.m. ET on April 30, 2024.

Any questions regarding speaking at or attending a public hearing may also be emailed to *publichearings@irs.gov.*

Oluwafunmilayo A. Taylor,

Section Chief, Publications and Regulations Section, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2024–08419 Filed 4–18–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2024–0169]

RIN 1625–AA08

Special Local Regulation; Sail Grand Prix, Upper Bay, New York City, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary special local regulation in the Upper Bay of New York Harbor in support of Sail Grand Prix 2024 from June 21, 2024, through June 23, 2024. This special local regulation is necessary to provide for the safety of life from the dangers associated with high-speed sailing during the event. This proposed rulemaking would temporarily prohibit persons and vessels from entering, transiting through, blocking, or loitering within the event area, unless authorized by the Captain of the Port New York or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before May 20, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2024–0169 using the Federal Decision-Making 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. This notice of proposed rulemaking with its plain-language, 100-word-or-less proposed rule summary will be available in this same docket.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email MST1 Kathryn Veal, Waterways Management Division, U.S. Coast Guard Sector New York; telephone 718–354–4151, email *Kathryn.M.Veal@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
Sail GP Sail Grand Prix
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On October 5, 2023, a representative of Sail Grand Prix (Sail GP) notified the Coast Guard of intentions to conduct Sail Grand Prix 2024 in the Upper Bay of New York Harbor from 1 p.m. to 4 p.m. on June 21, 2024, and from 3:30 p.m. to 6:30 p.m. on June 22, 2024, through June 23, 2024. The race will take place between Governor's Island, Ellis Island and Liberty Island in the Upper Bay featuring 50-foot foiling catamaran sailboats. Due to the high-profile nature of this event, spectator vessels and support craft that will be present and have the potential to cause vessel congestion in proximity of the Anchorage Channel and Hudson River Channel, the Captain of the Port (COTP) Sector New York has determined that potential hazards associated with the race and race location would be a safety concern for anyone within the race area and adjacent navigable waters.

The purpose of this rulemaking is to ensure the safety of vessels, spectators and participants and the navigable waters within the racing area before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70041.

III. Discussion of Proposed Rule

The COTP Sector New York proposes to establish a special local regulation in the Upper Bay of New York Harbor from 1 p.m. to 4 p.m. on June 21, 2024, and from 3:30 p.m. to 6:30 p.m. on June 22, 2024, through June 23, 2024. The areas regulated by this special local regulation would be between Governor's Island,

Ellis Island and Liberty Island and will cover all navigable waters, from surface to bottom, within the area formed by connecting the following latitude and longitude points in the following order: 40°42′10.6″ N, 74°01′48.5″ W; thence to 40°41′50.0″ N, 74°01′08.7″ W; thence to 40°41′35.6″ N 74°01′08.8″ W; thence along the shore to 40°41′02.4″ N 74°01′29.3″ W; thence to 40°40′46.9″ N 74°01′49.3″ W; thence to 40°40′49.0″ N 74°02′25.5″ W; thence to 40°41′13.3″ N 74°02′26.2″ W; thence to 40°41′31.0″ N 74°02′18.7″ W; thence to 40°41′54.6″ N 74°02′01.3″ W; thence to 40°42′03.9″ N 74°01′56.8″ W and thence back to the point of origin. The Sail GP Sponsor will mark the regulated area via colored visual markers and will designate a spectator area within the regulated area. The spectator area will be located on the southern end of the regulated area and may change depending upon the racecourse.

The duration of the establishment of the proposed special local regulation is intended to ensure the safety of vessels in these navigable waters during the scheduled practice and race periods. This proposed temporary special local regulation would temporarily restrict vessel traffic in the vicinity of Liberty Island and Ellis Island and prohibit vessels and persons not participating in the race event from entering the dedicated race area. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-day of the special local regulation. Vessel traffic will be able to safely transit around this area via the Buttermilk Channel and via a transit lane west of the race area. The event will impact a small, designated area of the New York Harbor for less than 4 hours each day. Considerations were made to adjust to an earlier time for Friday June 21, 2024, as to reduce impact to commuter ferries. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM Channel 16 about the regulation, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator. Routes around the race area are present while the special local regulation is in effect.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves special local regulation lasting 4 hours that would limit entry to the race area without authorization from the Captain of the Port or their

designated representatives. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view 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 Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2024–0169 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. 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 proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

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. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T01–0169 to read as follows:

§ 100.T01–0169 Sail Grand Prix 2024, Upper Bay New York Harbor, New York City, NY.

(a) *Regulated area.* The regulations in this section apply to the following area: All waters of the Upper Bay of New York Harbor, from surface to bottom, encompassed by a line connecting the following points beginning at 40°42′10.6″ N, 74°01′48.5″ W; thence to 40°41′50.0″ N, 74°01′08.7″ W; thence to 40°41′35.6″ N 74°01′08.8″ W; thence along the shore to 40°41′02.4″ N 74°01′29.3″ W; thence to 40°40′46.9″ N 74°01′49.3″ W; thence to 40°40′49.0″ N 74°02′25.5″ W; thence to 40°41′13.3″ N 74°02′26.2″ W; thence to 40°41′31.0″ N 74°02′18.7″ W; thence to 40°41′54.6″ N 74°02′01.3″ W; thence to 40°42′03.9″ N 74°01′56.8″ W and thence back to the point of origin. These coordinates are based on North American Datum 83 (NAD 83).

(b) *Definitions.* As used in this section—

Designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port New York (COTP) in the enforcement of the regulations in this section.

Participant means all persons and vessels registered with the event sponsor as a participant in the race.

(c) *Regulations.* (1) All non-participants are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area described in paragraph (a) of this section unless authorized by the Captain of the Port New York (COTP) or their designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF–FM Channel 16. Those in the regulated area must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(3) The COTP will provide notice of the regulated area through advanced notice via broadcast notice to mariners and by on-scene designated representatives.

(d) *Enforcement periods.* This section will be enforced from 1 p.m. to 4 p.m. on June 21, 2024, and from 3:30 p.m. to 6:30 p.m. on June 22, 2024, through June 23, 2024.

Zeita Merchant,

Captain, U.S. Coast Guard, Captain of the Port Sector New York.

[FR Doc. 2024–08433 Filed 4–18–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No. PTO–P–2023–0048]

RIN 0651–AD72

Patent Trial and Appeal Board Rules of Practice for Briefing Discretionary Denial Issues, and Rules for 325(d) Considerations, Instituting Parallel and Serial Petitions, and Termination Due to Settlement Agreement

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) proposes modifications to the rules of practice for inter partes review (IPR) and post-grant review (PGR) proceedings before the Patent Trial and Appeal Board (PTAB or Board) that the Director and, by delegation, the PTAB will use

in exercising discretion to institute IPRs and PGRs. The Office proposes these provisions in light of stakeholder feedback received in response to an October 2020 Request for Comments (RFC) and an April 2023 Advance Notice of Proposed Rulemaking (ANPRM). The proposals enhance and build on existing precedent and guidance regarding the exercise of the Director's discretion pursuant to the America Invents Act (AIA) to determine whether to institute an IPR or PGR proceeding with regard to serial petitions, parallel petitions, and petitions implicating the same or substantially the same art or arguments previously presented to the Office. The proposed rules also provide a separate briefing process for discretionary institution arguments and align the procedures for termination of proceedings pre- and post-institution.

DATES: Comments must be received by June 18, 2024 to ensure consideration.

ADDRESSES: *For reasons of Government efficiency,* comments must be submitted through the Federal eRulemaking Portal at *https://www.regulations.gov*. To submit comments via the portal, one should enter docket number PTO–P–2023–0048 on the homepage and click ''search.'' The site will provide search results listing all documents associated with this docket. Commenters can find a reference to this notice and click on the ''Comment'' icon, complete the required fields, and enter or attach their comments. Attachments to electronic comments will be accepted in Adobe® portable document format (PDF) or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of, or access to, comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Michael P. Tierney, Vice Chief Administrative Patent Judge; Amber L. Hagy, Lead Administrative Patent Judge; or

Jamie T. Wisz, Lead Administrative Patent Judge, at 571–272–9797.

SUPPLEMENTARY INFORMATION:

Background

The USPTO is charged with promoting innovation through patent protection. U.S. Const., art. I, section 8. The patent system is a catalyst for jobs, economic prosperity, and world problem-solving. It fosters innovation by encouraging the public disclosure of ideas and by providing inventors time-limited exclusive rights to their patented innovation, thereby incentivizing research and development and investment in the same, as well as the investment necessary to bring that research and development to market. The patent system works most efficiently and effectively when the USPTO issues and maintains robust and reliable patents upon which patent owners and the public can rely to engage in technology transfer and licensing (including cross-licensing), invest in innovations to bring them to market and commercialize ideas, and/or to enforce patent rights.

Congress granted the Office ''significant power to revisit and revise earlier patent grants'' as a mechanism to ''improve patent quality and restore confidence in the presumption of validity that comes with issued patents.'' *Cuozzo Speed Techs., LLC* v. *Lee,* 579 U.S. 261, 272 (2016) (quoting H.R. Rep. No. 112–98, pt. 1, at 45, 48). Congress also sought to ensure that the proceedings provided ''a quick, inexpensive, and reliable alternative to district court litigation to resolve questions of patent validity.'' S. Rep. No. 110–259, at 20. At the same time, Congress instructed that ''the changes made by [the AIA] are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent,'' as ''[d]oing so would frustrate the purpose of the section as providing quick and cost-effective alternatives to litigation.'' H.R. Rep. No. 112–98, at 48 (2011).

Under 35 U.S.C. 316(a) and 326(a), the Director shall prescribe regulations for certain enumerated aspects of AIA proceedings and 35 U.S.C. 2(b)(2)(A) gives the Director authority to establish regulations that ''shall govern the conduct of proceedings in the Office.'' The proposed rules are in furtherance of this statutory authority.

The AIA gives the Director discretion to institute an IPR or PGR proceeding that satisfies the relevant statutory institution standard. Sections 314(a) and 324(a) of 35 U.S.C. provide the Director with discretion to deny a petition, even when meritorious. *See, e.g.,* 35 U.S.C. 314(a) (stating ''[t]he Director may not authorize an *inter partes* review to be instituted unless . . .''); *Cuozzo,* 579 U.S. at 273 (''[T]he agency's decision to deny a petition is a matter committed to the Patent Office's discretion.''). The Director's discretion to institute an AIA trial is informed by 35 U.S.C. 316(b) and 326(b), which require that ''the Director shall consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under'' 35 U.S.C. 316 and 326. In addition, 35 U.S.C. 325(d) provides that ''[i]n determining whether to institute or order a proceeding . . . , the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.''

The powers and discretion granted to the Director to determine whether to institute an AIA proceeding have been delegated to the PTAB. 35 U.S.C. 6(a), 314, 324; 37 CFR 42.4(a). To promote the delegated authority being exercised consistent with how the Director would exercise their discretion and consistently across panels, and to promote more transparency and consistency for those appearing before the PTAB and the public, the Director and the PTAB have issued guidance and precedential decisions. In particular, to take into account the 35 U.S.C. 316(b) and 326(b) considerations of the economy, the integrity of the patent system, and the ability of the USPTO to provide timely and cost-effective post-grant proceedings, as outlined in the AIA, this guidance and precedential decisions have set forth factors to consider when determining whether to institute an AIA review, including whether: (1) more than one AIA petition challenging the same patent is filed by the same petitioner at the same time as the first petition or up until the filing of the preliminary response in the first filed proceeding (''parallel petitions''); (2) additional AIA petitions are filed by the same petitioner (or privy or real party in interest with a petitioner) challenging overlapping claims of the same patent as the first petition after the patent owner has filed a preliminary response to the first petition (''serial'' or ''follow-on'' petitions); or (3) an AIA petition relies on the same or substantially the same prior art or arguments previously addressed by the USPTO in connection with the challenged patent (implicating considerations under 35 U.S.C. 325(d)).

The changes under consideration would amend the rules of practice for IPR and PGR proceedings to codify and

build on that guidance and those precedential decisions as well as formalize PTAB's current practices, while creating more uniformity across PTAB panels. In proposing these changes, the Director considered ''the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under'' 35 U.S.C. 316 and 326. The Director has also considered the comments received from stakeholders, including those in response to the ''Request for Comments on Discretion To Institute Trials Before the Patent Trial and Appeal Board'' (85 FR 66502 (Oct. 20, 2020)), and received in response to the ANPRM titled ''Changes Under Consideration to Discretionary Institution Practices, Petition Word-Count Limits, and Settlement Practices for America Invents Act Trial Proceedings Before the Patent Trial and Appeal Board'' (88 FR 24503 (Apr. 21, 2023)). In light of the robust, extensive feedback from diverse stakeholders, and the Board's experience in implementing the AIA for over a decade, the Office proposes rule revisions intended to help ensure fairness, transparency, and efficiency. This rulemaking is consistent with comments received from stakeholders in response to the RFC and the ANPRM, as well as those received in other contexts, expressing a preference that key policy changes be made and formalized through rulemaking.

The Office is now proposing rules addressing a subset of topics from the ANPRM. The Office continues to consider issuing proposed rules, with associated opportunities to comment, on other topics raised in the ANPRM.

The Office proposes to incorporate into the rules the factors the Board will consider in determining whether to institute an IPR or PGR for parallel petitions and serial petitions as well as set forth the framework the Board will use to conduct an analysis under 35 U.S.C. 325(d) when determining whether to institute an IPR or PGR. These proposed changes enhance and build on existing precedent and guidance regarding the exercise of the Director's discretion to determine whether to institute an AIA proceeding.

Another proposed change would provide a procedure in which a patent owner may, in a separate paper filed prior to a preliminary response, request discretionary denial of institution, in which case each of the parties will have the opportunity, in a separate responsive briefing, to address relevant factors for discretionary denial. This separate briefing avoids encroaching on the parties' word-count limits for briefing on the merits.

An additional proposed change would amend the rules of practice for the termination of proceedings in view of settlement to align the requirements for terminating proceedings pre- and post-institution, requiring that pre-institution settlement agreements be filed timely with the Board to support termination of a proceeding pre-institution. This proposed change would also align with the ''Executive Order on Promoting Competition in the American Economy'' (E.O. 14036, 86 FR 36987 (July 9, 2021)) by facilitating a depository for all settlement agreements in connection with contested cases, including AIA proceedings, to assist the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in ensuring compliance with antitrust laws.

Development of the Changes Under Consideration

On September 16, 2011, the AIA was enacted into law (Pub. L. 112–29, 125 Stat. 284 (2011)), and in 2012, the USPTO implemented rules to govern Office practice for AIA proceedings, including IPRs, PGRs, covered business method (CBM) patent reviews, and derivation proceedings pursuant to 35 U.S.C. 135, 316, and 326 and AIA 18(d)(2). *See* 37 CFR part 42; Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 FR 48612 (Aug. 14, 2012); Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 FR 48680 (Aug. 14, 2012); Transitional Program for Covered Business Method Patents—Definitions of Covered Business Method Patent and Technological Invention, 77 FR 48734 (Aug. 14, 2012). Additionally, the USPTO published a ''Patent Trial Practice Guide'' to advise the public on the general framework of the regulations, including the structure and times for taking action in each of the new proceedings. *See* Office Patent Trial Practice Guide, 77 FR 48756 (Aug. 14, 2012). Since then, the USPTO has designated numerous decisions in such proceedings as precedential or informative, issued several Director memoranda providing agency guidance on the PTAB's implementation of various statutory provisions, and issued several updates to the ''Trial Practice Guide.''

Prior Request for Comments Regarding Discretionary Institution

On October 20, 2020, the USPTO published an RFC to obtain feedback from stakeholders on case-specific approaches by the PTAB for exercising discretion on whether to institute an AIA proceeding and whether the USPTO should promulgate rules based on these approaches. *See* Request for Comments on Discretion To Institute Trials Before the Patent Trial and Appeal Board, 85 FR 66502 (Oct. 20, 2020). The USPTO received 822 comments from a wide range of stakeholders, including individuals, associations, law firms, companies, and three United States Senators. In January 2021, the USPTO published an executive summary encapsulating stakeholder feedback received from the RFC.[1]

Prior Advance Notice of Proposed Rulemaking

On April 20, 2023, as a follow-up to the RFC, the USPTO published an ANPRM to obtain feedback from stakeholders on a range of concepts relating to how the Director, and, by delegation, the PTAB, exercises discretion to institute IPRs and PGRs under 35 U.S.C. 314(a), 324(a), and 325(d). *See* Changes Under Consideration to Discretionary Institution Practices, Petition Word-Count Limits, and Settlement Practices for America Invents Act Trial Proceedings Before the Patent Trial and Appeal Board, 88 FR 24503 (Apr. 20, 2023). In the ANPRM, the USPTO also solicited comments regarding whether it should provide a separate briefing process for discretionary institution arguments, and/or clarify that parties that settle prior to institution must file copies of any settlement agreements that exist with the PTAB.

Engagement on the ANPRM was extensive. During the two-month comment period, which ended on June 20, 2023, diverse stakeholders submitted over 14,500 comments, reflecting the nation's deep interest in shaping the future of the patent system. The comments provided support for, opposition to, and diverse recommendations on the concepts discussed. The Office appreciates the thoughtful comments and has considered and analyzed them thoroughly.

[1] USPTO, Executive Summary: Public Views on Discretionary Institution of AIA Proceedings (Jan. 2021), available at *https://www.uspto.gov/sites/default/files/documents/USPTOExecutiveSummaryofPublicViewsonDiscretionaryInstitutiononAIAProceedingsJanuary2021.pdf.*

The vast majority of comments were from individuals, whose views generally fell on the opposite ends of the spectrum—stating either that AIA review is an important protection against unwarranted litigation and unpatentable claims and the Office should have fewer bases for discretionarily denying review of patents or that AIA review is being misused, for example, to the detriment of small inventors.

The USPTO also received many comments from trade and legal associations representing numerous members, many of which provided detailed, point-by-point comments on each concept discussed in the ANPRM. Individual companies also weighed in, from large, established corporations to small startups. These comments also spanned the spectrum, with some supporting or opposing all or most of the concepts discussed.

Discussion of Proposed Changes

In this section, the Office describes the proposed changes to specific sections in part 42 of Title 37 of the Code of Federal Regulations. Each subsection describes a related group of regulatory changes and discusses stakeholder comments relevant to the proposed changes. The Office solicits additional comments on the specific proposed changes.

Definitions: Section 42.2

Section 42.2: Adds definitions of ''serial petition'' and ''parallel petitions'' as follows:

A ''serial petition'' is a petition that (1) challenges overlapping claims of the same patent that have already been challenged by the petitioner, the petitioner's real party in interest, or a privy of the petitioner; and (2) is filed after (a) the filing of a patent owner preliminary response to the first petition; or (b) the expiration of the period for filing such a response under § 42.107(a)(2) or § 42.207(a)(2), or as otherwise ordered, if no preliminary response to the first petition is filed.

Discussion: Comments were mixed as to whether the definition of a serial petition should apply to petitions filed by parties other than the original petitioner, and what degree of relationship between the parties is sufficient to bring a subsequent petition under the definition of a serial petition. Some comments expressed uncertainty as to the definition of ''significant relationship'' as set forth in *Valve Corp.* v. *Electronic Scripting Products, Inc.,* IPR2019–00062, Paper 11 (PTAB Apr. 2, 2019), and asked for clarity as to the degree of relationship that would be considered sufficient. The Office has determined that applying the real party in interest and privity concepts in exercising discretion in the serial petition context carries out Congress's desire that the Director balance concerns about harassment in exercising discretion. Further, adopting the established common-law concepts of real party in interest and privity (*see Taylor* v. *Sturgell,* 553 U.S. 880 (2008)) provides a body of case law from which the PTAB and the public can draw when assessing whether the relationship between the parties is sufficiently significant to warrant discretionary denial. The Office notes that though *Valve* used the term ''significant relationship'' to examine the relationship between the petitioners, the analysis was consistent with privity concepts.

''Parallel petitions'' are two or more petitions that (1) challenge the same patent and (2) are filed by the same petitioner on or before: (a) the filing of a patent owner preliminary response to any of the petitions, or (b) the due date set forth in § 42.107(a)(2) or § 42.207(a)(2) for filing a patent owner preliminary response to the first petition (if no patent owner preliminary response to the petitions is filed).

Discussion: In response to the ANPRM, some commenters expressed concern that the definition of parallel petitions in the ANPRM was overly restrictive, as the definition focused on petitions challenging the same ''patent'' as opposed to petitions challenging overlapping ''claims'' of the patent. The Office is moving forward with the ''same patent'' definition as opposed to the ''overlapping claims'' definition at this time to provide a mechanism for the Board to review filing behaviors to assess whether there are any abuses or misuses of the post-grant procedures, including ones that may place unwarranted and unnecessary burdens on the patent owner (*e.g.,* filing, without explanation, multiple petitions challenging a single patent where each petition challenges a single claim of the patent). That said, even if two petitions are considered parallel under this definition, if the petitions challenge different claims given a large claim set or different art relevant to the different claim sets, the Board may still exercise its discretion to institute both petitions under proposed §§ 42.108(d) and 42.208(e).

Some commenters requested more clarity regarding the difference in timing between petitions the Office deems to be filed in parallel and those it deems to be filed serially. To provide better clarity on this issue, the Office proposes to define a parallel petition in the rule as one filed during the time period for filing a patent owner preliminary response in the first proceeding. This timing reflects current practice, as noted in the Board's 2019 Consolidated Trial Practice Guide.

Briefing on Motions for Discretionary Denial: Sections 42.24, 42.107, 42.207, 42.108(c)(1), 42.208(c)(1)

Section 42.24: Provides page limits for briefing on requests for discretionary denial (which are provided for in §§ 42.107 and 42.207, and which further provide that a patent owner may file the request for discretionary denial without Board authorization under 37 CFR 42.20(b)). A patent owner request for discretionary denial is limited to 10 pages, a petitioner opposition is also limited to 10 pages, and a patent owner sur-reply is limited to 5 pages.

Sections 42.107 and 42.207: Amend the rules on preliminary responses to provide that the patent owner preliminary response shall not address discretionary denial unless authorized by the Board, and further provide that a patent owner may raise and address discretionary denial issues in a separate request for discretionary denial of the petition, which would be limited to addressing any applicable discretionary institution issues and factors. Issues and factors applicable to requests for discretionary institution include those provided for in proposed §§ 42.108 and 42.208, except §§ 42.108(d) and 42.208(e) governing parallel petitions, as well as any issue that the patent owner believes warrants discretionary denial of the petition in view of the Office's rules, precedents, or guidance. The proposed amendment also provides the following due dates: (1) a request for discretionary denial must be filed no later than two months after the date of a notice indicating that the petition to institute an IPR has been granted a filing date; (2) the opposition to the request must be filed no later than one month after the filing of the request for discretionary denial; and (3) a reply in support of the request must be filed no later than two weeks after the filing of the opposition. The proposed amendment also provides that the Board may *sua sponte* raise discretionary denial, in which case the Board will provide the parties with the opportunity for briefing on the relevant factors set forth in this section. However, nothing in the rules prevents the Board, when the circumstances warrant, from exercising discretion and authorizing the patent owner to include discretionary denial issues in the patent owner preliminary response. Further, to the extent the merits are relevant to

discretionary denial, the parties may direct the Board's attention to the petition and patent owner preliminary response for discussion of the merits as contained in those documents.

Sections 42.108(c)(1) and 42.208(c)(1): Provide that the Board's decision on institution will take into account a patent owner's request for discretionary denial when such a request is filed, including any opposition and reply.

Discussion: The Office has found the practice of allowing parties to file separate papers ranking their petitions in the order in which petitioner desires the Board to consider the merits is helpful in evaluating parallel petitions while preserving the parties' word count to focus on the merits of the challenge. The Office solicited feedback in the ANRPM on a similar procedure to allow parties to address discretionary denial in separate briefing. In response, most commenters favored separate briefing to discuss discretionary denial issues, noting that it would free up space in the petitions and patent owner responses to address the merits and allow more fulsome discussion of discretionary denial issues. That response is consistent with the responses the USPTO received from the RFC.

In response to the ANPRM, some commenters expressed concern that allowing separate briefing on discretionary denial would only favor petitioners because it would give a petitioner an automatic right to respond to a patent owner preliminary response. The proposed rules address these concerns by limiting the petitioner's opposition to the patent owner's request for discretionary denial to the issues raised in that request, and then allowing a patent owner the opportunity to file a reply brief limited to responding to the petitioner's opposition.

The USPTO also recognizes that there may be instances in which it is appropriate for the Office to address discretionary denial even if the patent owner does not file a request. The Office is further proposing amendments to §§ 42.107 and 42.207 to provide that the Board may raise discretionary denial *sua sponte,* in which case the Board will provide the parties with the opportunity for briefing.

Termination and Settlement Agreements: 37 CFR 42.72 and 42.74

Section 42.72: Revises the provisions for termination of a proceeding in view of settlement, clarifying that the Board may terminate a proceeding on its own initiative before or after institution. Provides that the parties may jointly move for termination of a proceeding, before or after institution.

Section 42.74: Provides that a joint motion for termination of a proceeding, filed before or after institution, must be accompanied by any written settlement agreement.

Discussion: Since FY2020, the settlement rate for AIA proceedings has been approximately 30% per year, with pre-institution being over 50% of the settlements each year. *See https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2023__roundup.pdf.* For consistency and predictability, the USPTO is proposing changes to the rules to ensure that pre-institution settlement agreements are filed with the Office, similar to post-institution settlement agreements. Although 35 U.S.C. 135(e), 317(b), and 327(b) require filing of settlement agreements made in connection with, or in contemplation of, the termination of an AIA proceeding that has been instituted, by their own terms these statutory provisions do not expressly govern AIA pre-institution settlement. *See* Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions, 77 FR 48612, 48625 (Aug. 14, 2012) (final rule) (stating that ''35 U.S.C. 135(e) and 317, as amended, and 35 U.S.C. 327 will govern settlement of Board trial proceedings but do not expressly govern pre-institution settlement''). Pursuant to the Board's authority to establish procedural rules for post-grant proceedings, 35 U.S.C. 316(a)(4) and 326(a)(4), we propose to extend the same practice required by statute to encompass current practice and require filing of pre-institution settlement agreements.

This proposed rule aligns with the policy set forth in Executive Order 14036, which encourages government agencies to cooperate on policing unfair, anticompetitive practices. In addition, having a depository for all settlement agreements in connection with contested cases, including AIA proceedings, in the USPTO would assist the FTC and the DOJ in determining whether antitrust laws have been violated.

Since the inception of AIA proceedings, the Board has been generally uniform in requiring the filing of a settlement agreement prior to terminating an AIA proceeding based on a joint motion by the parties, pre- or post-institution. Nevertheless, some petitioners have filed motions to dismiss or withdraw the petition before institution, arguing that they should not be required to file a copy of the parties' settlement agreements, and panels in some of those cases have granted the motions and terminated the proceedings without requiring the parties to file their settlement agreements. *See, e.g., Samsung Elecs. Co.* v. *Telefonaktiebolaget LM Ericsson,* IPR2021–00446, Paper 7 (PTAB Aug. 3, 2021) (Order—Dismissal Prior to Institution of Trial) (over the dissent of one Administrative Patent Judge (APJ), granting the petitioner's motion to dismiss the petition and terminating the proceeding without requiring the parties to file their settlement agreements); *Huawei Techs. Co.* v. *Verizon Patent & Licensing Inc.,* IPR2021–00616, Paper 9 and IPR2021–00617, Paper 9 (PTAB Sept. 9, 2021) (Order—Dismissal Prior to Institution of Trial) (same dispute among a panel of APJs); *AEP Generation Res. Inc.* v. *Midwest Energy Emissions Corp.,* IPR2020–01294, Paper 11 (PTAB Dec. 14, 2020).

Stakeholder comments in response to the ANPRM were divided on whether the filing of pre-institution settlement agreements should be required to terminate a proceeding pre-institution. A number of comments supported the filing of pre-institution settlement agreements to provide greater transparency and to curb the potential for abusive filings. The Office agrees. The proposed changes provide consistency and predictability by making clear that pre-institution settlement agreements must be filed with the Office. This approach provides the USPTO a greater ability to monitor and curb potential abusive filings and, consistent with Executive Order 14036, allows the USPTO to cooperate with other government agencies to police unfair, anticompetitive practices.

A few ANPRM comments opposed the proposed requirement to file pre-institution settlement agreements, taking the position that the statute only requires the filing of agreements post-institution. Some believed that parties should have the option to voluntarily file pre-institution settlement agreements. A few comments expressed concern that the Office lacks authority to require the filing of settlement agreements to terminate a proceeding before institution. As noted above, the statute requires the filing of settlement agreements made in connection with, or in contemplation of, the termination of a proceeding that has been instituted, and is silent on AIA pre-institution settlement. The proposed rule is promulgated within the Director's authority to prescribe regulations establishing and governing an IPR under the AIA provisions. *See* 35 U.S.C. 316(a)(4).

Further, as discussed above, the Board has been generally uniform in requiring

the filing of a settlement agreement prior to terminating an AIA proceeding both pre- and post-institution, pursuant to 37 CFR 42.74(b). The proposed rule ensures greater predictability and consistency.

Some ANPRM comments expressed concern that requiring the filing of settlement agreements would discourage or complicate pre-institution settlement negotiations. As noted above, the proposed rule is consistent with the prior general uniform practice of the Board of requiring the filing of settlement agreements if parties would like termination based on settlement prior to a decision on institution. Any concerns regarding possible disclosure to nonparties of settlement terms from such filings have not been borne out in practice, given the availability of filing such documents with the designation ''Board and Parties Only.''

Factors for Discretionary Denial: 37 CFR 42.108 and 42.208

Sections 42.108 and 42.208: Revise the rules for institution of IPRs to include factors to be addressed in consideration of discretionary denial on the basis of parallel petitions (§§ 42.108(d), 42.208(e)) and serial petitions (§§ 42.108(e), 42.208(f)), and in accordance with 35 U.S.C. 325(d) (§§ 42.108(f), 42.208(g)).

Sections 42.108(c)(1) and 42.208(c)(1) provide that the factors set forth for discretionary denial shall not be construed to limit the Board's discretion to deny institution or dismiss a proceeding as a sanction or in response to evidence of improper conduct or gamesmanship.

Sections 42.108(c)(2) and 42.208(c)(2) provide that, in reaching a decision on institution of a petition accompanied by a timely motion for joinder to a petition that was instituted, the Board will not consider arguments against initiating that petition on the basis of discretionary considerations under §§ 42.108(d) and 42.208(e) (parallel petitions) or §§ 42.108(f) and 42.208(g) (petitions implicating 35 U.S.C. 325(d)) where those considerations were available in the already-instituted petition. However, the Board may deny motions for joinder and the later-filed petition where a patent owner successfully identifies other bases for discretionary denial.

Sections 42.108(d) and 42.208(e) provide that the Board will not institute parallel petitions absent a threshold showing of good cause as to why more than one petition is necessary. The petitioner must provide information relevant to a good cause determination either in the petition or a separate filing, and the patent owner may respond in a separate filing. Various factors relevant to the good cause determination may be considered by the Board, including: (1) a petitioner's ranking of their parallel petitions in the order in which petitioner wishes the Board to consider the merits, (2) an explanation of the differences between parallel petitions, (3) the number of claims challenged by the petitioner and asserted by the patent owner, (4) whether the parties dispute the priority date of the challenged patent, (5) whether there are alternative claim constructions requiring different prior art, (6) whether the petitioner lacked information at the time of filing the petition; and (7) the complexity of the technology in the case, as well as any other information believed to be pertinent to the good cause determination.

Sections 42.108(e) and 42.208(f) provide that the Board may deny institution of any serial petition when it challenges claims of the same patent that overlap with claims challenged in a previously filed petition for IPR, PGR, or CBM patent review. The Board will consider various factors in determining whether to deny institution of a serial petition, including: (1) whether, at the time of filing of the first petition, the petitioner knew of the prior art asserted in the second petition or should have known of it; (2) whether, at the time of filing of the second petition, the petitioner had already received the patent owner preliminary response to the first petition or had received the Board's institution decision for the earlier petition; (3) the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition; and (4) whether the petitioner provided an adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent. (As discussed below, these are factors (2) through (5) from the 2017 *General Plastic* precedential decision. Factor (1) from *General Plastic* is incorporated into the proposed rule's definition of a ''serial petition,'' and factors (6) and (7) are not included in the proposed rule.)

Sections 42.108(f) and 42.208(g) provide that the Board may deny a petition for IPR under 35 U.S.C. 325(d) if the same or substantially the same prior art or arguments previously presented were meaningfully addressed by the Office with respect to the challenged patent or a related patent or application, unless the petitioner establishes material error in the Office's previous evaluation. The rule provides an opportunity for a patent owner to file a request for discretionary denial under 35 U.S.C. 325(d), for the petitioner to file an opposition, and for the patent owner to file a reply. The Board may deny the petition if section 325(d) is sufficiently implicated such that instituting on all grounds of unpatentability would not promote the efficient administration of the Office or support the integrity of the patent system.

Discussion

Statutory Authority

Some comments assert generally that discretionary denials frustrate Congress's intent by depriving parties of the ability to seek AIA review. Some comments express the view that the Director does not have the authority to preclude serial or parallel petitions.

Congress specifically granted the Director of the USPTO the authority to institute a review. 35 U.S.C. 314 and 324. The AIA statute does not require the Director to institute a review in any case, and gives the Director discretion not to institute even where the statutory requirements for institution are met. The Director's discretion is informed by 35 U.S.C. 316 and 326, which require that ''the Director shall consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter.'' 35 U.S.C. 316 and 326. Congress also empowered the Director to prescribe regulations related to the implementation of the AIA. *See* 35 U.S.C. 316(a) and 326(a) (stating that the Director shall prescribe regulations for certain enumerated aspects of AIA proceedings). Under 35 U.S.C. 2(b)(2)(A), the Director may establish regulations that ''shall govern the conduct of proceedings in the Office.'' The language and intent of the above statutes therefore support evaluating whether parallel or serial petitions advance the mission and vision of the Office to promote innovation or the intent behind the AIA to provide a less-expensive alternative to district court litigation when exercising the Director's discretion to institute. 35 U.S.C. 316(b) and 326(b). Also, under 35 U.S.C. 325(d), ''the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.''

Parallel Petitions

Comments pertaining to parallel petitions challenging the same patent, as defined in § 42.2, were mixed.

Many comments supported denying parallel petitions absent a showing of good cause. Some comments that supported the concept of requiring a showing of good cause for filing parallel petitions asserted that this practice is in line with the congressional intent to allow discretionary denials based on the volume of AIA petitions. In line with these comments, the proposed rule implements the current practice of requiring that petitioners demonstrate why parallel petitions should be allowed to proceed. This framework supports the Office's goal of reducing duplicative challenges to a patent and balances the interests of parties by preventing undue harassment of patent owners through the filing of multiple challenges to a patent, while allowing petitioners reasonable opportunities to seek review.

Many comments asserted that denials of meritorious challenges are an unnecessary restraint on review. Yet, some comments urged that the restrictions on parallel petitions do not go far enough. Some urged greater restrictions on parallel petitions, asserting that most, if not all, parallel petitions should be denied to prevent companies from harassing patent owners. The proposed rule strikes a balance between denying all parallel petitions and instituting all parallel petitions that meet the statutory threshold for institution in 35 U.S.C. 314(a) and 35 U.S.C. 324(a) by requiring a showing by the petitioner of good cause as to why more than one petition is necessary.

Some comments asserted that there are no justifications for limiting multiple petitions because there is little, if any, evidence of petitioners abusing the system by filing multiple petitions. A USPTO study of parallel petitions found that from fiscal year 2015 through fiscal year 2018, parallel petitions represented roughly 15–18% of all challenges. *https://www.uspto.gov/sites/default/files/documents/executive_summary_ptab_multiple_petitions_study_fy2021-2022_update.pdf.* In fiscal year 2019, parallel petitions represented roughly 20% of all challenges, but then in fiscal years 2020 through 2022, the percent of challenges involving parallel petitions steadily dropped, down to roughly 7% in fiscal year 2022 (the final year of the study). *See id.* The decrease in the number of parallel petition filings was influenced by USPTO guidance (*see* Consolidated Trial Practice Guide (2019)), which the USPTO is now codifying and clarifying through the rulemaking process.

Serial Petitions

Comments on proposed discretionary denials of serial petitions, as defined in § 42.2, were sharply divided, with most comments favoring either fewer or greater restrictions.

Some comments supported the adoption of the *General Plastic* factors as a compromise between denying all serial petitions and instituting all serial petitions that meet the statutory threshold for institution in 35 U.S.C. 314(a) and 35 U.S.C. 324(a). In *General Plastic Co.* v. *Canon Kabushiki Kaisha,* IPR2016–01357, 2017 WL 3917706, at *7 (PTAB Sept. 6, 2017) (precedential), the PTAB referred to the AIA's goals ''to improve patent quality and make the patent system more efficient by the use of post-grant review procedures'' but also ''recognize[d] the potential for abuse of the review process by repeated attacks on patents.'' 2017 WL 3917706, at *7 (citing H.R. Rep. No. 112–98, part 1, at 48 (2011)). To aid the Board's assessment of ''the potential impacts on both the efficiency of the inter partes review process and the fundamental fairness of the process for all parties,'' *General Plastic* identified a number of non-exclusive factors that the Board will consider in exercising discretion in instituting an IPR, especially as to ''follow-on'' petitions challenging a patent that was challenged previously in an IPR, PGR, or CBM proceeding. *Id.* at *8. The *General Plastic* non-exclusive factors include: (1) whether the same petitioner previously filed a petition directed to the same claims of the same patent; (2) whether, at the time of the filing of the first petition, the petitioner knew of the prior art asserted in the second petition or should have known of it; (3) whether, at the time of the filing of the second petition, the petitioner had already received a patent owner preliminary response (if filed) to the first petition or received the Board's decision on whether to institute review in the first petition; (4) the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition; and (5) whether the petitioner provided an adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent. *Id.* at *7. Additional factors include: (6) the finite resources of the Board, and (7) the requirement to issue a final determination not later than one year after the date on which the Director notices institution of review. *Id.*

The proposed serial petition definition and rules generally adopt the *General Plastic* factors approach, striking a balance between denying all serial petitions versus removing all restrictions on serial petitions. Specifically, *General Plastic* factor (1) is included in the definition of ''serial petition'' in § 42.2, and factors (2) through (5) are included in the proposed rules at § 42.108(e) and § 42.208(f). The other two *General Plastic* factors—(6) and (7)—are not proposed for regulatory adoption in light of stakeholder feedback that parties lack sufficient information to opine on the finite resources of the Board and the Board's ability to issue a final determination within one year. While the parties need not address existing factors (6) and (7), the Board may still weigh the considerations reflected by those factors in rendering its decision on serial petition issues.

Comments that urged greater restrictions on serial petitions asserted that most, if not all, serial petitions should be presumptively denied to prevent companies from harassing patent owners or contesting the same patent repeatedly. Some of these comments offered limited exceptions to presumptive denials, including requiring the petitioner to demonstrate it could not reasonably have discovered earlier the prior art presented in the subsequent petition and requiring a heightened burden for subsequent petitions of demonstrating unpatentability by clear and convincing evidence.

As discussed, the proposed rule implements the current practice of applying substantially the same factors as those stated in *General Plastic.* This framework supports the Office's goal of reducing duplicative challenges to a patent and balances the interests of parties by preventing undue harassment of patent owners through serial challenges while allowing petitioners reasonable opportunities to seek review.

A USPTO study of serial petitions filed by the same petitioner found a notable decrease in the filing of serial petitions, as well as institution of AIA trials based on serial petitions, after the Office issued *General Plastic* in late 2017. *See https://www.uspto.gov/sites/default/files/documents/executive_summary_ptab_multiple_petitions_study_fy2021-2022_update.pdf.* This data showed that in fiscal year 2015, serial petitions represented roughly 9.0% of all challenges, and in fiscal years 2016 and 2017 serial petitions represented roughly 8% of all

challenges. After the issuance of *General Plastic* in late 2017, serial petition filings began immediately dropping, representing 5.6% of filings in fiscal year 2018, approximately 2% of filings fiscal years 2019 and 2020, 1.4% of filings in fiscal year 2021, and 1.7% of filings in fiscal year 2022. Additionally, of the 17 petitions involving a serial petition attempt by the same petitioner in fiscal year 2022, only 3 petitions resulted in institution (roughly 18%), as compared to 42 out of 99 serial petition filings that resulted in institution (roughly 42%) in fiscal year 2015. Although the data suggests that only small number of serial petition challenges continue to occur each year, in the wake of *General Plastic,* the USPTO believes that there is a public benefit to codifying and clarifying the existing practice related to serial petition challenges through the rulemaking process.

Some stakeholders commented that multiple filings are often the result of a patent owner's litigation tactics. The Office believes the articulated factors provide adequate means to strike the appropriate balance between denying and allowing all serial petitions because they allow the Board to weigh relevant and appropriate evidence and, for example, to identify instances of improper roadmapping, in which a petitioner engages in a litigation tactic to gain an advantage by tailoring a ''follow on'' petition based on information gleaned from a patent owner's preliminary response to an earlier petition. As the Board noted in *General Plastic:* ''Multiple, staggered petitions challenging the same patent and same claims raise the potential for abuse. The absence of any restrictions on follow-on petitions would allow petitioners the opportunity to strategically stage their prior art and arguments in multiple petitions, using our decisions as a roadmap, until a ground is found that results in the grant of review.'' 2017 WL 3917706, at *7.

Previously Presented Art or Arguments

On March 24, 2020, the Office designated as precedential *Advanced Bionics, LLC* v. *Med-El Elektromedizinische Geräte GmbH,* IPR2019–01469, Paper 6 (PTAB Feb. 13, 2020). This precedent lays out a two-part framework for evaluating whether to exercise discretion under 325(d). The first part of the test relates to whether the same or substantially the same art or arguments were previously presented to the Office. The second part of the test looks to whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of the challenged claims.

The Office does not have any studies evaluating the impact of the *Advanced Bionics* precedent on the application of 325(d). Comments received in response to the ANPRM, however, generally expressed the view that *Advanced Bionics* provides the public with a simplified framework for evaluating 325(d) issues, even if application of the *Advanced Bionics* framework would not alter the outcome of the majority of cases where 325(d) issues arose.

Specific comments on the application of 35 U.S.C. 325(d) to deny petitions on the basis of previously presented prior art or arguments were split, primarily on the question of whether the Office should consider prior art that was made of record, but not applied or substantively discussed by the examiner, as having been ''previously presented.''

Some comments supported a proposed rule that would limit the application of discretionary denial under section 325(d) to situations in which the prior art was previously applied or substantively discussed during examination. One comment stated that applying discretionary denial in situations in which prior art was listed on an Information Disclosure Statement (IDS), without more involvement in examination, would encourage ''dumping'' of references on the Office during prosecution. Another comment agreed that a requirement that a prior art reference be previously addressed would increase efficiency by providing a clear test that reduces unnecessary briefing.

Section 325(d) provides discretion for the Director, when determining whether to institute a proceeding, to take into account whether the same (or substantially the same) art or arguments were previously presented to the Office. The USPTO agrees that the application of section 325(d) should be limited to situations in which the prior art or arguments were meaningfully addressed by the Office. The proposed rule provides that art or arguments are deemed to have been meaningfully addressed where the Office has evaluated the art or arguments and articulated its consideration of the art or arguments in the record of the application from which the patent issued or the record of a related application or patent with claims that are substantially the same. For purposes of this section, an application or patent is ''related'' to the challenged patent if it claims priority to a common application or is a parent application or parent patent of the challenged patent. This definition of ''related application or patent'' only applies to part 42 and does not apply to other sections that discuss the term (*e.g.,* 37 CFR 1.77(b)(2), 1.78(d)(5)).

Some comments favored the broader application of discretionary denial in circumstances in which prior art references were made of record during prosecution (such as on an IDS) but not applied or substantively discussed by the examiner. Comments expressed concern that requiring a patent owner to identify prior art or arguments that were meaningfully addressed by the Office is inconsistent with the text of 325(d). One comment noted patent applicants do not have control over what references an examiner chooses to cite in the record and believed that excluding art that was merely cited on an IDS may deter compliance with the duty of disclosure. Another comment expressed concern with a blanket rule that section 325(d) only applies to art and arguments previously evaluated by the Office. One comment suggested that if prior art and arguments are limited to art and arguments addressed by the Office, petitioners should face a higher ''material error'' burden. In response to the concern that patent applicants do not have control over what references an examiner chooses to address, the rule does not prevent patent applicants from drawing attention to specific references.

As noted above, 35 U.S.C. 325(d) gives the Director the authority to take into account whether the same or substantially the same prior art was previously presented to the Office, but does not require the Director to do so. After careful consideration of the comments, and to best support the integrity of the patent system, the USPTO proposes to limit the application of 325(d) to circumstances in which the same or substantially the same prior art or arguments previously presented to the Office were meaningfully addressed by the Office. Under these circumstances, the proposed rule installs the current Board practice of requiring petitioners to establish a ''material error'' by the Office. *Advanced Bionics, LLC* v. *Med-El Elektromedizinische Geräte GmbH,* IPR2019–01469, Paper 6 (PTAB Feb. 13, 2020) (precedential). A material error may include misapprehending or overlooking clear, specific evidence in the prior record, including teachings of the relevant prior art that impact the patentability of the challenged claims; evidence demonstrating an inherent feature of the prior art; or evidence rebutting a showing of unexpected results. A material error may also include a legal error, including an

erroneous claim construction that impacts the patentability of the challenged claims.

The proposed rule also seeks to carry out the purpose of 325(d), and give appropriate deference to prior findings made by the Office when meaningfully addressing prior art references, by focusing on instances in which a petitioner seeks to apply a reference in a manner that is directly contrary to prior Office findings. The proposed rule thus defines ''the same prior art'' as a reference that forms the basis of a challenge in a petition, where that reference was previously meaningfully addressed by the Office and the petition relies on the reference for a factual proposition that directly contradicts a finding made by the Office when the reference was previously meaningfully addressed. Therefore, if the ''same prior art'' was meaningfully addressed, the petition may be denied under 35 U.S.C. 325(d) unless the petitioner establishes material error by the Office.

The proposed rule ensures greater predictability and consistency in the application of 325(d) and focuses the application of 325(d) on circumstances in which the prior record is clear. The proposed rule further supports the Office's goal of reducing duplicative challenges to a patent by considering whether the same or substantially the same challenge was meaningfully addressed by the Office previously. The proposed rule does not reduce or eliminate a patent applicant's duty of disclosure under 37 CFR 1.56.

One comment suggested that where a patent owner asserts that the same or substantially the same prior art was previously presented in a related application, the requirement for the patent owner to identify how the claims are substantially the same as those in the challenged patent should only apply to related applications that are not direct ancestors.

Under the proposed rule, a patent owner must identify, in a request for discretionary denial under 35 U.S.C. 325(d), where the same or substantially the same prior art or arguments were meaningfully addressed by the Office. If the art or arguments were previously evaluated by the Office in the record of a related application, the patent owner must establish that the art or arguments were previously evaluated with respect to claims that are substantially the same as the claims in the challenged patent. Claims in a direct ancestor patent may not be substantially the same as those in the challenged patent, and therefore the requirement of establishing that the claims are substantially the same as those in the challenged patent to related applications that are not direct ancestors is still necessary. Additionally, where the claims are substantially the same as those in a related application, a petitioner could identify inconsistent positions taken by an examiner in the related application as part of its burden of establishing material error.

Discretionary Denial Considerations for Joinder Petitions

Proposed rule § 42.208(c)(2) installs current Board practice regarding the analysis of 35 U.S.C. 325(d) and parallel petition issues in the joinder context. Joinder petitions may present the same discretionary denial considerations as the petition upon which the IPR sought to be joined was instituted. *See Facebook, Inc.* v. *Windy City Innovations, LLC,* 973 F.3d 1321, 1335–38 (Fed. Cir. 2020) (holding that 35 U.S.C. 315(c) prohibits a joined party from bringing new issues through its petition into the proceeding being joined). Additionally, section 325(d) or parallel petition issues implicated by the joinder petition were already implicated by the previously instituted petition. Issues raised by discretionary considerations under 35 U.S.C. 325(d) are directed to the prosecution history of the challenged patent and to whether the same or substantially the same prior art or arguments were previously presented to the Office. Arguments under section 325(d) were available to the patent owner in the context of the already instituted petition. Similarly, parallel petition issues require the showing of good cause for multiple petitions filed by the same petitioner based on particular considerations (*e.g.,* the number of claims the petitioner is challenging, whether there is a priority date dispute, whether there are alternative claim constructions, the number of claims the patent owner is asserting in litigation, etc.). In the scenario in which a joinder petitioner seeks to join multiple instituted IPRs, the need to justify multiple IPR trials is implicated by the already instituted petitions.

Accordingly, under current practice, Board panels presented with 35 U.S.C. 325(d) or parallel petition issues for joinder petitions have declined to consider those issues in light of the decision to institute the previously instituted petition(s) to be joined. In order to maintain consistency with current practice, in reaching a decision on institution of a petition accompanied by a timely motion for joinder, Board panels will not consider arguments on discretionary considerations under § 42.108(d) (parallel petitions) or § 42.108(f) (35 U.S.C. 325(d)) where the petition(s) sought to be joined was instituted and those discretionary considerations were available in the already instituted petition. The Board may, however, deny motions for joinder where the later-filed petition implicates other bases for discretionary denial.

Rulemaking Considerations

A. Administrative Procedure Act: The changes proposed by this rulemaking involve rules of agency practice and procedure, and/or interpretive rules, and do not require notice-and-comment rulemaking. *See Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 97, 101 (2015) (explaining that interpretive rules ''advise the public of the agency's construction of the statutes and rules which it administers'' and do not require notice and comment when issued or amended); *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice-and-comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice''); and *JEM Broadcasting Co.* v. *F.C.C.,* 22 F.3d 320, 328 (D.C. Cir. 1994) (explaining that rules are not legislative because they do not ''foreclose effective opportunity to make one's case on the merits'').

Nevertheless, the USPTO is publishing this proposed rule for comment to seek the benefit of the public's views on the Office's proposed regulatory changes.

B. Regulatory Flexibility Act: For the reasons set forth in this notice, the Senior Counsel for Regulatory and Legislative Affairs, Office of General Law, USPTO, has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes set forth in this notice of proposed rulemaking (NPRM) would not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The changes in this NPRM set forth express modifications to the rules of practice for IPR and PGR proceedings before the PTAB that the Director and, by delegation, the PTAB, will use in exercising discretion to institute IPRs and PGRs under 35 U.S.C. 314(a), 324(a), and 325(d). The changes pertaining to discretionary institution are largely formalizing existing Board practice, as set forth in precedential decisions and the Trial Practice Guide. Additionally, the changes allowing parties to separately brief discretionary institution issues and the filing of pre-existing settlement agreements prior to

institution would not cause any party to incur significant additional cost.

As a result, the Office estimates that any requirements resulting from these proposed changes would create little, if any, additional burden to those practicing before the Board. The Office proposes to formalize rules that, for the most part, implement current PTAB practices with regard to discretionary denial of serial and parallel petitions for review, petitions implicating considerations under 35 U.S.C. 325(d), procedures for separate briefing on discretionary denial, and practices regarding termination due to settlement. Accordingly, any economic impact would be minimal.

Regarding parallel petitions, the proposed rule providing that the Board will not institute parallel petitions absent a showing of good cause as to why more than one petition is necessary reflects current practice. The Board's Consolidated Trial Practice Guide (November 2019) already makes clear that one petition should be sufficient in most situations and requires petitioners to rank any parallel petitions. In response to stakeholder comments, the proposed rule articulates specific circumstances that may establish good cause and promotes greater efficiency and transparency in the Board's determination whether to go forward with parallel petitions. Accordingly, the proposed change is expected to have minimal economic impact.

With regard to serial petitions, the proposed rule adopts the factors set forth in the Board's precedential decision in *General Plastic.* Accordingly, the proposed rule generally reflects current practice, including practice based on binding precedent, to reduce duplicative proceedings, and is expected to have minimal economic impact.

With regard to petitions implicating considerations under 35 U.S.C. 325(d), the proposed rule clarifies that mere prior citation of prior art in an IDS will not automatically satisfy the first prong of the analytical framework in the Board's decision in *Advanced Bionics, LLC* v. *Med-El Elektromedizinische Geräte GmbH,* IPR2019–01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential). The proposed rule resolves an issue that has caused confusion and resulted in unnecessary briefing and the consumption of significant time and effort in the past in the absence of credible evidence that the art or arguments were meaningfully addressed by the Office. Accordingly, the proposed change is expected to mitigate the need for parties and the Board to expend resources in trying to assess examiner error where the examiner did not meaningfully address the art and arguments. As such, the proposed rule is expected to increase efficiency for the parties and the Board and therefore is not expected to have a significant economic impact.

The proposed rule regarding separate briefing on discretionary denial issues is likewise expected to increase efficiency for the parties and the Board. The parties already brief the same issues and provide the same information that would be presented in the separate briefing in any existing patent owner preliminary response and any petitioner sur-reply, but will merely do so in a different format going forward. The proposed rule will help highlight and focus attention on the key issues concerning discretionary denial. As such, the proposed rule will not substantially change existing practice and is unlikely to have any significant economic impact.

Finally, with respect to practices regarding termination, the proposed change aligns the requirements for terminating proceedings pre- and post-institution by clarifying that pre-institution settlement agreements must be filed with the Board for termination of a proceeding, which includes pre-institution terminations as well as post-institution terminations. This proposal aligns with already widespread practice, where most parties requesting termination pre-institution have provided such agreements. 35 U.S.C. 135(e), 317(b), and 327(b), concerning settlement, do not expressly address settlements pre-institution, but the Board has been generally uniform in requiring agreements to be filed prior to termination. As such, the proposed rule reflects existing practice and eliminates potential confusion. Under the proposed rule, parties will simply be filing existing documents, not creating any additional documents, and accordingly, any cost for compliance will be minimal.

For these reasons, the proposed changes in this NPRM would not have a significant economic impact on a substantial number of small entities.

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking is significant under Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 14094 (Apr. 6, 2023).

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, and as discussed above, the Office has, to the extent feasible and applicable: (1) made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across Government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

E. Executive Order 13132 (Federalism): This rulemaking pertains strictly to federal agency procedures and does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

F. Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) have substantial direct effects on one or more Indian tribes, (2) impose substantial direct compliance costs on Indian tribal governments, or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

G. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

H. Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

I. Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

J. Executive Order 12630 (Taking of Private Property): This rulemaking will not affect a taking of private property or otherwise have taking implications

under Executive Order 12630 (Mar. 15, 1988).

K. Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this NPRM are not expected to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or 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. Therefore, this rulemaking is not a ''major rule'' as defined in 5 U.S.C. 804(2).

L. Unfunded Mandates Reform Act of 1995: The changes set forth in this NPRM do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of $100 million (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of $100 million (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

M. National Environmental Policy Act of 1969: This rulemaking will not have any effect on the quality of the environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

N. National Technology Transfer and Advancement Act of 1995: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions that involve the use of technical standards.

O. Paperwork Reduction Act of 1995: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This NPRM involves information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this rulemaking have been reviewed and previously approved by OMB under OMB control numbers 0651–0069. This rulemaking does not add any additional information requirements or fees for parties before the Board.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

P. E-Government Act Compliance: The USPTO is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 37 CFR Part 42

Administrative practice and procedure, Inventions and patents, Lawyers.

For the reasons set forth in the preamble, the Office proposes to amend 37 CFR part 42 as follows:

PART 42—TRIAL PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

■ 1. The authority citation for 37 CFR part 42 is revised to read as follows:

Authority: 35 U.S.C. 2(b)(2), 6, 21, 23, 41, 135, 311–319, 321–329; Pub. L. 112–129, 125 Stat. 284; and Pub. L. 112–274, 126 Stat. 2456.

■ 2. Amend § 42.2 by adding, in alphabetical order, the definitions for ''parallel petitions'' and ''serial petition'' to read as follows:

§ 42.2 Definitions.

* * * * *

Parallel petitions means two or more petitions that:

(1) Challenge the same patent by the petitioner; and

(2) Are filed on or before:

(i) The filing of the first patent owner preliminary response to any of the petitions; or

(ii) The due date set forth in § 42.107(a)(2) or § 42.207(a)(2) for filing a patent owner preliminary response to the first petition, if no patent owner preliminary response to the petitions is filed.

* * * * *

Serial petition means a petition that:

(1) Challenges same or overlapping claims of the same patent that have already been challenged by the petitioner, the petitioner's real party in interest, or a privy of the petitioner; and

(2) Is filed after:

(a) The filing of a patent owner preliminary response to the first petition; or

(b) The expiration of the period for filing such a response under § 42.107(a)(2) or § 42.207(a)(2), or as otherwise ordered, if no preliminary response to the first petition is filed.

* * * * *

■ 3. Amend § 42.24 by adding paragraph (e) to read as follows:

§ 42.24 Type-volume or page limits for petitions, motions, oppositions, replies, and sur-replies.

* * * * *

(e) *Requests for discretionary denial.* The following page limits apply to briefing in connection with a patent owner request for discretionary denial but do not include a table of contents; a table of authorities; a listing of facts that are admitted, denied, or cannot be admitted or denied; a certificate of service; or an appendix of exhibits:

(1) *Patent owner request:* 10 pages.

(2) *Petitioner opposition:* 10 pages.

(3) *Patent owner reply:* 5 pages.

■ 4. Revise § 42.72 to read as follows:

§ 42.72 Termination of proceeding.

(a) *The Board may terminate a proceeding.* The Board may terminate a proceeding, where appropriate, before institution or after institution, including where the proceeding is consolidated with another proceeding or pursuant to a joint request under 35 U.S.C. 317(a) or 327(a).

(b) *Motion for termination of a proceeding.* With prior authorization from the Board, parties may file a joint request for termination of a proceeding before institution, or after institution pursuant to 35 U.S.C. 317(a) or 327(a), by filing a joint motion accompanied by any written agreement or understanding, including any collateral agreements, between the parties as required by § 42.74.

■ 5. Amend § 42.74 by revising paragraph (b) to read as follows:

§ 42.74 Settlement.

* * * * *

(b) *Agreements in writing.* Any agreement or understanding between the parties made in connection with, or in contemplation of, the termination of a proceeding shall be in writing, and a true copy shall be filed with the Board before the termination of a proceeding.

* * * * *

■ 6. Amend § 42.107 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 42.107 Preliminary response to petition and request for discretionary denial.

(a) *Patent owner preliminary response.* (1) The patent owner may file a preliminary response to the petition. The response is limited to setting forth the reasons why no *inter partes* review should be instituted under 35 U.S.C. 314 based on issues other than discretionary denial, and can include supporting evidence. The preliminary response is subject to the word count under § 42.24. A patent owner preliminary response shall not address discretionary denial, which may only be raised pursuant to § 42.107(b), unless otherwise authorized by the Board.

(2) The preliminary response must be filed no later than three months after the date of a notice indicating that the petition to institute an *inter partes* review has been granted a filing date. A patent owner may expedite the proceeding by filing an election to waive the patent owner preliminary response.

(b) *Request for discretionary denial.* (1) In addition to a preliminary response to the petition, the patent owner may file a single request for discretionary denial of the petition. 37 CFR 42.20(b) notwithstanding, no prior Board authorization is required to file the single request for discretionary denial. The request is limited to addressing any applicable discretionary institution issues and factors, other than those involving parallel petitions under § 42.108(d). Applicable discretionary institution issues include those enumerated in § 42.108(e) and (f), as well as any issue that the patent owner believes, based on Office rules, precedent, or guidance, warrants discretionary denial of the petition. If the patent owner files a request for discretionary denial, the petitioner may file an opposition limited to the issues raised in the request, and the patent owner may file a reply limited to the issues raised in the opposition. The request, opposition, and reply are subject to the page limits under § 42.24(e). The Board may also *sua sponte* raise any applicable discretionary denial issue, in which case the Board will provide an opportunity for briefing by the parties.

(2) A request for discretionary denial must be filed no later than two months after the date of a notice indicating that the petition to institute an *inter partes* review has been granted a filing date. An opposition to the request for discretionary denial must be filed no later than one month after the filing of the request for discretionary denial. A reply in support of the request must be filed no later than two weeks after the filing of the opposition.

* * * * *

■ 7. Amend § 42.108 by revising paragraph (c) and adding paragraphs (d) through (f) to read as follows:

§ 42.108 Institution of inter partes review.

* * * * *

(c) *Institution considerations. Inter partes* review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable. The Board's decision will take into account a patent owner preliminary response when such a response is filed, including any testimonial evidence. A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause.

(1) *Consideration of discretionary denial.* The Board's decision will also take into account, when filed, a patent owner's request for discretionary denial, including any opposition and reply, and a petitioner's filing pursuant to § 42.108(d). To the extent the patent owner contends that there are substantive weaknesses in the petitioner's grounds of unpatentability that are relevant to the exercise of discretion under 35 U.S.C. 314(a), the patent owner may indicate in their request that they will address those substantive weaknesses in the preliminary response permitted by § 42.107(a). Nothing in § 42.108 shall be construed to limit the Board's discretion to deny institution or dismiss a proceeding as a sanction or for any other reason deemed warranted by the Board.

(2) *Discretionary considerations for joined petitions.* In reaching a decision on institution of a petition accompanied by a timely motion for joinder, the Board will not consider arguments on discretionary considerations under § 42.108(d) (parallel petitions) or § 42.108(f) (35 U.S.C. 325(d)) where the petition sought to be joined was instituted. However, the Board may deny the accompanying motion for joinder where the later-filed petition implicates other bases for discretionary denial.

(d) *Parallel petitions challenging the same patent.* The Board will not institute parallel petitions, as defined in § 42.2, absent a showing of good cause as to why more than one petition is necessary. A petitioner filing a parallel petition may, either in the petition or in a separate paper filed concurrently with the petition and limited to no more than five pages, provide information relevant to the good cause determination. 37 CFR 42.20(b) notwithstanding, the patent owner is authorized, without prior Board authorization, to file a separate paper of no more than five pages, on or before the deadline for the preliminary response, limited to providing an explanation of why the Board should not institute more than one petition. Information relevant to the good cause determination may include:

(1) A petitioner's ranking of their petitions in the order in which petitioner desires the Board to consider the merits of their petitions relative to the other parallel petitions;

(2) An explanation of the differences between the petitions and why the issues addressed by the differences are material;

(3) The number of patent claims of the challenged patent that have been asserted by the patent owner in district court litigation;

(4) The number of claims the petitioner is challenging;

(5) Whether there is a dispute about the priority date of the challenged patent;

(6) Whether there are alternative claim constructions that require different prior art references on mutually exclusive grounds;

(7) Whether the petitioner lacked information, such as the identity of asserted claims, at the time they filed the petitions;

(8) The complexity of the technology in the case; and

(9) Any other information believed to be pertinent to the good cause determination.

(e) *Institution factors for serial petitions.* The Board, in its discretion, may deny institution of any serial petition, as defined in § 42.2, for *inter partes* review challenging claims of the same patent that overlap with claims challenged in a previously filed petition for *inter partes* review, post-grant review, or covered business method patent review. The Board will consider the following factors in determining whether to deny institution:

(1) Whether, at the time of filing of the first petition, the petitioner knew of the prior art asserted in the second petition or should have known of it;

(2) Whether, at the time of filing of the second petition, the petitioner had already received the patent owner preliminary response to the first petition or had received the Board's decision on

whether to institute review in the first petition;

(3) The length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition; and

(4) Whether the petitioner provided an adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.

(f) *Discretion based on previously presented art or arguments.* A petition for *inter partes* review may be denied under 35 U.S.C. 325(d) if the same or substantially the same prior art was previously meaningfully addressed by the Office or the same or substantially the same arguments were previously meaningfully addressed by the Office with regard to the challenged patent or a related patent or application, unless the petitioner establishes material error by the Office. If some, but not all, of the grounds of unpatentability presented in a petition implicate considerations under 35 U.S.C. 325(d), the Board may deny the petition if section 325(d) is sufficiently implicated such that instituting on all grounds of unpatentability would not promote the efficient administration of the Office or support the integrity of the patent system.

(1) *Request to deny institution pursuant to discretion under 35 U.S.C. 325(d).* A patent owner may file a request for discretionary denial under 35 U.S.C. 325(d) under the provisions of § 42.107(b). Such request must identify whether the same or substantially the same prior art was previously meaningfully addressed by the Office and/or whether the same or substantially the same arguments were previously meaningfully addressed by the Office. A petitioner may file an opposition under the provisions of § 42.107(b) to argue that the same or substantially the same prior art or arguments were not previously meaningfully addressed by the Office and/or to argue that there was material error by the Office. The patent owner may file a reply to the opposition under the provisions of § 42.107(b).

(2) *The same prior art.* Prior art is deemed to be ''the same prior art'' if a reference that forms the basis of the challenges in the petition was previously meaningfully addressed by the Office and the petition relies on the reference for a factual proposition that directly contradicts a finding made by the Office when the reference was previously meaningfully addressed.

(3) *Substantially the same prior art.* Prior art is ''substantially the same prior art'' if the disclosure in the prior art previously meaningfully addressed by the Office contains the same teaching as that relied upon in the petition.

(4) *Meaningfully addressed art or arguments.* Art or arguments are deemed to have been meaningfully addressed when the Office has evaluated the art or arguments and articulated its consideration of the art or arguments in the record of the patent or the application from which the patent issued or the record of a related application or patent with claims that are substantially the same. An initialed Information Disclosure Statement, without more, does not satisfy this standard. Art or arguments from a related application or patent will only be considered to be meaningfully addressed if they are addressed by the Office before the issuance of the challenged patent.

(5) *Related application or patent.* For purposes of this section, an application or patent is ''related'' to the challenged patent if it claims priority to a common application or is a parent application or parent patent of the challenged patent.

■ 8. Amend § 42.207 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 42.207 Preliminary response to petition and request for discretionary denial.

(a) *Patent owner preliminary response.* (1) The patent owner may file a preliminary response to the petition. The response is limited to setting forth the reasons why no post-grant review should be instituted under 35 U.S.C. 324 based on issues other than discretionary denial, and can include supporting evidence. The preliminary response is subject to the word count under § 42.24. A patent owner preliminary response shall not address discretionary denial, which may only be raised pursuant to paragraph (b) of this section, unless otherwise authorized by the Board.

(2) The preliminary response must be filed no later than three months after the date of a notice indicating that the petition to institute a post-grant review has been accorded a filing date. A patent owner may expedite the proceeding by filing an election to waive the patent owner preliminary response.

(b) *Request for discretionary denial.* (1) In addition to a preliminary response to the petition, the patent owner may file a single request for discretionary denial of the petition. Section 42.20(b) notwithstanding, no prior Board authorization is required to file the single request for discretionary denial. The request is limited to addressing any applicable discretionary institution issues and factors other than those involving parallel petitions under § 42.208(e). Applicable discretionary institution issues include those enumerated in § 42.208(f) and (g), as well as any issue that the patent owner believes, based on Office rules, precedent, or guidance, warrants discretionary denial of the petition. If the patent owner files a request for discretionary denial, the petitioner may file an opposition limited to the issues raised in the request, and the patent owner may file a reply limited to the issues raised in the opposition. The request, opposition, and reply are subject to the page limits under § 42.24(e). The Board may also *sua sponte* raise discretionary denial, in which case the Board will provide an opportunity for briefing by the parties.

(2) A request for discretionary denial must be filed no later than two months after the date of a notice indicating that the petition to institute a post-grant review has been accorded a filing date. An opposition to the request for discretionary denial must be filed no later than one month after the filing of the request for discretionary denial. A reply in support of the request must be filed no later than two weeks after the filing of the opposition.

* * * * *

■ 9. Amend § 42.208 by revising paragraph (c) and adding paragraphs (e) through (g) to read as follows:

§ 42.208 Institution of post-grant review.

* * * * *

(c) *Institution considerations.* Post-grant review shall not be instituted unless the Board decides that the information presented in the petition demonstrates that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable. The Board's decision will take into account a patent owner preliminary response when such a response is filed, including any testimonial evidence. A petitioner may seek leave to file a reply to the preliminary response in accordance with §§ 42.23 and 42.24(c). Any such request must make a showing of good cause.

(1) *Consideration of discretionary denial.* The Board's decision will also take into account, where filed, a patent owner's request for discretionary denial, including any opposition and reply, and a petitioner's filing pursuant to § 42.208(e). To the extent the patent owner contends that there are substantive weaknesses in the petitioner's grounds of unpatentability that are relevant to the exercise of discretion under 35 U.S.C. 324(a), the

patent owner may indicate in their request that they will address those substantive weaknesses in the preliminary response permitted by § 42.207(a). Nothing in this section shall be construed to limit the Board's discretion to deny institution or dismiss a proceeding as a sanction or for any other reason deemed warranted by the Board.

(2) *Discretionary considerations for joined petitions.* In reaching a decision on institution of a petition accompanied by a timely motion for joinder, the Board will not consider arguments on discretionary considerations under paragraph (e) of this section (parallel petitions) or paragraph (g) of this section (35 U.S.C. 325(d)) where the petition sought to be joined was instituted. However, the Board may deny the accompanying motion for joinder where the later-filed petition implicates other bases for discretionary denial.

* * * * *

(e) *Parallel petitions challenging the same patent.* The Board will not institute parallel petitions, as defined in § 42.2, absent a showing of good cause as to why more than one petition is necessary. A petitioner filing a parallel petition may, either in the petition or in a separate paper filed concurrently with the petition and limited to no more than five pages, provide information relevant to the good cause determination. Section 42.20(b) notwithstanding, the patent owner is authorized, without prior Board authorization, to file a separate paper of no more than five pages, on or before the deadline for the preliminary response, limited to providing an explanation of why the Board should not institute more than one petition. Information relevant to the good cause determination may include:

(1) A petitioner's ranking of their petitions in the order in which petitioner desires the Board to consider the merits of their petitions relative to their other parallel petitions;

(2) An explanation of the differences between the petitions and why the issues addressed by the differences are material;

(3) The number of patent claims of the challenged patent that have been asserted by the patent owner in district court litigation;

(4) The number of claims the petitioner is challenging;

(5) Whether there is a dispute about the priority date of the challenged patent;

(6) Whether there are alternative claim constructions that require different prior art references on mutually exclusive grounds;

(7) Whether the petitioner lacked information, such as the identity of asserted claims, at the time they filed the petitions;

(8) The complexity of the technology in the case; and

(9) Any other information believed to be pertinent to the good cause determination.

(f) *Institution factors for serial petitions.* The Board, in its discretion, may deny institution of any serial petition, as defined in § 42.2, for post-grant review challenging claims of the same patent that overlap with claims challenged in a previously filed petition for *inter partes* review, post-grant review, or covered business method patent review. The Board will consider the following factors in determining whether to deny institution:

(1) Whether, at the time of filing of the first petition, the petitioner knew of the prior art asserted in the second petition or should have known of it;

(2) Whether, at the time of filing of the second petition, the petitioner had already received the patent owner preliminary response to the first petition or had received the Board's decision on whether to institute review in the first petition;

(3) The length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition; and

(4) Whether the petitioner provided an adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.

(g) *Discretion based on previously presented art or arguments.* A petition for post-grant review may be denied under 35 U.S.C. 325(d) if the same or substantially the same prior art was previously meaningfully addressed by the Office or the same or substantially the same arguments were previously meaningfully addressed by the Office with regard to the challenged patent or a related patent or application, unless the petitioner establishes material error by the Office. If some, but not all, of the grounds of unpatentability presented in a petition implicate considerations under 35 U.S.C. 325(d), the Board may deny the petition if section 325(d) is sufficiently implicated such that instituting on all grounds of unpatentability would not promote the efficient administration of the Office or support the integrity of the patent system.

(1) *Request to deny institution pursuant to discretion under 35 U.S.C. 325(d).* A patent owner may file a request for discretionary denial under 35 U.S.C. 325(d) under the provisions of § 42.207(b). Such request must identify whether the same or substantially the same prior art was previously meaningfully addressed by the Office and/or whether the same or substantially the same arguments were previously meaningfully addressed by the Office. A petitioner may file an opposition under the provisions of § 42.207(b) to argue that the same or substantially the same prior art or arguments were not previously meaningfully addressed by the Office and/or to argue that there was material error by the Office. The patent owner may file a reply to the opposition under the provisions of § 42.207(b).

(2) *The same prior art.* Prior art is deemed to be ''the same prior art'' if a reference that forms the basis of the challenges in the petition was previously meaningfully addressed by the Office and the petition relies on the reference for a factual proposition that directly contradicts a finding made by the Office when the reference was previously meaningfully addressed.

(3) *Substantially the same prior art.* Prior art is ''substantially the same prior art'' if the disclosure in the prior art previously meaningfully addressed by the Office contains the same teaching as that relied upon in the petition.

(4) *Meaningfully addressed art or arguments.* Art or arguments are deemed to have been meaningfully addressed when the Office has evaluated the art or arguments and articulated its consideration of the art or arguments in the record of the patent or the application from which the patent issued or the record of a related application or patent with claims that are substantially the same. An initialed Information Disclosure Statement, without more, does not satisfy this standard. Art or arguments from a related application or patent will only be considered to be meaningfully addressed if they are addressed by the Office before the issuance of the challenged patent.

(5) *Related application or patent.* For purposes of this section, an application or patent is ''related'' to the challenged patent if it claims priority to a common application or is a parent application or parent patent of the challenged patent.

Dated: April 15, 2024.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2024–08362 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 240212–0044; RTID 0648–XR130]

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List the Whitespotted Eagle Ray as Threatened or Endangered Under the Endangered Species Act

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

ACTION: Notification of 90-day petition finding.

SUMMARY: We, NMFS, announce a 90-day finding on a petition under the Endangered Species Act (ESA) to list the whitespotted eagle ray (*Aetobatus narinari*) as a threatened or endangered species and to designate critical habitat concurrent with the listing. We find that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted.

DATES: These findings were made on April 19, 2024.

ADDRESSES: Copies of the petition and related materials are available from the NMFS website at *https://www.fisheries.noaa.gov/national/endangered-species-conservation/negative-90-day-findings.*

FOR FURTHER INFORMATION CONTACT: Adrienne Lohe, NMFS Office of Protected Resources, (301) 427–8442, *adrienne.lohe@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On April 6, 2023, we received a petition from the Defend Them All Foundation to list the whitespotted eagle ray, *Aetobatus narinari,* as a threatened or endangered species under the ESA and to designate critical habitat concurrent with the listing. The petition asserts that this species is threatened by four of the five ESA section 4(a)(1) factors: (1) present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial and recreational purposes; (3) inadequacy of existing regulatory mechanisms; and (4) other natural or manmade factors. The petition requests that if the species is listed as threatened or endangered, we promulgate a regulation under section 4(e) of the ESA for species similar in appearance to the whitespotted eagle ray, and if we determine the whitespotted eagle ray warrants listing as a threatened species, we promulgate a protective regulation under section 4(d) of the ESA. The petition is available online (see **ADDRESSES**).

ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a ''positive 90-day finding''), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition (16 U.S.C. 1533(b)(3)(B)). Because the finding at the 12-month stage is based on a more thorough review that encompasses all the best available information, as compared to the narrow scope of review at the 90-day stage, a ''may be warranted'' finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and any vertebrate distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). A joint NMFS–U.S. Fish and Wildlife Service (USFWS) (jointly, ''the Services'') policy clarifies the Services' interpretation of the phrase ''distinct population segment'' for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722, February 7, 1996). A species, subspecies, or DPS is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five ESA section 4(a)(1) factors: (1) the present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms to address identified threats; or (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(h)(1)(i)) define ''substantial scientific or commercial information'' in the context of reviewing a petition to list, delist, or reclassify a species as ''credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.'' Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered ''substantial information.'' In accordance with 50 CFR 424.14(h)(1)(ii), in reaching the initial (90-day) finding on the petition, we will consider the information described in subsections 50 CFR 424.14(c), (d), and (g) (if applicable).

Our determination as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information: (1) information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available; (2) identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species; (3) whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.,* the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are; (4) information on adequacy of regulatory protections and effectiveness of conservation activities by states as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and (5) a complete, balanced representation of

the relevant facts, including information that may contradict claims in the petition. See 50 CFR 424.14(d).

If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original petition, and the statutory timeframes will begin when such supplemental information is received. See 50 CFR 424.14(g).

We may also consider information readily available at the time the determination is made (50 CFR 424.14(h)(1)(ii)). We are not required to consider any supporting materials cited by the petitioner if the petitioner does not provide electronic or hard copies, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (*e.g.,* publications, maps, reports, letters from authorities). See 50 CFR 424.14(c)(6).

The ''substantial scientific or commercial information'' standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition (50 CFR 424.14(h)(1)(iii)). Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action—such as a final listing determination, 90-day not-substantial finding, or 12-month not-warranted finding—a petitioned action will generally not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information or analysis not previously considered.

At the 90-day finding stage, we do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person conducting an impartial scientific review would conclude it supports the petitioners' assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person conducting an impartial scientific review would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, in light of the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk such that listing, delisting, or reclassification may be warranted; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.,* population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by nongovernmental organizations, such as the International Union for Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by other organizations or made under other Federal or state statutes may be informative, but such classification alone will not provide a sufficient rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act because NatureServe assessments have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide (*https://explorer.natureserve.org/AboutTheData/DataTypes/ConservationStatusCategories*). Additionally, species classifications under IUCN and the ESA are not equivalent; data standards, criteria used to evaluate species, and treatment of uncertainty are also not necessarily the same. Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the ESA standards on extinction risk and impacts or threats discussed above.

Analysis of the Petition

We have reviewed the petition, the literature cited in the petition, and other literature and information readily available in our files. In this section, we provide a summary of this information and present our analysis of whether this information indicates that the petitioned action may be warranted.

Species Description

The whitespotted eagle ray, *A. narinari,* is a large (up to 230 centimeters (cm) disc width (DW)) benthopelagic batoid found in warm-temperate and tropical coastal waters (Dulvy *et al.* 2021). The species was previously thought to have a circumglobal distribution, although morphological, parasitological, and genetic evidence indicates that the species is limited to the Atlantic, while eagle rays in the Pacific and Indian

Oceans constitute separate species (Sales *et al.* 2019). The petition cites Eschmeyer's Catalog of Fishes (Fricke *et al.* 2020) and Dulvy *et al.* (2021) in its assertion that the species spans the western and eastern Atlantic. This contradicts Sales *et al.* (2019)'s conclusion that based on nuclear and mitochondrial markers, *A. narinari* is restricted to the western Atlantic, and samples from South Africa formed a monophyletic clade closest to another species of eagle ray, *Aetobatus ocellatus,* found in the Indian Ocean. Despite the apparent ongoing scientific debate surrounding the taxonomy of the whitespotted eagle ray and the genus as a whole, there is no further discussion of the taxonomic status of *A. narinari* in the petition. The petition asserts that the whitespotted eagle ray ranges from Cape Hatteras, North Carolina, to Rio de Janeiro, Brazil, including the Gulf of Mexico, the Bahamas, and the Caribbean Islands, and in the eastern Atlantic, from Mauritania south to Angola, and possibly South Africa (Dulvy *et al.* 2021). We accept the petition's characterization of the species' taxonomy and distribution because the petition provides recent and reputable references for this conclusion, and because we find that a reasonable person conducting an impartial scientific review would conclude that the petitioners' assertions are reasonably supported.

Whitespotted eagle rays occur in the neritic zone from the low-tide mark to water depths of 60 meters (m), and are often associated with coral reefs, lagoons, and estuaries (Cerutti-Pereyra *et al.* 2018, Dulvy *et al.* 2021). They are highly mobile and display both migratory and resident behavior (Bassos-Hull *et al.* 2014; Sellas *et al.* 2015; De Groot *et al.* 2021). Whitespotted eagle rays are mid-trophic level predators that forage for invertebrates (often bivalves, gastropods, and crustaceans) in the seabed sediment, serving as bioturbators (Ajieman *et al.* 2012; Flowers *et al.* 2021). The species is often observed as solitary individuals, but can also be seen in large aggregations of up to several hundred individuals (Bassos-Hull *et al.* 2014; Tagliafico *et al.* 2012). Size at maturity has been estimated at approximately 115–130 cm DW for males and slightly larger for females (Araújo *et al.* 2022; Bassos-Hull *et al.* 2014; Taglifico *et al.* 2012). Age at maturity is estimated at 4 to 6 years (Cerutti-Pereyra *et al.* 2018). Whitespotted eagle rays exhibit matrotrophic viviparity in which embryos are nourished through uterine secretions and born live (Araújo *et al.* 2022). Between one and five young are produced in each litter after a gestation period of 12 months (Dulvy *et al.* 2021). Generation length for the species is estimated at 10 years, inferred from the slightly larger *A. ocellatus* which has a generation length of 12 years (Dulvy *et al.* 2021).

Population Status and Trends

The petition asserts that the whitespotted eagle ray has undergone dramatic population decline, largely relying on the IUCN Red List Assessment of the species as ''endangered'' (Dulvy *et al.* 2021). This assessment concludes that the whitespotted eagle ray ''is suspected'' to have experienced a population reduction of 50–79 percent over the past three generation lengths (30 years) due to ''actual and potential levels of fishing pressure'' (Dulvy *et al.* 2021).

Dulvy *et al.* (2021) use population trend data from baited remote underwater videos (BRUVs) in Belize from 2009–2018 (G. Clementi and D. Chapman, unpublished data 2019) and a survey in Mexico spanning 2000–2014 (J–C. Pérez Jiménez unpublished data 2019) to perform Bayesian state-space population trend analysis over three generation lengths (30 years). The BRUV data from Belize indicated an increase in abundance of 7.5 percent annually, while data from Mexico indicate a 0.95 percent decrease in abundance annually over the respective time series. Additionally, Dulvy *et al.* (2021) state that in the southern Gulf of Mexico, interviews with fishermen indicated catch declines from 30–40 rays per night/trip from 1990 to 2000 to 10–15 rays per night/trip in 2019 (Cuevas-Zimbrón *et al.* 2011; J–C. Pérez Jiménez unpublished data 2019, as cited in Dulvy *et al.* 2021). Considering the two available population trend datasets (Belize 2009–2018 and Mexico 2000–2014) and extrapolating over three generation lengths, however, Dulvy *et al.* (2021) found an increasing population trend of 1.32 percent per year in the Western Central Atlantic.

Outside of these datasets, there is little information available on whitespotted eagle ray population trends. Dulvy *et al.* (2021) rely on the assumption that where the species is known to be targeted in artisanal fisheries or bycaught in commercial fisheries (*e.g.,* in Colombia, Venezuela, the Guianas; see *ESA Section 4(a)(1) Factors*), it is experiencing population declines. In Brazil, personal communications cited in Dulvy *et al* (2021) from 2018 indicate that landings of the species in gillnets at Pernambuco have declined by about 80 percent since 1995, and that the species has also declined in São Paulo, where fishery monitoring between 1996 and 2002 only recorded five individuals. Dulvy *et al.* (2021) write that because unmanaged fisheries in Brazil have led to declines in other species, ''. . . there is no reason not to suspect that this species has also been reduced in numbers in that area.'' Based on suspected high exploitation levels and lack of adequate management, their assessment indicates that it is ''suspected that this species has undergone a population reduction of 50–79 percent over the past three generation lengths (30 years) in the Atlantic South American part of its range'' (Dulvy *et al.* 2021). It is unclear whether the personal communications cited by Dulvy *et al.* (2021) are based on time series data or take into account fishing effort or other factors. Therefore, it is unknown how accurately this estimate reflects the abundance of whitespotted eagle rays across this region. We find that, based on the information presented in the petition, a reasonable person conducting an impartial scientific review would conclude that some level of population decline may be occurring in the Southwest Atlantic, although there is not sufficient credible scientific or commercial information to conclude that the species has declined by 50–79 percent.

Trends specific to *A. narinari* are unavailable in the Eastern Atlantic, and therefore Dulvy *et al.* (2021) use reported catch levels of elasmobranchs as a proxy for whitespotted eagle ray population trends here. Dulvy *et al.* (2021) report the decline in average elasmobranch catch per unit effort by 71 percent from 1970–2015 and simultaneous increase in average elasmobranch catch by over 250 percent across the West Africa region, implying a dramatic increase in fishing effort. Trends in elasmobranch landings during this period of increasing fishing effort are described for individual countries in the region. In Mauritania, landings increased by 246 percent over 1992–2015; since then effort has been stable and landings continued to increase. In Senegal, reconstructed landings (which include an estimate of unreported landings data, therefore increasing uncertainty) showed a 30–80 percent decline from 2001–2016, suggesting population decline. In Guinea-Bissau, reconstructed landings declined 22 percent from 2012 to 2016 after rising since the 1960s. In Cameroon, there has been a 96 percent decline in reconstructed landings from 2007–2016

after rising since the 1960s. There have been few recent observations of the species in the Republic of Congo, Mauritania, Gabon, Senegal, Gambia, Guinea-Bissau, Sierra Leone, Ghana, Nigeria, Cameroon or Angola; in certain cases, this is despite sightings of species with similar habitat needs and catchability. However, some confounding factors are at play; for example, in Ghana there are few shallow fishing gears likely to take the species (Dulvy *et al.* 2021). Dulvy *et al.* (2021) take the above information to indicate that the species has largely disappeared from the Eastern Atlantic part of its range. Dulvy *et al.* (2021) conclude ''it is suspected that a population reduction of more than 80 percent has occurred in the past three generation lengths (30 years)'' (Dulvy *et al.* 2021). While trends in elasmobranch catch and fishing effort are concerning, they do not provide enough species-specific evidence for us to conclude that the whitespotted eagle ray in particular has followed these same trends. Further, neither the petition nor Dulvy *et al.* (2021) provide information on historical population sizes in the areas with few recent observations. We find that, based on the information presented in the petition, a reasonable person conducting an impartial scientific review would conclude that some level of population decline may be occurring in the Eastern Atlantic, although there is not sufficient credible scientific or commercial information to conclude that the species has declined by more than 80 percent.

Altogether, Dulvy *et al.* (2021) conclude that the whitespotted eagle ray has undergone a population reduction of 50–79 percent over the past three generation lengths across its range. However, a reasonable person would conclude that this information is not supported by credible scientific information and is therefore unreliable given the only available quantitative population data for whitespotted eagle rays from Belize and Mexico indicate that the population is increasing there. Species-specific information on trends is unavailable from the Southwest Atlantic, the Eastern Central Atlantic, and Southeast Atlantic, although Dulvy *et al.* (2021) suspect population reductions in these areas. While declining elasmobranch landings, few recorded sightings of the species, and accounts of reduced catch by artisanal fishermen are indicative of potential population declines in these areas, we are not able to conclude that this information points to the dramatic population declines that Dulvy *et al.* (2021) infer.

Outside of the IUCN Red List Assessment (Dulvy *et al.* 2021), the petition discusses just one other relevant study relating to population trends for the species. Bassos-Hull *et al.* (2014) observed a yearly decrease in number of whitespotted eagle rays observed in both aerial and boat-based surveys in the eastern Gulf of Mexico off southwest Florida from 2008–2013. The authors note, however, that without further study, it is unclear whether this is due to a true decrease in abundance over time or other factors such as sampling bias, a shift in range, or a clustering phenomenon in the study area during the 2008–2009 season (Bassos-Hull *et al.* 2014).

In all, we do not find that the information presented in the petition constitutes credible scientific information that indicates a dramatic decrease in whitespotted eagle ray abundance across its range as asserted by the petitioners. In fact, the region with available time-series population data shows an increasing population trend for the species. Information presented in the petition only points to potential abundance decreases in other parts of its range with little supporting information; the principal study the petition relies on for this assertion is unreliable because it rests on unsupported assumptions (*i.e.,* the assumptions that, where the species is known to be targeted in artisanal fisheries or bycaught in commercial fisheries, it is experiencing population declines; and that, where elasmobranch catch rates are declining, the species is experiencing population declines) rather than data. Therefore, we do not find that the petition offers substantial scientific or commercial information that would suggest that the species' current population status and trends may warrant the petitioned action.

ESA Section 4(a)(1) Factors

The petition asserts that four of the five factors in section 4(a)(1) of the ESA are adversely affecting the whitespotted eagle ray: (A) present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (D) inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. While the petition does not state that factor (C), disease or predation, poses a threat to the species, it does argue that the species may be more susceptible to disease in combination with other stressors. In the following sections, we discuss the information presented in the petition, viewed in the context of information readily available in our files where applicable, regarding threats to this species.

(A) Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

The petition describes the effect of destructive fishing practices, specifically bottom trawling, on coastal ocean habitats. Although the petition discusses negative impacts of trawling, including damage and destruction of biotic and abiotic seabed structures, increased water column turbidity, release of contaminants contained in seabed sediment, and reduced food availability for bottom-feeders, the petition includes no discussion of specific areas where bottom trawling activities occur within the range of the whitespotted eagle ray, or the intensity of bottom trawling activity. While the impacts of bottom trawling are concerning for certain marine habitats generally, the extent to which whitespotted eagle rays in particular may be threatened by such impacts is not clear based on the information in the petition.

The petition similarly discusses impacts of coastal development and dredging, as well as resulting pollution and suspension of sediment, on marine habitats. Suspension of sediment resulting from dredging can cause physiological stress and changes in foraging and predation behavior in marine fishes (Wenger *et al.* 2016). Contaminants released from disturbed sediment (*e.g.,* metals and persistent organic pollutants (POPs) such as polycyclic aromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs), and dichlorodiphenyltrichloroethane (DDT)), have been shown to accumulate in, and have further negative impacts on marine fishes, including on the reproductive success of adults and development of eggs and larvae (Wenger *et al.* 2016). PCBs, DDT and hexachlorobenzene (HCB) were detected in whitespotted eagle rays off Australia, sometimes in high enough concentrations to cause possible negative long-term impacts (Cagnazzi *et al.* 2019). Without further study, however, it remains unclear whether observed contaminant loads lead to lower survival and/or lower reproductive success in elasmobranchs (Cagnazzi *et al.* 2019). The petition also asserts that sounds from dredging activity may cause harm to whitespotted eagle rays based on a study that found the sound of boat motors to disturb *A. ocellatus,* causing these rays to exhibit

escape behavior when foraging (Berthe and Lecchini 2016). It is unclear whether such disruptions of foraging behavior would lead to population-level impacts to *A. narinari,* or whether noise from dredging would cause a similar response; neither of these points are addressed in the petition. Generally, the whitespotted eagle ray is vulnerable to coastal development as it uses shallow, coastal areas for breeding and feeding (Dulvy *et al.* 2021). While coastal development has the potential to negatively impact whitespotted eagle rays, specific information indicating how and where dredging and development are impacting the whitespotted eagle ray's habitat is not provided in the petition, and thus the degree to which the population may be threatened by this stressor is unclear.

The petition discusses, and provides references regarding, direct and indirect impacts of climate change, including physical and chemical changes to ocean habitats (*e.g.,* ocean warming and increasing ocean acidity), changes in ocean circulation patterns, declines in primary productivity, range shifts, increasing occurrences of extreme weather events and harmful algal blooms, and physiological and behavioral impairments in certain marine fishes. The specific effects of climate change on ray ecology are largely unknown, and few studies have investigated the impacts of climate change on the whitespotted eagle ray. Specific impacts that may be of concern to the whitespotted eagle ray that are discussed in the petition include decreased aragonite and calcite availability due to ocean acidification, which can hinder the ability of calcifying organisms such as bivalves and corals to build their skeletons (Branch *et al.* 2013; Kroeker *et al.* 2013). This could result in reduced availability of certain prey species and coral reef habitat for the whitespotted eagle ray to utilize. The petition cites Flowers *et al.* (2021) in its assertion that range and habitat shifts may result in negative effects on ray fitness through decreased ability to find food, increased predation risk and increased competition. However, the same study points out that vulnerability to climate change varies by species, and, in certain cases, climate change may have beneficial outcomes for rays (Flowers *et al.* 2021). The petition also points out that sharks and rays in particular exhibit thermotaxis, a behavior that involves moving to waters of different temperatures throughout the day. Therefore, beyond large-scale geographic range shifts that may occur as a result of climate change, changes in such small-scale movements may also be significant to the fitness and survival of sharks and rays (Vilmar and Di Santo 2022). In an assessment of shark and ray behavior in response to gradual increases in sea surface temperature as well as acute temperature anomalies caused by El Niño Southern Oscillation over 27 years, *A. narinari* exhibited significantly increased relative abundance at higher temperatures in both cases (Osgood *et al.* 2021). While this study took place in the eastern Pacific and taxonomic revisions have limited *A. narinari* to the Atlantic (see *Species Description*), the results suggest that eagle ray species such as *A. narinari* could be more tolerant of temperature extremes than other elasmobranchs (Osgood *et al.* 2021). Although climate change has the potential to adversely impact the whitespotted eagle ray, the degree to which whitespotted eagle ray individuals or populations have been or will be affected is unclear. Therefore, the degree to which climate change threatens the whitespotted eagle ray is not clear based on the information in the petition.

In summary, the petition and the references cited therein do not comprise substantial scientific or commercial information indicating there is present or threatened destruction, modification, or curtailment of the whitespotted eagle ray's habitat or range such that a reasonable person conducting an impartial scientific review would conclude that listing may be warranted.

(B) Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition identifies overutilization for commercial purposes as the greatest threat to the whitespotted eagle ray. The species is captured as incidental bycatch and, less commonly, in targeted fisheries (Tagliafico *et al.* 2012).

In the Western Central Atlantic, artisanal fisheries targeting the species are known to exist (but ''are not well described'') in Mexico, Cuba, the Caribbean coast of Colombia, and Venezuela (Dulvy *et al.* 2021). In Colombia, the whitespotted eagle ray is taken in gillnet, longline, and trawl gears (Dulvy *et al.* 2021). In both Colombia and Venezuela, artisanal fisheries are widespread, intense, and lack management (Dulvy *et al.* 2021). A study of the small, directed fishery in northeastern Venezuela found that while the time series analyzed (August 2005 to December 2007) is too short to infer changes in population abundance, the capture of juvenile, mature, and pregnant individuals is of concern (Tagliafico *et al.* 2012). An artisanal fishery targeting *A. narinari* exists off the coast of the State of Campeche in the southern Gulf of Mexico driven by the traditional consumption of this species there (Cuevas-Zimbrón *et al.* 2011). According to fishermen interviewed, catches of *A. narinari* have declined over recent decades due to overfishing of the species as well as its molluscan prey (Cuevas-Zimbrón *et al.* 2011). Data from Mexico's National Aquaculture and Fisheries Commission (CONAPESCA) indicate that in 2013, *A. narinari* was the second-most captured batoid in the region at about 40 tons each year (Rodriguez-Santiago *et al.* 2016). Whitespotted eagle rays have also been caught as bycatch in shark gillnet fisheries in the U.S. south Atlantic, and the petition asserts that they are among the top bycatch species by abundance in the observed catches (Trent *et al.* 1997). However, according to information readily available in our files, which provides important context for judging the accuracy and reliability of the information presented in the petition, the species hasn't been observed as bycatch in this fishery since 2008 (NOAA Fisheries Southeast Fisheries Science Center, unpublished data). In all, despite the existence of artisanal fisheries targeting the whitespotted eagle ray in this region as well as interactions with commercial fisheries, available population data does not support the conclusion that these fisheries are causing significant population declines. Rather, available data sources indicate an increasing population trend in the Western Central Atlantic (see *Population Status and Trends*).

In the Southwest Atlantic, artisanal fisheries and commercial trawl and longline fisheries along the coast of South America can be intense and unmanaged, and the petition asserts this has led to the disappearance of several elasmobranch species in the region, including largetooth sawfish (*Pristis pristis*), smalltooth sawfish (*Pristis pectinata*), daggernose shark (*Isogomphodon oxyrhynchus*), and smalltail shark (*Carcharhinus porosus*) (Dulvy *et al.* 2021). Although fishing pressure is heavy and many of the stocks targeted by artisanal fishermen are overexploited in this region (Dulvy *et al.* 2021), the petition does not present any information about the specific fisheries that interact with the whitespotted eagle ray, or levels of catch of the whitespotted eagle ray.

In the Eastern Central Atlantic, sharks are targeted in artisanal fisheries across much of the region due to demand for dried salted shark meat (Dulvy *et al.*

2021). Specifically, drift gillnets and demersal set gillnets are used to target sharks and rays in artisanal fisheries of Mauritania, Nigeria, Ghana, and Cameroon (Dulvy *et al.* 2021). Population reductions and some local extinctions of shark and ray species have been observed in this region as a result of fishing pressure (Dulvy *et al.* 2021). The petition states that total demersal biomass of inshore stocks in the Gulf of Guinea is estimated to have declined by 75 percent since 1982 as a result of destructive fishing practices (Dulvy *et al.* 2021). Additionally, the number of traditional and industrial fishing boats has significantly increased since 1950 (Dulvy *et al.* 2021). Although poorly managed fishing activity in this region is having negative impacts on fish stocks generally, the petition presents no information relating to the capture or landings of the whitespotted eagle ray in particular.

Little information on the impact of fisheries bycatch on the species was provided in the petition. A study examining the physiological responses of capture on benthopelagic rays, including *A. narinari,* showed elevated lactate and glucose levels lasting the length of time that the rays were confined after capture (Rangel *et al.* 2021). This is indicative of increased physiological stress, and immediate release of captured individuals is recommended (Rangel *et al.* 2021). Mortality rates or other sublethal effects of capture on the whitespotted eagle ray were not addressed in the petition.

The petition also discusses other potential sources of overutilization. The whitespotted eagle ray is popular in public aquarium displays and is collected for this purpose (Dulvy *et al.* 2021). No further information on the impact of the aquarium trade on the species is included in the petition. The petitioners also assert that the species may be vulnerable to negative interactions with shellfish farms due to their molluscan diet. Negative interactions have been anecdotally reported in the Northwest Atlantic, although confirmed interactions generally take place with eagle rays in the Indo-Pacific (Dulvy *et al.* 2021).

In all, while the petition presents information on fisheries targeting the whitespotted eagle ray in the Western Central Atlantic, overutilization does not appear to be occurring based on population increases indicated in this region. The petition does not provide information specific to fisheries affecting the whitespotted eagle ray in the Southwest Atlantic or the Eastern Atlantic parts of its range, although fishing pressure is generally high in these areas. There is little information on other potential sources of overutilization of the species such as the aquarium trade. Based on information in the petition and readily available in our files, overutilization does not appear to be affecting the species to such a point that a reasonable person conducting an impartial scientific review would conclude that the petitioned action may be warranted.

(C) Disease or Predation

Disease and predation are not identified as primary threats to the species in the petition. Although the petition asserts that whitespotted eagle rays may be more susceptible to disease and parasitic infection in the face of other stressors, there is no evidence in the petition indicating that disease or predation are negatively impacting the species.

(D) Inadequacy of Existing Regulatory Mechanisms

According to the petition, current regulatory mechanisms are inadequate to protect the whitespotted eagle ray from threats posed by fisheries. Generally, the petition states that the lack of research, monitoring plans, protected areas, species management, and education (as determined by Dulvy *et al.* 2021) contribute to the species' decline. In the United States, while Florida has prohibited the harvest, possession, landing, purchase, sale, or exchange of the species in state waters for over two decades, neighboring states do not have similar regulatory measures. The petition cites Dulvy *et al.* (2021) in its assertion that similar actions in other states ''could contribute to the conservation of the species.'' The petition concludes that because harvest is allowed in nearby state and federal waters, regulatory measures are inadequate; however, the petition fails to discuss why the lack of regulations is inadequate to address the threats. As discussed in *Population Status and Trends* above, the species has an increasing population trend in the Western Central Atlantic and it is not clear why further regulation would be needed in this area. Internationally, 13 of the top 20 shark-fishing nations have completed and implemented National Plans of Action for elasmobranchs (Dulvy *et al.* 2021), and the petition argues that this leaves whitespotted eagle rays vulnerable to threats globally. It is not clear if this statistic is relevant to the whitespotted eagle ray, or where in the species' range regulatory actions are lacking. Overall, the petition does not provide substantive information regarding the existing regulatory mechanisms for the species outside of the United States, or on whether they are inadequate to manage fisheries for the species. Unsupported conclusions are not considered ''substantial information'' under our regulations (50 CFR 424.14(h)(1)(i)).

The petition also argues that current regulatory mechanisms are inadequate to protect the whitespotted eagle ray from threats posed by climate change. While the petition discusses ways in which domestic and international regulatory measures are not sufficient to reduce greenhouse gas emissions, it remains unclear to what degree climate change is impacting or will impact the species in particular, and therefore, whether additional regulations are needed to address the impact of climate change on the species.

Altogether, we find that the information presented in the petition does not comprise substantial scientific or commercial information indicating inadequacies of existing regulatory mechanisms such that a reasonable person conducting an impartial scientific review would conclude that listing may be warranted.

(E) Other Natural or Manmade Factors Affecting Its Continued Existence

Finally, the petition discusses threats of noise, chemical pollution, plastic pollution, and human disturbance. We considered information provided on the impacts of noise, chemical pollution, and human disturbance (development and dredging) under *(A) Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range,* above. We considered information provided on the impact of human disturbance through fisheries bycatch/entanglement in fishing gear in *(B) Overutilization for commercial, recreational, scientific, or educational purposes,* above. The petition very briefly mentions the species' susceptibility to boat strikes as it inhabits coastal waters, although, beyond two individual whitespotted eagle rays with scars from boat strikes documented by Bassos-Hull *et al.* (2014), the petition does not provide any discussion of the frequency of, or impact of, boat strikes on the species.

Ingestion of microplastics has been shown to result in deleterious effects such as inflammation, metabolic disruption, compromised intestinal function, and behavioral changes in bony fishes (Pinho *et al.* 2022). Microplastics can also absorb POPs and other contaminants, leading to further contaminant exposure when ingested (Pinho *et al.* 2022). However, no information is presented in the petition

on the effect of microplastic ingestion in batoids. While microplastic ingestion poses a potential threat to the whitespotted eagle ray, the physiological impacts to individual rays and population-level impacts on survival and fitness remain unaddressed. We therefore find that there is not substantial scientific or commercial information provided in the petition indicating that the other natural or manmade factors named in the petition are impacting the species to such a degree that a reasonable person conducting an impartial scientific review would conclude that listing may be warranted.

Petition Finding

After thoroughly reviewing the information presented in the petition in the context of information readily available in our files, we conclude the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted.

References Cited

A complete list of all references cited herein is available upon request (See **FOR FURTHER INFORMATION CONTACT**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 15, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–08340 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 240408–0102]

RIN 0648–BM79

Fisheries of the Northeastern United States; 2024–2026 Specifications for the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan

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

ACTION: Proposed rule, request for comments.

SUMMARY: NMFS proposes the 2024–2026 specifications for the Mackerel, Squid, and Butterfish Fishery Management Plan as recommended by the Mid-Atlantic Fishery Management Council. This action proposes to set the 2024 *Illex* squid and 2024–2026 longfin squid specifications and reaffirms the 2024 chub mackerel and butterfish specifications. The implementing regulations for the Mackerel, Squid, and Butterfish Fishery Management Plan require us to publish specifications every fishing year for each of these species and to provide an opportunity for public comment. The proposed specifications are intended to establish allowable harvest levels that will prevent overfishing, consistent with the most recent scientific information.

DATES: Public comments must be received by May 20, 2024.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the draft Supplemental Information Report (SIR) and the Regulatory Flexibility Act (RFA) analysis are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901, telephone (302) 674–2331.

A plain language summary of this proposed rule is available at *https://www.regulations.gov/docket/NOAA-NMFS-2023-0154.* You may submit comments on this document, identified by NOAA–NMFS–2023–0154, by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Visit *https://www.regulations.gov* and NOAA–NMFS–2023–0154 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Louis Forristall, Fishery Management Specialist, (978) 281–9321.

SUPPLEMENTARY INFORMATION:

Background

This rule proposes specifications, which are the combined suite of commercial and recreational catch levels established for one or more fishing years, for longfin and *Illex* squid, and reaffirms previously announced projected specifications for butterfish and chub mackerel. Section 302(g)(1)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) states that the Scientific and Statistical Committee (SSC) for each regional fishery management council shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch (ABC), preventing overfishing, ensuring maximum sustainable yield, and achieving rebuilding targets. The ABC is a level of catch that accounts for the scientific uncertainty in the estimate of the stock's defined overfishing limit (OFL).

The regulations implementing the fishery management plan (FMP) require the Mid-Atlantic Fishery Management Council's (Council) Mackerel, Squid, and Butterfish Monitoring Committee to develop specification recommendations for each species based upon the ABC advice of the Council's SSC. The FMP regulations also require the specification of annual catch limits (ACL) and accountability measure (AM) provisions for butterfish. Both squid species are exempt from the ACL/AM requirements because they have a life cycle of less than one year. In addition, the regulations require the specification of domestic annual harvest (DAH), the butterfish mortality cap in the longfin squid fishery, and initial optimum yield (IOY) for both squid species.

On July 27, 2023 (88 FR 48389), NMFS published a final rule in the **Federal Register** implementing the 2023 specifications for the chub mackerel, butterfish, longfin squid, and *Illex* squid fisheries. This included projected 2024 specifications for butterfish and projected 2024–2025 specifications for chub mackerel.

The Council's SSC met in March, May, and July 2023 to reevaluate the longfin squid, *Illex* squid, chub mackerel, and butterfish 2024 specifications based upon the latest information. At those meetings, the SSC concluded that no adjustments to these species' ABCs were warranted.

Proposed 2024–2026 Longfin Squid Specifications

NMFS proposes to maintain the 2023 longfin squid ABC of 23,400 metric tons

(mt) for the 2024 fishing year, and projects the same ABC for the 2025–2026 fishing years. The background for this ABC is discussed in the proposed rule to implement the 2021–2022 squid and butterfish specifications (86 FR 38586, July 22, 2021) and is not repeated here. The IOY, DAH, and domestic annual processing (DAP) are calculated by deducting an estimated discard rate from the ABC. At its July 2023 meeting, the Mackerel, Squid and Butterfish Monitoring Committee recommended to increase the discard rate from 2 percent to 2.16 percent, therefore increasing the discard set-aside from 468 mt to 506.3 mt. This results in a 2024 IOY, DAH, and DAP of 22,893.7 mt (see table 1), which is a .17 percent decrease from the 2023 IOY, DAH and DAP of 22,932 mt. The Council adopted these recommendations at its August 2023 meeting, and NMFS concurs. NMFS and the Council will review these specifications during future annual specifications processes following data updates each spring. The 2025 specifications could change if new information becomes available.

TABLE 1—2024–2026 LONGFIN SQUID SPECIFICATIONS IN METRIC TONS

Specification	2024	2025–2026 (projected)
OFL	Unknown	Unknown
ABC	23,400	23,400
IOY	22,893.7	22,893.7
DAH/DAP	22,893.7	22,893.7

TABLE 2—2024–2026 LONGFIN QUOTA TRIMESTER ALLOCATIONS

Trimester	Percent	Metric tons
I (Jan–Apr)	43	9,861
II (May–Aug)	17	3,898
III (Sep–Dec)	40	9,173

Proposed 2024 Illex Squid Specifications

NMFS proposes to maintain the 2023 *Illex* squid ABC of 40,000 mt for the fishing year 2024, in alignment with the Council's recommendation. Based on the Council's recommendation, NMFS proposed that the rate used to calculate the discard set-aside be reduced from 4.53 percent to 3.42 percent, based on bycatch data from fishing years 2018–2019. Fishing years 2018–2019 were used because those were the most recent years where the full *Illex* quota was caught. This results in a 2024 IOY, DAH, and DAP of 38,631 mt (table 3), which is a slight increase from the 2023 IOY, DAH, and DAP of 38,192 mt.

TABLE 3—PROPOSED 2024 *Illex* SQUID SPECIFICATIONS IN METRIC TONS

Specification	2024
OFL	Unknown
ABC	40,000
IOY	38,631
DAH/DAP	38,631

Reaffirmation of 2024 Butterfish Specifications

As part of the 2023–2025 multiyear specifications for butterfish, NMFS implemented projected specifications that would decrease the ABC by 12.7 percent, from 17,267 mt in 2023 to 15,764 mt in 2024, and the available quota from 11,271 mt in 2023 to 9,844 mt in 2024. Even with this reduction, the proposed 2024 butterfish quota is still above recent catch levels. After reviewing recent biological data, fishery performance, and recommendations from staff, the Mackerel, Squid, Butterfish Advisory Panel, and the SSC, the Council decided to reaffirm the previously-set 2024 specifications at its June 2023 meeting, and NMFS proposes to reaffirm the 2024 specifications in this rule.

TABLE 4—PROPOSED 2024 BUTTERFISH SPECIFICATIONS IN METRIC TONS

Specification	2024
OFL	16,096
ABC/ACL	15,764
Annual Catch Target (ACT)	14,976
Assumed discards	1,248
Total discards	5,132
Butterfish cap in longfin	3,884
DAH	9,844

Reaffirmation of 2024 Atlantic Chub Mackerel Specifications

Amendment 21 to the FMP previously implemented chub mackerel specifications for the 2020–2022 fishing years. The Council reevaluated these specifications at its June 2022 meeting and decided to make no adjustments for the 2023–2025 fishing years. The Council reevaluated these specifications again at its June 2023 meeting and decided to make no adjustments for the 2024 fishing year. NMFS, in agreement with the Council's recommendation, proposes to set the previously implemented specifications for 2024 and projects the same for 2025.

TABLE 5—PROPOSED 2024–2025 ATLANTIC CHUB MACKEREL SPECIFICATIONS IN METRIC TONS

Specification	2024–2025
ABC	2,300
Annual Catch Limit (ACL)	2,262
ACT	2,171
Total Allowable Landings	2,041

Classification

NMFS is issuing this rule pursuant to section 305(d) of the Magnuson-Stevens Act. Consistent with Magnuson-Stevens Act section 305(d), this action is necessary to carry out the Mackerel, Squid, and Butterfish FMP in accordance with the FMP's implementing regulations. The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Mackerel, Squid, and Butterfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the

Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The purpose, context, and statutory basis for this action is described above and not repeated here. Business entities affected by this action include vessels that are issued limited access squid permits.

Vessels issued open access incidental catch permits for these species would not be affected by this action, because there are no proposed changes to the incidental trip limits for any species. Additionally, vessels holding chub mackerel permits would not be affected because there are no new changes proposed for that species.

Any entity with combined annual fishery landing receipts less than $11 million is considered a small entity based on standards published in the **Federal Register** (80 FR 81194, December 29, 2015). In 2023, 292 separate vessels held commercial limited access squid permits. Approximately 215 entities owned those vessels, and based on current SBA size standards, 205 would be small business entities. Fishing revenue and, therefore, economic impacts of annual mackerel, squid, and butterfish specifications depend upon species availability, which may change yearly. This action is not expected to have negative impacts on any participating entities. Chub mackerel would be maintained at status quo; butterfish quotas, which were previously approved in 2023 as projected specifications, would decrease from 2023 levels by 12.7 percent; longfin quotas would decrease by 0.17 percent; and *Illex* squid quotas would increase by 1.15 percent. This action would generally maintain the current squid specifications and there is no information that the action would impact small businesses differently than large businesses, or that it would unduly inhibit the ability of small entities to compete. To avoid exceeding the longfin squid ABC, the quota would be reduced by 0.17 percent to better account for potential discards, a negligible amount or impact, especially considering that the fishery rarely lands its quota. Although butterfish quotas would be reduced, the fishery has landed less than 75 percent of the DAH for the past several years, so the proposed quotas would still allow for a higher harvest level compared to what the fishery has recently landed.

In determining the significance of the economic impacts of the proposed action, NMFS considered the following two criteria outlined in applicable NMFS guidance: disproportionality and profitability. The proposed measures would not place a substantial number of small entities at a significant competitive disadvantage to large entities because all entities affected by this action would be equally affected. Accordingly, there are no disproportionate economic effects from this action between small and large entities. Proposed measures would not reduce fishing opportunities based on recent squid and butterfish landings, change any entity's access to these resources, or impose any costs on affected entities. Therefore, this action would not be expected to reduce revenues or profit for affected entities compared to recent levels. Based on the above justification, the proposed action is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule does not contain a change to a collection of information requirement for purposes of the Paperwork Reduction Act of 1995. The existing collection of information requirements would continue to apply under the following OMB Control Number: 0648–0229, Greater Atlantic Region Dealer Purchase Reports. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Fishery closures and accountability measures.

Dated: April 15, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2024–08367 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 89, No. 77
Friday, April 19, 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

Forest Service

Notice of Issuance of Final Permanent Prairie Dog Hunting Order in the Wall Ranger District of the Buffalo Gap National Grassland

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Forest Service (Forest Service or Agency), United States Department of Agriculture, is issuing a final permanent order prohibiting prairie dog hunting in part of the Conata Basin area of the Wall Ranger District in the Buffalo Gap National Grassland covering approximately 80,694 acres in Jackson and Pennington Counties, South Dakota.

ADDRESSES: The final permanent prairie dog hunting order, map and justification for the final permanent order, and the response to comments on the proposed permanent order are posted on the Nebraska National Forests and Grasslands web page at *https://www.fs.usda.gov/alerts/nebraska/alerts-notices.*

FOR FURTHER INFORMATION CONTACT: Julie Johndreau, Resource Staff Officer, 308–432–0330, or *julie.johndreau@usda.gov.* Individuals who use telecommunication devices for the hearing impaired may call 711 to reach the Telecommunications Relay Service, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Section 4103 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019 (Pub. L. 116–9, Title IV (Sportsmen's Access and Related Matters)), hereinafter ''the Dingell Act,'' requires the Forest Service to provide advance notice and opportunity for public comment before temporarily or permanently closing any National Forest System lands to hunting, fishing, or recreational shooting.

The final permanent order prohibiting prairie dog hunting in part of the Conata Basin area of the Wall Ranger District in the Buffalo Gap National Grassland has completed the public notice and comment process required under the Dingell Act. The Forest Service is issuing the final permanent prairie dog hunting order. The final permanent prairie dog hunting order, map and justification for the final permanent order, and the response to comments on the proposed permanent order are posted on the Nebraska National Forests and Grasslands web page at *https://www.fs.usda.gov/alerts/nebraska/alerts-notices.*

Dated: March 29, 2024.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–08299 Filed 4–18–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Pacific Northwest National Scenic Trail Advisory Council

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Pacific Northwest National Scenic Trail Advisory Council will hold public meetings according to the details shown below. The committee is authorized under the National Trails System Act (the Act) and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the Council is to advise and make recommendations to the Secretary of Agriculture, through the Chief of the Forest Service, on matters relating to the Pacific Northwest National Scenic Trail as described in the Act.

DATES: A virtual meeting will be held May 14th, 2024, 10:00 a.m.–2:00 p.m., Pacific Daylight Time.

Written and Oral Comments: Anyone wishing to provide virtual oral comments must pre-register by 11:59 p.m. Pacific Daylight Time on May 7, 2024. Written public comments will be accepted by 11:59 p.m. Pacific Daylight Time on May 7, 2024. Comments submitted after this date will be provided to the Agency, but the Committee may not have adequate time to consider those comments prior to the meeting.

All council meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held virtually. The public may join virtually via the Zoom app or the internet using the link posted on the Pacific Northwest National Scenic Trail Advisory Council Meetings web page: *https://www.fs.usda.gov/detail/pnt/working-together/advisory-committees/?cid=fseprd505622.* Council information and meeting details can be found at the following website: *https://www.fs.usda.gov/detail/pnt/working-together/advisory-committees/?cid=fseprd505622* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to *jeffrey.kitchens@usda.gov* or via mail (*i.e.,* postmarked) to Jeff Kitchens, 63095 Deschutes Market Road, Bend, Oregon 97701. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. Pacific Daylight Time, May 7, 2024, and speakers can only register for one speaking slot. Oral comments must be sent by email to *jeffrey.kitchens@usda.gov* or via mail (*i.e.,* postmarked) to Jeff Kitchens, 63095 Deschutes Market Road, Bend, Oregon 97701.

FOR FURTHER INFORMATION CONTACT: Jeff Kitchens, Designated Federal Officer (DFO), by email at *jeffrey.kitchens@usda.gov,* or by phone at (458) 899–6185.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Approve meeting minutes;
2. Discuss implementation of the comprehensive plan for the Pacific Northwest National Scenic Trail Advisory Council;
3. Discuss and identify future Pacific Northwest National Scenic Trail Advisory Council activity;

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least

three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 14 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720–2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

(below section completed by CMO)

Dated: April 12, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–08310 Filed 4–18–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

[Docket No. RHS–24–MFH–0010]

Notice of Solicitation of Applications for Section 514 Off-Farm Labor Housing Loans and Section 516 Off-Farm Labor Housing Grants for New Construction for Fiscal Year 2024

AGENCY: Rural Housing Service, United States Department of Agriculture.

ACTION: Notice of Solicitation of Applications (NOSA).

SUMMARY: The Rural Housing Service (RHS or Agency), a Rural Development (RD) agency of the United States Department of Agriculture (USDA), announces that it is soliciting competitive pre-applications for Section 514 Off-Farm Labor Housing (Off-FLH) loans and Section 516 Off-FLH grants for the construction of new Off-FLH units for domestic farm laborers, retired domestic farm laborers, or disabled domestic farm laborers. The program objective is to increase the supply of affordable housing for farm laborers. This Notice describes the method used to distribute funds, the pre-application and final application process, and submission requirements.

DATES: Eligible pre-applications submitted to the Production and Preservation Division, Processing and Report Review Branch, for this Notice will be accepted until July 3, 2024, 12:00 p.m., Eastern Time. Applications that are deemed eligible but are not selected for further processing due to inadequate funding will be withdrawn from processing. RHS will not consider any application that is received after the established deadlines unless the date and time are extended by another Notice published in the **Federal Register**. The RHS may at any time supplement, extend, amend, modify, or supersede this Notice by publishing another Notice in the **Federal Register**. Additional information about this funding opportunity can be found on the *Grants.gov* website at *http://www.grants.gov*.

The application deadlines are as follows:

1. Available loan and grant funding posted to the RHS Multifamily Housing (MFH) website by April 19, 2024.

2. Pre-applications must be submitted by July 3, 2024, 12 p.m., Eastern Time.

3. RHS pre-application notice to proceed and non-selection notifications to applicants by September 3, 2024.

4. Final applications must be submitted by October 16, 2024, 12 p.m., Eastern Time.

5. Awards communicated to applicants by December 16, 2024.

6. Awards posted to the RHS website by January 14, 2025.

ADDRESSES: Applications to this Notice must be submitted electronically to the Production and Preservation Division, Processing and Report Review Branch.

At least three business days prior to the application deadline, the applicant must email the RHS a request to create a shared folder in CloudVault. The email must be sent to the following address: *Off-FLHapplication@usda.gov*. The email must contain the following information:

1. *Subject line:* ''Off-FLH New Construction Application Submission.''

2. *Body of email:* Borrower Name, Project Name, Borrower Contact Information, Project State.

3. *Request language:* ''Please create a shared CloudVault folder so that we may submit our new construction application documents.''

Once the email request to create a shared CloudVault folder has been received, a shared folder will be created within two business days. When the shared CloudVault folder is created by the RHS, the system will automatically send an email to the applicant's submission email address with a link to the shared folder. All required application documents in accordance with this Notice must be loaded into the shared CloudVault folder. The applicant's access to the shared CloudVault folder will be removed when the submission deadline is reached. Any document uploaded to the shared CloudVault folder after the application deadline will not be reviewed or considered. Please note: CloudVault is a USDA-approved cloud-based file sharing and synchronization system. CloudVault folders are neither suitable nor intended for file storage due to agency file retention policies and space limitations. Therefore, the agency will remove all application-related files stored in shared CloudVault folders the latter of either 180 days from the application date, or once the application has been processed and the transaction has been closed.

FOR FURTHER INFORMATION CONTACT: Jonathan Bell, Branch Director, Processing and Report Review Branch, Production and Division, Multifamily Housing Programs, Rural Development, United States Department of Agriculture, via email: *MFHprocessing1@usda.gov* or phone at: 202–205–9217.

SUPPLEMENTARY INFORMATION:

Authority

This solicitation is authorized pursuant to the Title V of the Housing Act of 1949 (Pub. L. 81–171), as amended; 7 CFR 3560, subpart L; 42 U.S.C. 1484; 42 U.S.C. 1486; and 42 U.S.C. 1480.

RD: Key Priorities

RD will continue to support and promote activities and investments that will achieve the following:

1. *Creating More and Better Market Opportunities:* Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure.

2. *Addressing Climate Change and Environmental Justice:* Reducing climate pollution and increasing resilience to the impacts of climate change through economic support for rural communities.

3. *Advancing Racial Justice, Place-Based Equity, and Opportunity:* Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects. For further information, visit *https://www.rd.usda.gov/priority-points.*

Background

USDA's RD Agencies, comprised of the Rural Business-Cooperative Service (RB–CS), Rural Housing Service (RHS), and the Rural Utilities Service (RUS), are leading the way in helping rural America improve the quality of life and increase the economic opportunities for rural people. RHS offers a variety of programs to build or improve housing and essential community facilities in rural areas. The Agency also offers loans, grants, and loan guarantees for single-family and multi-family housing, child-care centers, fire and police stations, hospitals, libraries, nursing homes, schools, first responder vehicles and equipment, housing for farm laborers and much more. The Agency also provides technical assistance loans and grants in partnership with non-profit organizations, Indian tribes, state and Federal government agencies, and local communities.

Sections 514 and 516 of the Housing Act of 1949 allows the RHS to provide competitive loan financing and grants, respectively, for affordable multifamily rental housing. Funds will be used to construct new Off-FLH properties to serve domestic farm laborers, retired domestic farm laborers, or disabled domestic farm laborers.

To focus investments in areas where the need for increased prosperity is greatest, the RHS will set aside 10 percent of the available funds for applications that will serve persistent poverty counties. The term ''persistent poverty counties'' means any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses and 2007–2011 American Community Survey 5-year average, or any territory or possession of the United States. Information on which counties are considered persistent poverty counties can be found through using the following link (*Persistent Poverty Counties* (*arcgis.com*) provided by the USDA's RD Innovation Center. Set-aside funds will be awarded in point score order, starting with the highest score. Once the set-aside funds are exhausted, any further set-aside applications will be evaluated and ranked with the other applications submitted in response to this Notice. If the RHS does not receive enough eligible applications to fully utilize the 10 percent set aside in the service of these areas, the RHS will award any unused set aside funds to other eligible applicants.

Overview

Federal Agency: Rural Housing Service.

Funding Opportunity Title: Notice of Solicitation of Applications for Section 514 Off-Farm Labor Housing Loans and Section 516 Off-Farm Labor Housing Grants for New Construction for Fiscal Year 2024.

Funding Opportunity Number: USDA–RD–HCFP–OFFFLH–NEW–2024.

Available Funds: Available loan and grant funding amounts for new construction can be found at the following link: *https://www.rd.usda.gov/programs-services/farm-labor-housing-direct-loans-grants.*

Maximum Award: All awards are subject to the availability of funding. Total Award amounts for Section 514 loans and Section 516 grants under this notice for Off-FLH may not exceed the per unit, as adjusted by number of bedrooms, Basic Statutory Mortgage Limits published by the U.S. Department of Housing & Urban Development for the 221(d)(4) program for elevatored building as follows:

SECTION 221(d)(4)—MODERATE INCOME HOUSING

Bedrooms	Per unit limit
0	$66,591
1	76,340
2	92,831
3	120,090
4+	131,826

The maximum award per selected project may not exceed $5 million (total loan and grant).

Announcement Type: Request for applications from qualified applicants for Fiscal Year 2024.

Assistance Listing Number: 10.405.

Please Note: Expenses incurred in developing applications will be at the applicant's sole risk.

A. Federal Award Description

1. A state will not receive more than 30 percent of the Off-FLH funding (excluding awards made to Federally Recognized Tribes or Tribally Designated Housing Entities) unless there are remaining Section 514 and Section 516 funds after all eligible applications nationwide have been funded. In this case, funds will be awarded to the next highest-ranking eligible applications among all of the remaining unfunded applications. The allocation of these funds may result in a state or states exceeding the 30 percent limitation.

2. Section 516 Off-FLH grants must not exceed the limits set forth in 7 CFR 3560.562(c). Total Development Cost (TDC) is defined in 7 CFR 3560.11. Section 514 Off-FLH loans may not exceed the limits set forth in 7 CFR 3560.562(b).

3. All award commitments will be valid for a period of twelve months. Applicants dependent upon third-party funding, including but not limited to local, state, and federal resources through competitive and noncompetitive application rounds, must obtain and submit to the Agency a firm commitment letter for those funds, upon receipt, but no later than the twelve-month time frame, as specified in the award commitment. An extension of the award commitment of up to six months may be given, at the sole discretion of the Agency, and will be based on project viability, current program demand, and availability of program funds. Applicants unable to satisfy this condition of the award commitment will be subject to having the award rescinded and will be required to reapply in future funding announcements.

4. A firm commitment letter is defined as a lender's unqualified pledge to the borrower that they have passed their underwriting guidelines, and they

are willing to offer the borrower a loan and/or grant under specified terms. The letter validates that the borrower's financing has been fully approved and that the lender is prepared to close the transaction. Preliminary commitment letters, term sheets, or any other letter from the lender that does not meet the definition above will not be considered a firm commitment letter and will not meet the requirements specified in this Notice.

5. Rental Assistance (RA) and Operating Assistance (OA) may be available for projects funded under this Notice, subject to the availability of funds. OA is described in 7 CFR 3560.574 and may be used in lieu of tenant-specific RA in Off-FLH projects financed under Section 514 or Section 516(i) of the Housing Act of 1949 (42 U.S.C. 1484 and 1486(i) respectively) that serve migrant farmworkers as defined in 7 CFR 3560.11. Owners of eligible projects may choose tenant-specific RA as described in § 3560.573 or OA, or a combination of both, however, any tenant or unit assisted under § 3560.574 may not receive rental assistance under § 3560.573. To request RA and/or OA, applicants must submit form RD 3560–25, Initial Request for Rental Assistance or Operating Assistance.

6. To maximize the use of the limited supply of FLH funds, the RHS may contact eligible applicants selected for an award with proposals to modify the transaction's proportions of loan and grant funds. Such applicants will be contacted in point score order, starting with the highest score. In addition, if funds remain after the highest scoring eligible applications are selected for awards, the RHS may contact those eligible applicants selected for the awards, in point score order, starting with the highest score, to ascertain whether those respondents will accept the remaining funds.

7. To enhance customer service and the transparency of this program, RHS will publish a list of awardees and the loan and/or grant amounts of their respective awards in accordance with the dates listed in this Notice. This information can be found at: *https://www.rd.usda.gov/programs-services/farm-labor-housing-direct-loans-grants.* RHS reserves the right to post all information submitted as part of the pre-application and final application package that is not protected under the Privacy Act on a public website with free and open access to any member of the public.

B. Eligibility Information

1. Housing Eligibility

Housing that is constructed with FLH loans and/or grant funds must meet RHS's design and construction standards contained in 7 CFR part 1924, subparts A and C. All projects must comply with current building codes and standards. Better building performance efforts are rewarded in the section *Building Performance and Climate Resilience* under section (12) *Addressing Climate Change and Environmental Justice.* Once constructed, Off-FLH must be managed in accordance with 7 CFR part 3560. In addition, Off-FLH must be operated on a non-profit basis and tenancy must be open to all qualified domestic farm laborers, regardless of which farm they work. Section 514(f)(3) of the Housing Act of 1949, as amended (42 U.S.C.1484(f)(3)) defines domestic farm laborers to include any person regardless of the person's source of employment, who receives a substantial portion of his/her income from the primary production, handling, or processing of agricultural or aqua cultural commodities, and also includes the person's family.

2. Tenant Eligibility

Tenant eligibility is limited to persons who meet the definition of a ''domestic farm laborer,'' a ''disabled domestic farm laborer,'' or a ''retired domestic farm laborer'' as defined in Section 514(f)(3) of the Housing Act of 1949, as amended (42U.S.C. 1484(f)(3)).

Section 514(f)(3)(A) of the Housing Act of 1949 (42 U.S.C. 1484(f)(3)(A)) hasbeen amended to extend FLH tenant eligibility to agricultural workers legally admitted to theUnited States and authorized to work in agriculture.

Owners are responsible for verifying tenant income eligibility. Only very-low or low-income households are eligible for the operating assistance rents or RA. Households with incomes above the low-income limits must pay the full rent.

In accordance with 7 CFR 3560.554, off-farm labor housing may be used to serve migrant farmworkers, as defined in 7 CFR 3560.11. Migrants or migrant agricultural laborer is a person (and the family of such person) who receives a substantial portion of his or her income from farm labor employment and who establishes a residence in a location on a seasonal or temporary basis, in an attempt to receive farm labor employment at one or more locations away from their home base state, excluding day-haul agricultural workers whose travels are limited to work areas within one day of their residence.

Seasonal housing is housing that is operated on a seasonal basis, typically for migrants or migrant agricultural laborers as opposed to year-round. Off-FLH loan and grant funds may be used to provide facilities for seasonal or temporary residential use with appropriate furnishings and equipment. A temporary residence is a dwelling which is used for occupancy, usually for a short period of time, but is not the legal residence for the occupant.

The design and construction requirements established in § 3560.60 apply to all applications for Off-FLH loans and grants except that seasonal Off-FLH that will be occupied for eight months or less per year by migrant farmworkers while they are away from their residence, may be constructed in accordance with Exhibit I of 7 CFR part 1924, subpart A.

For Off-FLH operating on a seasonal basis, the management plan must establish specific opening and closing dates.

Off-FLH is subject to the tenant contribution and rental unit rent requirements for Plan II housing established under 7 CFR part 3560, subpart E, except where seasonal housing will be occupied for less than a three-month period. In such instances the best available and practical income verification methods may be used with prior approval of RHS.

For housing rented to farm laborers and owned by public bodies, public or private nonprofit organizations, and limited partnerships, when charging rent, households must meet the income requirements outlined in 7 CFR 3560.576(b)(2)(i)(A).

3. Applicant Eligibility

(a) To be eligible to receive a Section 514 loan for Off-FLH, the applicant must meet the requirements of 7 CFR 3560.555(a) and (1) be a broad-based non-profit organization, a non-profit organization of farmworkers, a Federally recognized Indian tribe, a community organization, or an Agency or political subdivision of state or local Government, and must meet the requirements of § 3560.55, excluding § 3560.55(a)(6), or (2) be a limited partnership with a non-profit general partner which meets the requirements of § 3560.55(d). A broad-based non- profit organization is a non-profit organization that has a membership that reflects a variety of interests in the area where the housing will be located.

(b) To be eligible to receive a Section 516 grant for Off-FLH, the applicant must meet the requirements of 7 CFR

3560.555(b) and (1) be a broad-based non- profit organization, a non-profit organization of farmworkers, a federally recognized Indian tribe, a community organization, or an agency or political subdivision of State or local Government, and must meet the requirements of § 3560.55, excluding § 3560.55(a)(6), and (2) be able to contribute at least one-tenth of the total FLH development cost from its own or other resources. A broad-based non-profit organization is a non-profit organization that has a membership that reflects a variety of interests in the area where the housing will be located . The applicant's contribution must be available at the time of the grant closing. An Off-FLH loan financed by RHS may be used to meet this requirement, however, an RHS grant cannot be used to meet this requirement. Limited partnerships with a non-profit general partner are eligible for Section 514 loans; however, they are not eligible for Section 516 grants.

(c) The applicant must be unable to provide the necessary housing from their own resources and be unable to obtain credit from any other source upon terms and conditions which the applicant could reasonably be expected to fulfill.

(d) Broad-based non-profit organizations must have a membership that reflects a variety of interests in the area where the housing will be located.

4. Other Requirements

The following requirements apply to loans and grants made in response to this Notice:

(a) 7 CFR part 1901, subpart E, regarding equal opportunity requirements;

(b) For grants only, 2 CFR parts 200 and 400, which establishes the uniform administrative and audit requirements for grants and cooperative agreements to State and local Governments and to non-profit organizations;

(c) 7 CFR part 1901, subpart F, regarding historical and archaeological properties;

(d) 7 CFR 1970.11, Timing of the environmental review process. *Please note, the environmental information must be submitted by the applicant to RHS. RHS must review and determine that the environmental information is acceptable before the obligation of funds;*

(e) 7 CFR part 3560, regarding the loan and grant authorities of the Off-FLH program;

(f) 7 CFR part 1924, subpart A, regarding the planning and performing of construction and other development;

(g) 7 CFR part 1924, subpart C, regarding the planning and performing of site development work;

(h) For construction utilizing a Section 516 grant, the provisions of the Davis-Bacon Act (40 U.S.C. chapter 31, subchapter IV) and implementing regulations published at 29 CFR parts 1, 3, and 5;

(i) Applicants must be financially stable and provide proof of credit worthiness.

(j) Borrowers and grantees must take reasonable steps to ensure that tenants receive the language assistance necessary to afford them meaningful access to USDA programs and activities, free of charge. Failure to provide this assistance to tenants who can effectively participate in or benefit from Federally assisted programs or activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

(k) In accordance with 7 CFR 3560.60, the housing must be economical to construct, operate, and maintain and must not be of elaborate design or materials.

(l) The agency promotes the protection of outdoor workers from heat illness. Applicants are encouraged to include amenities in the project that help prevent heat illness or promote recovery from potential impacts of exposure to heat illness.

(m) All program applicants, unless exempt under 2 CFR 25.110(b), (c), or (d), are required to:

i. Be registered in System Award Management (SAM) before submitting their applications;

ii. Provide a valid Unique Entity ID (UEI) in their applications; and

iii. Continue to maintain an active SAM registration with current information at all times during which they have an active Federal award or an application or plan under consideration by a Federal awarding agency.

The Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant. SAM is the Official U.S. Government system for collection of forms for acceptance of a federal award through the registration or annual recertification process. Applicants may register for SAM at *https://www.sam.gov* or by calling 1–866–606–8220. The applicant must ensure that the information in the database is current, accurate, and complete. On April 4, 2022, the unique entity identifier used across the federal government changed from the DUNS Number to the UEI (generated by SAM.gov). As required by the Office of Management and Budget (OMB), all applications must provide a UEI number when applying for Federal assistance. Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.* Applicants must ensure they complete the Financial Assistance General Certifications and Representations in SAM. Similarly, all recipients of Federal financial assistance are required to report information about first-tier subawards and executive compensation in accordance with 2 CFR part 170. So long as an entity applicant does not have an exception under 2 CFR 170.110(b), the applicant must have the necessary processes and systems in place to comply with the reporting requirements should the applicant receive funding. See 2 CFR 170.200(b).

Additional information concerning these requirements can be obtained on the *Grants.gov* website at *http://www.grants.gov.* The applicant must provide documentation that they are registered in SAM and their UEI number or the application will not be considered for funding. The following forms for acceptance of a federal award are now collected through the registration or annual recertification in SAM.gov in the Financial Assistance General Certifications and Representations section:

- Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions.''
- Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion. Lower Tier Covered Transactions.''
- Form AD–1049, ''Certification Regarding Drug-Free Workplace Requirements (Grants).''
- Form AD–3031, ''Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.''
- Form AD–3030, ''Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants.''

C. Pre-Application and Submission Information

The application process will be in two phases: The initial pre-application and the submission of a final application. Only those pre-applications that are selected for further processing will be

invited to submit a final application. In the event that a pre-application is selected for further processing and the applicant declines, the next highest ranked pre-application will be selected for further processing. All pre-applications for Section 514 and Section 516 funds must meet the requirements of this Notice. Incomplete pre-applications will be rejected and returned to the applicant. No pre-application will be accepted after the deadline unless the date and time is extended by another Notice published in the **Federal Register**.

Applicants are encouraged to include a checklist or Table of Contents of all the application requirements and to index and tab their application to facilitate the review process. Applicants must submit a separate one-page information sheet listing each of the pre-application scoring criteria contained in this Notice, followed by a reference to the page numbers of all relevant material and documentation that is contained in the proposal that supports the criteria.

1. Pre-Application submission process. Pre-applications must be submitted electronically. The process for submitting an electronic application to RHS is as follows:

(a) At least three business days prior to the application deadline, the applicant must email RHS a request to create a shared folder in CloudVault. The email must be sent to the following address: *Off-FLHapplication@usda.gov.* The email must contain the following information:

i. *Subject line:* ''Off-FLH New Construction Application Submission.''

ii. *Body of email:* Borrower Name, Project Name, Borrower Contact Information, Project State.

iii. *Request language:* ''Please create a shared CloudVault folder so that we may submit our new construction application documents.''

(b) Once the email request to create a shared CloudVault folder has been received, a shared folder will be created within two business days. When the shared CloudVault folder is created by RHS, the system will automatically send an email to the applicant's submission email with a link to the shared folder. All required application documents in accordance with this Notice must be loaded into the shared CloudVault folder. When the submission deadline is reached, the applicant's access to the shared CloudVault folder will be removed. Any document uploaded to the shared CloudVault folder after the application deadline will not be reviewed or considered.

(c) The applicant should upload a Table of Contents of all of the documents that have been uploaded to the shared CloudVault folder. Last-minute requests and submissions may not allow adequate time for the submission process to take place prior to the deadline. *Applicants are reminded that all submissions must be received by the deadline and the application will be rejected if it is not received by the deadline date and time, regardless of when the application was submitted.*

2. Pre-Application Requirements. The application must contain the following:

(a) An executed and dated Executive Summary on the applicant's letterhead that must include at least the following:

i. Brief description of the proposed project. Be sure to address if the project will be used year-round or seasonally and to what construction standards the housing will be built.

ii. Document the need for the project. The *applicant* must document that the housing and related facilities will fulfill a pressing need in the area in which the project will be located.

iii. Description of the proposed ownership structure with an organizational chart.

iv. Narrative verifying the applicant's ability to meet the eligibility requirements stated earlier in this Notice.

v. A statement of the applicant's experience in operating labor housing or other rental housing. If the applicant's experience is limited, additional information should be provided to indicate that the applicant plans to compensate for this limited experience (*e.g.,* by obtaining assistance and advice of a management firm, non-profit group, public agency, or other organization which is experienced in rental management and will be available on a continuous basis).

vi. Description of the applicant's legal and financial capability to carry out the obligation of the loan and/or grant.

vii. Proposed management. A brief statement explaining the applicant's proposed method of operation and management (*e.g.,* on-site manager, contract for management services, or other method.). As stated earlier in this Notice, the housing must be managed in accordance with the program's management regulations, 7 CFR part 3560.

viii. Description and proof of established site control.

ix. Proposed Return to Owner (RTO), if applicable.

x. Any financial commitments, financial concessions, or other economic benefits proposed to be provided by RHS.

xi. Third-party funding, if applicable. For each third-party funding source or leveraged funds, discuss briefly the funding provider, funding amount, including terms, commitment status, timing issues such as any proposed closing dates, any restrictions that will be applicable to the project, and whether any accommodation from RHS is proposed, such as a lien position other than first. The desired lien position of any third-party funding source must be clearly disclosed as well as any proposal for RHS to accept a second lien position.

xii. Any proposed compensation to parties having an identity of interest with either the seller, purchaser, consultant, or Technical Assistance (TA) provider.

xiii. Any proposed construction financing, for example, a construction or bridge loan or the use of multiple advances.

xiv. Type and method of construction such as negotiated bid or contractor method.

xv. If a FLH grant is desired, a statement concerning the need for a FLH grant. The statement must include estimates of the rents required with a grant and rents required without a grant. Documentation to demonstrate how the rent figures were computed must be provided. Documentation must be in the form of a completed Form RD 3560–7 ''Multiple Family Housing Project Budget/Utility Allowance'' completed as if a grant was received and another form completed as if a grant would not be received. RHS will review each budget to determine that the income and expenses are reasonable and customary for the area.

xvi. If RA or OA is requested, a statement concerning the need for the RA or OA and a statement concerning the specific number of units of RA or OA that is needed. Strong and detailed justification must be provided for requests of 100 percent RA or OA.

xvii. In accordance with § 3560.63(f), all applicants must agree in writing to provide funds at no cost to the housing and without pledging the housing as security to pay cost overruns for completing planned construction after the maximum debt limit is reached.

xviii. Estimated development timeline to include estimated start and end date as well as any other important milestones such as a required closing date.

xix. Description of any required site development such as building roads, obtaining easements, installing utilities, verification that there is proper site

access, and any state or local approvals such as zoning.

xx. Description of the required and intended applicant contribution.

xxi. Any other pertinent information that the applicant feels should be disclosed as part of this proposal.

(b) Provide the following forms and certifications:

i. Standard Form 424 ''Application for Federal Assistance'' which can be obtained at: *https://www.grants.gov/.*

ii. Form RD 3560–30, ''Certification of no Identity of Interest (IOI),'' if applicable, can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD3560-30.PDF.*

iii. Form RD 3560–31, ''Identity of Interest Disclosure/Qualification Certification'' if applicable, can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD3560-31.PDF.*

An IOI is defined in 7 CFR 3560.11. RHS will review Form RD 3560–30 and Form RD 3560–31, as applicable, to determine if they are completed in accordance with the Forms Manual Insert and to determine that all IOI's have been disclosed. TA will not be funded by RHS when an IOI exists between the TA provider and the loan or grant applicant.

iv. Form HUD 2530, ''Previous Participation Certification'' can be found at: *https://www.hud.gov/sites/dfiles/OCHCO/documents/2530.pdf.*

v. Form RD 400–4, ''Assurance Agreement'' can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD400-4.PDF.*

vi. RD Instruction 1940–Q, Exhibit A–1, ''Certification for contracts, grants and loans,'' can be found at: *https://www.rd.usda.gov/files/1940q.pdf.*

vii. Form RD 1910–11, ''Applicant Certification, Federal Collection Policies for Consumer or Commercial Debts'' can be found at: *https://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD1910-11.PDF.*

viii. Form RD 400–1, ''Equal Opportunity Agreement,'' can be found at: *https://formsadmin.sc.egov.usda.gov/eFormsAdmin/browseFormsAction.do?pageAction=displayPDF&formIndex=2.*

(c) Provide the following financial and organizational information:

i. Current (within six months of this Notice's pre-application submission due date) financial statements for each entity within the ownership structure with the following paragraph certified by the applicant's designated and legally authorized signer:

''I/we certify the above is a true and accurate reflection of our financial condition as of the date stated herein. This statement is given for the purpose of inducing the United States of America to make a loan or to enable the United States of America to make a determination of continued eligibility of the applicant for a loan as requested in the loan application of which this statement is a part.''

ii. Submit a current (within 6 months from the date of issuance) comprehensive credit reports that contain details of both current open credit accounts and closed accounts for both the entity and the actual individual principals, partners, and members within the applicant entity, including any sub-entities who are responsible for controlling the ownership and operations of the entity. If any of the principals in the applicant entity are not natural persons (including but not limited to corporations, limited liability companies, trusts, partnerships, or limited partnerships), separate comprehensive commercial credit reports must be submitted on those organizations as well. Only credit reports provided by one of the three accredited major credit bureaus (Experian, Equifax, or TransUnion) will be accepted. The Agency will also accept combination comprehensive credit reports which provide a comprehensive view of the applicant's credit profile by combining data from all three major credit bureaus (Experian, Equifax, and TransUnion). If the credit report(s) is not submitted by the application deadline, the application will be considered incomplete and will not be considered for funding.

iii. Letter from the IRS indicating the applicant's tax identification number.

iv. Organizational applicants must provide to their attorney acceptable evidence of U.S. citizenship and/or qualified alien status. Acceptable evidence of U.S. citizenship may include a valid U.S. birth certificate, a valid U.S. Passport, a valid U.S. Certificate of Naturalization, or other acceptable evidence of U.S. citizenship proposed by the applicant and determined by the Agency. Acceptable evidence of qualified alien status may include valid documentation issued by the U.S. Citizenship and Immigration Services (USCIS), or other acceptable documentation of qualified alien status proposed by the applicant and determined by the Agency.

Attorney Certification. The applicant's attorney must review all applicable evidence to verify U.S. citizenship and/or qualified alien status, must certify that the Agency's U.S. citizenship and/or qualified alien status eligibility requirements are met by all applicants, and must submit the certification for Agency review.

v. Documentation verifying the applicant is registered in SAM and the applicant's UEI number (unless exempt under 2 CFR 25.110(b), (c), or (d)).

vi. If the applicant is a limited partnership, a current and fully executed limited partnership agreement and certificates of limited partnership. If changes are proposed to be made to the limited partnership agreement prior to loan/grant closing, the applicant must provide the proposed limited partnership agreement and certificates of limited partners for any proposed new limited partners. (Agency requirements should be contained in one section of the agreement and their location identified by the applicant or their attorney in a cover sheet.)

vii. If the applicant is a non-profit organization:

a. Tax-exempt ruling from the IRS designating the applicant as a 501(c)(3) or 501(c)(4) organization. If the designation is pending, a copy of the designation request must be submitted.

b. Purpose statement, including the provision of low-income housing.

c. Evidence of organization under Tribal, state and/or local law, or copies of pending applications and a copy of the applicant's charter, Articles of Incorporation, and by-laws.

d. List of Board of Directors including their names, occupations, phone numbers, and addresses.

e. If the applicant is a member or subsidiary of another organization, the organization's name, address, and nature of business.

viii. Certificate of Good Standing.

ix. Attorney Certification. Letter from the applicant's attorney certifying the legal sufficiency of the organizational documents. The attorney must certify:

a. The applicant's legal capacity to successfully operate the proposed project for the life of the loan and/or grant.

b. That the organizational documents comply with RHS regulations.

c. For partnership purchasers, that the term of the partnership extends at least through the latest maturity of all proposed RHS debt.

d. That the organizational documents require prior written RHS approval for any of the following: withdrawal of a general partner of a partnership or limited partnership applicant, withdrawal of any member of a limited liability company applicant, admission of a new general partner to a partnership or limited partnership applicant, admission of any new member to a limited liability company applicant, amending the applicant's organizational

documents, and selling all or substantially all of the assets of the applicant.

(d) Provide the following information about the Project:

i. Market feasibility documentation to identify the supply and demand for Off-FLH in the market area. A market study must be submitted. The market area must be clearly identified and may include only the area from which tenants can reasonably be drawn for the proposed project. Documentation must be provided to justify a need within the intended market area for the housing of domestic farm laborers, taking into consideration the pool of applicants that meet the occupancy requirements of the Off-FLH program under 7 CFR 3560.576. The documentation must also consider disabled and retired farm workers and adjusted median incomes of very-low, low, and moderate. The market study must include the following:

a. A complete description of the proposed site and a map showing the site, location of services, and their distances from the site.

b. Names and qualifications of members of the community interviewed during the site visit and a discussion of their comments.

c. Major employers in the area and year established.

d. Employment opportunities and rates for the area for the past 5 years.

e. Services available in the area, including shopping, schools, and medical facilities as well as community services such as recreational, transportation, and day care that are available.

f. Population by year plus the annual increase or decrease for the past 5 years.

g. Population characteristics by age.

h. Number of households by year and number of persons per household for the past 5 years.

i. Historical breakdown of households by owners and renters.

j. Households by income groups.

k. A survey of existing or proposed rental housing, including complex name, location, number of units, bedroom mix, family or elderly type, year built, rent charges, vacancies, waiting lists, amenities, and the availability of RA or other subsidies.

l. Available mobile homes, if part of housing stock.

m. The existing vacancy rate of all available rental units in the community, including houses.

n. Proportionate need for project type.

o. Building permits issued per year for the last 3 years for single and multiple unit dwellings.

p. For proposals where the applicant is requesting LIHTCs, the number of LIHTC units and the maximum LIHTC incomes and rents by unit size. This information will determine the levels of incomes in the market area, which will support the basic rents while also qualifying the applicant for tax credits.

q. The amount of RA and/or OA necessary to ensure the project's success.

r. Major employment data including the name, location, and date of establishment of any major employers within the community; the product or service of each employer; the number of employees; and salary range for each employer; and business permits issued.

s. Housing stock as defined by total number of units: one-unit buildings, two- or more unit buildings, mobile homes, and the number of these lacking some or all plumbing facilities (substandard housing).

t. Number of rent-overburdened households.

u. An expanded analysis of existing vacancy rates for all available rental units in the community, including mobile homes. The analysis must make a distinction between ''owned properties,'' ''available for rent,'' and ''for sale—not available for rent,'' as well as available apartments and other rental units.

v. Population characteristics by age.

w. A projection of housing demand based on:

- Household growth;
- Units constructed since the last U.S. Census;
- Number of owned and rented units;
- Number of replacements; and
- Number of households in the eligible-income range.

x. The annual income level of farmworker families in the area and the probable income of the farm workers who will likely occupy the proposed housing;

y. A realistic estimate of the number of farm workers who remain in the area where they harvest and the number of farm workers who normally migrate into the area. Information on migratory workers should indicate the average number of months the migrants reside in the area and an indication of what type of households are represented by the migrants (*i.e.,* single individuals as opposed to families);

z. General information concerning the type of labor-intensive crops grown in the area and prospects for continued demand for farm laborers;

aa. The overall occupancy rate for comparable rental units in the area, the rents charged, and customary rental practices for these comparable units (*e.g.,* will they rent to large families, do they require annual leases, etc.);

bb. The number, condition, adequacy, rental rates and ownership of units currently used by or available to farm workers;

cc. Information on any proposed new construction of housing units within the market area. The building permit information and pending tax credit applications must be checked for the primary market area;

dd. Documentation verifying that interviews were conducted with farms and other agricultural businesses within the primary market area to inquire if they are in need of additional housing for their employees or if they plan to expand and hire additional employees that will need housing; and

ee. A description of the proposed units, including the number, type, size, rental rates, amenities such as carpets and drapes, related facilities such as a laundry room or a community room, and other facilities providing supportive services in connection with the housing and the needs of the prospective tenants such as a health clinic or day care facility.

ff. All market studies must provide a summary of the sample of farm workers used to document the need for off-farm labor housing. This summary should quantify eligible tenants according to 7 CFR part 3560 subpart L section 3560.577 within the farm worker demographics sample and provide the reference/source of the information.

gg. The market study must also include the following required elements of the market feasibility documentation (MFD):

- Services available in the area include shopping, schools, and medical facilities as well as community services such as recreational, transportation, and day care. Services appear to be appropriate for the project type and within reasonable proximity of the site.
- Building permits issued during the past 3 years and new employment opportunities show the community to be growing, rather than declining.
- Major employers in the area provide employment opportunities sufficient to support a population base of renters for the proposed project.
- Employment rates for the area have been high over the past 5 years.

hh. The analyst makes realistic recommendations supported by the statistical information provided:

- Population characteristics and household data for the community are stable or show an increase during the past 5 years.
- Population characteristics by age shows support for the type of project being proposed, and the type of complex proposed reflects the greater

proportionate need and demand of the community. To establish this, compare the share or percentage of the community's total rental units that are designated for the elderly (62 years or older or disabled) to the community's share of elderly households, and the share of total rental units for families to the share of family households in the community. For mixed projects, the unit mix must reflect the proportionate need of each household type.

- Statistical data showing households by income group shows that there are households in the eligible income group that could rent in the project.
- Historical breakdown of households by owners and renters shows that there is a tradition of renters.
- The MFD addresses the need for more than just one and two bedroom units.
- The bedroom mix of the proposed units is proportional to the need in the market area based on renter household size and the bedroom mix of existing units.
- The bedroom mix of fully accessible units (5 percent) is comparable to the bedroom mix of non-accessible units.
- The MFD shows evidence of need for the housing in that there are rent overburdened households and/or households in substandard housing.
- A discussion of existing housing supply includes reference to the single-family housing rental and sale units available and shows these to be inadequate.
- Temporary residents of a community, including college students, military personnel, or others not claiming their current residence as their legal domicile, have not been included in determining need and project size.
- The MFD includes a discussion on the current market for single-family houses and how sales, or the lack of sales, will affect the demand for elderly rental units. If the market study discusses how elderly homeowners reinforce the need for rental housing, it does so only as a secondary market and not as the primary market.
- The vacancy rates in existing rental housing, including available single-family housing and mobile homes, is 5 percent (or the State-approved vacancy standard, if different) or less, or there is an acceptable explanation where higher rates occur. Existing rental complexes should also show waiting lists.
- The CRCU shown is less than or equal to the rents proposed for the project.
- For proposals where the applicant is requesting LIHTCs, the number of LIHTC units and the maximum LIHTC incomes and rents by unit size are provided. Statistical data provided show that there are households in the tax credit-eligible income group to rent in the project. If not, rental assistance is requested.
- The MFD makes clear the amount of RA that is necessary to ensure the project's success.

ii. The analyst that completes the market study must provide the following certifications:

- The information presented is accurate to the best of the preparer's knowledge.
- Reliable sources were used to collect the information and data presented (for a study, the analyst has included a statement of qualifications).
- A site visit was made by the preparer or their representative.
- The analyst will not receive any fees that are contingent upon approval of the project by the Agency.
- The analyst will have no interest in the project.

jj. The market study must also include the following methodologies:

- A brief statement of the methodology used in the study has been included.
- All mathematical calculations are expressed in actual numbers, including percentages.
- Source references are identified for each table or section of the market study.

It is recommended that the provider include a copy of Attachment 4–F, located in HB–1–3560, Chapter 4 (*https://www.rd.usda.gov/sites/default/files/3560-1chapter04.pdf*), within the report and provide the page number of the report where it contains the information that satisfies each element of Attachment 4–F. The market study must be obtained from, and performed by, an independent third-party provider that has no identity of interest with the property owner, management agent, applicant or any other principal or affiliate. The market study must also include the following:

ii. If the applicant is seeking points for land donation, a narrative to explain how the land donation meets all of the requirements set forth in Section E(5) of this Notice.

iii. Evidence of site control, such as an executed option contract or sales contract. The option contract or sales contract must not be expired.

iv. A map and description of the proposed site, including the availability of water, sewer, and utilities and the proximity to community facilities and services such as shopping, schools, transportation, doctors, dentists, and hospitals. Off-FLH projects must comply with the site requirements in 7 CFR 3560.58 with the exception of the requirement that the property be located in a designated place.

v. A supportive services plan which describes services that will be provided on-site or made available to tenants through cooperative agreements with service providers in the community, such as a health clinic or day care facility. Off-site services must be accessible and affordable to farm workers and their families. A map showing the location of supportive services must be included. Letters of commitment from service providers to deliver services to tenants must be included. The plan must describe how the services will be funded. RA may not fund supportive services.

(e) Provide the following construction related documents:

i. Preliminary plans and specifications, including a plot plan, site plan with contour lines, floor plan for each living unit type and other spaces, such as laundry facilities, community rooms, stairwells, etc., building exterior elevations, typical building exterior wall section, building layouts, and type of construction and materials. The housing must meet RHS's design and construction standards contained in 7 CFR part 1924, subparts A and C, including meeting all current applicable building codes, and must also meet all applicable federal, state, and local accessibility standards and be in compliance with all building codes. Applications for Off-FLH loans and grants must also meet the design requirements in 7 CFR 3560.559.

ii. A description of the proposed interior/exterior washing facilities, if applicable. Applicants should consider incorporating interior/exterior washing facilities for tenants, as necessary to protect the housing and the tenants from excess dirt and chemical exposure. Such facilities might include a boot washing station or hose bibs, among others.

iii. Description and justification of related facilities as defined in 7 CFR 3560.11, and a schedule of separate charges for the related facilities.

iv. A checklist, certification, and signed affidavit by the project architect or engineer, as applicable, for any energy programs the applicant intends to participate in.

(f) Provide the following project financing information:

i. A Sources and Uses Statement which shows all sources of funding included in the proposed transaction. The terms and schedules of all sources included in the project should be included in the Sources and Uses Statement. (Note: A Section 516 grant

may not exceed 90 percent of the TDC of the transaction)

ii. All applications that propose the use of any grant, non-amortizing leveraged funds, or similar funding source should submit commitment letters with their application, if available. If the applicant is unable to secure third-party firm commitment letters within 180 calendar days from the issuance of the award letter under this NOSA, the application will be deemed incomplete, the award letter will be considered null and void, and the applicant will be notified in writing that the application will be rejected.

iii. Description of how the applicant will meet the applicable equity contribution requirement.

(g) Provide the following environmental information:

i. Environmental information in accordance with the requirements in 7 CFR part 1970. The applicant is responsible for preparing and submitting the environmental review document in accordance with the format and standards provided by RHS in 7 CFR part 1970. Applicants may employ a design or environmental professional or technical service provider to assist them in the preparation of their environmental review documents at their own expense.

ii. Evidence of the submission of the project description to the applicable State Housing Preservation Office (SHPO), and/or Tribal Historic Preservation Officer (THPO) with the request for comments. A letter from the SHPO and/or THPO where the Off-FLH project is located stating they have reviewed the site and made a determination, signed by their designee, is required to demonstrate compliance.

iii. Intergovernmental review. Evidence of compliance with Executive Order 12372. The applicant must initiate the intergovernmental review by submitting the required information to the applicable State Clearinghouse. The applicant must provide documentation that the intergovernmental review process was completed. The applicant must also submit any comments that were received as part of this review to the agency. If no comments are received, the applicant must provide documentation that the review was properly initiated and that the required comment period has expired. Applications from Federally recognized Indian tribes are not subject to this requirement.

iv. FEMA Form 81–93, Standard Flood Hazard Determination.

v. Comments regarding relevant offsite environmental conditions, which could include but are not limited to, information on surrounding businesses or land uses such as abandoned buildings or facilities, landfills, and waste or water management facilities, etc. that may present an adverse impact to the proposed development.

(h) Provide the following budget and management information:

i. A proposed post-construction operating budget utilizing Form RD 3560–7, ''Multiple Family Housing Project Budget/Utility Allowance'' can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD3560-7.PDF.*

RHS will review the budget to determine that the income and expenses are reasonable and customary for the area. RHS will also verify that the budget reflects the correct and estimated RHS debt service, number of units, unit mix, and proposed rents. Overall, RHS will review the budget for feasibility, accuracy, and reasonableness.

ii. An estimate of development costs utilizing Form RD 1924–13 ''Estimate and Certificate of Actual Cost'' can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD1924-13.PDF.*

iii. If requesting RA or OA, Form RD 3560–25, ''Initial Request for Rental Assistance or Operating Assistance'' can be found at: *http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD3560-25.PDF.*

If any of the required items listed above are not submitted within the pre-application in accordance with this Notice or are incomplete, the pre-application will be considered incomplete and will not be considered for funding.

RHS will not consider information from an applicant after the pre-application deadline. RHS may contact the applicant to clarify items in the application. RHS will uniformly notify applicants of each curable deficiency. A curable deficiency is an error or oversight that if corrected it would not alter, in a positive or negative fashion, the review and rating of the application. An example of a curable (correctable) deficiency would be inconsistencies in the amount of the funding request.

D. Preliminary Eligibility Assessment

RHS shall make a preliminary eligibility assessment using the following criteria:

1. The pre-application was received by the applicable submission deadlines specified in the Notice;

2. The pre-application is complete as specified by the Notice;

3. The applicant is an eligible entity and is not currently debarred, suspended, or delinquent on any Federal debt; and

4. The proposal is for authorized purposes.

E. Pre-Application Review and Scoring Information

RHS will accept, review, score, and rank pre-applications in accordance with this Notice. The maximum score that can be obtained is 106 points. Section 514 Off- FLH loan funds and Section 516 Off- FLH grant funds will be distributed to states based on a national competition, based on the following scoring criteria:

(1) *Development Team Experience (up to 15 points).* Applicants should demonstrate their team's (owner, including the General Partner of a partnership applicant, Developer and Management Company) recent experience in successfully completing the development of FLH and/or MFH projects in a timely manner. RHS will consider the applicant's experience with utilizing federal financing programs, including timely project completion and ensuring that Section 514/516 projects are occupied by eligible farmworker tenants. A firm resume must be provided for all sponsors/co-sponsors, including the management agent in order to receive points. The description or firm resumes must include any rental housing projects that the applicant team sponsored, owns, or operates. To score the highest number of points for this factor, applicants must describe significant previous experience in providing housing to generally and significant previous experience implementing affordable housing development activities. Points will be awarded as follows:

Low level of development experience (5 points)
Medium level of development experience (10 points)
High level of development experience (15 points)

(2) *Market Conditions/Need for Farm Labor Housing (up to 15 points).* The applicant must provide the required market study as described above in Section C, Pre-application and Submission Information, number 11. In particular, the applicant must ensure that the market study assesses the supply of eligible farmworkers that meet the tenancy requirements for the Section 514/516 program. Points will be awarded as follows:

a. *Need (up to 10 points).* Points will be awarded based on the absorption ratio. The absorption ratio is computed by dividing the number of units in the proposed project by the number of

income eligible and farm labor eligible households within the primary market area.

Evidence of Strong Need (10 points). An absorption ratio of 15 percent or less.

Evidence of Need (5 points). An absorption ratio greater than 15 percent and less than 30 percent.

b. *Diminished Needs Waivers in Primary Market Area.* If the market study indicates that the primary market area for the property includes an existing Section 514/516 property, the Agency will determine if the existing property has been approved by the Agency for a Diminished Needs Waiver (DNW) due to a lack of qualified farmworker tenants. If a DNW is in place, the Agency will reduce the scoring by two (2) points in (a) to reflect a reduced need for the property.

c. *Location and Access to Services (up to 5 points).* Applicants must demonstrate that the location of the site supports FLH. The applicant must identify the location, the proximity, and ease of access of the project site to amenities important to the residents that supplement the services provided on-site. Applicants must describe how residents could reasonably access critical amenities. Amenities will generally be considered readily available if they are within one-half mile walking distance or they can be accessed by public transportation within one-quarter walking mile, and/or affordable private door-to-door shuttle/van service that is reliable and accessible. Applicants may commit to providing such transportation services if the nature of the commitment and the financing of the commitment is adequately described. Project funds cannot be used for this purpose. To score the maximum number of points on this factor, applicants must make a compelling argument that the location of the proposed project is well suited with respect to proximate amenities to meet the needs of farm workers. Documentation must be provided that clearly outlines the project site and its proximity to the applicable amenities. The site location will be rated on access to the following:

Health care and social services (1 point) (*e.g.* hospital, medical clinic, social service organization that offers services to farm workers);

Grocery stores (1 point) (*e.g.,* supermarket or other store that sells produce and meat);

Recreational facilities (1 point) (*e.g.,* parks and green space, community center, gym, health club, family entertainment venue, library);

Schools and civic facilities (1 point) (*e.g.,* place of worship, schools, police or fire station, post office);

Other neighborhood-serving amenities (1 point) (*e.g.,* apparel store, convenience store, pharmacy, bank, hair care, and restaurants).

(3) *Ownership and Management Capacity (up to 15 points).* Applicants should demonstrate that they have the experience and organizational resources to successfully own, operate and manage FLH on a long-term basis. In the case of co-sponsored applications, the rating will be based upon the combination of the experience of all co-sponsors in the area under review. In order to receive points, a firm resume must be provided for the applicant and all Sponsors/Co-Sponsors, including the management agent. Each resume must include FLH and MFH ownership and management experience, as applicable. In addition, the resume should include a description of all similar projects that the applicant and Sponsors/Co-Sponsors have been involved with, to include whether they were Federal housing projects, and information regarding the success of the projects. Points will be awarded as follows:

Low level of management experience (5 points)

Medium level of management experience (10 points)

High level of management experience (15 points)

(4) Leveraging Other Funds (up to 10 points). Points will be allocated for applications that leverage other funds based on the ratio of leveraged funds to total development cost (TDC). Leveraged funds are defined as non-Section 514/516 funds, including third-party funds from equity, grants, loans and deferred developer fees. To receive points, the proposal must serve tenants meeting Agency income limits at basic rents comparable to what the rent would be if the Agency provided full financing. These comparable rents will be determined by the Agency. Points are calculated as follows:

Leveraged funds/TDC is greater than 80%: 10 points

Leveraged funds/TDC is 60% to 79%: 8 points

Leveraged funds/TDC is 40% to 59%: 6 points

Leveraged funds/TDC is 20% to 39%: 4 points

Leveraged funds/TDC is 5% to 19%: 2 points

(5) *Land Donation (5 points).* Points are provided if the proposal uses a donated site which meets the following conditions: (A) The site is donated by a state, unit of local government, public body or a nonprofit organization; (B) The site is suitable for the housing proposal and meets Agency requirements in accordance with § 3560.56 (c) (1) (iv); (C) Site development costs do not exceed what they would be to purchase and develop an alternative site; (D) The overall cost of the FLH is reduced by the donation of the site; and (E) A return on investment is not paid to the borrower for the value of the donated site nor is the value of the site considered as part of the borrower's contribution. If the applicant is seeking points for land donation, provide a narrative to explain how the land donation meets all of the requirements.

(6) *Operational cost savings (up to 5 points).* The presence of outside funding sources that contribute to operational cost savings, such as tax abatements, non-RHS tenant subsidies or donated services, are calculated on a per-unit cost savings for the sum of the savings. Savings must be available for at least 15 years and documentation must be provided within the pre-application demonstrating the availability of savings for 15 years. To calculate the savings, take the total amount of savings and divide it by the number of units in the project that will benefit from the savings to obtain the per-unit cost savings. For example, a 10- unit property receiving $30,000 per year non-RHS subsidy yields a cost savings of $450,000 ($30,000 × 15 years); resulting in a $3,000 per-unit per-year cost savings ($450,000/10 units/15 years). Documentation must be provided within the pre-application that verifies the presence of operational cost savings. Points will be awarded relative to the amount of operating cost savings obtained by other NOSA applicants:

Per-unit operating costs saving amount is among the top 50% of applicants: (5 points)

Per unit operating cost savings are demonstrated, but are not among the top 50% of applicants: (3 points)

No per-unit operating cost savings are demonstrated: (0 points)

(7) *Targeted Locations (5 points).* Points will be awarded to proposals that provide rental units in a colonia, on Tribal land, Rural Economic Area Partnership (REAP) community, Enterprise Zone or Empowerment Community (EZ/EC) or in a place identified in the state Consolidated Plan or a state needs assessment as a high need community for MFH. Documentation must be provided within the pre-application that verifies

the property is located in one of the targeted locations.

(8) *Tenant Support Services (up to 5 points).* Points will be allocated for the presence of tenant supportive services. One point will be awarded for each tenant service included in the tenant supportive services plan up to a maximum of 5 points. In order to receive points, the tenant support services plan must describe the proposed supportive services, including a description of the public or private funds that are expected to fund the proposed services as well as the way the services will be delivered, who will administer them, and where they will be administered. All tenant service plans must include letters of intent that clearly state the service that will be provided at the project for the benefit of the residents from any party administering each service, including the applicant. These services may include, but are not limited to, transportation-related services, on-site English as a Second Language classes, move-in funds, emergency assistance funds, homeownership counseling, food pantries, after school tutoring, and computer learning centers. The proposed supportive services plan must describe how the services will meet the identified needs of the tenants and how the services will be provided on a consistent, long-term basis to support the tenants. The plan must clearly state how the services will be funded. RA, OA and project funds may not be used to pay for these services.

(9) *Rural Communities (5 points).* Although a rural area location is not required for the Section 514/516 program, points will be awarded to properties located in MFH eligible rural areas. Applicants must include a copy of the map demonstrating the project is located in an eligible rural area. MFH eligible areas are found on the following website: Eligibility (usda.gov)

(10) *Creating More and Better Markets (5 points).* Assisting Rural communities to recover economically through more and better market opportunities and through improved infrastructure. Priority points will be awarded if the project is located in or serving a rural community whose economic well-being ranks in the most distressed tier of the Distressed Communities Index. The Distressed Communities Index provides a score between 1–100 for every community at the zip code level. The most distressed tier of the index are those communities with a score over 80. Please use the Distressed Communities Index Look-Up Map to determine if your project qualifies for priority points. Provide a copy of the map showing the project is eligible to claim points. *Note:* US Territories are considered distressed and qualify for priority points. For additional information on data sources used for this priority determination, please download the Data Sources for Rural Development Priorities document. Additional information for priority points can be found on the following website: *https://www.rd.usda.gov/priority-points.*

(11) *Advancing Racial Justice, Place-Based Equity, and Opportunity (5 points).* Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects. Priority points will be awarded if the project is located in or serving a community with score 0.75 or above on the CDC Social Vulnerability Index. Please use Social Vulnerability Index Map to look up map or list to determine if your project qualifies for priority points. Provide a copy of the map showing the project is eligible to claim points. Applications from Federally Recognized Tribes, including Tribal instrumentalities and entities that are wholly owned by Tribes, will receive priority points. Federally Recognized Tribes are classified as any Indian or Alaska Native tribe, band, nation, pueblo, village, or community as defined by the Federally Recognized Indian Tribe List Act (List Act) of 1994 (Pub. L. 103–454). Please refer to the Bureau of Indian Affairs for a listing of Federally Recognized Tribes. Additionally, projects where at least 50% of the project beneficiaries are members of Federally Recognized Tribes, will receive priority points if applications from non-Tribal applicants include a Tribal Resolution of Consent from the Tribe or Tribes that the applicant is proposing to serve. *Note:* US Territories are considered socially vulnerable and qualify for priority points. For additional information on data sources used for this priority determination, please download the Data Sources for Rural Development Priorities document. Additional information for priority points can be found on the following website: *https://www.rd.usda.gov/priority-points.*

(12) *Addressing Climate Change and Environmental Justice (up to 5 points).* Increasing resilience to the impacts of climate change through economic support to rural communities. Applicants can receive priority points through the options listed below.

Option 1 (5 points). Priority points will be awarded if the project is in or serves a Disadvantaged Community as defined by the Climate and Economic Justice Screening Tool (CEJST), from the White House Council on Environmental Quality (CEQ). CEJST is a tool to help Federal agencies identify disadvantaged communities that will benefit from programs included in the Justice40 initiative. Census tracts are considered disadvantaged if they meet the thresholds for at least one of the CEJST's eight (8) categories of burden: Climate, Energy, Health, Housing, Legacy Pollution, Transportation, Water and Wastewater, or Workforce Development.

OR;

Option 2 (5 points). Priority points will be awarded if the project is in or serves an Energy Community as defined by the Inflation Reduction Act (IRA). The IRA defines energy communities as:

A ''brownfield site'' (as defined in certain subparagraphs of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA))

A ''metropolitan statistical area'' or ''non-metropolitan statistical area'' that has (or had at any time after 2009) 0.17% or greater direct employment or 25% or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas; and has an unemployment rate at or above the national average unemployment rate for the previous year

A census tract (or directly adjoining census tract) in which a coal mine has closed after 1999; or in which a coal-fired electric generating unit has been retired after 2009.

To determine if your project qualifies for priority points under Option 1 or Option 2, please use the Disadvantaged Community & Energy Community Look-Up Map on the following website: *https://www.rd.usda.gov/priority-points.* Provide a copy of the map showing the project is eligible to claim points.

(13) Building Performance and Climate Resilience (11 points maximum).

A. *Disaster Resilient Construction Practices and Standards (Up to 3 points).* Constructing buildings to be of good quality at the outset will ensure the long-term durability, health, safety, operational efficiency, and asset quality into the future. Addressing location specific hazards may also offer applicants an opportunity to lower insurance premiums.

The FEMA National Risk Index (NRI) *https://hazards.fema.gov/nri/map.* identifies the following hazards, which may occur simultaneously: Avalanche, coastal flooding, cold wave, drought, earthquake, hail, heat wave, hurricane, ice storm, landslide, lightening, riverine flooding, strong wind, tornado, tsunami, volcanic activity, wildfire, winter

weather. The FEMA mapping tool allows a report to be generated for the County level and the Census track level. The applicant should use the tool to create a report based on the address of the proposed project at the Census track level. This report should be included in the application in order to obtain points in this category.

USDA RD was involved in the authorship of the collaborative creation of guides to builders on resilient construction techniques germane to Natural Hazards. Five volumes include: wind, water, fire, earth, and auxiliary hazards. *https://www.huduser.gov/portal/publications/Designing-for-Natural-Hazards-Series.html*.

(i) *Disaster Resilient Construction (1 point).* Applicants seeking to earn 1 point for Disaster Resilient construction must submit a signed commitment from the applicant that the project will be designed and constructed using the most current suite of codes published by the International Code Council, including the International Building Code 2021 without weakening amendments, or a more stringent code, and shall articulate the specific measures that will be carefully taken to mitigate the impact of pertinent natural hazards impacting the project location. In order to obtain points, the applicant must also provide a certification from a licensed professional architect or engineer that the building plans meet these standards and that the final building plans, if not yet available, will meet these standards.

(ii) *Addressing Specific Hazards (2 points)* In addition to best practices illustrated in the Natural Hazard guides, there are some industry standards that address specific hazards. To obtain points in this category, applicants must commit to additional compliance beyond the building code, with the industry standard resilience programs such as those listed below, and must illustrate this through commitments signed by the applicant and key leaders of the project development team, including the lead developer, architects, engineers, and special consultants if applicable. Applicants can obtain points by illustrating the specific hazard(s) germane to the location of the project and committing to participate in an industry standard program designed to address the identified risk(s). The applicant must also submit a certification from a licensed professional architect or engineer that the building plans comply with the standards of the identified resilience program and that the final building plans, if not yet available, will comply with such standards.

- *Strong Wind, Hurricane, Tornado, Hail:* Institute for Business and Home Safety (IBHS) FORTIFIED programs that address high-wind, hail, hurricane and up to CAT 3 tornado risk. *https://fortifiedhome.org/fortified-multifamily/*
- *Wildfire:* 2021 Wildland Urban Interface (WUI) Code *https://planningforhazards.com/wildland-urban-interface-code-wui-code.*

NFPA Firewise USA *https://www.nfpa.org/education-and-research/wildfire/firewise-usa*.

- *Riverine, Coastal, or Pluvial Flooding*—Federal Flood Risk Management Standard (FFRMS) (required as of January 1, 2024)
- *Wholistic Multihazard*—RELi is a holistic third-party rating system that can be used for both individual buildings and communities, addressing multi-hazards and deeper community resilience. *https://c3livingdesign.org/reli/*.

B. *Green Building Standards: (3–6 points).* The complex processes of design and construction of buildings have interwoven choices that have potential to protect the health, safety, and welfare of not only its occupants but also every part of the supply chain and lives of human beings within that ecosystem. Development has the potential to improve lives, create communities, elevate economies, and heal ecosystems if done well. Achieving certification from one or more of the green building standard programs listed below will yield a maximum of 3 points for achievement of an above-code, green building standard, with an additional 3 points possible for full zero energy achievements, for a total of 6 points maximum.

(i) *Green Building Program Participation (3 points)*

- EPA's Energy Star Multifamily Certification or Energy Star Next Gen *https://www.energystar.gov/partner_resources/residential_new/homes_prog_reqs/multifamily_national_page*.
- DOE Zero Energy Ready Homes *https://www.energy.gov/eere/buildings/zero-energy-ready-homes*.
- Earth Advantage *https://www.earthadvantage.org/*.
- Earthcraft Gold or Platinum *https://earthcraft.org/programs/earthcraft-house/*.
- Green Communities program by the Enterprise Community Partners (2020 Criteria, EGC + Zero Ready/Phius) *https://www.enterprisecommunity.org/solutions-and-innovation/green-communities*.
- Greenpoint Gold or Platinum. *https://www.greenpointrated.com/greenpoint-rated/*.
- The National Green Building Standard (NGBS)—Multifamily and Mixed Use (four levels of base certification, plus *NGBS Green + NET ZERO ENERGY CERTIFICATION) *https://www.homeinnovation.com/services/certification/green_homes/multifamily_certification*.
- International Living Future Institute (ILFI) Living Building Challenge (LBC 4.0—Core Building Certification, *Zero Energy, *Zero Carbon). *https://living-future.org/lbc/*.
- LEED V4 Homes and Multifamily Midrise, or LEED BD+C: Homes and Multifamily Lowrise LEED BD+C: Multifamily Midrise (four levels of certification, plus *LEED Zero) *https://www.usgbc.org/resources/leed-v4-homes-and-multifamily-midrise-current-version*.
- Passive House Institute US, Inc. (Phius Core, *Phius Zero) *https://multifamily.phius.org/service-category/phius-within-reach*.

(ii) *Zero Energy Buildings (3 points maximum).* Points will be awarded for achievements of deep energy efficiency and transitions toward Zero Energy Building Performance for projects that have already committed to compliance with at least Energy Star for Homes program, with the additional following performance achievement commitments. For Energy Star and other programs, a Home Energy Rating System (HERS score) is a potential pathway for assessment of energy performance achievement. A HERS score of 100 is the benchmark of an average home, and scores that are lower than 100 illustrate a percentage of improved performance from that average. A HERS 85 would mean that the unit performs 15% better than the average housing unit. A HERS 0 means that the housing unit has achieved net zero—that there is enough on-site renewable energy to cover its consumption needs. HERS 42 is an approximate benchmark that indicates that improved energy performance achievements in performance will require the addition of on-site renewable energy sources. Energy modeling that illustrates the achievements of the following progressively successful achievements will be awarded the following points:

- (1 point) HERS 42 or lower and all-electric
- (2 points) HERS 42 or lower, all-electric, and 10% on-site renewable energy
- (3 points) HERS 0 or lower, all-electric, and 100% on-site renewable energy

Applicants aspiring to achieve net zero energy are encouraged to choose a

program from the list of green building programs above that has a Zero Energy achievement adder or separately designed track. These programs have asterisks next to them and include programs such as the Phius Zero program, the ILFI Zero Energy or Zero Carbon Program, the NGBS Green + NET ZERO ENERGY CERTIFICATION or LEED Zero. Working within a guided program will assist the applicant in ensuring successful achievement of zero energy goals.

Applicants must submit the corresponding checklist, registrations in programs, and signed affidavits by the owner, the architect, applicable mechanical, electrical plumbing, and structural engineers, and other program-required green building professionals, energy modelers and raters as applicable to the programs selected for point consideration.

C. *Water Conservation (1 point).* One (1) point will be awarded for xeriscaping of site landscaping and/or water conservation in irrigation measures to include a recycled water (gray water or storm water) for landscape irrigation covering 50 percent or more of the property's site landscaping needs. In order to receive this point, the applicant's architect or consulting landscape architect must illustrate in narrative, draft specifications, and schematic drawings how this will be achieved.

D. *Property Management Credentials (1 point).* Projects may be awarded one (1) point if the designated property management company or individuals that will assume maintenance and operation responsibilities upon completion of construction work have a Credential for Green Property Management. Credentialing can be obtained from the National Apartment Association (NAA), National Affordable Housing Management Association, The Institute for Real Estate Management, U.S. Green Building Council Leadership in Energy and Environmental Design (USGBC LEED) for Operations and Maintenance, or another source with a certifiable credentialing program. Credentialing must be illustrated in the resume(s) of the property management team and included with the application in order to receive the point.

Additional requirement: All projects awarded scoring points for energy initiatives must enroll the project in the EPA Portfolio Manager program and the associated EPA Water Score program to track post construction energy consumption data as well as water usage. More information about this program may be found at: *https://www.energystar.gov/buildings/benchmark.*

F. Federal Award Administration Information

1. Review and Selection Process

All pre-applications must be received by the due dates specified in this Notice. Applications or application materials received after the deadline will not be considered. Each application will be reviewed for overall completeness, as well as compliance with eligibility and program requirements set forth in this Notice. If an application does not meet these requirements, it will be removed from consideration and will not be scored. For applications found ineligible or incomplete, RHS will send notices of ineligibility that provide notice of any applicable appeal rights under 7 CFR part 11.

RHS will rank all eligible and complete pre-applications nationwide by score, highest to lowest. Taking into account available funding, the 10 percent persistent poverty counties set-aside, and the 30 percent limitation per state, RHS will determine which pre-applications will be selected for further processing starting with the highest scoring pre-application. RHS will notify applicants with pre-applications found eligible and selected for further processing.

When proposals have an equal score and not all pre-applications can be funded, preference will be given first to Indian tribes as defined in § 3560.11, then local non-profit organizations or public bodies whose principal purposes include low-income housing and that meet the conditions of § 3560.55(c) and the following conditions:

- Is exempt from Federal income taxes as a public body or under section 501(c)(3) or 501(c)(4) of the Internal Revenue Code;
- Is not wholly or partially owned or controlled by a for-profit or limited-profit type entity;
- Whose members, or the entity, do not share an identity of interest with a for-profit or limited-profit type entity;
- Is not co-venturing with a for-profit or limited-profit type entity; and
- The entity or its members will not be receiving any direct or indirect benefits pursuant to the Low Income Housing Tax Credit Program (LIHTC).

If after all of the above evaluations are completed and there are two or more pre-applications that have the same score, and all cannot be funded, a lottery will be used to break the tie. The lottery will consist of the names of each pre-application with equal scores printed onto a same size piece of paper, which will then be placed into a receptacle that fully obstructs the view of the names. The Director of the RHS Production and Preservation Division, in the presence of two witnesses, will draw a piece of paper from the receptacle. The name on the piece of paper drawn will be the applicant to be funded.

If insufficient funds or RA/OA remain for the next ranked proposal, that applicant will be given a chance to modify their pre-application funding request to bring it within the remaining available funding. This will be repeated for the next ranked eligible proposal until an award can be made or the list is exhausted.

If a pre-application is selected and the applicant declines, the next highest ranked pre-application will be selected.

Applicants will be notified if there are insufficient funds available for the proposal, and such notification is not appealable.

2. Administrative and National Policy

All FLH loans and grants are subject to the restrictive-use requirements contained in 7 CFR 3560.72(a)(2).

For Section 516 Off-FLH grant awardees, a FLH grant agreement, prepared by RHS, must be dated and executed by the applicant on the date of closing. The grant agreement will remain in effect for so long as there is a need for the housing and will not expire until an official determination has been made by RHS that there is no longer a need for the housing.

The applicant's Board of Directors must adopt a resolution in a form acceptable to the RHS stating that the Board has read and fully understands the grant agreement and understands that the grant agreement will remain in effect until RHS determines that there is no longer a need for the housing.

3. Reporting

Borrowers must maintain separate financial records for the operation and maintenance of the project and for tenant services. Tenant services will not be funded by RHS. Funds allocated to the operation and maintenance of the project may not be used to supplement the cost of tenant services, nor may tenant service funds be used to supplement the project operation and maintenance. Detailed financial reports regarding tenant services will not be required unless specifically requested by RHS, and then only to the extent necessary for RHS and the borrower to discuss the affordability (and competitiveness) of the service provided to the tenant. The project audit, or

verification of accounts on Form RD 3560–10, ''Multifamily Housing Borrower Balance Sheet'' together with an accompanying Form RD 3560–7, ''Multiple Family Housing Project Budget/Utility Allowance'' must allocate revenue and expenses between project operations and the tenant services component.

G. Final Application and Submission Information

1. Final Application Submission Process

The pre-applications that are selected for further processing will be invited to submit final applications. In the event that a pre-application is selected for further processing and the applicant declines, the next highest ranked pre-application will be selected for further processing. The final applications will be due by the dates specified in this Notice.

All final applications must be submitted to RHS and must meet the requirements of this Notice. The final application submission process will be the same as previously explained and outlined for the pre-application submission process in Section C 1, ''Pre-Application and Submission Information.'' Final applications that are incomplete as of the deadline will be rejected and returned to the applicant. No final applications or application materials will be accepted after the deadline unless the date and time are extended by another Notice published in the **Federal Register**.

A final application in accordance with this Notice must be submitted and approved by RHS prior to the obligation of funds. RHS will follow this Notice for the processing of final applications. Awards will require a determination from RHS that the project is feasible and meets all applicable program requirements as stated in this Notice and in RHS regulations. If there are insufficient funds available to fund all eligible final applications, awards will be made in accordance with the Review and Selection Process described in Section F.1 of this Notice.

2. Final Application Requirements

In addition to the items listed below, the final application must contain any document that was submitted within the pre-application that has since changed or needs to be updated. The Agency will advise the applicant of any documents that are required to be updated. The applicant may also change or update additional documents at the applicant's discretion. The following new documents must be submitted:

(a) A narrative that contains a description of any changes from the pre-application submission.

(b) Provide the following forms and certifications:

a. Form RD 400–1, ''Equal Opportunity Agreement'' can be found at: *https://forms.sc.egov.usda.gov/eForms/browseFormsAction.do?pageAction=displayPDF&formIndex=1.*

b. Form RD 400–6, ''Compliance Statement'' can be found at: *https://forms.sc.egov.usda.gov/eForms/browseFormsAction.do?pageAction=displayPDF&formIndex=4.*

(c) Provide the following financial and organizational information:

a. Final organizational documents and Certificate of Good Standing.

b. Description of how the applicant will meet the equity contribution requirement as applicable.

c. Description of how the applicant will provide the two percent initial operating and maintenance reserve requirement.

(d) Provide the following Project information:

a. Current Preliminary title insurance commitment/binder.

b. Land survey with flood plain certification.

(e) Provide the following construction documents:

a. Final plans and specifications along with the proposed manner of construction, if available. The housing must meet RHS's design and construction standards contained in 7 CFR part 1924, subparts A and C, and must also meet all applicable Federal, state, and local accessibility standards and be in compliance with all current building codes. The final plans and specifications, along with the proposed manner of construction, are not required to be submitted prior to the final application deadline. However, these documents must be submitted prior to the approval of the final application. The Agency will communicate to applicants the deadline to submit these documents.

b. Final construction planning, bidding, and contract documents, including, but not limited to the construction contract and architectural agreement, if available. The final construction planning, bidding, and contract documents, including the construction contract and architectural agreement, etc., are not required to be submitted prior to the final application deadline. However, these documents must be submitted prior to the approval of the final application. The Agency will communicate to applicants the deadline to submit these documents.

(f) Provide the following financing information:

a. All applications that propose the use of any leveraged funds should submit firm commitment letters within their final application, if available. Applicants dependent upon third-party funding, including but not limited to local-, state-, and federal resources through competitive and noncompetitive application rounds, must obtain and submit to the Agency a satisfactory commitment of those funds, as determined by the Agency, upon receipt, but no later than the twelve-month time frame, as specified in the award commitment. An extension of the award commitment of up to six months may be given, at the sole discretion of the Agency, and will be based on project viability, current program demand, and availability of program funds. Applicants unable to satisfy this condition of the award commitment will be subject to having the award rescinded and will be required to reapply in future funding announcements.

(g) Provide the following budget and management information:

a. Final proposed Form RD 1924–13, ''Estimate and Certificate of Actual Cost.''

b. Final proposed post-construction operating budget utilizing Form RD 3560–7, ''Multiple Family Housing Project Budget/Utility Allowance.''

c. Form RD 3560–13, ''Multifamily Project Borrower's/Management Agent's Management Certification'' if applicable, can be found at: *https://forms.sc.egov.usda.gov//efcommon/eFileServices/eForms/RD3560-13.PDF.*

d. Management plan with all attachments including the proposed record keeping system, the proposed lease with an attorney's certification, if applicable, and the proposed occupancy rules.

e. Management Agreement, if applicable.

f. For projects that have five or more rental units, an Affirmative Fair Housing Marketing Plan (AFHMP) as defined in 24 CFR part 200, subpart M, in accordance with 7 CFR 1901.203(c). The AFHMP will reflect that occupancy is open to all qualified ''domestic farm laborers,'' regardless of which farming operation they work for, and that they will not discriminate on the basis of race, color, sex, age, disability, marital or familial status or National origin in regard to the occupancy or use of the units. The AFHMP must include all attachments and supporting documentation.

Indian Tribes, including instrumentalities of such Indian Tribes,

are not required to comply with certain aspects of the AFHMP guidelines above, and may allow members of Indian Tribes to be given preference for housing. The Native American Housing Enhancement Act of 2005 (NAHEA), Public Law 109–136, Codified at 25 U.S.C. 4101 *et seq.,* amended Title V of the Housing Act of 1949 (42 U.S.C. 1471 *et seq*.) which created the housing programs administered by the United States Department of Agriculture, Rural Housing Service. The NAHEA excludes Indian Tribes, including instrumentalities of such Indian Tribes, from the requirement to comply with Title VI of the Civil Rights Act of 1964, and Title VIII of the Civil Rights Act of 1968, allowing members of Indian Tribes to be given preference for housing in accordance to the Native American Housing Assistance and Self Determination Act of 1996 (25 U.S.C. 4101 *et seq*.).

The NAHEA does not exempt Indian Tribes from complying with other laws that apply to recipients of Federal financial assistance. Therefore, Federally recognized Indian Tribes must continue to comply with Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title IX of the Education Amendments Act of 1972, where applicable. The NAHEA also does not exempt Indian Tribes from complying with the accessibility requirements of the Fair Housing Amendments Act (FHAA) of 1988. This Act amended Title VIII of the Fair Housing Act of 1968, to include disability and familial status. Therefore, the NAHEA did not specifically exempt Indian Tribes from the accessibility requirements of the FHAA. The requirements to construct multi-family housing properties accessible to, or adaptable for, persons with disabilities are to be followed. This requirement shall be consistent with 7 CFR 3560.60(d).

(h) Provide the following third-party reports:

a. Acceptable appraisal. Appraisals for applications requesting an Off-FLH loan may be conditioned but will be required prior to closing. Please refer to the Agency's appraisal guidance under the ''To Apply'' tab on the Off-Farm Labor Housing Direct Loans & Grants website (*https://www.rd.usda.gov/programs-services/multifamily-housing-programs/farm-labor-housing-direct-loans-grants#to-apply*).

b. A Capital Needs Assessment (CNA) is not required. When underwriting new construction applications, the Agency will require an initial and ongoing capitalization of the replacement reserve account to address future replacement reserve-eligible needs. This shall be reflected in the applicant's development budget as an Initial Deposit for Replacement Reserve (IDRR) in an amount equal to $250 per-unit. The Annual Deposit for Replacement Reserve (ADRR) requirements shall be reflected in the operating budget and shall be the lower of the following:

i. 0.2% of the Total Development Costs (TDC) per unit.

ii. $450 per unit.

iii. An amount determined to be acceptable, at the sole discretion of the agency based on the underwriting analysis, that is required by another participating state or federal: program, lender, or investor in the proposed transaction.

H. Documentation of Underwriting and Costs

All final applications including the loan and/or grant requests will be analyzed using an underwriting template that RHS has developed. A complete analysis and underwriting of the proposed transaction will be completed to ensure all regulatory requirements are met and to ensure overall project feasibility as well as to determine the minimum amount of assistance that is needed for the proposal. Proposals that are determined not to be feasible will not receive funding.

Questions regarding this Notice may be directed to Jonathan Bell, Branch Director, Processing and Report Review Branch, Production and Preservation Division, Multifamily Housing Program, Rural Development, United States Department of Agriculture, or email: *MFHprocessing1@usda.gov* or phone at: 800–292–8293.

I. Technical Assistance Providers

Please be aware that TA services may not be used to reimburse a non-profit or public body applicant for technical services provided by a non-profit organization, with housing and/or community development experience, to assist the non-profit applicant entity in the development and packaging of its loan/grant docket and project. In addition, TA will not be funded by RHS when an identity of interest exists between the TA provider and the loan or grant applicant. Identity of interest is defined in 7 CFR 3560.11.

J. Applicant Assistance

The RHS plans to host a workshop to discuss this Notice, the application process, and the borrower's responsibilities, among other topics. Further information regarding the date and time of this workshop, as well as information on how to participate in the workshop will be issued at a later date in a public notice via GovDelivery. Click here to sign up for notifications from Rural Development.

Prior to the submission of an application, the applicant is encouraged to schedule a concept meeting with RHS to discuss the application process, the specifics of the proposed project, and the borrower's responsibilities under the Off-FLH new construction program, among other topics.

Concept meetings will be scheduled between the dates of May 6, 2024 and May 31, 2024. No concept meetings will be scheduled outside of the specified dates.

Requests for concept meetings can be sent to the following email address: *MFHprocessing1@usda.gov* and must be received by May 20, 2024. The email must contain the following information:

(1) *Subject line:* ''Off-FLH New Construction Concept Call Request.''

(2) *Body of email:* Borrower Name, Project Name, Borrower Contact Information, Project State.

(3) *Request language:* ''We request to schedule a concept call to discuss our proposed application for the Off-FLH New Construction NOSA.''

K. Equal Opportunity Survey

RHS will provide applicants the voluntary OMB 1890–0014 form, ''Survey on Ensuring Equal Opportunity for Applicants,'' (or other forms currently being used by RHS) and ask the applicant to complete it and return it to RHS.

L. Substantial Portion of Income From Farm Labor

The Notice restates the requirement that domestic farm laborers must receive a substantial portion of their income from ''farm labor.'' Further explanation of this requirement can be found in the regulation at 7 CFR 3560.576(b)(2). The term ''farm labor'' is defined in 7 CFR 3560.11.

M. Build America, Buy America Act

Funding to Non-Federal Entities. Awardees that are Non-Federal Entities, defined pursuant to 2 CFR 200.1 as any State, local government, Indian tribe, Institution of Higher Education, or nonprofit organization, shall be governed by the requirements of Section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (Pub. L. 117–58), and its implementing regulations at 2 CFR part 184. Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available

online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

N. Equal Opportunity and Non-Discrimination Requirements

In accordance with federal civil rights law and USDA civil rights regulations and policies, USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Mission Area, agency, staff office; or the 711 Relay Service. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, a complainant should complete Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights about the nature and date of an alleged civil rights violation.

The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* United States Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) *Fax:* (202) 690–7442; or

(3) *Email at: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Joaquin Altoro,

Administrator, Rural Housing Service.

[FR Doc. 2024–08155 Filed 4–18–24; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Regional Economic Development Data Collection Instrument

AGENCY: Economic Development Administration, Department of 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 18, 2024.

ADDRESSES: Interested persons are invited to submit written comments via email to Hallie Davis, Program and Management Analyst, Economic Development Administration (EDA), at *HDavis1@eda.gov* or *PRAcomments@doc.gov.* 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 Hallie Davis, Program and Management Analyst, EDA, at *HDavis1@eda.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

EDA leads the Federal economic development agenda by promoting innovation and competitiveness and preparing American regions for growth and success in the worldwide economy. Guided by the basic principle that sustainable economic development should be driven locally, EDA works directly with communities and regions to help them build the capacity for economic development based on local business conditions and needs. Section 28 of the Stevenson-Wydler Technology Innovation Act of 1980 (Regional Technology and Innovation Hub Program (15 U.S.C. 3722a) is the legal authority under which EDA awards financial assistance and designee status under the Fiscal Year (FY) 23 Regional Technology and Innovation Hub Program (''Tech Hubs''). Under Tech Hubs, EDA seeks to strengthen U.S. economic and national security through place-based investments in regions with the assets, resources, capacity, and potential to become globally competitive, within approximately ten years, in the technologies and industries of the future—and for those industries, companies, and the good jobs they create to start, grow, and remain in the U.S. in order to support the growth and modernization of U.S. manufacturing, improve commercialization of the domestic production of innovative research, and strengthen U.S. economic and national security. Tech Hubs is a two-phase program: in Phase 1, EDA funded Strategy Development grants and designated 31 regions as Tech Hubs. In Phase 2, designated Tech Hubs are eligible to compete for funding for implementation projects. Further information on Tech Hubs can be found at *www.eda.gov.*

The purpose of this notice is to seek comments from the public and other Federal agencies on a request for a new information collection for designated Tech Hubs to help ensure that Tech Hub investments are evidence-based, data-driven, and accountable to participants and the public.

Lead consortium members of the 31 designated Tech Hubs will submit identified program metrics and qualitative information to help assess specific program objectives. A one-time questionnaire will be sent to each of the Tech Hubs consortium leads which will gather the relevant data and stories for each of the 31 Tech Hubs designee consortia, resulting in consortia regional impact evaluation, resources, and tools for regional economic development decision-makers. The 31 designated Tech Hubs will provide information on the following objectives:

(1) Accelerating technology innovation, commercialization, demonstration, and deployment, which may include information on the number of patents filed, licensing agreements, approximate levels of research and development expenditures, adoption of

new technologies, and acceleration of current technologies.

(2) Enabling infrastructure and advancing manufacturing, which may include information on specific facility information.

(3) Integrating an agile workforce system, which may include information on skills needed by employers, available training, hard-to-fill vacancies, policies and strategies for worker retention, and strategies for engagement with underserved workers.

(4) Increasing business and entrepreneurial capacity, which may include assessing employer competitiveness, relationships with federal, state, and local entities, current partnerships, and information about sources of capital to start and grow businesses and to adopt innovative approaches and technologies.

(5) Strengthening national security, which may include information on procurement processes, critical inputs, sourcing, supply chains, and strategic implications of technologies and their use cases.

Tech Hubs designees must submit this data one time to provide a baseline status of the Tech Hub and to help assess the results of designee status as well as potential future federal investments.

EDA is particularly interested in public comment on how the proposed data collection will support the assessment of job quality, including in ways that rely on pairing this information administrative data for analysis and other ways to minimize burden, or if alternative information should be considered.

II. Method of Collection

Data will be collected electronically.

III. Data

OMB Control Number: None: new information collection.

Form Number(s): None: new information collection.

Type of Review: Regular submission: new information collection.

Affected Public: Tech Hubs designees, which may include a (n): Institution of higher education, including Historically Black Colleges and Universities, Tribal Colleges or Universities, and Minority-Serving Institutions; State, territorial, local or Tribal governments or other political subdivisions of a State, including State and local agencies, or a consortium thereof; Industry groups or firms in relevant technology, innovation, or manufacturing sectors; Economic development organizations or similar entities that are focused primarily on improving science, technology, innovation, entrepreneurship, or access to capital; Labor organizations or workforce training organizations, which may include State and local workforce development boards; Economic development entities with relevant expertise, including a district organization; Organizations that contribute to increasing the participation of underserved populations in science, technology, innovation, and entrepreneurship; Venture development organizations; Organizations that promote local economic stability, high wage domestic jobs, and broad-based economic opportunities, such as employee ownership membership associations and State or local employee ownerships and cooperative development centers, financial institutions and investment funds, including community development financial institutions and minority depository institutions; Elementary schools and secondary schools, including area career and technical education schools; National laboratories; Federal laboratories; Manufacturing extension centers; Manufacturing U.S.A. Institutes; Transportation planning organizations; A cooperative extension services; Organizations that represent the perspectives of underserved communities in economic development initiatives; and Institutions receiving an award under the National Science Foundation's (NSF) Regional Innovation Engines Program.

Estimated Number of Respondents: Consortium Lead Members/Tech Hubs Designee Consortia: 31 respondents, responding once.

Estimated Time per Response: Consortium Lead Members/Tech Hubs Designee Consortia: 3 hours.

Estimated Total Annual Burden Hours: 93 hours.

Type of respondent (one time)	Number of respondents	Hours per response (hours)	Number of responses per year	Total estimated time (hours)
Lead Consortium Members/Tech Hubs Designee Consortia	31	3	1 (Once)	93
Total	31	3	1	93

Estimated Total Annual Cost to Public: $5,769.72 (cost assumes application of U.S. Bureau of Labor Statistics second quarter 2022 mean hourly employer costs for employee compensation for professional and related occupations of $62.04).

Respondent's Obligation: Mandatory for Consortium Lead Members.

Legal Authority: Stevenson Wydler Technology Innovation Act of 1980, section 28 (15 U.S.C. 3722a).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary of Economic Affairs, Commerce Department.

[FR Doc. 2024–08443 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–34–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Simple Network Application Process and Multipurpose Application Form

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on December 8, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: Bureau of Industry and Security, Department of Commerce.

Title: Simple Network Application Process and Multipurpose Application Form.

OMB Control Number: 0694–0088.

Form Number(s): BIS–748P, BIS–748P–A, BIS–748P–B.

Type of Request: Revision of a current information collection.

Number of Respondents: 78,360.

Average Hours per Response: 29.7.

Burden Hours: 38,826.

Needs and Uses: Section 1761(h) under the Export Control Reform Act (ECRA) of 2018, authorizes the President and the Secretary of Commerce to issue regulations to implement the ECRA including those provisions authorizing the control of exports of U.S. goods and technology to all foreign destinations, as necessary for the purpose of national security, foreign policy and short supply, and the provision prohibiting U.S. persons from participating in certain foreign boycotts. Export control authority has been assigned directly to the Secretary of Commerce by the ECRA and delegated by the President to the Secretary of Commerce. This authority is administered by the Bureau of Industry and Security through the Export Administration Regulations (EAR). BIS administers a system of export, re-export, and in-country transfer controls in accordance with the EAR. In doing so, BIS requires that parties wishing to engage in certain transactions apply for licenses, submit Encryption Review Requests, or submit notifications to BIS. BIS also reviews, upon request, specifications of various items and determines their proper classification under the EAR.

Affected Public: Business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Section 1761(h) of the Export Control Reform Act (ECRA).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0694–0088.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08424 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Miscellaneous Short Supply Activities

AGENCY: Bureau of Industry and Security, Department of 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 18, 2024.

ADDRESSES: Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov*). Please reference OMB Control Number 0694–0102 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 Mark Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection comprises two rarely used short supply activities: ''Registration of U.S. Agricultural Commodities for Exemption from Short Supply Limitations on Export (USAG)'', and ''Petitions for the Imposition of Monitoring or Controls on Recyclable Metallic Materials; Public Hearings (Petitions).'' Under provisions of sections 754.6 and 754.7 of the Export Administration Regulations (EAR), agricultural commodities of U.S. origin purchased by or for use in a foreign country and stored in the United States for export at a later date may voluntarily be registered with the Bureau of Industry and Security for exemption from any quantitative limitations on export that may subsequently be imposed under the EAR for reasons of short supply.

II. Method of Collection

Any entity, including a trade association, firm or certified or recognized union or group of workers, which is representative of an industry or a substantial segment of an industry which processes metallic materials capable of being recycled with respect to which an increase in domestic prices or a domestic shortage, either of which results from increased exports, has or may have a significant adverse effect on the national economy or any sector thereof, may submit a written petition to BIS requesting the monitoring of exports, or the imposition of export controls, or both, with respect to such materials.

III. Data

OMB Control Number: 0694–0102.

Form Number(s): None.

Type of Review: Extension of a current information collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2.

Estimated Time per Response: 100.5 hours.

Estimated Total Annual Burden Hours: 201.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Voluntary.

Legal Authority: 754.6 and 754.7 of the Export Administration Regulations (EAR).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08423 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Request for Investigation Under Section 232 of the Trade Expansion Act

AGENCY: Bureau of Industry and Security, 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 18, 2024.

ADDRESSES: Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov*). Please reference OMB Control Number 0694–0120 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 Mark Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Upon request, BIS will initiate an investigation to determine the effects of imports of specific commodities on the national security and will make the findings known to the President for possible adjustments to imports through tariffs. The findings are made publicly available and are reported to Congress. The purpose of this collection is to account for the public burden associated with the surveys distributed to determine the impact on national security. These surveys are designed to gather information so that BIS can evaluate the impact of foreign imports of strategic commodities on the national security of the United States. Each Section 232 study is for a specific commodity or technology that is required for national security reasons (*e.g.,* precision bearings, microprocessors, machine tools, etc). These surveys attempt to determine the size of the domestic U.S. industry, how the domestic U.S. industry has been effected by foreign imports, demand for the commodity during peacetime, demand during wartime, the ability of the U.S. domestic industry to meet a surge in demand during wartime, and the potential impact on U.S. national security if wartime demand cannot be met by domestic U.S. suppliers.

II. Method of Collection

BIS custom-designs unique instruments for each Section 232 survey. The method of collection could be via paper or electronic.

III. Data

OMB Control Number: 0694–0120.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 800.

Estimated Time Per Response: 15 hours.

Estimated Total Annual Burden Hours: 12,000.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Mandatory.

Legal Authority: Section 232 of the Trade Expansion Act.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number,

email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–08422 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–824]

Boltless Steel Shelving Units Prepackaged for Sale From Malaysia: Final Affirmative Determination of Sales at Less-Than-Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of boltless steel shelving units prepackaged for sale (boltless steel shelving) from Malaysia are being, or are likely to be, sold in the United States at less-than-fair value (LTFV). The period of investigation is April 1, 2022, through March 31, 2023.

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Samuel Frost, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–8180.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in this investigation, in which we also postponed the final determination until April 12, 2024.[1] We invited parties to comment on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation is boltless steel shelving from Malaysia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination.*

Verification

In the *Preliminary Determination,* Commerce stated that it intended to verify the information relied upon in making its final determination.[5] However, due to circumstances discussed in the Issues and Decision Memorandum, Commerce declined to conduct any verifications in this investigation.[6]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

We have made certain changes since the *Preliminary Determination.* For a discussion of these changes, *see* the Issues and Decision Memorandum.

Use of Adverse Facts Available

As discussed in the *Preliminary Determination,* Commerce assigned to certain mandatory respondents in this investigation, Nanjing Chervon Industry Co., Ltd. (Nanjing Chervon) and Wuxi Bote Electrical Apparatus Co., Ltd. (Wuxi Bote), estimated weighted-average dumping margins on the basis of adverse facts available (AFA), pursuant to sections 776(a) and (b) of the Tariff Act of 1930, as amended (the Act).[7] There is no new information on the record that would cause us to revisit our decision in the *Preliminary Determination.* Accordingly, for this final determination, we continue to find that the application of AFA pursuant to sections 776(a) and (b) of the Act is warranted with respect to Nanjing Chervon and Wuxi Bote.

Moreover, in the *Preliminary Determination,* Commerce calculated an estimated weighted-average dumping margin of zero for Eonmetall Industries Sdn. Bhd. (EMI).[8] However, following the *Preliminary Determination,* we determined that information submitted by EMI in this investigation is unverifiable.[9] Therefore, as explained in the Issues and Decision Memorandum, we find that EMI failed to provide verifiable information and did not cooperate to the best of its ability in this proceeding. As such, for this final determination, we determine it is also appropriate to apply a dumping margin based on AFA to EMI, in accordance with sections 776(a) and (b) of the Act. For further discussion, *see* the Issues and Decision Memorandum.

[1] *See Boltless Steel Shelving Units Prepackaged for Sale from Malaysia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 88 FR 83386 (November 29, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Decision Memorandum for the Final Affirmative Determination of Sales at Less-Than-Fair-Value Boltless Steel Shelving Units Prepackaged for Sale from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated November 13, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Scope Decision Memorandum,'' dated April 12, 2024 (Final Scope Decision Memorandum).

[5] *See Preliminary Determination,* 88 FR at 83388.

[6] *See* Issues and Decision Memorandum at Comment 1.

[7] *See Preliminary Determination,* 88 FR at 83387.

[8] *Id.*

[9] *See* Memorandum, ''Verification Cancellation and Establishment of Briefing Schedule,'' dated January 22, 2024.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act.

Pursuant to section 735(c)(5)(B) of the Act, if the estimated weighted-average dumping margins established for all exporters and producers individually examined are zero, *de minimis* or determined based entirely on facts otherwise available, Commerce may use any reasonable method to establish the estimated weighted-average dumping margin for all other producers or exporters. Consequently, pursuant to section 735(c)(5)(B) of the Act, Commerce's normal practice under these circumstances has been to calculate the all-others rate as a simple average of the alleged dumping margins(s) from the petition.[10] In the Petition, the petitioner provided two dumping margins, 35.45 percent and 81.12 percent.[11] Therefore, in the absence of any estimated weighted-average dumping margin on the record of this investigation that is not zero, *de minimis,* or determined entirely under section 776 of the Act, we are assigning the simple average of the two dumping margins in the Initiation Checklist, *i.e.,* 58.29 percent, as the all-others rate.[12]

Final Determination

The final estimated dumping margins are as follows:

Producer/exporter	Estimated dumping margins (percent)
Eonmetall Industries Sdn. Bhd	*81.12
Nanjing Chervon Industry Co., Ltd	*81.12
Wuxi Bote Electrical Apparatus Co., Ltd	*81.12
All Others	58.29

*Rate based on facts available with adverse inferences.

Disclosure

Normally, Commerce will disclose to the parties in a proceeding the calculations performed in connection with a final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce relied solely on the application of AFA for the mandatory respondents in this investigation, there are no calculations to disclose for this final determination.

Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after November 29, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**, except for those entries of subject merchandise produced and exported by EMI.

In accordance with section 735(c)(1)(B) of the Act, for EMI, Commerce will direct CBP to suspend liquidation of all subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after the date of publication of this notice in the **Federal Register**.[13]

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) the cash deposit rate for the respondents listed above will be equal to the company-specific estimated dumping margins determined in this final determination; (2) if the exporter is not a respondent identified above but the producer is, then the cash deposit rate will be equal to the company-specific estimated dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated dumping margin.

These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission (ITC) of our final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of boltless steel shelving from Malaysia no later than 45 days after this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded or canceled, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Suspension of Liquidation'' section.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is

[10] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 21909, 21912 (April 23, 2008), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; *see also Notice of Final Determination of Sales at Less Than Fair Value: Raw Flexible Magnets from Taiwan,* 73 FR 39673, 39674 (July 10, 2008); and *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances,* 78 FR 79670, 79671 (December 31, 2013), unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* 79 FR 14476, 14477 (March 14, 2014).

[11] *See* Edsal Manufacturing Co., Inc. (Petitioner)'s Letter, ''Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and Vietnam—Petition for the Imposition of Antidumping Duties'' dated April 25, 2023 (Petition) at Volume III; *see also* Petitioner's Letter, ''Boltless Steel Shelving Units Prepackaged for Sale from Malaysia—Petitioner's Response to the Department's Second Supplemental Questionnaire Regarding Volume III of the Petition for the Imposition of Antidumping Duties on Imports from Malaysia,'' dated May 8, 2023.

[12] *See* Checklist, ''Antidumping Duty Investigation Initiation Checklist: Boltless Steel Shelving Units Prepackaged for Sale from Malaysia,'' dated May 15, 2023 (Initiation Checklist), at 7.

[13] For additional discussion of this issue, *see* the Issues and Decision Memorandum at Comment 2.

hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This final determination and notice are issued and published in accordance with sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: April 12, 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 I—Scope of the Investigation

The scope of this investigation covers boltless steel shelving units prepackaged for sale, with or without decks (boltless steel shelving). The term ''prepackaged for sale'' means that, at a minimum, the steel vertical supports (*i.e.,* uprights and posts) and steel horizontal supports (*i.e.,* beams, braces) necessary to assemble a completed shelving unit (with or without decks) are packaged together for ultimate purchase by the end-user. The scope also includes add-on kits. Add-on kits include, but are not limited to, kits that allow the end-user to add an extension shelving unit onto an existing boltless steel shelving unit such that the extension and the original unit will share common frame elements (*e.g.,* two posts). The term ''boltless'' refers to steel shelving in which the vertical and horizontal supports forming the frame are assembled primarily without the use of nuts and bolts, or screws. The vertical and horizontal support members for boltless steel shelving are assembled by methods such as, but not limited to, fitting a rivet, punched or cut tab, or other similar connector on one support into a hole, slot or similar receptacle on another support. The supports lock together to form the frame for the shelving unit, and provide the structural integrity of the shelving unit separate from the inclusion of any decking. The incidental use of nuts and bolts, or screws to add accessories, wall anchors, tie-bars or shelf supports does not remove the product from scope. Boltless steel shelving units may also come packaged as partially assembled, such as when two upright supports are welded together with front-to-back supports, or are otherwise connected, to form an end unit for the frame. The boltless steel shelving covered by this investigation may be commonly described as rivet shelving, welded frame shelving, slot and tab shelving, and punched rivet (quasi-rivet) shelving as well as by other trade names. The term ''deck'' refers to the shelf that sits on or fits into the horizontal supports (beams or braces) to provide the horizontal storage surface of the shelving unit.

The scope includes all boltless steel shelving meeting the description above, regardless of: (1) vertical support or post type (including but not limited to open post, closed post and tubing); (2) horizontal support or beam/brace profile (including but not limited to Z-beam, C-beam, L-beam, step beam and cargo rack); (3) number of supports; (4) surface coating (including but not limited to paint, epoxy, powder coating, zinc and other metallic coating); (5) number of levels; (6) weight capacity; (7) shape (including but not limited to rectangular, square, and corner units); (8) decking material (including but not limited to wire decking, particle board, laminated board or no deck at all); or (9) the boltless method by which vertical and horizontal supports connect (including but not limited to keyhole and rivet, slot and tab, welded frame, punched rivet and clip).

Specifically excluded from the scope are:

- wall-mounted shelving, defined as shelving that is hung on the wall and does not stand on, or transfer load to, the floor. The addition of a wall bracket or other device to attach otherwise freestanding subject merchandise to a wall does not meet the terms of this exclusion;
- wire shelving units, which consist of shelves made from wire that incorporates both a wire deck and wire horizontal supports (taking the place of the horizontal beams and braces) into a single piece with tubular collars that slide over the posts and onto plastic sleeves snapped on the posts to create the finished shelving unit;
- bulk-packed parts or components of boltless steel shelving units; and
- made-to-order shelving systems.

Subject boltless steel shelving enters the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 9403.20.0075. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–08374 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–846]

Boltless Steel Shelving Units Prepackaged for Sale From Thailand: Final Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that boltless steel shelving units prepackaged for sale (boltless steel shelving) from Thailand are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2022, through March 31, 2023.

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Fred Baker, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in this investigation, in which we also postponed the final determination until April 12, 2024.[1] On January 2, 2024, Commerce published in the **Federal Register** its *Amended Preliminary Determination.*[2] We published a correction to the *Preliminary Determination* and *Amended Preliminary Determination* on January 24, 2024.[3] We invited parties to comment on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a

[1] *See Boltless Steel Shelving Units Prepackaged for Sale from Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 88 FR 83389 (November 29, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See Boltless Steel Shelving Units Prepackaged from Thailand: Amended Preliminary Determination of Sales at Less-Than-Fair-Value,* 89 FR 62 (January 2, 2024) (*Amended Preliminary Determination*), and accompanying Amended Preliminary Determination Analysis Memorandum.

[3] *See Boltless Steel Shelving Units Prepackaged for Sale from Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Amended Preliminary Determination of Sales at Less Than Fair Value; Correction,* 89 FR 4591 (January 24, 2024) (*Correction Notice*).

full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[4] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The products covered by this investigation are boltless steel shelving from Thailand. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[5] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[6] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination.*

Verification

Commerce verified the sales and cost information submitted by Bangkok Sheet Metal Public Co., Ltd. (Bangkok Sheet) and Siam Metal Tech Co., Ltd. (Siam Metal) for use in our final determination, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the home market sales and cost of production responses submitted by Bangkok Sheet and Siam Metal. We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by Bangkok Sheet and Siam Metal.[7]

Analysis of Comments Received

All issues raised in the case briefs and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

We have made certain changes to the margin calculations for the Bangkok Sheet and Siam Metal since the *Preliminary Determination.* In addition, for both Bangkok Sheet and Siam Metal, we made changes certain changes based on minor corrections accepted during the cost and sales verifications. *See* the Issues and Decision Memorandum for a discussion of these changes.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually examined exporters and producers, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act, *i.e.,* facts otherwise available.

In this investigation, we calculated an individual estimated weighted-average dumping margin for Bangkok Sheet that is not zero, *de minimis,* or determined entirely on the basis of facts available.[8] We also calculated a dumping margin for Siam Metal that is zero. Consequently, Commerce is assigning the estimated weighted-average dumping margin calculated for Bangkok Sheet to all other producers and exporters of the merchandise under consideration, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Exporter/Producer	Estimated weighted-average dumping margin (percent)
Bangkok Sheet Metal Public Co., Ltd.	2.75
Siam Metal Tech Co., Ltd.	0.00
All Others	2.75

Disclosure

Commerce intends to disclose its calculations performed to interested parties in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after November 29, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**.

Because the estimated weighted-average dumping margin for Siam Metal as the producer and exporter is zero, entries of shipments of subject merchandise that are produced and exported by Siam Metal will not be subject to suspension of liquidation or cash deposit requirements. Accordingly, Commerce will direct CBP not to suspend liquidation of entries of subject merchandise produced and exported by Siam Metal. In accordance with section 735(a)(4) of the Act and 19 CFR 351.204(e)(1), should the investigation result in an antidumping duty order pursuant to section 736 of the Act, entries of shipments of subject merchandise from this producer/exporter combination will be excluded from the order. However, entries of shipments of subject merchandise from this company in any other producer/exporter combination, or by third parties that sourced subject merchandise from the excluded producer/exporter combination, will be subject to suspension of liquidation at the all-others rate.

[4] *See* Memorandum, ''Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Thailand,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[5] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated November 13, 2023 (Preliminary Scope Decision Memorandum).

[6] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Scope Decision Memorandum,'' dated April 12, 2024 (Final Scope Decision Memorandum).

[7] *See* Memoranda, ''Verification of the Sales Response of Bangkok Sheet Metal Public Co., Ltd.,'' dated March 12, 2024; ''Verification of the Sales Response of Siam Metal Tech Co., Ltd.,'' dated March 12, 2024; ''Verification of the Cost Response of Siam Metal Tech Co., Ltd. in the Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged (BSS) from Thailand'' dated March 11, 2024; and, ''Verification of the Cost Response of Bangkok Sheet Metal Public Co., Ltd. in the Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged from Thailand'' dated March 12, 2024.

[8] *See Amended Preliminary Determination,* 89 FR at 62.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin as follows: (1) the cash deposit rate for the respondents listed in the table above is equal to the company-specific estimated weighted-average dumping margin listed for the respondent in the table; (2) if the exporter is not a respondent identified in the table above but the producer is, then the cash deposit rate is equal to the company-specific estimated weighted-average dumping margin listed for the producer of the subject merchandise in the table above; and (3) the cash deposit rate for all other producers and exporters is equal to the all-others estimated weighted-average dumping margin listed in the table above.

These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because Commerce's final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of boltless steel shelving from Thailand no later than 45 days after this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded or canceled, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

This notice serves as the final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This determination is issued and published in accordance with sections 735(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: April 12, 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 I—Scope of the Investigation

The scope of this investigation covers boltless steel shelving units prepackaged for sale, with or without decks (boltless steel shelving). The term ''prepackaged for sale'' means that, at a minimum, the steel vertical supports (*i.e.,* uprights and posts) and steel horizontal supports (*i.e.,* beams, braces) necessary to assemble a completed shelving unit (with or without decks) are packaged together for ultimate purchase by the end-user. The scope also includes add-on kits. Add-on kits include, but are not limited to, kits that allow the end-user to add an extension shelving unit onto an existing boltless steel shelving unit such that the extension and the original unit will share common frame elements (*e.g.,* two posts). The term ''boltless'' refers to steel shelving in which the vertical and horizontal supports forming the frame are assembled primarily without the use of nuts and bolts, or screws. The vertical and horizontal support members for boltless steel shelving are assembled by methods such as, but not limited to, fitting a rivet, punched or cut tab, or other similar connector on one support into a hole, slot or similar receptacle on another support. The supports lock together to form the frame for the shelving unit, and provide the structural integrity of the shelving unit separate from the inclusion of any decking. The incidental use of nuts and bolts, or screws to add accessories, wall anchors, tie-bars or shelf supports does not remove the product from scope. Boltless steel shelving units may also come packaged as partially assembled, such as when two upright supports are welded together with front-to-back supports, or are otherwise connected, to form an end unit for the frame. The boltless steel shelving covered by this investigation may be commonly described as rivet shelving, welded frame shelving, slot and tab shelving, and punched rivet (quasi-rivet) shelving as well as by other trade names. The term ''deck'' refers to the shelf that sits on or fits into the horizontal supports (beams or braces) to provide the horizontal storage surface of the shelving unit.

The scope includes all boltless steel shelving meeting the description above, regardless of: (1) vertical support or post type (including but not limited to open post, closed post and tubing); (2) horizontal support or beam/brace profile (including but not limited to Z-beam, C-beam, L-beam, step beam and cargo rack); (3) number of supports; (4) surface coating (including but not limited to paint, epoxy, powder coating, zinc and other metallic coating); (5) number of levels; (6) weight capacity; (7) shape (including but not limited to rectangular, square, and corner units); (8) decking material (including but not limited to wire decking, particle board, laminated board or no deck at all); or (9) the boltless method by which vertical and horizontal supports connect (including but not limited to keyhole and rivet, slot and tab, welded frame, punched rivet and clip).

Specifically excluded from the scope are:

- wall-mounted shelving, defined as shelving that is hung on the wall and does not stand on, or transfer load to, the floor. The addition of a wall bracket or other device to attach otherwise freestanding subject merchandise to a wall does not meet the terms of this exclusion;
- wire shelving units, which consist of shelves made from wire that incorporates both a wire deck and wire horizontal supports (taking the place of the horizontal beams and braces) into a single piece with tubular collars that slide over the posts and onto plastic sleeves snapped on the posts to create the finished shelving unit;
- bulk-packed parts or components of boltless steel shelving units; and
- made-to-order shelving systems.

Subject boltless steel shelving enters the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 9403.20.0075. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–08373 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–871]

Boltless Steel Shelving Units Prepackaged for Sale From Taiwan: Final Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that boltless steel shelving units prepackaged for sale (boltless steel shelving) from Taiwan are being, or are likely to be, sold in the United States at less-than-fair value (LTFV). The period of investigation is April 1, 2022, through March 31, 2023.

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Joy Zhang, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1168.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in this investigation, in which we also postponed the final determination until April 12, 2024.[1] We invited parties to comment on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation is boltless steel shelving from Taiwan. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination.*

Verification

Commerce verified the sales and cost information relied upon in making its final determination in this investigation, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the home market sales, U.S. sales, and cost of production responses submitted by Taiwan Shin Yeh Enterprise Co., Ltd (Shin Yeh).[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

We are incorporating Shin Yeh's revised home market and U.S. sales database submitted on January 31, 2024, which reflects changes from minor corrections Shin Yeh submitted at verification.[6] We also have adjusted Shin Yeh's reported costs.[7] These minor corrections and cost adjustments resulted in a change to the estimated weighted-average dumping margin calculated for Shin Yeh from the *Preliminary Determination.*[8]

Use of Adverse Facts Available (AFA)

As discussed in the *Preliminary Determination,* Commerce assigned to a mandatory respondent in this investigation, Jin Yi Sheng Industrial Co., Ltd. (Jin Yi Sheng) an estimated weighted-average dumping margins on the basis of adverse facts available (AFA), pursuant to sections 776(a) and (b) of the Act.[9] There is no new information on the record that would cause us to revisit our decision in the *Preliminary Determination.* Accordingly, for the reasons explained in the *Preliminary Determination,* and consistent with Commerce's practice, as AFA, we assigned Jin Yi Sheng the highest corroborated dumping margin alleged in the petition.[10]

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other

[1] *See Boltless Steel Shelving Units Prepackaged for Sales from Taiwan: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 88 FR 83382 (November 29, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Decision Memorandum for the Final Affirmative Determination in the Less Than Fair Value Investigation of Boltless Steel Shelving Prepackaged for Sales from Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated November 13, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Scope Decision Memorandum,'' dated April 12, 2024 (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of the Sales Response of Shin Yeh in the Antidumping Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Taiwan,'' dated February 29, 2024 ; and ''Verification of the Cost Response of Taiwan Shin Yeh Enterprise Co., Ltd. in the Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Taiwan,'' dated March 8, 2024.

[6] *See* Shin Yeh's Letter, ''Shin Yeh Response to Request for Revised Sales Data,'' dated January 31, 2024.

[7] *See* Memorandum, ''Cost of Production and Constructed Value Calculation Adjustments for the Final Determination—Taiwan Shin Yeh Enterprise Co., Ltd.,'' dated concurrently with this memorandum (Final Cost Calculation Memorandum).

[8] *Id., see also* Memorandum, ''Final Determination Analysis Memorandum for Shin Yeh,'' dated concurrently with this memorandum; dated concurrently with this memorandum (Final Sales Calculation Memorandum).

[9] *See Preliminary Determination,* 88 FR at 83383.

[10] *See Preliminary Determination* PDM at 7.

producers and exporters not individually investigated shall be 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,* or determined entirely under section 776 of the Act.

In this investigation, Commerce assigned a rate based entirely on facts available to Jin Yi Sheng. Therefore, the only rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for Shin Yeh. Consequently, the rate calculated for Shin Yeh is also assigned as the rate for all other producers and exporters.

Final Determination

Commerce determines that the following estimated weighted-average dumping margins exist for the POI:

Exporter/producer	Weighted-average dumping margin (percent)
Taiwan Shin Yeh Enterprise Co., Ltd	8.09
Jin Yi Sheng Industrial Co., Ltd	*78.12
All Others	8.09

*Rate based on AFA.

Disclosure

Commerce intends to disclose its calculations performed in connection with this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption, on or after November 29, 2023, the date of publication of the *Preliminary Determination* in the **Federal Register**.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), upon the publication of this notice, we will instruct CBP to require a cash deposit for estimated antidumping duties for such entries as follows: (1) the cash deposit rate for each respondent listed in the table above is the company-specific estimated weighted-average dumping margin listed for the respondent in the table; (2) if the exporter is not the respondent listed in the table above, but the producer is, then the cash deposit rate is the company-specific estimated weighted-average dumping margin listed for the producer of the subject merchandise in the table above; and (3) the cash deposit rate for all other producers and exporters is the all-others estimated weighted-average dumping margin listed in the table above.

These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of tin mill products no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, all cash deposits posted will be refunded, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the ''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

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

Notification to Interested Parties

This determination and this notice are issued and published in accordance with sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: April 12, 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 I

Scope of the Investigation

The scope of this investigation covers boltless steel shelving units prepackaged for sale, with or without decks (boltless steel shelving). The term ''prepackaged for sale'' means that, at a minimum, the steel vertical supports (*i.e.,* uprights and posts) and steel horizontal supports (*i.e.,* beams, braces) necessary to assemble a completed shelving unit (with or without decks) are packaged together for ultimate purchase by the end-user. The scope also includes add-on kits. Add-on kits include, but are not limited to, kits that allow the end-user to add an extension shelving unit onto an existing boltless steel shelving unit such that the extension and the original unit will share common frame elements (*e.g.,* two posts). The term ''boltless'' refers to steel shelving in which the vertical and horizontal supports forming the frame are assembled primarily without the use of nuts and bolts, or screws. The vertical and horizontal support members for boltless steel shelving are assembled by methods such as, but not limited to, fitting a rivet, punched or cut tab, or other similar connector on one support into a hole, slot or similar receptacle on another support. The supports lock together to form the frame for the shelving unit, and provide the structural integrity of the shelving unit separate from the inclusion of any decking. The incidental use of nuts and bolts, or screws to add accessories, wall anchors, tie-bars or shelf supports does not remove the product from scope. Boltless steel shelving units may also come packaged as partially assembled, such as when two upright supports are welded together with front-to-back supports, or are otherwise connected, to form an end unit for the frame. The boltless steel shelving covered by this investigation may be commonly described as rivet shelving, welded frame shelving, slot and tab shelving, and punched rivet (quasi-rivet) shelving as well as by other trade names. The term ''deck'' refers to the shelf that sits on or fits into the horizontal supports (beams or braces) to provide the horizontal storage surface of the shelving unit.

The scope includes all boltless steel shelving meeting the description above, regardless of: (1) vertical support or post type (including but not limited to open post, closed post and tubing); (2) horizontal support or beam/brace profile (including but not limited to Z-beam, C-beam, L-beam, step beam and cargo rack); (3) number of supports; (4) surface coating (including but not limited to paint, epoxy, powder coating, zinc and other metallic coating); (5) number

of levels; (6) weight capacity; (7) shape (including but not limited to rectangular, square, and corner units); (8) decking material (including but not limited to wire decking, particle board, laminated board or no deck at all); or (9) the boltless method by which vertical and horizontal supports connect (including but not limited to keyhole and rivet, slot and tab, welded frame, punched rivet and clip).

Specifically excluded from the scope are:

- wall-mounted shelving, defined as shelving that is hung on the wall and does not stand on, or transfer load to, the floor. The addition of a wall bracket or other device to attach otherwise freestanding subject merchandise to a wall does not meet the terms of this exclusion;
- wire shelving units, which consist of shelves made from wire that incorporates both a wire deck and wire horizontal supports (taking the place of the horizontal beams and braces) into a single piece with tubular collars that slide over the posts and onto plastic sleeves snapped on the posts to create the finished shelving unit;
- bulk-packed parts or components of boltless steel shelving units; and
- made-to-order shelving systems.

Subject boltless steel shelving enters the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 9403.20.0075. While the HTSUS subheading is provided for convenience and customs purposes, the description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–08372 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–835]

Boltless Steel Shelving Units Prepackaged for Sale From the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less-Than-Fair-Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that imports of boltless steel shelving units prepackaged for sale (boltless steel shelving) from the Socialist Republic of Vietnam (Vietnam) are being, or likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is October 1, 2022, through March 31, 2023.

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Eliza DeLong or Eric Hawkins, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3878 or (202) 482–1988, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2023, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of boltless steel shelving from Vietnam.[1] We invited parties to comment on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation is boltless steel shelving from Vietnam. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination.*

Verification

Commerce verified the sales and factors of production information submitted by Xinguang (Vietnam) Logistic Equipment Co., Ltd (Xinguang Vietnam) and the sales information submitted by Thanh Phong Production and Trade Limited Company (Thanh Phong) for use in our final determination, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by Xinguang Vietnam and Thanh Phong.[5]

[1] *See Boltless Steel Shelving Units from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 88 FR 83392 (November 29, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Boltless Steel Shelving Units Prepackaged for Sale from the Socialist Republic of Vietnam,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated November 13, 2023 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Scope Decision Memorandum,'' dated April 12, 2024 (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of the Questionnaire Responses of Thanh Phong Production and Trade Limited Company in the Less-Than-Fair-Value Investigation of Boltless Steel Shelving Units Prepackaged for Sale from the Socialist Republic of Vietnam,'' dated February 13, 2024; and ''Verification of the Questionnaire Responses of Xinguang (Vietnam) Logistic

Continued

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

Based on our review and analysis of the comments received from interested parties, we made changes to the margin calculations for Xinguang Vietnam.[6] For a discussion of these changes, *see* the Issues and Decision Memorandum.

Vietnam-Wide Entity and Use of Adverse Facts Available (AFA)

Consistent with the *Preliminary Determination,*[7] Commerce continues to find, pursuant to sections 776(a)(1) and (a)(2)(A)–(C) of the Act, that the use of facts available is warranted in determining the rate of the Vietnam-wide entity, which includes Cuong Nghia Imp. Exp. (Cuong Nghia) and Parkway Thanh Phong Co. (Parkway), two companies that were not selected for individual examination [8] that did not respond to our requests for information. Furthermore, we continue to find that an adverse inference is warranted in selecting from the facts otherwise available, pursuant to section 776(b) of the Act and 19 CFR 351.308(a), because the Vietnam-wide entity, including the two companies referred to above, failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information. For the final determination, consistent with the *Preliminary Determination,*[9] as AFA, we are continuing to assign the Vietnam-wide entity, including the above-referenced companies, the rate of 224.94 percent, which is the highest margin alleged in the petition.[10]

Combination Rates

Consistent with the *Preliminary Determination* and Policy Bulletin 05.1,[11] Commerce calculated a combination rate for Xinguang Vietnam, *i.e.,* the sole respondent eligible for a separate rate.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Exporter	Producer	Estimated weighted-average dumping margin (percent)
Xinguang (Vietnam) Logistic Equipment Co., Ltd	Xinguang (Vietnam) Logistic Equipment Co., Ltd	181.60
Vietnam-Wide Entity		[12] 224.94

Disclosure

Commerce intends to disclose its calculations performed to interested parties in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise entries, as described in Appendix I of this notice, which are entered, or withdrawn from warehouse, for consumption on or after November 29, 2023, the date of publication in the **Federal Register** of the *Preliminary Determination.*

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), Commerce will instruct CBP to require a cash deposit equal to the amount by which the normal value exceeds the U.S. price as follows: (1) the cash deposit rate for the exporter/producer combination listed in the table above will be the rate identified in the table; (2) for all combinations of Vietnamese exporters/producers of subject merchandise that have not received their own separate rate above, the cash deposit rate will be the cash deposit rate established for the Vietnam-wide entity; and (3) for all non-Vietnamese exporters of subject merchandise which have not received their own separate rate above, the cash deposit rate will be the cash deposit rate applicable to the Vietnamese exporter/producer combination that supplied that non-Vietnamese exporter. These suspension of liquidation instructions will remain in effect until further notice.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission (ITC) of its final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of boltless steel shelving from Vietnam no later than 45 days after this final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded or canceled, and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed in the

Equipment Co., Ltd. in the Less-Than-Fair-Value Investigation of Boltless Steel Shelving Units Prepackaged for Sale from the Socialist Republic of Vietnam,'' dated February 13, 2024.

[6] *See* Issues and Decision Memorandum.

[7] *See Preliminary Determination* PDM at 6–8.

[8] *Id.*

[9] *Id.*

[10] *See* Initiation Checklist, ''Antidumping Duty Investigation Initiation Checklist: Boltless Steel Shelving Units Prepackaged for Sale from the Socialist Republic of Vietnam,'' dated May 15, 2023.

[11] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' dated April 5, 2005 (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[12] The Vietnam-wide rate is based on facts available with adverse inferences.

''Continuation of Suspension of Liquidation'' section above.

Administrative Protective Order

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

Notification to Interested Parties

This final determination is issued and published in accordance with sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: April 12, 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 I

Scope of the Investigation

The scope of this investigation covers boltless steel shelving units prepackaged for sale, with or without decks (boltless steel shelving). The term ''prepackaged for sale'' means that, at a minimum, the steel vertical supports (*i.e.,* uprights and posts) and steel horizontal supports (*i.e.,* beams, braces) necessary to assemble a completed shelving unit (with or without decks) are packaged together for ultimate purchase by the end-user. The scope also includes add-on kits. Add-on kits include, but are not limited to, kits that allow the end-user to add an extension shelving unit onto an existing boltless steel shelving unit such that the extension and the original unit will share common frame elements (*e.g.,* two posts). The term ''boltless'' refers to steel shelving in which the vertical and horizontal supports forming the frame are assembled primarily without the use of nuts and bolts, or screws. The vertical and horizontal support members for boltless steel shelving are assembled by methods such as, but not limited to, fitting a rivet, punched or cut tab, or other similar connector on one support into a hole, slot or similar receptacle on another support. The supports lock together to form the frame for the shelving unit and provide the structural integrity of the shelving unit separate from the inclusion of any decking. The incidental use of nuts and bolts, or screws to add accessories, wall anchors, tie-bars or shelf supports does not remove the product from scope. Boltless steel shelving units may also come packaged as partially assembled, such as when two upright supports are welded together with front-to-back supports, or are otherwise connected, to form an end unit for the frame. The boltless steel shelving covered by this investigation may be commonly described as rivet shelving, welded frame shelving, slot and tab shelving, and punched rivet (quasi-rivet) shelving as well as by other trade names. The term ''deck'' refers to the shelf that sits on or fits into the horizontal supports (beams or braces) to provide the horizontal storage surface of the shelving unit.

The scope includes all boltless steel shelving meeting the description above, regardless of: (1) vertical support or post type (including but not limited to open post, closed post and tubing); (2) horizontal support or beam/brace profile (including but not limited to Z-beam, C-beam, L-beam, step beam and cargo rack); (3) number of supports; (4) surface coating (including but not limited to paint, epoxy, powder coating, zinc and other metallic coating); (5) number of levels; (6) weight capacity; (7) shape (including but not limited to rectangular, square, and corner units); (8) decking material (including but not limited to wire decking, particle board, laminated board or no deck at all); or (9) the boltless method by which vertical and horizontal supports connect (including but not limited to keyhole and rivet, slot and tab, welded frame, punched rivet and clip).

Specifically excluded from the scope are:

- Wall-mounted shelving, defined as shelving that is hung on the wall and does not stand on, or transfer load to, the floor. The addition of a wall bracket or other device to attach otherwise freestanding subject merchandise to a wall does not meet the terms of this exclusion;
- Wire shelving units, which consist of shelves made from wire that incorporates both a wire deck and wire horizontal supports (taking the place of the horizontal beams and braces) into a single piece with tubular collars that slide over the posts and onto plastic sleeves snapped on the posts to create the finished shelving unit;
- Bulk-packed parts or components of boltless steel shelving units; and
- Made-to-order shelving systems.

Subject boltless steel shelving enters the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 9403.20.0075. While the HTSUS subheading is provided for convenience and customs purposes, the description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–08370 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty

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

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Samuel Brummitt, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave. NW, Washington, DC 20230, telephone: (202) 482–7851.

SUPPLEMENTARY INFORMATION: On November 15, 2023, the U.S. Department of Commerce (Commerce), pursuant to section 702(h) of the Trade Agreements Act of 1979 (as amended) (the Act), published the quarterly update to the annual listing of foreign government subsidies on articles of cheese subject to an in-quota rate of duty covering the period April 1, 2023, through June 30, 2023.[1] In the *Second Quarter 2023 Update,* we requested that any party that had information on foreign government subsidy programs that benefited articles of cheese subject to an in-quota rate of duty submit such information to Commerce.[2] We received no comments, information, or requests for consultation from any party.

Pursuant to section 702(h) of the Act, we hereby provide Commerce's update of subsidies on articles of cheese that were imported during the period July 1, 2023, through September 30, 2023. The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amounts of each subsidy for which information is currently available.

Commerce will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the

[1] *See Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty,* 88 FR 78295 (November 15, 2023) (*Second Quarter 2023 Update*).

[2] *Id.*

information is developed. Commerce encourages any person having information on foreign government subsidy programs which benefit articles of cheese subject to an in-quota rate of duty to submit such information in writing through the Federal eRulemaking Portal at *https://www.regulations.gov,* Docket No. ITA–2020–0005, ''Quarterly Update to Cheese Subject to an In-Quota Rate of Duty.'' The materials in the docket will not be edited to remove identifying or contact information, and Commerce cautions against including any information in an electronic submission that the submitter does not want publicly disclosed. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF formats only. All comments should be addressed to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the Act.

Dated: April 15, 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

SUBSIDY PROGRAMS ON CHEESE SUBJECT TO AN IN-QUOTA RATE OF DUTY

Country	Program(s)	Gross [3] subsidy ($/lb)	Net [4] subsidy ($/lb)
27 European Union Member States [5]	European Union Restitution Payments	0.00	0.00
Canada	Export Assistance on Certain Types of Cheese	0.47	0.47
Norway	Indirect (Milk) Subsidy	0.00	0.00
	Consumer Subsidy	0.00	0.00
	Total	0.00	0.00
Switzerland	Deficiency Payments	0.00	0.00

[FR Doc. 2024–08405 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–914]

Boltless Steel Shelving Units Prepackaged for Sale From India: Final Negative Determination of Sales at Less Than Fair Value

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that boltless steel shelving units prepackaged for sale (boltless steel shelving) from India are not being, or are not likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2022, through March 31, 2023.

DATES: Applicable April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Andrew Huston, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4261.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2023, Commerce published in the **Federal Register** its preliminary negative determination in this investigation, in which we also postponed the final determination until April 12, 2024.[1] We invited parties to comments on the *Preliminary Determination.*

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Investigation

The product covered by this investigation is boltless steel shelving from India. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope-specific case and rebuttal briefs.[3]

[3] Defined in 19 U.S.C. 1677(5).

[4] Defined in 19 U.S.C. 1677(6).

[5] The 27 member states of the European Union are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

[1] *See Boltless Steel Shelving Units Prepackaged for Sale from India: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 88 FR 83395 (November 29, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Negative Determination in the Less-Than-Fair-Value Investigation of Boltless Steel Shelving Units Prepackaged for Sale from India,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Antidumping Duty Investigations of Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated November 13, 2023 (Preliminary Scope Decision Memorandum).

We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we addressed in the Final Scope Decision Memorandum.[4] We did not make any changes to the scope of the investigation from the scope published in the *Preliminary Determination.*

Verification

Commerce verified the sales and cost information submitted by Triune Technofab Private Limited (Triune) for use in our final determination, consistent with section 782(i) of the Tariff Act of 1930, as amended (the Act). Specifically, Commerce conducted on-site verifications of the home market sales and cost of production responses submitted by Triune. We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by Triune.[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by interested parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues raised is attached to this notice as Appendix II.

Changes Since the Preliminary Determination

We are incorporating Triune's revised U.S. sales database submitted on January 9, 2024, which reflects changes from minor corrections Triune submitted at verification.[6] For additional details, *see* the Final Analysis Memorandum.[7]

Final Determination

The final estimated weighted-average dumping margin is as follows:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Triune Technofab Private Limited	0.00

Commerce determines that Triune, the only individually examined respondent, has not made sales of subject merchandise at LTFV. Accordingly, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters pursuant to sections 735(c)(1)(B) and (c)(5) of the Act because it has not made an affirmative determination of sales at LTFV.

Disclosure

Commerce intends to disclose its calculations performed to interested parties in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In the *Preliminary Determination,* the estimated weighted-average dumping margin for Triune was zero percent and, therefore, we did not suspend liquidation of entries of boltless steel shelving from India.[8] Because Commerce has made a final negative determination of sales at LTFV with regard to the subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of boltless steel shelving from India.

U.S. International Trade Commission Notification

In accordance with section 735(d) of the Act, Commerce will notify the U.S. International Trade Commission of its final negative determination of sales at LTFV. As our final determination is negative, this proceeding is terminated in accordance with section 735(c)(2) of the Act.

Administrative Protective Order

This notice serves as the final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This final determination is issued and published in accordance with sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: April 12, 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 I

Scope of the Investigation

The scope of this investigation covers boltless steel shelving units prepackaged for sale, with or without decks (boltless steel shelving). The term ''prepackaged for sale'' means that, at a minimum, the steel vertical supports (*i.e.,* uprights and posts) and steel horizontal supports (*i.e.,* beams, braces) necessary to assemble a completed shelving unit (with or without decks) are packaged together for ultimate purchase by the end-user. The scope also includes add-on kits. Add-on kits include, but are not limited to, kits that allow the end-user to add an extension shelving unit onto an existing boltless steel shelving unit such that the extension and the original unit will share common frame elements (*e.g.,* two posts). The term ''boltless'' refers to steel shelving in which the vertical and horizontal supports forming the frame are assembled primarily without the use of nuts and bolts, or screws. The vertical and horizontal support members for boltless steel shelving are assembled by methods such as, but not limited to, fitting a rivet, punched or cut tab, or other similar connector on one support into a hole, slot or similar receptacle on another support. The supports lock together to form the frame for the shelving unit, and provide the structural integrity of the shelving unit separate from the inclusion of any decking. The incidental use of nuts and bolts, or screws to add accessories, wall anchors, tie-bars or shelf supports does not remove the product from scope. Boltless steel shelving units may also come packaged as partially assembled, such as when two upright supports are welded together with front-to-back supports, or are otherwise connected, to form an end unit for the frame. The boltless steel shelving covered by these investigations may be commonly described as rivet shelving, welded frame shelving, slot and tab shelving, and punched rivet (quasi-rivet) shelving as well as by other trade names. The term ''deck'' refers to the shelf that sits on or fits into the horizontal supports (beams or braces) to provide the horizontal storage surface of the shelving unit.

The scope includes all boltless steel shelving meeting the description above,

[4] *See* Memorandum, ''Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from Malaysia, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Scope Decision Memorandum,'' dated April 12, 2024 (Final Scope Decision Memorandum).

[5] *See* Memoranda, ''Verification of Cost Response of Triune Technofab Private Limited in the Antidumping Investigation of Boltless Steel Shelving from India,'' dated February 28, 2024; and ''Verification of Sales Responses of Triune Technofab Private Limited in the Antidumping Investigation of Boltless Steel Shelving from India,'' dated January 25, 2024 (Sales Verification Report).

[6] *See* Sales Verification Report at 2.

[7] *See* Memorandum, ''Triune Technofab Private Limited Final Determination Analysis,'' dated concurrently with this notice (Final Analysis Memorandum).

[8] *See Preliminary Determination,* 88 FR at 83396.

regardless of: (1)Vertical support or post type (including but not limited to open post, closed post and tubing); (2) horizontal support or beam/brace profile (including but not limited to Z-beam, C-beam, L-beam, step beam and cargo rack); (3) number of supports; (4) surface coating (including but not limited to paint, epoxy, powder coating, zinc and other metallic coating); (5) number of levels; (6) weight capacity; (7) shape (including but not limited to rectangular, square, and corner units); (8) decking material (including but not limited to wire decking, particle board, laminated board or no deck at all); or (9) the boltless method by which vertical and horizontal supports connect (including but not limited to keyhole and rivet, slot and tab, welded frame, punched rivet and clip).

Specifically excluded from the scope are:

- wall-mounted shelving, defined as shelving that is hung on the wall and does not stand on, or transfer load to, the floor. The addition of a wall bracket or other device to attach otherwise freestanding subject merchandise to a wall does not meet the terms of this exclusion;
- wire shelving units, which consist of shelves made from wire that incorporates both a wire deck and wire horizontal supports (taking the place of the horizontal beams and braces) into a single piece with tubular collars that slide over the posts and onto plastic sleeves snapped on the posts to create the finished shelving unit;
- bulk-packed parts or components of boltless steel shelving units; and
- made-to-order shelving systems.

Subject boltless steel shelving enters the United States through Harmonized Tariff Schedule of the United States (HTSUS) statistical subheading 9403.20.0075. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–08371 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No.: 240229–0064]

Minority Business Development Agency's Request for Public Comment and Notice of Tribal Consultation Meetings

AGENCY: Minority Business Development Agency, Department of Commerce

ACTION: Notice of meeting and request for comments.

SUMMARY: The Minority Business Development Agency (MBDA) plans to establish a period for the submission and acceptance of written comments from the public through Sunday, June 16, 2024 and conduct virtual Tribal consultation meetings on Friday, May 17, 2024.

DATES: The Tribal consultation meetings will be held virtually on Friday, May 17, 2024. Additional information regarding the consultation meetings will be posted on MBDA's website at *https://www.mbda.gov/tribalconsult2024.* The Tribal consultation meetings will be recorded and transcribed so that MBDA can retain valuable input and feedback.

ADDRESSES: Please submit all comments in response to the questions presented in this notice at *www.regualtions.gov.* To access the docket where comments may be submitted, please enter ''DOC–2024–0003'' in the search bar. Written comments must be submitted no later than 11:59 p.m. EDT, June 16, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis Doster, Jr., Associate Director, Office of Legislative, Education and Intergovernmental Affairs, Minority Business Development Agency, at (202) 482–2332; or by email at *MBDA-OLIA@mbda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' the Federal government has established a practice of conducting consultations with Tribal governments that are designed to provide ''regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications[.]'' The requirements under E.O. 13175 are currently implemented by the United States Department of Commerce under Department Administrative Order (DAO) 218–8, effective April 26, 2012. The Department of Commerce further sets out its policy in the Tribal Consultation Policy of the U.S. Department of Commerce, available at: *https://www.commerce.gov/files/tribal-consultation-and-coordination-policy-us-department-commerce.* The U.S. Government has additionally reiterated its commitment to improving accountable consultation processes in Executive Order 14112, ''Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination,'' the Presidential Memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation), and the Presidential Memorandum of January 26, 2021 (Tribal Consultation and Strengthening Nation-to-Nation Relationships).

MBDA's Office of Legislative, Education, and Intergovernmental Affairs (OLEIA) serves as the focal point for Tribal consultation on policy, regulatory and legislative issues that will have a direct impact on American Indian, Alaska Native, and Native Hawaiian (AIANNH) communities. The Tribal consultation meetings will be conducted in conjunction with MBDA's Office of Business Centers, Office of Data, Research and Evaluation and Office of Grants Management which document evidence and design and manage business development services, including services that may be of interest to Native American, Alaska Native and Native Hawaiian entrepreneurs and Tribe-owned businesses. Outreach specific to the AIANNH populations is one part of the overall efforts of MBDA to ensure members of Native communities are able to learn about and access programs and services.

MBDA is the only Federal agency created specifically to foster the growth and global competitiveness of minority business enterprises (MBEs). MBDA actively promotes the growth and expansion of MBEs by offering management and technical assistance, including through a nationwide network of AIANNH projects.

AIANNH projects address strategic initiatives that may include innovation and entrepreneurship (*e.g.,* business training, access to capital, incubators, accelerators, Federal program coaching); strategic planning (*e.g.,* fostering, developing and/or implementing entrepreneurial and economic development); and transformative projects (*e.g.,* support for MBEs involved in infrastructure focused public-private partnerships, and broadband).

MBDA awarded thirteen AIANNH projects during the 2021 competition cycle under funding opportunity number MBDA–OBD–2021–2006916. MBDA designated at least one award in each of these service locations: (1) Alaska; (2) California; (3) Northwest Area (Idaho, Oregon and Washington); (4) Rocky Mountain Area (Montana and Wyoming); (5) Western Area (Arizona, Nevada, and Utah); (6) Southwest Area (Colorado and New Mexico); (7) Great Plains Area (Nebraska, North Dakota and South Dakota); (8) Southern Plains Area (Kansas, Oklahoma and Texas); (9) Midwest Area (Iowa, Michigan, Minnesota, and Wisconsin); (10) Eastern Area (Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Illinois, Indiana, Louisiana, Maine, Massachusetts, Missouri, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia); and (11) Hawaii.

The AIANNH project cycle spanned from September 2021 through August 2023 and was extended through August 2024. The one-year extension allowed MBDA to conduct an analysis of current AIANNH projects, outcomes, and impact and to obtain public feedback through Tribal consultation and open comment period for future program design. The current AIANNH project awards will expire in August 2024.

II. Consultation Meetings

The purpose of the consultation meetings is, consistent with E.O. 13175 and DAO 218–8, to provide an accountable and transparent process that ensures meaningful and timely input from Tribal officials regarding MBDA's business development and entrepreneurial services in Indian Country, Alaska, and Hawaii and the implications that these programs have in these communities. The consultation meetings are closed to the public.

III. Questions for Public Comment

Members of the general public are invited to submit responses to the following questions. Please provide comments on any or all of the following issues and identify the specific AIANNH community addressed by these comments:

1. What is the primary challenge (or top three challenges) businesses encounter in AIANNH communities? What solutions do you think would help to address the challenge(s)?

2. What are some best practices that you have seen implemented that positively address the business challenges experienced by your AIANNH community through self-funded and/or externally funded programs (*e.g.,* Federal, State, local government, foundations, etc.)?

3. If you have direct or indirect experience with a MBDA AIANNH project, please provide your thoughts on which services and activities were most beneficial and which could have been more effective.

For comments to be considered, they must include the following identification of the commenter: name; title (if applicable); Tribe, Alaska Native Corporation, or native community (if applicable); organization or business (if applicable); city and state; and they must be submitted in written form at *www.regulations.gov. To access the docket where comments may be submitted, please enter* ''DOC–2024–0003'' in the search bar. Comments must be received no later than 11:59 p.m., EDT, Sunday, June 16, 2024.

Dated: April 16, 2024.

Eric Morrissette,

Acting Under Secretary, Minority Business Development Agency, U.S. Department of Commerce.

[FR Doc. 2024–08414 Filed 4–17–24; 11:15 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Draft Supplemental Programmatic Environmental Assessment for Fisheries Research Conducted and Funded by the Alaska Fisheries Science Center

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

ACTION: Notice of availability of a Draft Supplemental Programmatic Environmental Assessment; request for comments.

SUMMARY: NMFS announces the availability of the ''Draft Supplemental Programmatic Environmental Assessment (SPEA) for Fisheries Research Conducted and Funded by the Alaska Fisheries Science Center.'' Publication of this notice begins the official public comment period for this SPEA. The purpose of this Draft SPEA is to evaluate potential direct, indirect, and cumulative effects of changes in research that were not analyzed in the 2019 Alaska Fisheries Science Center (AFSC) Programmatic Environmental Assessment (PEA), or new research activities in the North Pacific Ocean and marine waters off of Alaska. Where necessary, updates to certain information on species, stock status or other components of the affected environment that may result in different conclusions from the 2019 PEA are presented in this analysis.

DATES: Comments and information must be received no later than June 18, 2024.

ADDRESSES: Comments on the Draft SPEA should be addressed to Rebecca Reuter, Environmental Compliance Coordinator, NOAA/NMFS/AFSC, 7600 Sand Point Way NE, Seattle, WA 98115.

The mailbox address for providing email comments is: *nmfs.afsc.spea@noaa.gov* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

A copy of the Draft SPEA may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *https://www.fisheries.noaa.gov/action/supplemental-programmatic-environmental-assessment-fisheries-research-conducted-and-funded.* Documents cited in this notice may also be viewed, by appointment, during regular business hours at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Rebecca Reuter, email: *rebecca.reuter@noaa.gov,* phone: (206) 526–4234.

SUPPLEMENTARY INFORMATION: The AFSC is the research arm of NMFS in the Alaska Region. The purpose of AFSC fisheries research is to produce scientific information necessary for the management and conservation of living marine resources in the North Pacific Ocean and marine waters off of Alaska. AFSC's research is needed to promote both the long-term sustainability of the resource and the recovery of certain species, while generating social and economic opportunities and benefits from their use. The AFSC provides scientific data and technical advice to a variety of management organizations and stakeholder groups, including the NMFS Alaska Regional Office, North Pacific Fishery Management Council (NPFMC), State of Alaska, Alaska coastal subsistence communities, and U.S. representatives participating in international fishery and marine mammal negotiations, as well as the fishing industry, environmental non-governmental organizations and other constituents.

NMFS has prepared the Draft SPEA under the National Environmental Policy Act (NEPA) to evaluate several

alternatives for conducting and funding fisheries and ecosystem research activities as the primary Federal action. Additionally, in the Draft SPEA, NMFS evaluates a related action—also called a ''connected action'' under 40 CFR 1508.25 of the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA (42 U.S.C. 4321 *et seq.*)—which is the proposed promulgation of regulations and authorization of the take of marine mammal incidental to the fisheries research under the Marine Mammal Protection Act (MMPA). Additionally, because the proposed research activities occur in areas inhabited by species of marine mammals, birds, sea turtles and fish listed under the Endangered Species Act (ESA) as threatened or endangered, this Draft SPEA evaluates activities that could result in unintentional takes of ESA-listed marine species.

The following two alternatives are currently evaluated in the Draft SPEA:

- Alternative 1—Continue current fisheries and ecosystem research (Status Quo/no action) as described in the 2019 AFSC PEA.
- Alternative 2—Conduct current research with some modifications as well as new research activities that are planned for the future (*i.e.,* 2024—2029). New future research proposed under Alternative 2 was not previously analyzed in the 2019 PEA.

The alternatives include a program of fisheries and ecosystem research projects conducted or funded by the AFSC as the primary Federal action. Because this primary action is connected to a secondary Federal action, to consider authorizing incidental take of marine mammals under the MMPA, NMFS must identify as part of this evaluation ''(t)he means of effecting the least practicable adverse impact on the species or stock and its habitat.'' (section 101(a)(5)(A) of the MMPA [16 U.S.C. 1361 *et seq.*]) NMFS must therefore identify and evaluate a reasonable range of mitigation measures to minimize impacts to protected species that occur in AFSC research areas. These mitigation measures are considered as part of the identified alternatives in order to evaluate their effectiveness to minimize potential adverse environmental impacts. The two action alternatives also include mitigation measures intended to minimize potentially adverse interaction with other protected species that occur within the action area. Protected species include all marine mammals, which are covered under the MMPA, all species listed under the ESA, and bird species protected under the Migratory Bird Treaty Act.

Potential direct and indirect effects on the environment are evaluated under each alternative in the Draft SPEA. The environmental effects on the following resources are considered: physical environment, special resource areas, fish, marine mammals, birds, sea turtles, invertebrates, and the social and economic environment. Cumulative effects of external actions and the contribution of fisheries research activities to the overall cumulative impact on the aforementioned resources is also evaluated in the Draft SPEA for the geographic regions in which AFSC surveys are conducted.

NMFS requests comments on the Draft SPEA for Fisheries Research Conducted and Funded by the National Marine Fisheries Service, Alaska Fisheries Science Center. Please include, with your comments, any supporting data or literature citations that may be informative in substantiating your comment.

Dated: March 29, 2024.

Robert Foy,

Science and Research Director, Alaska Fisheries Science Center, National Marine Fisheries Service.

[FR Doc. 2024–07096 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD884]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Center of Independent Experts (CIE) review of the Gulf of Alaska walleye pollock stock assessment will be held in May, in Seattle, WA.

DATES: The meeting will be held on Tuesday, May 7, 2024 through Thursday, May 9, 2024, from 10 a.m. to 5 p.m., Pacific Time.

ADDRESSES:

Meeting address: The meeting will be in-person only and will be held in Room 2079 on Tuesday, May 7, 2024 and in Room 2143 on May 8–9, 2024, at the Alaska Fishery Science Center, Sand Point Way NE, Building 4, Seattle, WA 98115.

If you plan to attend, you need to notify Cole Monnahan (*cole.monnahan@noaa.gov*) at least 2 days prior to the meeting (or 2 weeks prior if you are a foreign national). You will also need a valid U.S. Identification Card.

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: Cole Monnahan, Alaska Fishery Science Center staff; phone: (206) 526–4224; email: *cole.monnahan@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, May 7, 2024 Through Thursday, May 9, 2024

The CIE will review the Gulf of Alaska walleye pollock stock assessment input data and model. The agenda is subject to change, and the latest version will be posted at *https://apps-afsc.fisheries.noaa.gov/Plan_Team/2024_GOA_pollock_cie/* prior to the meeting, along with meeting materials.

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

Dated: April 16, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–08402 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD882]

Atlantic Highly Migratory Species; Meeting of the Atlantic Highly Migratory Species Advisory Panel

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

ACTION: Notice of public meeting and webinar/conference call.

SUMMARY: NMFS will hold a 3-day Atlantic Highly Migratory Species (HMS) Advisory Panel (AP) meeting in May 2024. The intent of the meeting is to consider options for the conservation and management of Atlantic HMS. The meeting is open to the public.

DATES: The AP meeting and webinar will be held on Tuesday, May 14, from 9:30 a.m. to 5 p.m. ET; Wednesday, May 15, from 9:30 a.m. to 5 p.m. ET; and Thursday, May 16, from 9 a.m. to 12 p.m. ET.

ADDRESSES: The meeting will be held at the DoubleTree by Hilton Silver Spring Hotel, 8777 Georgia Avenue, Silver Spring, MD 20910. The meeting will also be accessible via WebEx webinar/conference call. Conference call and webinar access information are available at: *https://www.fisheries.noaa.gov/event/may-2024-hms-advisory-panel-meeting.*

Participants accessing the webinar are strongly encouraged to log/dial in 15 minutes prior to the meeting. NMFS will show the presentations via webinar and allow public comment during identified times on the agenda.

FOR FURTHER INFORMATION CONTACT: Peter Cooper (*peter.cooper@noaa.gov*) or Lisa Crawford (*lisa.crawford@noaa.gov*) at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries (tunas, billfish, swordfish, and sharks) are managed under the 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments pursuant to the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and consistent with the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). HMS implementing regulations are at 50 CFR part 635.

The Magnuson-Stevens Act requires the establishment of APs and requires NMFS to consult with and consider the comments and views of AP members during the preparation and implementation of FMPs or FMP amendments (16 U.S.C. 1854(g)(1)(A)–(B)). NMFS meets with the HMS AP approximately twice each year to consider potential alternatives for the conservation and management of Atlantic tunas, swordfish, billfish, and shark fisheries, consistent with the Magnuson-Stevens Act.

Some of the discussion topics are:

- Outcomes of the 2023 International Commission for the Conservation of Atlantic Tunas Annual Meeting;
- Atlantic bluefin tuna fishery update: management and recent trends;
- Atlantic shark fishery update: management and recent trends;
- Amendment 15 to the 2006 Consolidated HMS FMP regarding spatial management; and
- Atlantic HMS fishing gear considerations.

We also anticipate inviting other NMFS offices and the U.S. Coast Guard to provide updates, if available, on their activities relevant to HMS fisheries. Additional information on the meetings and a copy of the draft agenda will be posted prior to the meeting (see **ADDRESSES**).

All members of the public will have virtual access to the meeting available via webinar and status updates of in-person public access to the meeting will be available on the NMFS website (see **ADDRESSES**). The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Peter Cooper at 301–427–8503, at least 7 days prior to the meeting.

Dated: April 16, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–08396 Filed 4–18–24; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds product(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* May 19, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 489–1322, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 3/15/2024, the Committee for Purchase From People Who Are Blind or Severely Disabled (operating as the U.S. AbilityOne Commission) published an initial notice of proposed additions to the Procurement List (89 FR 18912). This final notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. The Committee has determined that the product listed below is suitable for procurement by the Federal Government and has added this product to the Procurement List as a mandatory purchase for Federal entities. In accordance with 41 CFR 51–5.2, the Committee has authorized the qualified nonprofit agency described with the product as the source of supply.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the product(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the product(s) to the Government.
2. The action will result in authorizing small entities to furnish the product(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product is added to the Procurement List:

Product(s)

NSN(s)—Product Name(s):
4210–01–387–1392—Rake, Collapsible, Forest Fire

Authorized Source of Supply: BESTWORK INDUSTRIES FOR THE BLIND, INC, Cherry Hill, NJ

Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA TROOP SUPPORT

Mandatory for: Total Government Requirement

Distribution: The product will be available through the Commission's Commercial Distribution Program

Deletions

On 3/15/2024 (83 FR), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) listed below are no longer suitable for procurement by the Federal Government

under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
8105–01–662–7124—Can Liners—Can Liner, Linear Low Density, 44 Gallon, Clear
8105–01–662–6362—Can Liners—Can Liner, Linear Low Density, 23 Gallon, Clear
8105–01–662–7122—Can Liners—Can Liner, Linear Low Density, 32 Gallon, Clear
8105–01–662–6361—Can Liners—Can Liner, Linear Low Density, 10–15 Gallons, Clear
8105–01–662–7928—Can Liners—Can Liner, Linear Low Density, 40–45 Gallon, Clear
Authorized Source of Supply: Envision, Inc., Wichita, KS
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY
NSN(s)—Product Name(s):
7350–00–988–6498—Cup, Paper, Disposable, Hot, White, 8 oz, with Handle
7350–00–205–1182—Cup, Paper, Disposable, Hot, White, 6 oz, with Handle
Authorized Source of Supply: The Lighthouse for the Blind in New Orleans, Inc., New Orleans, LA
Contracting Activity: STRATEGIC ACQUISITION CENTER, FREDERICKSBURG, VA
NSN(s)—Product Name(s):
7350–00–988–6498—Cup, Paper, Disposable, Hot, White, 8 oz, with Handle
7350–00–205–1182—Cup, Paper, Disposable, Hot, White, 6 oz, with Handle
Authorized Source of Supply: The Lighthouse for the Blind in New Orleans, Inc., New Orleans, LA
Contracting Activity: GSA/FSS GREATER SOUTHWEST ACQUISITI, FORT WORTH, TX
NSN(s)—Product Name(s):
8520–01–522–0832—Refill, Body and Hair Shampoo, Scented, 2000 mL
8520–01–522–0833—Refill, Body and Hair Shampoo, Scented, 1000 mL
8520–01–522–0836—Refill, Body and Hair Shampoo, Scented, 800 mL
Authorized Source of Supply: Travis Association for the Blind, Austin, TX
Contracting Activity: GSA/FSS GREATER SOUTHWEST ACQUISITI, FORT WORTH, TX

Michael R. Jurkowski,

Director, Business Operations.

[FR Doc. 2024–08417 Filed 4–18–24; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Changes

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed changes to the Procurement List.

SUMMARY: The Committee is proposing to change requirements for products already existing on the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: May 12, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 489–1322, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Changes

If the Committee approves the proposed changes, the entities of the Federal Government identified in this notice will be required to procure the product(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

NSN(s)—Product Name(s):
8415–01–670–9017—Coat, Improved Hot Weather Combat Uniform (IHWCU), Permethrin, Unisex, Army, OCP 2015 (s)
Authorized Source of Supply: Goodwill Industries of South Florida, Inc., Miami, FL
Authorized Source of Supply: ReadyOne Industries, Inc., El Paso, TX
Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA TROOP SUPPORT

The Commission is correcting its Notice of 4/12/2024 which stated that the mandatory purchase requirement for the Improved Coat, Improved Hot Weather Combat Uniform (IHWCU), Permethrin, Unisex would be 70,900. The correct mandatory purchase amount is 270,900.

Michael R. Jurkowski,

Director, Business Operations.

[FR Doc. 2024–08418 Filed 4–18–24; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes product(s) and service(s) previously furnished by such agencies.

DATES: Comments must be received on or before: May 19, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 489–1322, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

In accordance with 41 CFR 51–5.3(b), the Committee intends to add these service requirements to the Procurement List as a mandatory purchase only for (contracting activity) at (location) with the proposed qualified nonprofit agency as the authorized source of supply. Prior to adding the service to the Procurement List, the Committee will consider other pertinent information, including

information from Government personnel and relevant comments from interested parties regarding the Committee's intent to geographically limit this services requirement.

The following product(s) and service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—Product Name(s):
700005401N—Monitor, Desktop, 23.8″
Authorized Source of Supply: Goodwill Vision Enterprises, Rochester, NY
Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA TROOP SUPPORT
Distribution: B-List
Mandatory for: Total Government Requirement

Service(s)

Service Type: Custodial
Mandatory for: US Geological Survey, Earth Resources Observation Science (EROS) Center, Sioux Falls, SD
Authorized Source of Supply: Northwest Center, Seattle, WA
Contracting Activity: US GEOLOGICAL SURVEY, US GEOLOGICAL SURVEY
Service Type: Base Information Transfer Center & Postal Service, Mail Distribution Service
Mandatory for: US Army, Central Mail Facility, Redstone Arsenal, Huntsville, AL
Authorized Source of Supply: Huntsville Rehabilitation Foundation, Inc., Huntsville, AL
Contracting Activity: DEPT OF THE ARMY, W6QK ACC–RSA

Deletions

The following product(s) and service(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
9930–00–NIB–0105—Kit, Post Mortem Bag, Basic, Straight Zipper, 36″ x 90″
9930–00–NIB–0106—Kit, Post Mortem Bag, Basic, Curved Zipper, 36″ x 90″
9930–00–NIB–0107—Kit, Post Mortem Bag, Heavy Duty, 36″ x 90″
9930–00–NIB–0108—Kit, Post Mortem Bag, Heavy Duty, XL, 72″ x 90″
9930–00–NIB–0109—Kit, Disaster Bag with ID Tags, 34″ x 96″
Authorized Source of Supply: BOSMA Enterprises, Indianapolis, IN
Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Service(s)

Service Type: Grounds Maintenance Service
Mandatory for: Joint Interagency Task Force South, Truman Annex, Key West, FL
Authorized Source of Supply: Goodwill Industries of South Florida, Inc., Miami, FL
Contracting Activity: DEPT OF THE ARMY, W453 JIATFS

Michael R. Jurkowski,
Director, Business Operations.

[FR Doc. 2024–08416 Filed 4–18–24; 8:45 am]
BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Second Draft Environmental Impact Statement for Army Training Land Retention at Pōhakuloa Training Area in Hawai'i

AGENCY: Department of the Army, DOD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army (Army) announces the availability of a Second Draft Environmental Impact Statement (Draft EIS) regarding its proposed action to retain up to approximately 22,750 acres of the 23,000 acres of land the Army currently leases from the State of Hawai'i (''State-owned land'') at Pōhakuloa Training Area (PTA) on the island of Hawai'i. The Army is publishing the Draft EIS for public review during a 45-day comment period. In accordance with the National Environmental Policy Act (NEPA) and the Hawai'i Environmental Policy Act (HEPA), the Draft EIS analyzes the potential direct, indirect, and cumulative impacts of a range of reasonable alternatives that meet the purpose of, and need for, the proposed action. Because the proposed action involves State-owned land, the EIS is a joint NEPA–HEPA document; therefore, the public review process runs concurrently and meets both NEPA and HEPA requirements.

DATES: The Army invites public comments on the Draft EIS during the 45-day public comment period. To be considered in the Final EIS, all comments must be postmarked or received by 11:59 p.m. Hawai'i standard time on June 7, 2024. Public meetings will be held in Waimea District Park on May 6, 2024, and at the 'Imiloa Astronomy Center on May 7, 2024 to provide information on the Draft EIS and to enhance the opportunity for public comment. Information on how to participate in the Draft EIS public meetings and how to submit comments is available on the EIS website at *https://home.army.mil/hawaii/index.php/PTAEIS.*

ADDRESSES: Written comments should be submitted through the EIS website at *https://home.army.mil/hawaii/index.php/PTAEIS,* emailed to *atlr-pta-eis@g70.design,* mailed to ATLR PTA EIS Comments, P.O. Box 3444, Honolulu, HI 96801–3444, or provided during the public meetings. Comments must be postmarked or received by June 7, 2024.

FOR FURTHER INFORMATION CONTACT: U.S. Army Garrison-Hawaii, Mr. Michael Donnelly, Public Affairs Office, by telephone at (808) 787–2140 or by email at *usarmy.hawaii.nepa@army.mil.*

SUPPLEMENTARY INFORMATION: During World War II, the U.S. Marine Corps trained on the land now known as PTA. A 1956 maneuver agreement between the Territory of Hawai'i and the Army formally established PTA. In 1964, the State of Hawai'i granted the Army a 65-year lease of approximately 23,000 acres of land adjacent to PTA for military purposes. The State-owned land now contains utilities, critical infrastructure, maneuver area, and key training facilities, some of which are not available elsewhere in Hawai'i. The parcel also provides access among the PTA cantonment area and Bradshaw Army Airfield and two other federally owned parcels at PTA.

The Army made a Draft EIS available for comment on this action on April 8, 2022. In response to comments received from agencies and the public on that Draft EIS, the Army is no longer considering the retention of approximately 250 acres of State-owned land administered by the Department of Hawaiian Home Lands. In addition to analyzing impacts of a fee simple retention method, the new Draft EIS also assesses impacts of a lease retention method. Due to these changes, the Army determined that another draft EIS should be made available for public comment.

The Draft EIS evaluates the potential impacts of a range of reasonable alternatives: (1) Maximum Retention (of approximately 22,750 acres); (2) Modified Retention (of approximately 19,700 acres); and (3) Minimum Retention and Access (of approximately 10,100 acres and 11 miles of roads and training trails). The Draft EIS also analyzes the potential impacts of the No Action Alternative, under which Army use of the land would cease altogether when the lease expires in 2029. The Army has identified Alternative 2, Modified Retention, as the Preferred Alternative. The Army based its preference on: public comments; environmental, social, technical, and economic considerations; and the ability of the alternative to meet the mission of the Army.

The Draft EIS analyzes: land use; biological resources; historic and cultural resources and cultural

practices; hazardous substances and hazardous wastes; air quality and greenhouse gases; noise; geology, topography, and soils; water resources; socioeconomics; environmental justice; transportation and traffic; airspace; electromagnetic spectrum; utilities; and human health and safety.

The Draft EIS indicates that under Alternatives 1, 2, and 3, significant adverse impacts on land use (land tenure), cultural practices, and environmental justice could occur. Under the No Action Alternative, significant adverse impacts on biological resources, socioeconomics, and utilities could occur. The No Action Alternative could have significant beneficial impacts on land use, cultural practices, and environmental justice. To mitigate adverse impacts to land use, the Army would consider adding non-barbed wire fencing and signage to minimize encroachment and accidental or intentional trespass from adjacent non-U.S. Government-owned land. In consideration of adverse impacts to cultural practices and environmental justice, the Army, in consultation with Native Hawaiians and cultural practitioners, proposes to: (1) formalize a cultural access request process to enable Native Hawaiians and cultural practitioners to promote and preserve cultural practices, beliefs, and resources; and (2) explore options to provide unlimited access to specific locations. To mitigate adverse impacts on human health and safety, the Army would consider: (1) negotiating an agreement with the State to allow the Army to monitor for wildfires on the State-owned land that is not retained by the Army; and (2) continuing or renegotiating its Memorandum of Agreement with the Hawai'i County Fire Department to assist wildfire responders with wildfire suppression outside of PTA boundaries.

The No Action Alternative could have: significant adverse impacts on biological resources, socioeconomics, and utilities; significant beneficial impacts for land use, cultural practices, and environmental justice; and less than significant impacts on all other resources.

The Army distributed the Draft EIS to: Native Hawaiian Organizations; Federal, State, and local agencies and officials; and other stakeholders. The Draft EIS and informational materials are also available on the EIS website at: *https://home.army.mil/hawaii/index.php/PTAEIS*. The public may also review the Draft EIS and select materials at the following libraries:

1. Hawai'i State Library, Hawai'i Documents Center, 478 S King Street, Honolulu, HI 96813
2. Hilo Public Library, 300 Waianuenue Avenue, Hilo, HI 96720
3. Kailua-Kona Public Library, 75–138 Hualalai Road, Kailua-Kona, HI 96740
4. Thelma Parker Memorial Public and School Library, 67–1209 Mamalahoa Highway, Kamuela, HI 96743

Native Hawaiian Organizations, Federal, State, and local agencies/officials, and other interested entities/individuals are encouraged to comment on the Draft EIS during the 45-day public comment period. All comments postmarked or received June 7, 2024 will be considered in the development of the Final EIS.

James W. Satterwhite, Jr.,

U.S. Army Federal Register Liaison Officer.

[FR Doc. 2024–08403 Filed 4–18–24; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee (DoDWC); Notice of Federal Advisory Committee Meetings

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

ACTION: Notice of closed Federal Advisory Committee meetings.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meetings of the DoDWC will take place.

DATES: Tuesday, April 16, 2024, from 10 a.m. to 1 p.m. and will be closed to the public. Tuesday, April 30, 2024, from 10 a.m. to 11:30 a.m. and will be closed to the public; Tuesday, May 14, 2024, from 10 a.m. to 1 p.m. and will be closed to the public; Tuesday, May 28, 2024, from 10 a.m. to 10:30 a.m. and will be closed to the public; Tuesday, June 11, 2024, from 10 a.m. to 11:30 a.m. and will be closed to the public.

ADDRESSES: The closed meetings will be held by Microsoft Teams.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Fendt, (571) 372–1618 (voice), *karl.h.fendt.civ@mail.mil.* (email), 4800 Mark Center Drive, Suite 05G21, Alexandria, Virginia 22350 (mailing address). Any agenda updates can be found at the DoDWC's official website: *https://wageandsalary.dcpas.osd.mil/BWN/DODWC/.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer (DFO) and the DoD, the DoDWC was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its April 16, 2024 meeting. Accordingly, the Advisory Committee Management Officer for the DoD, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Due to circumstances beyond the control of the DFO and the DoD, the DoDWC was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its April 30, 2024 meeting. Accordingly, the Advisory Committee Management Officer for the DoD, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

These meetings are being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b(c) (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of these meetings is to provide independent advice and recommendations on matters relating to the conduct of wage surveys and the establishment of wage schedules for all appropriated fund and non-appropriated fund areas of blue-collar employees within the DoD.

Agendas

April 16, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Wage Schedule (Full Scale) for the Onslow, North Carolina wage area (AC–097).

3. Wage Schedule (Full Scale) for the Shelby, Tennessee wage area (AC–098).

4. Wage Schedule (Full Scale) for the Christian, Kentucky/Montgomery, Tennessee wage area (AC–099).

5. Wage Schedule (Full Scale) for the Charleston, South Carolina wage area (AC–120).

6. Wage Schedule (Full Scale) for the San Juan-Guaynabo, Puerto Rico wage area (AC–155).

7. Wage Schedule (Wage Change) for the Sacramento, California wage area (AC–002).

8. Wage Schedule (Wage Change) for the San Joaquin, California wage area (AC–008).

9. Wage Schedule (Wage Change) for the Bernalillo, New Mexico wage area (AC–019).

10. Wage Schedule (Wage Change) for the Dona Ana, New Mexico wage area (AC–021).
11. Wage Schedule (Wage Change) for the El Paso, Texas wage area (AC–023).
12. Survey Specifications for the Frederick, Maryland wage area (AC–088).
13. Survey Specifications for the Washington, District of Columbia wage area (AC–124).
14. Survey Specifications for the Alexandria-Arlington-Fairfax, Virginia wage area (AC–125).
15. Survey Specifications for the Prince William, Virginia wage area (AC–126).
16. Survey Specifications for the Prince George's-Montgomery, Maryland wage area (AC–127).
17. Survey Specifications for the Charles-St. Mary's, Maryland wage area (AC–128).
18. Survey Specifications for the Anne Arundel, Maryland wage area (AC–147).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

19. Wage Schedule (Full Scale) for the Salinas-Monterey, California wage area (AC–015).
20. Wage Schedule (Full Scale) for the Southern Colorado wage area (AC–023).
21. Wage Schedule (Full Scale) for the Lexington, Kentucky wage area (AC–058).
22. Wage Schedule (Full Scale) for the Northern Mississippi wage area (AC–077).
23. Wage Schedule (Full Scale) for the New York, New York wage area (AC–094).
24. Wage Schedule (Full Scale) for the Rochester, New York wage area (AC–096).
25. Wage Schedule (Full Scale) for the Dayton, Ohio wage area (AC–107).
26. Wage Schedule (Full Scale) for the Memphis, Tennessee wage area (AC–124).
27. Wage Schedule (Full Scale) for the Nashville, Tennessee wage area (AC–125).
28. Wage Schedule (Full Scale) for the Wyoming wage area (AC–150).
29. Wage Schedule (Wage Change) for the Fresno, California wage area (AC–012).
30. Wage Schedule (Wage Change) for the Sacramento, California wage area (AC–014).
31. Wage Schedule (Wage Change) for the Stockton, California wage area (AC–020).
32. Wage Schedule (Wage Change) for the Denver, Colorado wage area (AC–022).
33. Wage Schedule (Wage Change) for the Miami, Florida wage area (AC–031).
34. Wage Schedule (Wage Change) for the Louisville, Kentucky wage area (AC–059).
35. Wage Schedule (Wage Change) for the Jackson, Mississippi wage area (AC–078).
36. Wage Schedule (Wage Change) for the Meridian, Mississippi wage area (AC–079).
37. Wage Schedule (Wage Change) for the Cincinnati, Ohio wage area (AC–104).
38. Wage Schedule (Wage Change) for the Narragansett Bay, Rhode Island wage area (AC–118).
39. Wage Schedule (Wage Change) for the Eastern Tennessee wage area (AC–123).
40. Survey Specifications for the Alaska wage area (AC–007).
41. Survey Specifications for the Hawaii wage area (AC–044).
42. Survey Specifications for the Central & Western Massachusetts wage area (AC–069).
43. Survey Specifications for the Southwestern Wisconsin wage area (AC–149).
44. Survey Specifications for the Central and Northern Maine wage area (AC–064).
45. Survey Specifications for the Montana wage area (AC–083).
46. Survey Specifications for the Asheville, North Carolina wage area (AC–098).
47. Survey Specifications for the Southwestern Oregon wage area (AC–113).
48. Survey Specifications for the Charleston, South Carolina wage area (AC–119).
49. Survey Specifications for the Austin, Texas wage area (AC–129).
50. Survey Specifications for the Corpus Christi, Texas wage area (AC–130).
51. Special Pay—Northern Mississippi Special Rates.
52. Special Pay—Fresno, California Special Rates.
53. Special Pay—Louisville, Kentucky Special Rates.
54. Special Pay—Stockton, California Special Rates.
55. Special Pay—Narragansett Bay, Rhode Island Special Rates.
56. Special Pay—Southeast Power Rate.
57. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

April 30, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.
2. Wage Schedule (Full Scale) for the Oklahoma, Oklahoma wage area (AC–052).
3. Wage Schedule (Full Scale) for the Harrison, Mississippi wage area (AC–070).
4. Wage Schedule (Full Scale) for the Hardin-Jefferson, Kentucky wage area (AC–096).
5. Wage Schedule (Full Scale) for the Wayne, North Carolina wage area (AC–107).
6. Wage Schedule (Full Scale) for the Cumberland, North Carolina wage area (AC–108).
7. Wage Schedule (Full Scale) for the Richland, South Carolina wage area (AC–110).
8. Wage Schedule (Full Scale) for the Wichita, Texas wage area (AC–122).
9. Wage Schedule (Full Scale) for the Comanche, Oklahoma wage area (AC–123).
10. Wage Schedule (Full Scale) for the Craven, North Carolina wage area (AC–164).
11. Wage Schedule (Wage Change) for the Lauderdale, Mississippi wage area (AC–001).
12. Wage Schedule (Wage Change) for the Lowndes, Mississippi wage area (AC–004).
13. Wage Schedule (Wage Change) for the Rapides, Louisiana wage area (AC–024).
14. Wage Schedule (Wage Change) for the Caddo-Bossier, Louisiana wage area (AC–025).
15. Wage Schedule (Wage Change) for the Chatham, Georgia wage area (AC–037).
16. Wage Schedule (Wage Change) for the Dougherty, Georgia wage area (AC–046).
17. Wage Schedule (Wage Change) for the Lowndes, Georgia wage area (AC–047).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

18. Survey Specifications for the Cedar Rapids-Iowa City, Iowa wage area (AC–052).
19. Survey Specifications for the Madison, Wisconsin wage area (AC–147).
20. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

May 14, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Wage Schedule (Full Scale) for the Calhoun, Alabama wage area (AC–104).

3. Wage Schedule (Full Scale) for the Madison, Alabama wage area (AC–105).

4. Wage Schedule (Full Scale) for the Lake, Illinois wage area (AC–145).

5. Wage Schedule (Full Scale) for the Douglas-Sarpy, Nevada wage area (AC–149).

6. Wage Schedule (Full Scale) for the Leavenworth, Kansas/Jackson-Johnson, Missouri wage area (AC–151).

7. Wage Schedule (Full Scale) for the St. Clair, Illinois wage area (AC–157).

8. Wage Schedule (Wage Change) for the Richmond, Georgia wage area (AC–035).

9. Wage Schedule (Wage Change) for the Houston, Georgia wage area (AC–036).

10. Wage Schedule (Wage Change) for the Pulaski, Arkansas wage area (AC–045).

11. Wage Schedule (Wage Change) for the Montgomery, Alabama wage area (AC–048).

12. Wage Schedule (Wage Change) for the Sedgwick, Kansas wage area (AC–078).

13. Wage Schedule (Wage Change) for the Montgomery-Greene, Ohio wage area (AC–166).

14. Survey Specifications for the Los Angeles, California wage area (AC–130).

15. Survey Specifications for the Orange, California wage area (AC–131).

16. Survey Specifications for the Ventura, California wage area (AC–132).

17. Survey Specifications for the Riverside, California wage area (AC–133).

18. Survey Specifications for the San Bernardino, California wage area (AC–134).

19. Survey Specifications for the Santa Barbara, California wage area (AC–135).

20. Survey Specifications for the Guam wage area (AC–150).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

21. Wage Schedule (Full Scale) for the Reno, Nevada wage area (AC–086).

22. Wage Schedule (Full Scale) for the Syracuse-Utica-Rome, New York wage area (AC–097).

23. Wage Schedule (Full Scale) for the North Dakota wage area (AC–103).

24. Wage Schedule (Full Scale) for the Houston-Galveston-Texas City, Texas wage area (AC–133).

25. Wage Schedule (Wage Change) for the Northeastern Arizona wage area (AC–008).

26. Wage Schedule (Wage Change) for the Phoenix, Arizona wage area (AC–009).

27. Wage Schedule (Wage Change) for the Tucson, Arizona wage area (AC–010).

28. Wage Schedule (Wage Change) for the Minneapolis-St. Paul, Minnesota wage area (AC–075).

29. Wage Schedule (Wage Change) for the Albany-Schenectady-Troy, New York wage area (AC–091).

30. Wage Schedule (Wage Change) for the Northern New York wage area (AC–095).

31. Wage Schedule (Wage Change) for the West Virginia wage area (AC–146).

32. Survey Specifications for the Little Rock, Arkansas wage area (AC–011).

33. Survey Specifications for the Portland, Oregon wage area (AC–112).

34. Survey Specifications for the Wichita Falls, Texas-Southwestern Oregon wage area (AC–138).

35. Special Pay—Pacific Northwest Power Rate.

36. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

May 28, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Boston, Massachusetts wage area (AC–068).

3. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

June 11, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Maricopa, Arizona wage area (AC–012).

3. Survey Specifications for the Pima, Arizona wage area (AC–013).

4. Survey Specifications for the Yuma, Arizona wage area (AC–055).

5. Survey Specifications for the Kings-Queens, New York wage area (AC–091).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

6. Wage Schedule (Full Scale) for the Anniston-Gadsden, Alabama wage area (AC–001).

7. Wage Schedule (Full Scale) for the Huntsville, Alabama wage area (AC–004).

8. Wage Schedule (Full Scale) for the Tampa-St. Petersburg, Florida wage area (AC–035).

9. Wage Schedule (Full Scale) for the Lake Charles-Alexandria, Louisiana wage area (AC–060).

10. Wage Schedule (Full Scale) for the El Paso, Texas wage area (AC–132).

11. Wage Schedule (Wage Change) for the New Haven-Hartford, Connecticut wage area (AC–024).

12. Wage Schedule (Wage Change) for the Albuquerque, New Mexico wage area (AC–089).

13. Wage Schedule (Wage Change) for the Cleveland, Ohio wage area (AC–105).

14. Wage Schedule (Wage Change) for the Texarkana, Texas wage area (AC–136).

15. Survey Specifications for the Los Angeles, California wage area (AC–013).

16. Survey Specifications for the Santa Barbara, California wage area (AC–019).

17. Survey Specifications for the New London, Connecticut wage area (AC–025).

18. Survey Specifications for the Panama City, Florida wage area (AC–033).

19. Survey Specifications for the Las Vegas, Nevada wage area (AC–085).

20. Survey Specifications for the Portsmouth, New Hampshire wage area (AC–087).

21. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b(c)(4), the DoD has determined that the meetings shall be closed to the public. The USD(P&R), in consultation with the DoD Office of General Counsel, has determined in writing that each of these meetings is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Written Statements: Pursuant to 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.140,

interested persons may submit written statements to the DFO for the DoDWC at any time. Written statements should be submitted to the DFO at the email or mailing address listed above in **FOR FURTHER INFORMATION CONTACT**. If statements pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written statements received after this date may not be provided to or considered by the DoDWC until its next meeting. The DFO will review all timely submitted written statements and provide copies to all the committee members before the meetings that are the subject of this notice.

Dated: April 15, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08356 Filed 4–18–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF THE DEFENSE

Department of the Army, Corps of Engineers

Withdrawal of the Notice of Intent To Prepare a Joint Environmental Impact Statement/Environmental Impact Report for the Dredged Material Management Plan Feasibility Study, Los Angeles County, CA

AGENCY: Army Corps of Engineers, Department of the Army, DoD.

ACTION: Notice of intent; withdrawal.

SUMMARY: The U.S. Army Corps of Engineers, Los Angeles District, Planning Division is notifying interested parties that it has withdrawn the Notice of Intent (NOI) to develop a Joint Environmental Impact Statement/ Environmental Impact Report for the Dredged Material Management Plan Feasibility Study. The original NOI to prepare a Joint EIS/EIR was published in the **Federal Register** on February 13, 2003. The proposed Dredged Material Management Plan Feasibility Study was converted into a Dredged Material Management Framework on August 24, 2009. A Final EIS/EIR was never completed.

DATES: The notice of intent to prepare an EIS published in the **Federal Register** on February 13, 2003 (68 FR 7353), is withdrawn as of April 19, 2024.

ADDRESSES: U.S. Army Corps of Engineers, Los Angeles District, Environmental Resources Branch, (CESPL–PDR), 915 Wilshire Blvd., Suite 1109, Los Angeles, CA 90017–3409.

FOR FURTHER INFORMATION CONTACT: Questions regarding the withdrawal of this NOI should be addressed to Mr. Larry Smith, 213–452–3876, or *.army.mil.*

SUPPLEMENTARY INFORMATION: The Draft EIS/EIR was distributed for public and agency review on February 10, 2009. The Dredged Material Management Framework was completed as an internal document in November 2022 after it was determined that the Study did not meet the programmatic definition of a Dredged Material Management Plan.

David R. Hibner,

Programs Director, South Pacific Division.

[FR Doc. 2024–08379 Filed 4–18–24; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Peer Review Opportunities With the U.S. Department of Education's Office of Elementary and Secondary Education (OESE); Office of English Language Acquisition (OELA); Office of Postsecondary Education (OPE); and Office of Special Education and Rehabilitative Services (OSERS)

AGENCY: Office of Elementary and Secondary Education, Office of English Language Acquisition, Office of Postsecondary Education, and Office of Special Education and Rehabilitative Services, U.S. Department of Education.

ACTION: Notice.

SUMMARY: The U.S. Department of Education (Department) announces opportunities for individuals to participate in its peer review process for competitive grant funding under the programs administered by OESE, OELA, OPE, and OSERS.

DATES: Requests to serve as a peer reviewer for fiscal year 2024 will be accepted on an ongoing basis, aligned with this year's grant competition schedule. Requests to serve as a peer reviewer should be submitted at least four weeks prior to the program's application deadline noted on the Department's website under ''Forecast of Funding Opportunities'' at *www2.ed.gov/fund/grant/find/edlite-forecast.html.* This notice highlights the specific needs of OESE, OELA, OPE, and OSERS.

ADDRESSES: An individual interested in serving as a peer reviewer must register and upload his or her resume in the Department's grants management system known as ''G6'' at *www.g6.gov.*

FOR FURTHER INFORMATION CONTACT:

OESE: Andrew Brake, U.S. Department of Education, 400 Maryland Avenue SW, Room 4B168, Washington, DC 20202. Telephone: (202) 453–6136. Email: *andrew.brake@ed.gov.*

OELA: Francisco Javier López, U.S. Department of Education, 400 Maryland Avenue SW, Washington, DC 20202–5076. Telephone: (202) 558–4880. Email: *NPD2024@ed.gov.*

OPE: Tonya Hardin, U.S. Department of Education, 400 Maryland Avenue SW, 5th Floor, Washington, DC 20202. Telephone: (202) 453–7694. Email: *tonya.hardin@ed.gov.*

OSERS: Kate Friday, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A–111, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 987–1439. Email: *kate.friday@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: The mission of the Department is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. The Department pursues its mission by funding grant programs that will improve access to high-quality educational opportunities and programs that pursue innovations in teaching and learning with a focus on underserved students. The Department also funds programs in other areas as authorized by statute. Grant funds are awarded to State educational agencies; local educational agencies (*i.e.,* school districts); State, local, or Tribal governments; nonprofit organizations; institutions of higher education; and other entities through a competitive process referred to as a grant competition.

Each year the Department convenes panels of external education professionals and practitioners to serve as peer reviewers.[1] Peer reviewers evaluate and score submitted applications against competition-specific criteria and announced priorities. Application scores are then used to inform the Secretary's funding decisions.

Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, directs Federal agencies to ''assess whether

[1] Please note that the Institute of Education Sciences (IES) uses different peer review processes and procedures than those described in this notice. More information on the IES peer review process can be found at: *https://ies.ed.gov/director/sro/application_review.asp.* IES also administers its research grant competitions on a different timeline from other offices in the Department.

underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs.'' The Department is committed to increasing the racial and ethnic diversity of peer reviewers—an important element of the Department's efforts to implement this Executive order. Moreover, the Department is particularly interested in peer reviewers who represent diverse experiences and perspectives, including experiences working with diverse and underserved communities, and whose expertise pertains to the Department's grant competitions. This emphasis on increasing peer reviewer diversity is included in the Department's Agency Equity Plan, available at *www2.ed.gov/documents/equity/2022-equity-plan.pdf.*

This year, OESE is managing over 20 grant competitions to fund a range of projects that support increasing the number of mental health providers in schools; education innovation and research; educator preparation, growth, and diversity; migratory or seasonal farmworkers; magnet schools; charter schools; literacy; Indian education; and technical assistance, among others.

OELA is managing one grant competition: National Professional Development. Grants awarded under this program may be used for effective pre-service professional development programs that will increase the number and diversity of fully licensed or certified bilingual or multilingual teachers supporting ELs.

OPE is managing approximately 15 grant competitions to fund a wide range of projects, including projects to support improvements in educational quality, management, and financial stability at colleges and universities that enroll high numbers of underserved students; projects designed to increase college enrollment among students in high-poverty schools; projects to strengthen multilingual education and foreign language instruction, international studies, teaching and research, professional preparation and development for educators, and curriculum development at the K–12, graduate, and postsecondary levels; projects to fund fellowships to students studying in a field designated as an area of national need; projects designed to support high-quality teacher preparation at Historically Black Colleges and Universities, Tribally Controlled Colleges and Universities, and Minority Serving Institutions; and projects to build research and development infrastructure at under resourced institutions.

OSERS is managing nearly 20 grant competitions. The competitions in OSERS' Office of Special Education Programs (OSEP) include those under the following programs: State Personnel Development Grants; Personnel Development; Technical Assistance and Dissemination; Educational Technology, Media, and Materials; and Technical Assistance on State Data Collection. The remaining competitions in OSERS' Rehabilitation Services Administration (RSA) are under the following programs: Braille Training Program, American Indian Vocational Rehabilitation Services, and the Disability Innovation Fund.

The Department seeks to expand its pool of peer reviewers to ensure that applications are evaluated by individuals with up-to-date and relevant knowledge of educational interventions and practices across the learning continuum, from early education to college and career, in a variety of learning settings. Department peer reviewers are education professionals and practitioners who have gained subject matter expertise through their education and work as teachers, professors, principals, administrators, school counselors, researchers, evaluators, content developers, or vocational rehabilitation professionals or interpreters. Peer reviewers can be active education professionals in any educational level or sector, or those who are retired but stay informed of current educational content and issues. No prior experience as a peer reviewer is required.

Peer reviewers for each competition will be selected based on several factors, including each reviewer's program-specific expertise, the number of applications to be reviewed, and the diversity and availability of prospective reviewers. Individuals selected to serve as peer reviewers are expected to participate in training; independently read, score, and provide written evaluative comments on assigned applications; and participate in facilitated panel discussions with other peer reviewers. Panel discussions are held via conference calls or in-person, as identified for the specific competition. The time commitment for peer reviewers is usually several hours a day over a period of two to four weeks. Peer reviewers receive an honorarium payment as monetary compensation for successfully reviewing applications.

If you are interested in serving as a peer reviewer for the Department, you should first review the program web pages of the grant programs that match your area of expertise. You can access information on each grant program from the link provided on the Department's grants forecast page at *www2.ed.gov/fund/grant/find/edlite-forecast.html.* If you have documented experience that you believe qualifies you to serve as a peer reviewer for one or more specific grant programs, please register in G6, at *www.g6.gov,* which allows the Department to manage and assign potential peer reviewers to competitions that may draw upon their professional backgrounds and expertise. A toolkit that includes helpful information on how to be considered as a peer reviewer for programs administered by the Department can be found at *www2.ed.gov/documents/peer-review/peer-reviewer-toolkit.pptx.* Additional information on becoming a peer reviewer is available at *www2.ed.gov/fund/grant/about/discretionary/peer-review-flyer-2024.pdf.* Neither the submission of a resume nor registration in G6 guarantees you will be selected to be a peer reviewer.

In addition to registering in G6, some OPE and OSERS/RSA peer reviews may require being registered in the System for Award Management. Since registration for this process can take longer than a week, interested individuals are encouraged to register in advance of being contacted by the Department. In addition to registering in G6, some OSERS/OSEP peer reviews require being approved to serve on the Office of Special Education's Standing Panel. Individuals should express their interest to serve as a peer reviewer for OSEP competitions directly to the competition manager listed in the notice inviting applications for that competition at least four weeks prior to the application closing date.

If you have interest in serving as a reviewer specifically for OESE competitions (Chart 2 of the Forecast of Funding Opportunities), you must also send your resume to *OESEPeerReviewRecruitment@ed.gov.*

If you have interest in serving as a reviewer specifically for the OELA competition (Chart 6 of the Forecast of Funding Opportunities), you must also send your resume to *NPD2024@ed.gov.* The subject line of the email should read ''Prospective 2024 Peer Reviewer.''

If you have interest in serving as a reviewer specifically for RSA competitions (Chart 4B of the Forecast of Funding Opportunities), you must also send your resume to *RSAPeerReview@ed.gov* and *osersprs@ed.gov.* The subject line of the email should read ''Prospective 2024 Peer Reviewer.'' In the body of the email, list all programs for which you would like to be considered to serve as a peer reviewer.

Requests to serve as a peer reviewer should be submitted at least four weeks prior to the program's application deadline, noted on the forecast page, to provide program offices with sufficient time to review resumes and determine an individual's suitability to serve as a peer reviewer for a specific competition. If you are selected to serve as a peer reviewer, the program office will contact you.

Accessible Format: On request to the person(s) 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.

Program Authority: Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6301 *et seq.*); Higher Education Act of 1965, as amended (20 U.S.C. 1001 *et seq.*); Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*); and the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (29 U.S.C. 701 *et seq.*).

Roberto J. Rodriguez,

Assistant Secretary for Planning, Evaluation and Policy Development.

[FR Doc. 2024–08341 Filed 4–18–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0025]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Student Assistance General Provision Subpart I Immigration Status Confirmation

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 20, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Student Assistance General Provision Subpart I Immigration Status Confirmation.

OMB Control Number: 1845–0052.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Private sector; State, local, and Tribal governments; individuals and households.

Total Estimated Number of Annual Responses: 118,360.

Total Estimated Number of Annual Burden Hours: 14,794.

Abstract: This request is for approval of an extension of the reporting requirements currently in the Student Assistance General Provisions, 34 CFR 668, subpart I. This subpart governs the Immigration-Status Confirmation, as authorized by section 484(g) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1091). The regulations may be reviewed at 34 CFR 668, subpart I. The regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds. This collection updates the usage by individuals and schools. While the regulations refer to a secondary confirmation process and completion of the paper G–845 form these processes are no longer in use. The Department of Homeland Security/U.S. Citizen and Immigration Services (DHS/USCIS) replaced the paper secondary confirmation method with a fully electronic process, Systematic Alien Verification for Entitlements (SAVE) system and the use of the Third Step Verification Process.

Dated: April 16, 2024.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–08420 Filed 4–18–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Request for Information (RFI) on Critical Materials Market Dynamics

AGENCY: Office of Manufacturing and Energy Supply Chains, Department of Energy.

ACTION: Request for information.

SUMMARY: The Department of Energy (DOE or the Department)'s Office of Manufacturing and Energy Supply Chains seeks public comment on market dynamics for critical materials, including non-competitive practices and

price volatility, to identify potential ways DOE can help address these concerns.

DATES: Responses to the RFI are requested by May 20, 2024.

ADDRESSES: Interested parties may submit comments electronically to *MESCanalysis@hq.doe.gov* and include ''Critical Materials Market Dynamics RFI'' in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Further questions may be addressed to Charles Yang, *MESCanalysis@hq.doe.gov* or (202) 586–6116.

SUPPLEMENTARY INFORMATION:

I. Background

This is an RFI issued by the U.S. Department of Energy's (DOE) Office of Manufacturing and Energy Supply Chains (MESC). This RFI seeks public input on market dynamics and price volatility in critical materials processing, refining, and recycling. This RFI will inform DOE's development of critical materials strategies and measures to more effectively mitigate market volatility as critical materials processing, refining, and recycling are scaled up in the United States and allied countries.

MESC seeks input from all types of critical material market participants:

- Companies that process, refine, or recycle critical materials;
- Groups that supply feedstock for such processors or recyclers (*e.g.,* miners, scrap collectors);
- Offtakers of critical materials (*e.g.,* automobile manufacturers, battery manufacturers, other clean energy manufacturers, utilities, heavy industries);
- Investors in critical material projects (*e.g.,* project finance investors, banks, commodity traders, brokers, private equity);
- Not-for-profit organizations (*e.g.,* entities capable of operating demand-side support mechanisms to scale up critical material processing, refining, and recycling);
- State, local, and tribal government entities; and
- Other interested entities (*e.g.,* trade associations, market-clearing organizations).

II. Purpose

On July 31, 2023, DOE released its Critical Material Assessment,[1] which identified critical materials in the near and medium term that will face supply-demand imbalances. This assessment also informed the DOE's Critical Material List.[2]

MESC is committed to securing the energy supply chains needed to support a clean and stable energy transition, which will be fueled by critical materials. This RFI will help inform the development of the U.S. Department of Energy's and its Office of Manufacturing Energy Supply Chain's strategy towards securing critical materials for the energy sector industrial base.

The purpose of this RFI is to solicit feedback on market dynamics in the critical material supply chain and how the Federal Government can play a role in supporting market stability and price transparency. DOE is specifically interested in information on:

- Market dynamics for critical material producers and implications of those market dynamics for securing a secure and resilient critical material supply chain; and
- What kind of Federal Government support or coordination would be essential to scaling up domestic critical material processing, refining, and recycling, particularly to mitigate market volatility.

You may answer as few or as many of the questions below as you would like. Please use the question number in your response to help reviewers. Please also provide detailed responses.

III. Questions

1. For a given critical material, are there particular market dynamics DOE should be aware of?

a. Are there specific critical materials that have experienced significant market volatility and price instability?

b. For a given critical material, are there differences in cost of production domestically versus cost of production in other countries? How are those differences in cost of production reflected in prices?

c. What, if any, impact has market volatility and price instability had on various market participants?

d. For those critical materials that have experienced significant market volatility and price instability, what are the underlying causes?

e. Are there particular critical materials where processing, refining, or recycling projects struggle to attract investment specifically because of demand-side uncertainty and/or lack of firm offtake (vs., *e.g.,* concerns about competitiveness on price or lengthy qualification processes)?

f. How do these market dynamics implicate the ability of domestic critical material producers to sign offtake agreements with end users? How does this impact DOE investments in the critical material industry and the path to securing a resilient supply chain?

2. What measures can DOE take to promote market stability within a given critical material market?

a. How can DOE facilitate market adoption and maturity as a stakeholder (*e.g.,* facilitating market information sharing, encouraging price transparency, supporting consortiums)?

b. How can DOE support critical material projects beyond capital grants and loans? Are there particular programs or policy mechanisms DOE should leverage with existing statutory authority to support critical material projects and successful project offtake? Are there particular aspects of the supply chain that DOE should focus on?

c. In operations without co-located vertical integration across extraction (or production) and processing, what specific federal support would be most useful to provide operational stability?

3. What indicators of market volatility demonstrate the need for support? What are effective measures or guiding principles DOE or the Federal Government could take to support critical materials?

a. What are important considerations in exploring reverse auctions, advanced market commitments, contracts for difference, direct procurement, pooled offtake vehicles, or other support measures?

b. What are implementation approaches for DOE to facilitate demand-side support for critical materials through existing grant and loan authorities and/or public-private partnerships?

4. What are the benefits and drawbacks of physical offtake of critical material products for stockpiling compared to other measures that do not involve physical offtake? What existing mechanisms could be used and what concerns should be considered in terms of implementation?

5. How would setting up alternative market exchanges or indices with international partners for critical materials enable price transparency, market stability, and/or reduce emissions from critical material production?

a. What premium would firms be willing to pay for validated attributes such as ESG standards and supply chains sourced from domestic/allied

[1] *https://www.energy.gov/sites/default/files/2023-07/doe-critical-material-assessment_07312023.pdf.*

[2] The following materials are on the DOE critical material list: aluminum, cobalt, copper, dysprosium, electrical steel, fluorine, gallium, iridium, lithium, magnesium, natural graphite, neodymium, nickel, platinum, praseodymium, silicon, silicon carbide and terbium. *https://www.energy.gov/cmm/what-are-critical-materials-and-critical-minerals.*

countries? How could DOE or the Federal Government support greater demand for higher standard materials?

b. How might environmental, social, and governance (ESG) standards or critical material grades specific to energy applications be incorporated into an exchange and what are the conditions needed for successful implementation?

6. What other tools outside of market exchanges could support price transparency, market stability, and/or reduce emissions from critical material production?

a. What actions could the United States take in collaboration with its international partners to enhance price transparency and stability?

b. Which country partners would be ideal collaborators?

c. Are there established international fora that are better suited to have an impact on these challenges? (*i.e.,* International Energy Agency, G7, OECD, etc.)

IV. Response Guidelines

Commenters are welcome to comment on any question. RFI responses shall include:

1. RFI title;

2. Name(s), phone number(s), and email address(es) for the principal point(s) of contact;

3. Institution or organization affiliation and postal address; and

4. Clear indication of the specific question(s) to which you are responding.

Responses to this RFI must be submitted electronically to *MESCanalysis@hq.doe.gov* with the subject line ''Critical Materials Market Dynamics RFI'' no later than 5:00 p.m. (ET) on May 20, 2024. Responses must be provided as attachments to an email. It is recommended that attachments with file sizes exceeding 25 MB be compressed (*i.e.,* zipped) to ensure message delivery. Responses must be provided as a Microsoft Word (*.docx) or Adobe Acrobat (*.pdf) attachment to the email, and no more than 10 pages in length, 12-point font, 1-inch margins. Only electronic responses will be accepted.

A response to this RFI will not be viewed as a binding commitment to develop or pursue the project or ideas discussed. MESC may engage in pre- and post-response conversations with interested parties.

Confidential Business Information

Because information received in response to this RFI may be used to structure future programs and/or otherwise be made available to the public, respondents are strongly advised NOT to include any information in their responses that might be considered business sensitive, proprietary, or otherwise confidential.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Failure to comply with these marking requirements may result in the disclosure of the unmarked information under the Freedom of Information Act or otherwise. The U.S. Government is not liable for the disclosure or use of unmarked information and may use or disclose such information for any purpose. If your response contains confidential, proprietary, or privileged information, you must include a cover sheet marked as follows identifying the specific pages containing confidential, proprietary, or privileged information:

Notice of Restriction on Disclosure and Use of Data:

Pages [list applicable pages] of this response may contain confidential, proprietary, or privileged information that is exempt from public disclosure. Such information shall be used or disclosed only for the purposes described in this RFI. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

In addition, (1) the header and footer of every page that contains confidential, proprietary, or privileged information must be marked as follows: ''Contains, Confidential, Proprietary, or Privileged Information Exempt from Public Disclosure'' and (2) every line and paragraph containing proprietary, privileged, or trade secret information must be clearly marked with [[double brackets]] or highlighting. Submissions containing CBI should be sent to: *MESCanalysis@hq.doe.gov.*

Signing Authority

This document of the Department of Energy was signed on April 12, 2024, by Giulia Siccardo, Director, Office of Manufacturing and Energy Supply Chains, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 16, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–08391 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of an open virtual meeting.

SUMMARY: This notice announces an open virtual meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, April 23, 2024; 11:00 a.m. to 12:15 p.m. EST.

ADDRESSES: Information for viewing the livestream of the meeting can be found on the PCAST website closer to the meeting at: *www.whitehouse.gov/PCAST/meetings.*

FOR FURTHER INFORMATION CONTACT: Dr. Melissa A. Edwards, Designated Federal Officer, PCAST, email: *PCAST@ostp.eop.gov;* telephone: 202–881–9018.

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at *whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Melissa A. Edwards. Information about PCAST can be found at: *www.whitehouse.gov/PCAST.*

Tentative Agenda

PCAST will discuss and consider for approval a report on Supercharging Science: Harnessing AI to Achieve Unprecedented Discoveries and Understandings in fulfillment of the charge to PCAST in the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (E.O. 141110). Additional information and the meeting agenda, including any changes that arise, will be posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Public Participation: The open meeting is open to the public. The meeting will be held virtually for members of the public. It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on April 23, 2024, at times specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties and members' availability.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *PCAST@ostp.eop.gov,* no later than 12:00 p.m. Eastern Time on April 19, 2024. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will select speakers on a first-come, first-served basis from those who registered. Those not able to present oral comments may file written comments with the council.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to *PCAST@ostp.eop.gov* no later than 12:00 p.m. Eastern Time on April 19, 2024, so that the comments can be made available to the PCAST members for their consideration prior to this meeting.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Minutes: Minutes will be available within 45 days at: *www.whitehouse.gov/PCAST/meetings.*

Signing Authority: This document of the Department of Energy was signed on April 16, 2024, by David Borak, Deputy Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 16, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–08415 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. 24–27–LNG]

Sabine Pass Liquefaction, LLC and Sabine Pass Liquefaction Stage V, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas to Non-Free Trade Agreement Nations

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy and Carbon Management (FECM) of the Department of Energy (DOE) gives notice (Notice) of receipt of an application (Application), filed by Sabine Pass Liquefaction, LLC and Sabine Pass Liquefaction Stage V, LLC (collectively, Sabine Pass Stage 5 or Sabine Pass) on March 1, 2024, and supplemented on March 21, 2024. Sabine Pass Stage 5 requests long-term, multi-contract authorization to export domestically produced liquefied natural gas (LNG) in a volume equivalent to approximately 899.46 billion cubic feet (Bcf) per year (Bcf/yr) of natural gas from the proposed Sabine Pass Stage 5 Expansion Project (Trains 7–8) (Stage 5 Project) to be added to the existing Sabine Pass LNG Terminal (SPLNG Terminal) located in Cameron Parish, Louisiana. Sabine Pass Stage 5 filed the Application under the Natural Gas Act (NGA).

DATES: Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed as detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, June 18, 2024.

ADDRESSES: *Electronic Filing by email (Strongly encouraged): fergas@hq.doe.gov.* Postal Mail, Hand Delivery, or Private Delivery Services (*e.g.,* FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–056, 1000 Independence Avenue SW, Washington, DC 20585.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit filings electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT:

Jennifer Wade or Peri Ulrey, U.S. Department of Energy (FE–34), Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability, Office of Fossil Energy and Carbon Management, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–4749 or (202) 586–7893, *jennifer.wade@hq.doe.gov* or *peri.ulrey@hq.doe.gov*

Cassandra Bernstein, U.S. Department of Energy (GC–76), Office of the Assistant General Counsel for Energy Delivery and Resilience, Forrestal Building, Room 6D–033, 1000 Independence Avenue SW, Washington, DC 20585, (240) 780–1691, *cassandra.bernstein@hq.doe.gov*

SUPPLEMENTARY INFORMATION: Sabine Pass Stage 5 states that the proposed Stage 5 Project will include two new natural gas liquefaction trains (Trains 7 and 8), a boil-off gas re-liquefaction unit, two full-containment LNG storage tanks and supporting infrastructure, which will be constructed on land controlled under long-term lease by Sabine Pass, adjacent to and interconnected and operated, on an integrated basis, with the existing SPLNG Terminal.[1] Sabine Pass Stage 5 seeks to export LNG by ocean-going

[1] Sabine Pass Stage 5 states that they have previously received DOE authorizations for LNG exports from six liquefaction trains at the SPLNG Terminal that are already fully operational.

carrier from the proposed Stage 5 Project in a volume equivalent to approximately 899.46 Bcf/yr of natural gas (approximately 2.46 Bcf per day) on a non-additive basis to: (i) any country with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries), and (ii) any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries). This Notice applies only to the portion of the Application requesting authority to export LNG to non-FTA countries pursuant to section 3(a) of the NGA.[2] DOE will review the Applicants' request for an export authorization to FTA countries separately pursuant to NGA section 3(c).[3]

Sabine Pass Stage 5 seeks this authorization on its own behalf and as agent for other parties that may hold title to the LNG at the time of export. Sabine Pass Stage 5 requests the authorization for a term commencing on the earlier of the date of first export or seven (7) years from the date of issuance of the requested authorization and extending through the later of (1) December 31, 2050, or (2) a 20-year term.

Additional details can be found in the Application and supplement, posted on the DOE website at: *https://www.energy.gov/fecm/articles/sabine-pass-liquefaction-llc-and-sabine-pass-liquefaction-stage-v-llc-fecm-docket-no.*

DOE Evaluation

In reviewing Sabine Pass Stage 5's Application, DOE will consider any issues required by law or policy under NGA section 3(a), DOE's regulations, and any other documents deemed appropriate. Parties that may oppose the Application should address these issues and documents in their comments and/or protests, as well as other issues deemed relevant to the Application. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding before DOE has met its environmental responsibilities.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, a motion to intervene or notice of intervention, or request for additional procedures, as applicable. Interested parties will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, or notices of intervention.

Any person wishing to become a party to this proceeding evaluating the Application must file a motion to intervene or notice of intervention. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to this proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, notices of intervention, or request for additional procedures must meet the requirements specified by the regulations in 10 CFR part 590, including the service requirements.

Filings may be submitted using one of the following methods:

(1) Submitting the filing electronically at *fergas@hq.doe.gov;*

(2) Mailing the filing to the Office of Regulation, Analysis, and Engagement at the address listed in the **ADDRESSES** section; or

(3) Hand delivering the filing to the Office of Regulation, Analysis, and Engagement at the address listed in the **ADDRESSES** section.

For administrative efficiency, DOE prefers filings to be filed electronically. All filings must include a reference to ''Docket No. 24–27–LNG'' or ''Sabine Pass Stage V Application'' in the title line.

For electronic submissions: Please include all related documents and attachments (*e.g.,* exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner.

The Notice, and any filed protests, motions to intervene, notices of intervention, and comments will be available electronically on the DOE website at *www.energy.gov/fecm/regulation.*

A decisional record on the Application will be developed through responses to this Notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this Notice, in accordance with 10 CFR 590.316.

Signed in Washington, DC, on April 15, 2024.

Amy Sweeney,

Director, Office of Regulation, Analysis, and Engagement, Office of Resource Sustainability.

[FR Doc. 2024–08384 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

[2] 15 U.S.C. 717b(a).

[3] 15 U.S.C. 717b(c).

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Record of Decision for the Final Environmental Impact Statement for the Surplus Plutonium Disposition Program

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the U.S. Department of Energy (DOE), is issuing this Record of Decision (ROD) for the Final Environmental Impact Statement (EIS) for the Surplus Plutonium Disposition Program (SPDP) (SPDP EIS) (DOE/EIS–0549). In this ROD, NNSA announces its decision to use the dilute and dispose strategy, rather than the Mixed Oxide Fuel (MOX) Program, to permanently dispose of 34 metric tons (MT) of plutonium surplus to the defense needs of the Nation (surplus defense-related plutonium). NNSA will implement the Base Approach Sub-alternative of the Preferred Alternative as described and analyzed in the SPDP EIS.

FOR FURTHER INFORMATION CONTACT: For further information on this ROD or the SPDP EIS, contact: Ms. Maxcine Maxted, National Environmental Policy Act (NEPA) Document Manager, National Nuclear Security Administration, Office of Material Management and Minimization, P.O. Box A, Bldg. 730–2B, Rm. 328, Aiken, SC 29802; via email at *SPDP-EIS@nnsa.doe.gov;* or by phone at (803) 952–7434. This ROD, the SPDP EIS, and related NEPA documents are available at *www.energy.gov/nnsa/nnsa-nepa-reading-room.*

SUPPLEMENTARY INFORMATION: DOE is currently employing the dilute and dispose strategy to dispose of up to 13.1 MT of surplus plutonium. Recently, NNSA announced a replanning effort to revisit the initiation of the Pit

Disassembly and Processing (PDP) Project, a part of the SPDP, by approximately 10 years. Increased capacity for producing plutonium oxide, which NNSA evaluated as part of the Preferred Alternative in the SPDP EIS, will therefore be delayed. This decision will extend the timeline for the full 34 MT disposition mission. NNSA will continue to dismantle surplus pits and produce plutonium oxide at the Los Alamos National Laboratory (LANL) and remains fully committed to dispositioning 34 MT of surplus plutonium. The Surplus Plutonium Disposition line-item project execution at the Savannah River Site (SRS) will continue as described in the SPDP EIS, and NNSA will continue to dilute surplus plutonium and ship contact-handled transuranic waste to the Waste Isolation Pilot Plant (WIPP) for permanent disposal. This decision will allow NNSA to continue to remove surplus plutonium from South Carolina in alignment with the DOE-South Carolina Settlement Agreement.

Background

NNSA prepared the SPDP EIS pursuant to NEPA (title 42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality's NEPA regulations (40 CFR parts 1500–1508), and the DOE NEPA implementing procedures (10 CFR part 1021). NNSA's previous NEPA reviews and decisions regarding the disposition of surplus plutonium are summarized in Section 1.1 of the SPDP EIS. The following paragraphs describe recent developments relevant to the scope of the SPDP EIS.

In 2015, NNSA completed the Surplus Plutonium Disposition Supplemental Environmental Impact Statement (SPD Supplemental EIS) (DOE/EIS–0283–S2). In the SPD Supplemental EIS, NNSA evaluated the environmental impacts of alternatives for dispositioning 13.1 MT of surplus plutonium (7.1 MT of pit plutonium and 6 MT of non-pit plutonium) for which a disposition path had not been assigned. The alternatives evaluated in the 2015 SPD Supplemental EIS included the MOX Fuel Alternative, the WIPP Alternative (the WIPP Alternative is equivalent to the dilute and dispose strategy, as used in the SPDP EIS), and two variations of waste immobilization. In addition, NNSA evaluated four options for pit disassembly and conversion (pit disassembly and conversion is equivalent to pit disassembly and processing as used in the SPDP EIS) using facilities at SRS and LANL. In a 2016 ROD, NNSA announced a decision to disposition the 6 MT of non-pit surplus plutonium by downblending it with an adulterant (downblending is a process equivalent to dilution in the dilute and dispose strategy as used in the SPDP EIS), packaging it as defense-related contact-handled transuranic (CH–TRU) waste, and shipping it to the WIPP facility for disposal (81 FR 19588). In this 2016 ROD, NNSA also decided to increase available downblend capability by continuing construction and initiating operation of the SPD Project at SRS. NNSA did not make a decision about the disposition of the 7.1 MT of pit plutonium or about the various options for pit disassembly and conversion that were analyzed in the 2015 SPD Supplemental EIS.

In May 2018, the Secretary of Energy halted the MOX Program by waiving the requirement to use funds for construction and support activities for the Mixed Oxide Fuel Fabrication Facility in accordance with the National Defense Authorization Act. In a letter dated May 10, 2018 to Congress, the Secretary of Energy certified that ''the remaining lifecycle cost for the dilute and dispose strategy will be less than approximately half of the estimated remaining lifecycle cost of the MOX Program.'' NNSA prepared this SPDP EIS to evaluate alternatives for disposition of the 34 MT of surplus plutonium previously designated for disposition using the MOX Program (Amended ROD 68 FR 20134, April 24, 2003) that no longer has a disposition path because the MOX Program has been cancelled.

In 2020, NNSA prepared a Supplement Analysis (SA) based on the analysis presented in the 2015 SPD Supplemental EIS. NNSA determined that disposition of 7.1 MT of non-pit surplus plutonium was not a substantial change in the action analyzed in the 2015 SPD Supplemental EIS to disposition 7.1 MT of pit plutonium via the WIPP Alternative, and that the environmental impacts had been sufficiently analyzed. NNSA subsequently issued an Amended ROD stating its decision to prepare an additional 7.1 MT of non-pit surplus plutonium for disposal as defense-related CH–TRU waste at the WIPP facility (85 FR 53350, August 28, 2020). In the same 2020 Amended ROD, NNSA also decided that non-pit metal processing (NPMP) may be performed at either LANL or SRS.

The 7.1 MT of non-pit surplus plutonium referred to in the 2020 Amended ROD is part of the 34 MT of surplus plutonium that NNSA had decided (Amended ROD 68 FR 20134, April 24, 2003) to disposition by fabricating it into MOX fuel for use in commercial reactors (*i.e.,* the MOX Program). The disposition of that 34 MT is the subject of the SPDP EIS.

Alternatives Considered

In the SPDP EIS, NNSA analyzed the impact of two alternatives: the Preferred Alternative, consisting of four sub-alternatives, and the No Action Alternative. Both alternatives use the dilute and dispose strategy and both include up to 7.1 MT of non-pit surplus plutonium that NNSA previously decided to dispose of (85 FR 53350) using the dilute and dispose strategy. NNSA's Preferred Alternative is to use the dilute and dispose strategy for 34 MT of surplus plutonium comprised of both pit and non-pit plutonium. The No Action Alternative is continued management of the 34 MT of both pit and non-pit plutonium, including the disposition of up to 7.1 MT of non-pit plutonium using the dilute and dispose strategy based on the previous NNSA decision (85 FR 53350). The Preferred Alternative is the only alternative that meets NNSA's purpose and need to take action.

Preferred Alternative: NNSA's Preferred Alternative is to use the dilute and dispose strategy for disposal of 34 MT of surplus plutonium comprised of both pit and non-pit surplus plutonium. The exact amounts of pit and non-pit forms of plutonium that compose the 34 MT are classified. To bound the impacts, in the SPDP EIS NNSA evaluated the impacts of dispositioning 34 MT of surplus plutonium in pit form and the impacts of dispositioning 7.1 MT of non-pit surplus plutonium. However, the SPDP Program would disposition only up to 34 MT of surplus plutonium total, not 34 MT plus 7.1 MT. The activities that are part of the Preferred Alternative would occur at five DOE sites: the Pantex Plant (Pantex) in Texas, LANL in New Mexico, SRS in South Carolina, the Y–12 National Security Complex (Y–12) in Tennessee, and the WIPP facility in New Mexico. NNSA describes the steps and technologies involved in the Preferred Alternative in detail in Section 2.1 of the SPDP EIS. NNSA developed and evaluated the impacts of four sub-alternatives for the Preferred Alternative based on the location of processing activities.

The Base Approach Sub-Alternative involves shipping 34 MT of pit plutonium from Pantex to LANL and disassembling and processing (PDP) the 34 MT of pit plutonium to oxide, with subsequent shipment of the decontaminated and oxidized highly enriched uranium (HEU) to Y–12. The Base Approach Sub-Alternative also includes processing 7.1 MT of non-pit

surplus plutonium using the same capability provided by PDP at LANL. This sub-alternative relies on expanding existing capabilities at LANL in the Plutonium Facility (PF–4) and modifying or building additional support facilities for PDP and NPMP. This expansion would allow NNSA to accelerate the dilute and dispose strategy compared to relying solely on existing facilities at LANL. The resulting plutonium oxide from the surplus pit and non-pit plutonium would be shipped to K-Area at SRS, where it would be blended with an adulterant and characterized and packaged (C&P) as CH–TRU waste for shipment to and disposal at the WIPP facility.

The SRS NPMP Sub-Alternative is similar to the Base Approach Sub-Alternative: NNSA would ship 34 MT of pit plutonium from Pantex to LANL where PDP would take place in PF–4. In the SRS NPMP Sub-Alternative, NNSA would ship the decontaminated and oxidized HEU to Y–12. PDP would be followed by shipment of the resulting plutonium oxide to SRS (K-Area). Unlike the Base Approach Sub-Alternative, NPMP would not take place at LANL. Instead of processing 7.1 MT of non-pit surplus plutonium would occur at SRS's K-Area either in Building 105–K or in a modular system adjacent to the building. Similar to the Base Approach Sub-Alternative, the SRS NPMP Sub-Alternative plutonium oxide would be blended with an adulterant and characterized and packaged as CH–TRU waste for shipment to and disposal at the WIPP facility.

For the All LANL Sub-Alternative, NNSA would use only capabilities at LANL for the entire disposition pathway. Like the Base Approach Sub-Alternative, under the All LANL Sub-Alternative NNSA would ship 34 MT of pit plutonium from Pantex to LANL for PDP in PF–4 with subsequent shipment of the decontaminated and oxidized HEU to Y–12. In the All LANL Sub-Alternative, processing 7.1 MT of non-pit surplus plutonium would occur at LANL in PF–4. Unlike the Base Approach Sub-Alternative, the resulting plutonium oxide would remain at LANL for dilution and C&P before shipment to and disposal at the WIPP facility as CH–TRU waste.

For the All SRS Sub-Alternative, NNSA would use only capabilities at SRS. NNSA would ship 34 MT of pit plutonium from Pantex to SRS. PDP would take place in a new capability installed at SRS in either K-Area or F-Area. NNSA would ship the decontaminated and oxidized HEU to Y–12. Processing 7.1 MT of non-pit surplus plutonium would use new capability provided by PDP. The resulting plutonium oxide would remain at SRS for dilution and C&P before shipment to and disposal at the WIPP facility as CH–TRU waste.

No Action Alternative: NNSA's No Action Alternative for dispositioning 34 MT of surplus plutonium is continued management of 34 MT of surplus plutonium. This includes (1) continued storage of pits at Pantex, (2) the continued plutonium mission at LANL to process up to 400 kg of actinides (including surplus plutonium) a year as announced in NNSA's 2008 LANL SWEIS ROD (73 FR 55833), and (3) disposition of up to 7.1 MT of non-pit surplus plutonium for which the disposition decision, using the dilute and dispose strategy, was announced in NNSA's 2020 Amended ROD (85 FR 53350). NNSA describes the steps and technologies involved in the No Action Alternative in detail in Section 2.1.2 of the SPDP EIS.

NPMP of up to 7.1 MT could be performed in the existing furnaces installed in gloveboxes at LANL's PF–4 or in a NPMP capability that would be built at Building 105–K in K-Area at SRS. If NPMP occurs at LANL, the resulting plutonium oxide would be shipped to SRS for dilution and C&P and subsequently shipped from K-Area to the WIPP facility for disposal as CH–TRU waste.

Environmentally Preferrable Alternative

The No Action Alternative, using only existing facilities at LANL and SRS, would require no new land disturbance or construction. In addition, the lesser quantity of plutonium that would be processed would result in fewer emissions and a smaller volume of CH–TRU waste for disposal at the WIPP facility. The No Action Alternative is therefore the environmental preferable alternative. However, the No Action Alternative does not meet NNSA's mission need.

Potential Environmental Impacts of Preferred Alternative

NNSA estimated the potential environmental impacts of the Preferred Alternative, the Sub-Alternatives, and the No Action Alternative on air quality, visual resources, human health, socioeconomics, waste management, transportation, environmental justice, land resources, geology and soils, water resources, noise, ecological resources, cultural resources, infrastructure, and the global commons. NNSA also evaluated the potential impacts of the irreversible and irretrievable commitment of resources, the short-term uses of the environment, and the maintenance and enhancement of long-term productivity. These analyses and results for the 34 MT of surplus plutonium are described in the Summary and Section 4 of the Final SPDP EIS. Table S–10 of the Final SPDP EIS Summary provides a summary of potential environmental impacts associated with each alternative as well as a means for comparing the potential impacts among alternatives and sub-Alternatives. A full discussion of the impacts for all resources is found in Section 4.0 of Volume 1. Appendix C in Volume 2 contains the detailed potential environmental impacts broken out by activity and site (LANL and SRS), as well as impacts across the sites under each of the alternatives and sub-alternatives. NNSA determined that the impacts of the Preferred Alternative at both LANL and SRS are minor to negligible for land use and visual resources, air quality, noise, geology and soils, water resources, human health (chemical use), and waste management. NNSA finds that impacts at both sites from radiological releases during normal operations and impacts on other resources are small and within the bounds of existing regulations.

DOE has authorized WIPP to use fiscal year (FY) 2050 as a planning assumption for a closure date for project management plans related to capital asset projects and other strategic planning initiatives. Therefore, for the purpose of estimating impacts, NNSA chose fiscal year (FY) 2050 as the date for completion of the 34 MT mission described in the SPDP EIS. NNSA estimated operational durations based on process throughputs that would result in mission completion in FY 2050. Because NNSA has decided to revisit the timing for initiation of the PDP, the 34 MT mission will not be completed by 2050. As a result, the annual impacts NNSA estimated in the SPDP EIS are greater than the impacts that will result from implementation of the Preferred Alternative without the PDP Project. The impact analysis of the Preferred Alternative assumed the PDP Project would be operational in approximately 2030. In addition, construction impacts, except for those associated with the SPD Project at SRS, will not occur until the PDP Project is initiated.

Public Involvement

On December 16, 2020, NNSA published a Notice of Intent (NOI) to prepare this SPDP EIS in the **Federal Register** (85 FR 81460) announcing a 45-day public scoping period ending February 1, 2021. NNSA extended the

scoping period to February 18, 2021. The NOI also provided information regarding NNSA's overall NEPA strategy related to fulfilling the purpose and need to disposition 34 MT of surplus plutonium. Considering the public health concerns at the time, NNSA held virtual public scoping meetings on January 25 and 26, 2021, to discuss the SPDP EIS and to receive comments on the potential scope of the SPDP EIS. In addition to the scoping meetings, NNSA encouraged members of the public to provide comments via U.S. postal mail, email, or telephone. NNSA received 279 comment documents related to the project scope during the public scoping process. NNSA considered all comments received during the public scoping process including some received after the close of the comment period, when preparing the Draft SPDP EIS. A summary of the comments, including an indication of how NNSA addressed the comments, was published in the Draft SPDP EIS.

In accordance with NEPA regulations, the Draft SPDP EIS was provided to the public for comment on December 16, 2022, with publication of a Notice of Availability (NOA) in the **Federal Register** (87 FR 77096). Publication of the U.S. Environmental Protection Agency's NOA (87 FR 77106) on the same day started a 60-day public comment period that originally ran through February 14, 2023, and was extended 30 days until March 16, 2023, resulting from requests from the public. The Environmental Protection Agency announced the comment period extension in a February 10, 2023, Notice in the **Federal Register**. NNSA held in-person public hearings at locations near SRS, the WIPP facility, and LANL on January 19, 24, and 26, 2023, respectively, and a virtual public hearing on January 30, 2023, to present preliminary findings and to provide the public, governmental entities including Native American Tribes, and other stakeholders the opportunity to comment on the Draft SPDP EIS.

The NOA encouraged members of the public to provide comments on the Draft EIS. NNSA considered all comments carefully and equally. After considering the comments, NNSA revised the Draft SPDP EIS. The primary changes found in the Final SPDP EIS that resulted from public comments include clarification related to (1) pit and non-pit terminology and descriptions, (2) facility throughputs, (3) various plutonium disposition pathways NNSA had determined, and (4) assumptions used in technical calculations and analyses. In addition, NNSA included background information on plutonium and americium-241 in the Final SPDP EIS and updated radiological health information to address potential impacts to surrounding communities. NNSA provided responses to comments in Volume 3 of the Final SPDP EIS. Volume 3 includes a detailed description of the public comment process and copies of correspondence received on the Draft SPDP EIS. In addition to changes made in the Final SPDP EIS in response to public comments, NNSA also made changes to update the environmental baseline information, update analyses based on more recent information, correct inaccuracies, and to clarify text.

NNSA invited 24 Native American groups with ties to the land on or in the vicinity of the SRS and LANL sites to participate in Government-to-Government consultations and offered briefings on the Draft SPDP EIS. The initial meeting was held on December 6, 2022. The Pueblo de San Ildefonso requested an additional consultation meeting to discuss the program and potential impacts from the SPDP. The meeting with the San Ildefonso Pueblo leadership and attorneys was held on January 31, 2023.

Comments on the Final Surplus Plutonium Disposition Program EIS

NNSA posted the Final SPDP EIS on the NNSA NEPA Reading Room website (*www.energy.gov/nnsa/nnsa-nepareading-room*) and EPA published a NOA in the **Federal Register** (89 FR 3653, January 19, 2024). NNSA also published a NOA of the Final SPDP EIS in the **Federal Register** on January 19, 2024 (89 FR 3642). In response to these Notices, NNSA received three comment documents related to the Final SPDP EIS. NNSA considered each of the comments contained in these documents during the preparation of this ROD.

Decision

NNSA has decided to implement the Preferred Alternative, Base Approach Sub-alternative, to continue the 34 MT surplus plutonium disposition mission. This decision changes the program of record for surplus plutonium disposition from the MOX Program to the dilute and dispose strategy. NNSA will continue to dismantle surplus pits and produce plutonium oxide in the Advanced Recovery and Integrated Extraction System (ARIES) facility at LANL. Because the MOX Program has been terminated, NNSA has decided to use existing and future inventories of plutonium oxide from the ARIES facility as feedstock for the dilute and dispose strategy. NNSA does not plan to expand the ARIES footprint at this time.

Using the dilute and dispose strategy, NNSA will disassemble pits, convert pit and non-pit plutonium metal to oxide, and blend surplus plutonium in oxide form with an adulterant. The blended material will be compressed into a steel container (called the robust outer container (ROC)) for radiation control, then the ROC will be enclosed in a further container for contamination control. These ROC containers are then placed in overpacks and disposed of as defense-related CH–TRU waste underground at the WIPP facility.

This decision will require the use of existing facilities at Pantex, LANL, SRS, Y–12, and WIPP, and completion and operation of the SPD Project at SRS. Implementation will involve (1) continued transfer of surplus pits from Pantex to LANL, (2) continued operation of the existing ARIES process at LANL to oxidize pit and non-pit plutonium, until a decision on the PDP Project is made, (3) transfer of plutonium oxide from LANL to SRS, (4) continued operation of existing dilution capability and operation of the Surplus Plutonium Disposition Project at SRS to dilute plutonium oxide, transferred from LANL or currently stored at SRS, with an adulterant, (5) characterization and packaging of defense-related CH–TRU waste and transfer to WIPP, and (6) disposal in the WIPP underground.

Recently, NNSA announced a decision to replan the timeline for the Pit Disassembly and Processing (PDP) Project, delaying initiation of the PDP for approximately 10 years. Increased capacity for producing plutonium oxide, which NNSA evaluated as part of the Preferred Alternative in the SPDP EIS, will therefore be available later than originally planned, extending the timeline for the full 34 MT disposition mission. NNSA will determine whether it needs to prepare any additional NEPA analysis and complete that review prior to initiating any new facility to increase plutonium oxidation capacity.

Basis for Decision

In 2003 (Amended ROD 68 FR 20134, Apr. 24, 2003), NNSA decided to use the MOX Program to disposition 34 MT of surplus plutonium. Construction on the Mixed Oxide Fuel Fabrication Facility (MFFF) at SRS began in 2008. In 2016, NNSA, partnering with the U.S. Army Corps of Engineers, developed an independent cost estimate for the MFFF project, and concluded that the cost of the project, upon completion of construction, would be approximately $17 billion, and construction would not be complete until 2048. Congress

directed NNSA to prepare a lifecycle cost estimate for disposal of surplus plutonium using the dilute and dispose strategy. The completed cost estimate indicated that the estimate-to-complete lifecycle cost of the dilute and dispose strategy would be substantially lower than the cost to complete the MOX Program. In response, the Secretary of Energy halted construction of the MFFF in May 2018 by waiving the requirement to use funds for MFFF construction as required by the *National Defense Authorization Act of 2018.* In a letter dated May 10, 2018, the Secretary of Energy certified ''that the remaining lifecycle cost for the dilute and dispose approach will be less than approximately half of the estimated remaining lifecycle cost of the MOX fuel program.'' In 2018, NNSA terminated construction of the MFFF. In 2019, the U.S. Nuclear Regulatory Commission (NRC) terminated the construction license for MFFF. With the end of the MOX project there was no longer a disposition path for the 34 MT of surplus plutonium that had been designated for disposition as MOX fuel.

The decision to use the dilute and dispose strategy for disposition of the 34 MT of surplus plutonium allows NNSA to make the maximum use of existing, proven technologies and operating facilities.

Construction of the SPD Project will continue consistent with DOE's 2016 decision (81 FR 19588). When it becomes operational, the project's three new gloveboxes for dilution will significantly increase throughput capacity. Other aspects of the SPD Program, including pit transfer from Pantex, ARIES operation at LANL, the capability to transfer plutonium oxide from LANL to SRS, dilution, assay, and shipment of resulting CH–TRU waste to WIPP for emplacement in the underground, are operational and require no upgrades or modifications to continue operations. This decision will result in continued progress toward the disposition of 34 MT of surplus plutonium while eliminating potential conflicts with ongoing construction projects and new missions within the nuclear security enterprise.

After analyzing options for expanding a PDP capability at SRS or LANL and considering the current high volume of major construction projects across the nuclear security enterprise, NNSA has decided to revisit the initiation of the PDP capital line-item project. This will result in initiation of the PDP project in the mid-2030s rather than the mid-2020s. NNSA may re-evaluate this decision as conditions change in the nuclear security enterprise. In the meantime, NNSA will continue to dismantle surplus pits and produce plutonium oxide at LANL and remains fully committed to dispositioning 34 MT of surplus plutonium.

The Surplus Plutonium Disposition line-item project execution at SRS will continue as planned and NNSA will continue to dilute and ship downblended plutonium as defense-related contact handled transuranic waste to the Waste Isolation Pilot Plant for permanent disposal. This decision will allow NNSA to focus on removal of material from South Carolina in alignment with the DOE-South Carolina Settlement Agreement.

Mitigation Measures

Operations at each facility involved in the SPD Program would result in airborne emissions of various pollutants, including radionuclides, and organic and inorganic constituents. These emissions would continue to be controlled using Best Available Control Technology to ensure that emissions are compliant with applicable standards. Impacts would be controlled by use of glovebox confinement, packaging as applicable, and confinement and air filtration systems to remove radioactive particulates before discharging process exhaust air to the atmosphere. Occupational safety risks to workers would be limited by adherence to Federal and state laws, Occupational Safety and Health Administration regulations, NNSA requirements including regulations and orders, and plans and procedures for performing work. NNSA facility operations adhere to programs to ensure the reduction of human health and safety impacts. Workers are protected from specific hazards by use of engineering and administrative controls, use of personal protective equipment, and monitoring and training. Implementation of DOE's required Radiological Protection Program limits impacts by ensuring that radiological exposures and doses to all personnel are maintained As Low As Reasonably Achievable and by providing job specific instructions to the facility workers regarding the use of personal protective equipment.

The Emergency Preparedness Program required for each site mitigates potential accident consequences by ensuring that appropriate organizations are available to respond to emergency situations and take appropriate actions to recover from accident events, while reducing the spread of contamination and protecting facility personnel and the public.

Signing Authority

This document of the Department of Energy was signed on April 3, 2024, by Jill Hruby, Under Secretary for Nuclear Security and Administrator, NNSA, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 16, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–08390 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed fiscal year 2025 Boulder Canyon Project base charge and rates for electric service.

SUMMARY: The Desert Southwest region (DSW) of the Western Area Power Administration (WAPA) proposes an adjustment to the fiscal year (FY) 2025 base charge and rates for Boulder Canyon Project (BCP) electric service under Rate Schedule BCP–F11. The proposed FY 2025 base charge is unchanged from FY 2024 and will remain at $74.3 million. The proposed base charge and rates would go into effect on October 1, 2024, and remain in effect through September 30, 2025. Publication of this **Federal Register** notice will initiate the public process.

DATES: A consultation and comment period begins today and will end July 18, 2024. DSW will present a detailed explanation of the proposed FY 2025 base charge and rates at a public information forum on May 20, 2024, from 10 a.m. Mountain Standard Time to no later than 12 p.m. Mountain Standard Time. DSW will also host a public comment forum on June 18, 2024, from 10 a.m. Mountain Standard Time to no later than 12 p.m. Mountain

Standard Time, or until the last comment is received.

ADDRESSES: The public information and public comment forums will be held virtually and in person at WAPA's Desert Southwest Regional Office located at 615 South 43rd Avenue, Phoenix, Arizona 85009. Instructions for participating in the forums will be posted on DSW's website at least 14 days prior to the public information and comment forums at: *www.wapa.gov/about-wapa/regions/dsw/rates/boulder-canyon-project-rates.* DSW will accept written comments any time during the consultation and comment period.

As access to Federal facilities is controlled, any U.S. citizen wishing to attend a public forum at WAPA must present an official form of picture identification (ID), such as a U.S. driver's license, U.S. passport, U.S. Government ID, or U.S. military ID at the time of the meeting. Foreign nationals should contact Tina Ramsey, Rates Manager, Desert Southwest Region, Western Area Power Administration, (602) 605–2565, or *dswpwrmrk@wapa.gov* in advance of a forum to obtain the necessary form for admittance to the Desert Southwest Regional Office. Written comments and requests to be informed of Federal Energy Regulatory Commission (FERC) actions concerning the proposed base charge and rates should be sent to: Jack D. Murray, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, or *dswpwrmrk@wapa.gov.* DSW will post information concerning the rate process and written comments received to its website at: *www.wapa.gov/about-wapa/regions/dsw/rates/boulder-canyon-project-rates.*

FOR FURTHER INFORMATION CONTACT: Tina Ramsey, Rates Manager, Desert Southwest Region, Western Area Power Administration, (602) 605–2565, or *dswpwrmrk@wapa.gov.*

SUPPLEMENTARY INFORMATION: Hoover Dam,[1] authorized by the Boulder Canyon Project Act of 1928, as amended (43 U.S.C. 617, *et seq.*), sits on the Colorado River along the Arizona-Nevada border. The Hoover Dam power plant has 19 generating units (two for plant use) with installed capacity of 2,078.8 megawatts (4,800 kilowatts for plant use). In collaboration with the U.S. Bureau of Reclamation (Reclamation), WAPA markets and delivers hydropower from the Hoover Dam power plant through high-voltage transmission lines and substations to customers in Arizona, Southern California, and Southern Nevada.

The rate-setting methodology for BCP calculates an annual base charge rather than a unit rate for Hoover Dam hydropower. The base charge recovers an annual revenue requirement that includes projected costs for investment repayment, interest, operations, maintenance, replacements, payments to states, and Hoover Dam visitor services. Non-power revenue projections such as water sales, Hoover Dam visitor revenue, ancillary services, and late fees help offset these projected costs. Hoover power customers are billed a percentage of the base charge in proportion to their power allocation. Unit rates are calculated for comparative purposes but are not used to determine the charges for service.

On March 31, 2023, FERC approved and confirmed Rate Schedule BCP–F11, under Rate Order No. WAPA–204, on a final basis through September 30, 2027.[2] Rate Schedule BCP–F11 and the BCP Electric Service Contract require WAPA to determine the annual base charge and rates for the next fiscal year before October 1 of each year. The FY 2024 BCP base charge and rates expire on September 30, 2024.

COMPARISON OF BASE CHARGE AND RATES

	FY 2024	FY 2025	Amount change	Percent change
Base Charge ($)	$74,334,285	$74,334,285	$0.00	0.0
Composite Rate (mills/kWh)	23.10	24.61	1.51	6.5
Energy Rate (mills/kWh)	11.55	12.30	0.75	6.5
Capacity Rate ($/kW-Mo)	$2.15	$2.19	$0.04	1.9

The proposed FY 2025 base charge for BCP electric service is projected to remain at $74.3 million, the same as FY 2024.

Reclamation's FY 2025 budget is decreasing $700,000 from $87.9 million to $87.2 million, a 0.8 percent decrease from FY 2024. Reflected in this budget, O&M costs are increasing $1.1 million primarily due to higher projected labor costs for salaries, benefits, and overhead. Several large projects are being delayed, decreasing replacements costs by $2.2 million. Post-retirement benefits costs are increasing $109,000 based on a higher five-year average of recent actual expenses. Visitor services costs are increasing by $270,000 primarily due to higher projected labor costs for salaries, benefits, overhead, and overtime. The FY 2024 budget amounts cited for Reclamation do not include approximately $20.8 million in costs that are funded by prior year carryover from FY 2023.

WAPA's FY 2025 budget is increasing approximately $600,000 to $10.1 million, a 5.9 percent increase from FY 2024. WAPA's O&M costs are increasing $770,000 from FY 2024 due to higher labor projections for salaries, overtime, overhead, and benefits. The increase in O&M costs is offset by a $208,000 decrease in replacement costs and modest decreases in WAPA's post-retirement benefit costs and interest expenses due to lower 5-year averages of recent actual expenses. The FY 2024 budget amounts for WAPA do not include approximately $282,000 in costs that are funded by prior year carryover from FY 2023.

Non-power revenue projections for Reclamation and WAPA are decreasing $2.1 million due to lower estimated revenues for the Commercial Use Fee program and ancillary services. Prior year carryover is projected to be $4.1 million, a $1.9 million increase from FY 2024.

The composite and energy rate are both increasing 6.5 percent and the capacity rate is increasing 1.9 percent from FY 2024. These unit rate calculations use forecasted energy and capacity values, which have been decreasing due to the ongoing drought in the Lower Colorado River Basin. Forecasted energy and capacity values may be updated when determining the

[1] Hoover Dam was known as Boulder Dam from 1933 to 1947, but was renamed Hoover Dam by an April 30, 1947, joint resolution of Congress. *See* Act of April 30, 1947, H.J. Res. 140, ch. 46, 61 Stat. 56–57.

[2] *Order Confirming and Approving Rate Schedule on a Final Basis,* FERC Docket No. EF22–4–000.

final base charge and rates if hydrological conditions change.

WAPA's proposed base charge and rates for FY 2025, which would be effective October 1, 2024, are preliminary and subject to change based on modifications to forecasts before publication of the final base charge and rates.

Legal Authority

WAPA is establishing rates for BCP electric service in accordance with section 302 of the DOE Organization Act (42 U.S.C. 7152). This provision transferred to, and vested in, the Secretary of Energy certain functions of the Secretary of the Interior, along with the power marketing functions of Reclamation. Those functions include actions that specifically apply to the BCP.

WAPA's proposal to calculate the base charge and rates for FY 2025 constitutes a major rate adjustment, as defined by 10 CFR 903.2(d). In accordance with 10 CFR 903.15, 10 CFR 903.16, and 10 CFR 904.7(e), DSW will hold public information and public comment forums for this rate adjustment. DSW will review and consider all timely public comments at the conclusion of the consultation and comment period and adjust the proposal as appropriate.

DOE regulations governing charges for the sale of BCP power, 10 CFR 904.7(e), require annual review of the BCP base charge and an ''adjust[ment], either upward or downward, when necessary and administratively feasible, to assure sufficient revenues to effect payment of all costs and financial obligations associated with the [p]roject.'' This proposal is issued pursuant to Delegation Order No. S1–DEL–RATES–2016, effective November 19, 2016, in which the Secretary of Energy delegated the authority to develop power and transmission rates to WAPA's Administrator. The BCP Electric Service Contract states that for years other than the first year and each fifth year thereafter, when the rate schedule is approved by the Deputy Secretary of Energy on a provisional basis and by FERC on a final basis, adjustments to the base charge ''shall become effective upon approval by the Deputy Secretary of Energy.'' Accordingly, the Deputy Secretary of Energy would approve the final FY 2025 base charge and rates for BCP electric service, as authorized by the BCP Electric Service Contract and DOE's procedures for public participation in rate adjustments set forth at 10 CFR parts 903 and 904.[3] The FY 2025 base charge will also be filed at FERC for informational purposes only.

Availability of Information

All brochures, studies, comments, letters, memorandums, or other documents that DSW initiates or uses to develop the proposed formula rates for electric service and the base charge and rates are available for inspection and copying at the Desert Southwest Regional Office, located at 615 South 43rd Avenue, Phoenix, Arizona. Many of these documents and supporting information are also available on DSW's website at: *www.wapa.gov/about-wapa/regions/dsw/rates/boulder-canyon-project-rates.*

Ratemaking Procedure Requirements

Environmental Compliance

WAPA is in the process of determining whether an environmental assessment or an environmental impact statement should be prepared or if this action can be categorically excluded from those requirements.[4]

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on April 12, 2024, by Tracey A. LeBeau, Administrator, Western Area Power Administration, pursuant to delegated authority from the Secretary of Energy. The document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

[3] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

[4] In compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

Signed in Washington, DC, on April 16, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2024–08387 Filed 4–18–24; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2015–0739; FRL–11816–01–OCSPP]

Pesticide Registration Review; Draft Human Health and Ecological Risk Assessments for Formaldehyde and Paraformaldehyde; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's draft human health and ecological risk assessments for the registration review of formaldehyde and paraformaldehyde and opens a 60-day public comment period on this document.

DATES: Comments must be received on or before June 18, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2015–0739, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: The Chemical Review Manager for formaldehyde identified in table 1 of unit I.

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This notice is directed to the public in general and may be of interest to a

wide range of stakeholders including environmental, human health, worker rights advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager identified in table 1 in unit I.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

4. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. However, the Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English, and a written transcript must accompany any information submitted as an audio graphic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed comprehensive draft human health and/or ecological risk assessments for the pesticides listed in table 1 in unit I. After reviewing comments received during the public comment period, EPA may issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for the pesticides listed in table 1 in unit I. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of formaldehyde and paraformaldehyde pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 3(g) (7 U.S.C. 136(g)) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. FIFRA section 3(g) provides, among other things, that pesticide registrations are to be reviewed every 15 years. Consistent with 40 CFR 155.57, in its final registration review decision, EPA will ultimately determine whether a pesticide continues to meet the registration standard in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)).

As part of the registration review process, the Agency has completed draft human health and ecological risk assessments on formaldehyde and paraformaldehyde. Pursuant to 40 CFR 155.53(c), EPA generally provides for at least a 30-day public comment period on draft human health and/or ecological risk assessments during registration review. This comment period is intended to provide an opportunity for public input on the Agency's assessment of the human health and/or ecological risks posed by use of these pesticides.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.53(c), this notice announces the availability of EPA's draft human health and ecological risk assessments for formaldehyde and paraformaldehyde and opens a 60-day public comment period on this document.

TABLE 1—FORMALDEHYDE AND PARAFORMALDEHYDE REGISTRATION REVIEW DOCKET DETAILS

Registration review case name and No.	Docket ID No.	Chemical Review Manager and contact information
Formaldehyde and Paraformaldehyde Case 0556.	EPA–HQ–OPP–2015–0739	Kendall Ziner, *ziner.kendall@epa.gov,* (202) 566–0621.

All comments should be submitted using the methods in **ADDRESSES** and must be received by the EPA on or before the closing date. These comments will become part of the docket for formaldehyde and paraformaldehyde.

The Agency will consider all comments received during the public comment period and make changes, as appropriate, to the draft human health and/or ecological risk assessment. As appropriate, EPA may then issue a revised risk assessment, explain any changes to the draft risk assessment, and respond to comments.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 10, 2024.

Anita Pease,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 2024–08399 Filed 4–18–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–122]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed April 8, 2024 10 a.m. EST

Through April 15, 2024 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

EIS No. 20240065, Final, USAF, CA, KC–46A MOB 5 Beddown, Review Period Ends: 05/20/2024, Contact: Mr. Austin Naranjo 478–222–9225.

EIS No. 20240066, Final Supplement, GSA, MN, Land Port of Entry Modernization and Expansion Project at International Falls MN, Review Period Ends: 05/20/2024, Contact: Michael Gonczar 312–810–2326.

EIS No. 20240067, Draft, BLM, NV, Rhyolite Ridge Lithium-Boron Mine Project, Comment Period Ends: 06/03/2024, Contact: Scott Distel 775–635–4093.

EIS No. 20240068, Draft, BLM, AZ, Jove Solar Energy Project, Comment Period Ends: 06/03/2024, Contact: Derek Eysenbach 480–352–4158.

EIS No. 20240069, Draft, USA, HI, Army Training Land Retention at Pohakuloa Training Area, Comment Period Ends: 06/07/2024, Contact: Matthew B. Foster 808–656–6821.

EIS No. 20240070, Final, NOAA, NY, Lake Ontario National Marine Sanctuary Final Environmental Impact Statement and Final Management Plan, Review Period Ends: 05/20/2024, Contact: Ellen Brody 734–741–2270.

EIS No. 20240071, Draft, BLM, NV, GridLiance West Core Upgrades Transmission Line Project Draft Environmental Impact Statement and Resource Management Plan Amendment, Comment Period Ends: 07/18/2024, Contact: Lisa Moody 702–515–5000.

EIS No. 20240072, Draft, NRC, MD, Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Supplement 26, Second Renewal Regarding Subsequent License Renewal for Monticello Nuclear Generating Plant, Unit 1, Comment Period Ends: 06/03/2024, Contact: Jessica Umana 301–415–5207.

Dated: April 15, 2024.

Nancy Abrams,

Associate Director, Office of Federal Activities.

[FR Doc. 2024–08385 Filed 4–18–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2024–0118; FRL–11870–01–OCSPP]

Nominations to the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP); Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is now accepting public comments on the experts the Agency is considering for membership on the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP). This document identifies the individuals nominated. The Agency anticipates selecting from those nominees that are identified as interested and available to appoint up to four new SAP members by July 2024 due to expiring membership terms. Current members of the SAP are eligible for reappointment during this period. Therefore, the appointments anticipated to be completed by July may include a mix of newly appointed and reappointed members. Public comments on these nominations will be used to assist the Agency in selecting the new members for the FIFRA SAP.

DATES: Submit your comments on or before May 20, 2024.

ADDRESSES: Submit comments, identified by docket identification (ID) number EPA–HQ–OPP–2024–0118, online at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: The Designated Federal Official (DFO) is Tamue L. Gibson; Mission Support Division (7602M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency; telephone number: (202) 564–7642; email address: *gibson.tamue@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. It may be of particular interest to persons who are interested in the impact of pesticide regulatory actions on health and the environment and pesticide-related issues in general. The Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI

Do not submit CBI information to EPA through email or *https://www.regulations.gov.* If your comment contains any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. Information properly marked as CBI will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2.

2. Commenting on EPA Dockets

When preparing and submitting your comments, see Commenting on EPA Dockets at *https://www.epa.gov/dockets/commenting-epa-dockets.*

C. What action is the Agency taking?

This document solicits public comment on the experts recently

nominated to serve on the FIFRA SAP (see unit III.D.2.). The Agency anticipates selecting from these nominations to appoint up to four new SAP members by July 2024 due to expiring membership terms. Current members of the SAP are eligible for reappointment during this period. Therefore, the appointments anticipated to be completed by July may include a mix of newly appointed and reappointed members. Public comments on these recent nominations will be used to assist the Agency in selecting the new members for the FIFRA SAP.

D. What is the Agency's authority for taking this action?

The FIFRA SAP is a Federal advisory committee, established in 1975 under FIFRA (7 U.S.C. 136 *et seq.*), that operates in accordance with requirements of the Federal Advisory Committee Act (FACA) (5 U.S.C. 10). In accordance with FACA requirements, a Charter for the FIFRA SAP, dated August 17, 2022, provides for open meetings with opportunities for public participation.

II. Background

The FIFRA SAP serves as a scientific peer review mechanism of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide independent scientific advice, information, and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. The FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health (NIH) and the National Science Foundation (NSF). Members serve staggered terms of appointment, generally of three to six years duration. To augment the knowledge-base of the FIFRA SAP, FIFRA established a Science Review Board (SRB) consisting of at least 60 scientists who are available to the FIFRA SAP on an ad hoc basis to assist in reviews conducted by the FIFRA SAP.

As a scientific peer review mechanism, the FIFRA SAP provides comments, evaluations, and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of the FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendations to the Agency.

III. Nominees

A. Qualifications of Members

Members are scientists who have sufficient professional qualifications, including training and experience, to provide expert comments on the impact of pesticides on human health and the environment. In accordance with FIFRA section 25(d)(1), the Administrator shall require nominees to the FIFRA SAP to furnish information concerning their professional qualifications, including educational background, employment history, and scientific publications. No persons shall be ineligible to serve on the FIFRA SAP by reason of their membership on any other advisory committee to a Federal department or agency, or their employment by a Federal department or agency (except EPA). FIFRA section 25(d) further stipulates that the Agency publish the name, address, and professional affiliation of the nominees in the **Federal Register**.

B. Applicability of Existing Regulations

Consistent with the requirements of FIFRA section 25(d), FIFRA SAP members are subject to the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, conflict of interest statutes in title 18 of the United States Code, and related regulations. Before being formally appointed, each candidate is required to submit a Confidential Financial Disclosure Form in which they must fully disclose, among other financial interests, the nominee's sources of research support, if any. EPA will evaluate the candidate's financial disclosure forms to assess the possibility of financial conflicts of interest, appearance of a loss of impartially, or any prior involvement with the development of documents likely to be under consideration by the FIFRA SAP (including previous scientific peer reviews) before the candidate is considered further.

C. Process of Obtaining Nominees

In accordance with the provisions of FIFRA section 25(d), on November 21, 2023, EPA requested that the NIH and the NSF nominate scientists to fill vacancies occurring on the FIFRA SAP. The Agency requested nominations of nationally recognized experts in the fields of ecological and human exposure assessment, including environmental fate and transport of chemicals; mathematical biostatistics; new approach methodologies (NAMs), including in vitro to in vivo extrapolation (IVIVE); toxicology, including carcinogenicity and physiologically-based pharmacokinetic (PBPK) modeling. Experts with specific experience in risk assessment, dose-response analysis, cheminformatics, bioinformatics, and genomics are preferred.

D. Nominated Individuals

NIH and NSF provided the Agency with a total of 39 nominees, of which, 12 are interested and available to actively participate in FIFRA SAP meetings (see unit III.D.2.), and 27 individuals are not available to be considered further for membership at this time (see unit III.D.1.). In addition to the list of nominees provided in this document, a compilation of brief biographical sketches, including information about the qualifications of the individual nominees, is available in the public docket identified under **ADDRESSES**.

1. Nominees That Are Not Available

The following individuals are not available to be considered further for membership at this time (listed alphabetically):

1. Lauren Aleksunes, PharmD, Ph.D., Rutgers University, Piscataway, New Jersey.
2. Abby Alkon, RN, Ph.D., University of California-San Francisco, San Francisco, California.
3. Thomas Arcury, Ph.D. (retired), Wake Forest School of Medicine, Winston-Salem, North Carolina.
4. Michelle Block, Ph.D., Indiana University, Indianapolis, Indiana.
5. Kim Boekelheide, Ph.D., Brown University, Providence, Rhode Island.
6. Tianxi Cai, ScD, Harvard Medical School, Boston, Massachusetts.
7. Weihsueh Chu, Ph.D., Texas A&M University, College Station, Texas.
8. Robert M. Corrigan, Ph.D., RMC Pest Management Consulting. Briarcliff Manor, New York.
9. Elaine Faustman, Ph.D., University of Washington, Seattle, Washington.
10. John Glasser, Ph.D., Centers for Disease Control and Prevention, Atlanta, Georgia.
11. Damian Helbing, Ph.D., Cornell University, Ithaca, New York.
12. Mevin Hooten, Ph.D., University of Texas-Austin, Austin, Texas.
13. Steve Hrudey, Ph.D., Professor Emeritus, University of Alberta. Edmonton, Alberta.
14. Nicole Kleinstreuer, Ph.D., National Institute of Environmental Health Sciences, Durham, North Carolina.
15. Ed Kolodziej, Ph.D., University of Washington, Seattle, Washington.
16. Rosa Krajmalnik-Brown, Ph.D., Arizona State University, Tempe, Arizona.
17. Teresa Leavens, Ph.D., North Carolina State University, Raleigh, North Carolina.
18. Zhoumeng Lin, Ph.D., University of Florida, Gainsville, Florida.
19. Michael Plewa, Ph.D., University of Illinois Urbana, Champaign, Illinois.

20. Beate Ritz, Ph.D., MD, University of California- Los Angeles, Los Angeles, California.
21. Ivan Rusyn, Ph.D., Texas A&M University, College Station, Texas.
22. Martyn Smith, Ph.D., University of California-Berkely, Berkeley, California.
23. Ana-Maria Staicu, Ph.D., North Carolina State University, Raleigh, North Carolina.
24. Michael L. Stein, Ph.D., Rutgers University, Piscataway, New Jersey.
25. Robyn Tanguay, Ph.D., Oregon State University, Corvallis, Oregon.
26. Katrina Waters, Ph.D., Oregon State University, Portland, Oregon.
27. Forest White, Ph.D., Massachusetts Institute of Technology, Cambridge, Massachusetts.

2. Nominees That Are Interested and Available

The following individuals are interested and available experts that the Agency is considering for membership on the FIFRA SAP (listed alphabetically). Selected biographical data for each nominee is available in the docket identified under **ADDRESSES** and through the FIFRA SAP website at *https://www.epa.gov/sap.* The Agency anticipates selecting new members by July 2024 to fill upcoming vacancies occurring on the Panel.

1. Antonio Banes, Ph.D., North Carolina Central University, Durham, North Carolina.
2. Steven Belmain, Ph.D., University of Greenwich, Greenwich, London.
3. Rebecca Fry, Ph.D., University of North Carolina, Chapel Hill, North Carolina.
4. James J. Galligan, Ph.D., University of Arizona, Tuscon, Arizona.
5. Thomas Hartung, MD, Ph.D., Johns Hopkins University, Baltimore, Maryland.
6. Eunha Hoh, Ph.D., San Diego State University, San Diego, California.
7. Lifang Hou, MD, Northwestern University, Chicago, Illinois.
8. Pamela Lein, Ph.D., University of California-Davis, Davis, California.
9. Bo Li, Ph.D., University of Illinois Urbana-Champaign, Illinois.
10. Michael Parsons, Ph.D., Fordham University, Bronx, New York.
11. Irfan Rahma, Ph.D., University of Rochester Medical Center, Rochester, New York.
12. Brian J. Reich, Ph.D., North Carolina State University, Raleigh, North Carolina.

Authority: 7 U.S.C. 136 *et. seq.;*21 U.S.C. 301 *et seq.;* 5 U.S.C. 10.

Dated: April 16, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–08444 Filed 4–18–24; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[FRL–11903–01–OAR]

Announcing Upcoming Meeting of Mobile Sources Technical Review Subcommittee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, the Environmental Protection Agency (EPA) announces an upcoming meeting of the Mobile Sources Technical Review Subcommittee (MSTRS), which is a subcommittee under the Clean Air Act Advisory Committee (CAAAC). This is a hybrid (both in-person and virtual) meeting and open to the public. The meeting will include discussion of current topics and presentations about activities being conducted by EPA's Office of Transportation and Air Quality. MSTRS listserv subscribers will receive notification when the agenda is available on the Subcommittee website. To subscribe to the MSTRS listserv, send an email to *MSTRS@epa.gov.*

DATES: EPA will hold a hybrid (both in-person and virtual) public meeting on Thursday, May 30, 2024 from 9 a.m. to 4:30 p.m. central daylight time (CDT). Registration for in-person participants begins at 8:30 a.m. Please monitor the website *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac* for any changes to meeting logistics. The final meeting agenda will be posted on the website.

ADDRESSES: The meeting is currently scheduled to be held virtually and at EPA's Region 5 Offices at The Metcalfe Federal Building, 77 W Jackson Boulevard, Chicago, IL, 60604. However, this date and location are subject to change and interested parties should monitor the Subcommittee website (above) for the latest logistical information. For information on the public meeting or to register to attend, please contact *MSTRS@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Further information concerning this public meeting and general information concerning the MSTRS can be found at: *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac.* Other MSTRS inquiries can be directed to Jessica Fan, the Designated Federal Officer for MSTRS, Office of Transportation and Air Quality, at 202–564–1094 or *mroz.jessica@epa.gov.*

SUPPLEMENTARY INFORMATION: During the meeting, the Subcommittee may also hear progress reports from its workgroups as well as updates and announcements on Office of Transportation and Air Quality activities of general interest to attendees.

Participation in hybrid public meetings. The hybrid (both in-person and virtual) public meeting will provide interested parties the opportunity to participate in this Federal Advisory Committee meeting.

For individuals with disabilities: For information on access or services for individuals with disabilities, please email *MSTRS@epa.gov.* To request accommodate of a disability, please email *MSTRS@epa.gov,* preferably at least 10 business days prior to the meeting, to give EPA as much time as possible to process your request.

EPA is asking all meeting attendees, even those who do not intend to speak, to register for the meeting by sending an email to the address listed in the **FOR FURTHER INFORMATION CONTACT** section above, by Thursday, May 16, 2024. This will help EPA ensure that sufficient participation capacity will be available.

Please note that any updates made to any aspect of the meeting logistics, including potential additional sessions, will be posted online at *https://www.epa.gov/caaac/mobile-sources-technical-review-subcommittee-mstrs-caaac.* While EPA expects the meeting to go forward as set forth above, please monitor the website for any updates.

Jessica Mroz,

Designated Federal Officer, Mobile Source Technical Review Subcommittee, Office of Transportation and Air Quality.

[FR Doc. 2024–08445 Filed 4–18–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 24–338; FR ID 213961]

Disability Advisory Committee; Announcement of Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission announces the fourth meeting of the fifth term of its Disability Advisory Committee (DAC or Committee).

DATES: Thursday, May 16, 2024. The meeting will come to order at 10:00 a.m. Eastern Time.

ADDRESSES: The DAC meeting will be held remotely, with video and audio coverage at: *www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Joshua Mendelsohn, Designated Federal Officer, Federal Communications Commission, (202) 559–7304, or email: *dac@fcc.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to members of the general public. The meeting will be webcast with sign language interpreters and open captioning at: *www.fcc.gov/live.* In addition, a reserved amount of time will be available on the agenda for comments and inquiries from the public. Members of the public may comment or ask questions of presenters via *livequestions@fcc.gov.*

Requests for other reasonable accommodations or for materials in accessible formats for people with disabilities should be submitted via email to: *fcc504@fcc.gov* or by calling the Consumer and Governmental Affairs Bureau at (202) 418–0530. Such requests should include a detailed description of the accommodation needed and a way for the FCC to contact the requester if more information is needed to fill the request. Requests should be made as early as possible; last minute requests will be accepted but may not be possible to accommodate.

Proposed Agenda: At this meeting, the DAC is expected to (1) hold a facilitated conversation on the current and emerging challenges and opportunities in the area of digital accessibility; (2) receive updates from the working groups; and (3) address any other topics relevant to the DAC's work.

Federal Communications Commission.

Suzanne Singleton,

Chief, Disability Rights Office, Consumer and Governmental Affairs Bureau.

[FR Doc. 2024–08386 Filed 4–18–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 214886]

Privacy Act of 1974; System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC or Commission or Agency) proposes to modify a system of records, FCC/WCB–6, USAC Customer Relationship Management (CRM), subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the Agency. The Universal Service Administrative Company (USAC), under the direction of the Commission and, by delegation, of the Commission's Wireline Competition Bureau (WCB), administers the Universal Service Fund (USF) programs and certain programs funded by Congressional appropriations (appropriated programs). This system of records contains information about individuals who are customers, participants, and stakeholders of the programs who submit complaints and requests for assistance to USAC to address issues with their program participation.

DATES: Written comments are due on or before May 20, 2024. This action will become effective on April 19, 2024, except for any new or significantly modified routine uses, which will become effective May 20, 2024.

ADDRESSES: Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005. Send comments to Brendan McTaggart, Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Brendan McTaggart, (202) 418–1738, or *privacy@fcc.gov.*

SUPPLEMENTARY INFORMATION: This notice serves to update and modify FCC/WCB–6, USAC Customer Relationship Management (CRM), system of records as a result of necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/WCB–6 system of records include:

1. Updating the Categories of Records to include USAC-assigned identifying numbers, such as ''Application ID,'' ''Eligibility Check ID,'' or ''eligibility ID'' numbers;

2. Updating the Authority for Maintenance of the System and Categories of Records sections to accommodate FCC implementation of the Safe Connections Act, which, among other things, designates the Lifeline program to provide emergency communications support to survivors of domestic violence;

3. Adding a new routine use (1) Customer Relations to permit disclosure of records to individuals to whom those records pertain;

4. Updating and/or revising language in the following routine uses (listed by the routine use number provided in this notice): (9) Law Enforcement and Investigation; and (15) Non-Federal Personnel (formerly named ''Contract Services, Grants, or Cooperative Agreements'').

The system of records is also revised for clarity and updated to reflect various administrative changes.

SYSTEM NAME AND NUMBER:

FCC/WCB–6, USAC Customer Relationship Management.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005; and Wireline Competition Bureau (WCB), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

SYSTEM MANAGER(S):

Address inquiries to USAC, 700 12th Street NW, Suite 900, Washington, DC 20005; or WCB, FCC, 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 U.S.C. 151–154, 201–205, 214, 403; 47 CFR part 54, subpart H; Safe Connections Act of 2022, Public Law 117–223, 116 Stat. 2280.

PURPOSE(S) OF THE SYSTEM:

USAC administers the programs of the USF (including the Lifeline, High Cost, Rural Health Care, and E-Rate programs) and certain appropriated programs including the Affordable Connectivity Program (ACP), Emergency Connectivity Fund Program (ECF), and the COVID–19 Telehealth Program on behalf of the FCC, as set forth in 47 CFR part 54, under the direction of the Commission and, by delegation, of WCB. Under the Memorandum of Understanding Between the FCC and USAC (Dec. 19, 2018), as amended (Nov. 22, 2021) and extended (Dec. 19, 2023) (FCC/USAC MOU),1 USAC is responsible for the effective administration of the programs, including responding to inquiries from program participants and providing timely and relevant data and analysis to inform the Commission in its policy making and oversight of the USF and appropriated programs. The USAC CRM handles and processes inquiries from individuals, groups, and other entities, for all of the programs administered by USAC. The system allows USAC customer service representatives to access prior related inquiries in order to provide excellent customer service. It includes a portal to allow customers to

easily interact with USAC through one channel of communication, maintaining the ability to view case status, create new cases, and review closed cases within the same interface. This system of records includes existing data from the established USF and appropriated programs administered by USAC. The system can also accommodate data from any future programs assigned by the FCC to be administered by USAC. The system allows USAC to retrieve records based on an individual's information within the system. The CRM system will be launched in phases on a program by program basis. Phase I currently includes High Cost, Rural Health Care, and Finance (Contributions) customer support. Phase II is anticipated to incorporate Lifeline and the Affordable Connectivity Program for customer support. Phase III will commence the consumer portal.

This system of records is maintained to provide a unified tool to enable USAC, on behalf of the FCC, to respond to inquiries from consumers, participants, and stakeholders in the USF and appropriated programs; to inform the FCC of concerns regarding the USF and appropriated programs in support of the agency's policymaking and enforcement endeavors or otherwise to evaluate the efficiency and administration of FCC programs and to inform future FCC rulemaking activity; to provide consumers with access to a unified portal to view case status, create new cases, and review closed cases; and to provide USAC staff with access to documents and otherwise improve staff efficiency.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals in this system include, but are not limited to, individuals who contact USAC with inquiries concerning USF and appropriated programs administered by USAC on behalf of the FCC. These individuals include, but are not limited to, individuals and representatives of individuals who participate in these programs; individuals making inquiries on behalf of program participants and stakeholders; and employees of USAC, USAC's vendors, and the FCC.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in the system collected by design include first and last name, telephone number, email address, and user ID numbers; service representative names and ID numbers; USAC-assigned identifying numbers, such as Application ID, Eligibility Check ID, or eligibility ID numbers; and the name of the organization associated with the individual. Examples for organization names include but are not limited to carrier and school names. Customers or customer representatives may provide data elements that have not been specifically requested, including date of birth, home address, place of birth, gender, work address, taxpayer ID numbers, facsimile numbers, Social Security numbers (SSNs), mother's maiden name, information contained in birth, death, or marriage certificates, financial account numbers, employment status, employer identification numbers (EINs), and a driver's licenses or State ID (or foreign country equivalent). This system of records also includes existing data from the established USF and appropriated programs administered by USAC.

RECORD SOURCE CATEGORIES:

Information systems for established USF and appropriated programs administered by USAC; participants in USF and appropriated programs; participating providers and their registered enrollment representatives; and USAC employees or contractors or FCC employees or contractors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC, as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. Customer Relations—To the individual to whom a record pertains in order to respond to inquiries about that individual's participation in USF and appropriated programs or otherwise assist that individual.

2. Program Management—To USAC employees to conduct official duties associated with the administration of FCC programs or the management, operation, and oversight of the CRM, as directed by the Commission.

3. Third Party Contractors—To an employee of a third-party contractor engaged by USAC or a participating provider, or to a subcontractor engaged by a third-party contractor, engaged by USAC, to, among other things, develop the CRM, respond to inquiries concerning USF and appropriated programs, run call center and email support operations, assist in dispute resolution, and develop, test, and operate the database system and network.

4. Service Providers—To service providers, and their registered representatives, only such information that may be required to help resolve a consumer complaint or dispute.

5. State, Tribal, or Local Governmental Agencies and Other Authorized Governmental Entities—To State, Tribal, or local government agencies and other authorized governmental entities, including public utility commissions, only such information that may be required to help resolve a consumer complaint or dispute.

6. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of the Communications Act of 1934, as amended, or FCC regulations or orders (FCC Rules and Regulations) by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant, in filing his or her complaint, explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

7. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

8. Government-Wide Program Management and Oversight—To the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

9. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation and determines that a record in this system, either alone or in conjunction with other information, indicates a violation or potential violation of law, regulation, policy, consent decree, order, or other compulsory obligation, the FCC may disclose pertinent information as it deems necessary to the target of an investigation, as well as with the appropriate Federal (including the

Internal Revenue Service to investigate income eligibility verification), State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, order, or other compulsory obligation.

10. Litigation—To disclose the records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

11. Adjudication—To disclose the records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

12. Breach Notification—To appropriate agencies, entities (including USAC), and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

13. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or entity, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

14. Prevention of Fraud, Waste, and Abuse Disclosure—To Federal agencies, or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State, Tribal, or local governmental agency), and their employees and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom the FCC or USAC has a contract, service agreement, cooperative agreement, or computer matching agreement for the purpose of: (1) detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in Federal programs administered by a Federal agency or non-Federal entity; (3) detection of fraud, waste, and abuse by individuals in their operations and programs, but only to the extent that the information shared is necessary and relevant to verify pre-award and prepayment requirements prior to the release of Federal funds, prevent and recover improper payments for services rendered under programs of the FCC or of those Federal agencies and non-Federal entities to which the FCC or USAC provides information under this routine use.

15. Non-Federal Personnel—To disclose information to non-Federal personnel, including FCC or USAC contractors, other vendors (*e.g.,* identity verification services), grantees, or volunteers who have been engaged to assist the FCC or USAC in the performance of a contract service, grant, cooperative agreement, or other activity related to this system of records that has not been otherwise identified in this Notice and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The information pertaining to the CRM includes electronic records, files, data, records, and may include audio recordings of calls. Records are maintained in secure, limited access areas. Physical entry by unauthorized persons is restricted through use of locks, passwords, and other security measures. Both USAC and its contractors will jointly manage the electronic data housed at USAC and contractors will have access to the data at their locations.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information in the CRM system of records may be retrieved by various identifiers, including, but not limited to the individual's name, or identification number. USAC employees and contractors information can also be retrieved through identifiers including first or last name, title, email address, and username.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Data from USF programs contained in the CRM system are maintained and disposed of in accordance with the National Archives and Records Administration (NARA) Records Schedule DAA–0173–2017–0001. ACP records are maintained and disposed of in accordance with NARA Records Schedule DAA–0173–2021–0022, Emergency Broadband Benefit Program (EBB Program)/Affordable Connectivity Program (ACP). Records related to the Connected Care Pilot Program/COVID–19 Telehealth Program are maintained and disposed of in accordance with NARA Records Schedule DAA–0173–2020–0006.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, data, and files are maintained in the FCC and the USAC computer network databases, which are protected by the FCC's and USAC's privacy safeguards, a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal IT privacy standards, including those required by OMB, the National Institute of Standard and Technology (NIST) and the Federal Information Security Modernization Act of 2014 (FISMA). In addition, access to the electronic files is restricted to authorized USAC and contractors' supervisors and staff, to the FCC's supervisors and staff in WCB, and to the IT contractors who maintain these computer databases. Other FCC employees and contractors may be granted access only on a ''need-to-know'' basis. In addition, data in USAC's network servers which are accessible by USAC's contractors will be routinely backed-up. The servers will be stored in secured environments to protect the data.

The paper documents and files are maintained in file cabinets in USAC and the contractors' office suites. The file cabinets are locked when not in use and

at the end of the business day. Access to these files is restricted to authorized USAC and its contractors' staffs.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedures below.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request an amendment of records about themselves should follow the Notification Procedures below.

NOTIFICATION PROCEDURES:

Individuals wishing to determine whether this system of records contains information about themselves may do so by writing Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.* Individuals requesting access must also comply with the FCC's Privacy Act regulations regarding verification of identity to gain access to the records (47 CFR part 0, subpart E).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

88 FR 19138 (March 30, 2023) and 88 FR 23672 (April 18, 2023) (correction).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2024–08376 Filed 4–18–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 214884]

Privacy Act of 1974; System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC or Commission or Agency) is modifying an existing system of records, FCC/WCB–1, Lifeline Program, subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The Lifeline Program (or ''Lifeline'') provides discounts for one Lifeline Program voice service per household and/or broadband internet access service (BIAS) to qualifying low-income individuals. Individuals may qualify for Lifeline through proof of income or participation in another qualifying program. Since the enactment of the Telecommunications Act of 1996 (1996 Act), the Lifeline Program has been administered by the Universal Service Administrative Company (USAC) under the direction of the Commission and, by delegation, of the Commission's Wireline Competition Bureau (WCB). This system of records contains information about individuals who have started an application online or applied to participate in the Lifeline Program, respondents to consumer surveys related to the Lifeline program, and enrollment representatives. The modifications described in this notice will allow USAC to maintain and administer this system in a manner that promotes efficiency and minimizes waste, fraud, and abuse.

DATES: This modified system of records will become effective on April 19, 2024. Written comments on the routine uses are due by May 20, 2024. The routine uses in this action will become effective on May 20, 2024 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Brendan McTaggart, Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Brendan McTaggart, (202) 418–1738, or *privacy@fcc.gov.*

SUPPLEMENTARY INFORMATION: This notice modifies FCC/WCB–1, Lifeline Program system of records as a result of necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/WCB–1 system of records include:

1. Updating the Authority for Maintenance of the System, Purposes of the System, Categories of Individuals, and Categories of Records sections to accommodate FCC implementation of the Safe Connections Act (SCA), that, among other things, designates the Lifeline program to provide emergency communications support to survivors, as that term is defined in the SCA and FCC regulations or orders;

2. Updating the Categories of Records to include identifying numbers assigned by USAC to applicants and or subscribers, such as ''Application ID,'' ''Eligibility Check ID,'' or ''eligibility ID'' numbers;

3. Adding one new routine use (listed by the routine use number provided in this notice): (2) Application, Enrollment, and Recertification;

4. Updating and/or revising language in the following routine uses (listed by the routine use number provided in this notice): (14) Law Enforcement and Investigation; (15) Litigation and (16) Adjudication (formerly a single routine use); and (21) Non-Federal Personnel (formerly named ''Contract Services, Grants, or Cooperative Agreements'').

The system of records is also revised for clarity and updated to reflect various administrative changes related to the system managers and system addresses; policies and practices for storage, retrieval, and retention of the information; administrative, technical, and physical safeguards; and updated notification, records access, and contesting records procedures.

SYSTEM NAME AND NUMBER:

FCC/WCB–1, Lifeline Program.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005; and Wireline Competition Bureau (WCB), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

SYSTEM MANAGER(S):

USAC administers the Lifeline Program for the FCC. Address inquiries to the Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005; or Wireline Competition Bureau (WCB), 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 U.S.C. 151–154, 201–205, 214, 254, 403; 47 CFR 54.400–54.424; Safe Connections Act of 2022, Public Law 117–223, 116 Stat. 2280.

PURPOSE(S) OF THE SYSTEM:

The Lifeline Program provides discounts for one Lifeline voice service and/or BIAS per household, and the initial connection charge in certain Tribal areas to support such service, to qualifying low-income individuals, including survivors eligible to receive emergency communications support. Individuals may qualify for Lifeline through proof of income, proof of participation in another qualifying program, or proof of the need for emergency communications support for survivors, including documentation of financial hardship as defined in FCC regulations and orders. The Lifeline Program system of records is maintained to determine whether the applicant meets the eligibility requirements for

initial enrollment and recertification, including the limit of one benefit per household; program administration; dispute resolution; monitoring of enrollment representatives; and, consumer surveys.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals in this system include those individuals residing in a single household who have applied for benefits; are currently receiving benefits; are individuals who enable another individual in their household to qualify for benefits; are minors whose status qualifies a parent or guardian for benefits; are individuals who have received benefits under the Lifeline Program; are survivors seeking emergency communications support and, as required, their alleged abusers; are individuals that respond to a consumer survey developed using information in this system; and are individuals acting as enrollment representatives and providing information directly or indirectly into USAC's Lifeline Systems on behalf of an ETC to enroll subscribers, recertify subscribers, or update subscriber information in the Lifeline Program.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in the system include first and last name of the applicant, subscriber, other household members, survivor, alleged abuser, caregiver, or consumer survey participant; date of birth; last four digits of Social Security Number or a full Tribal identification number; residential address; descriptive address; address based on geographic coordinates (geolocation); internet Protocol (IP) address; contact information; evidence of residence on Tribal lands; qualifying program participation; financial information; username and password; account security questions and answers; Lifeline subscriber identification number; assigned Representative ID Number; Lifeline participation status; amount of benefit received; documents demonstrating eligibility; documents showing only one benefit is received per household; voice recordings; USAC-assigned identifying numbers, such as Application ID, Eligibility Check ID, or eligibility ID numbers; for survivors seeking emergency communications support, documentation related to the submission of a legitimate line separation request to a telecommunications provider and documentation or certification of financial hardship (such as income self-certification or documentation related to receipt of Pell Grants or qualification for federal nutrition programs); and signatures.

For ETC enrollment representatives who register to access the National Verifier or National Lifeline Accountability Database the following information may be collected: first and last name, date of birth, the last four digits of his or her social security number, email address, residential address, or other identity proof documentation.

RECORD SOURCE CATEGORIES:

The sources for the information in the Lifeline Program system of records include ETCs and their registered enrollment representatives; applicants; consumer survey respondents; State, Tribal, and Federal databases; and, third-party identity verifiers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows. In each of these cases, the FCC will determine whether disclosure of the records is compatible with the purpose(s) for which the records were collected:

1. Program Management—To USAC employees to conduct official duties associated with the management, operation, and oversight of the Lifeline Program, NLAD, National Verifier, Lifeline Claims System, and Representative Accountability Database, as directed by the Commission.

2. Application, Enrollment, and Recertification—To facilitate the Lifeline application, enrollment, or recertification processes, including for survivors seeking or receiving communications support, records from this system may be disclosed to the individual who originally submitted the records, to the individual applicant to whom the records pertain, or to an authorized representative, entity, or organization supporting the individual in the application, enrollment, or recertification process.

3. Third Party Contractors—To an employee of a third-party contractor, or subcontractor of the third- party contractor, engaged by USAC or an ETC to, among other things, develop the Lifeline Eligibility Database, conduct the eligibility verification process, recertification process, run call center and email support operations, and assist in dispute resolution.

4. Business Process Outsourcing (BPO) Entity—To an employee of the BPO engaged by USAC or an employee of a third-party contractor engaged by the BPO to perform and review eligibility evaluations where the National Verifier conducts such processes for purposes of conducting the eligibility verification process or recertification process, performing manual eligibility verification (when needed), run call center and email support operations, and to assist in dispute resolution.

5. State Agencies and Other Authorized State Government Entities—To designated State agencies and other authorized governmental entities, including State public utility commissions, State departments of health and human services or other State entities that share data with USAC or the FCC, and their agents, as is consistent with applicable Federal and State laws, for purposes of eligibility verification and recertification; administering the Lifeline Program on behalf of ETCs in that State; performing other management and oversight duties and responsibilities; enabling the National Verifier to perform eligibility verification for individuals applying for or re-certifying for Lifeline support; enabling the State to perform eligibility verification for individuals applying for or re-certifying for Lifeline support; providing enrollment and other selected reports to the State; comparing information contained in the National Lifeline Accountability Database (NLAD) and Lifeline eligibility, recertification, and related systems to information contained in state databases associated with State- administered Lifeline Programs in order to assess differences between State and Federal programs and make adjustments.

6. Social Service Agencies and Other Approved Third Parties—To social service agencies and other third parties that have been approved by USAC for purposes of assisting individuals in applying for and recertifying for Lifeline support.

7. Federal Agencies—To other Federal agencies for the development of and operation under data sharing agreements with USAC or the FCC to enable the National Verifier to perform eligibility verification or recertification for individuals applying for Lifeline support or another federal program using Lifeline qualification as an eligibility criterion.

8. Tribal Nations—To Tribal Nations to perform eligibility verification or recertification for individuals applying

for Lifeline support, to provide enrollment and other selected reports to Tribal Nations, and for purposes of assisting individuals in applying for and recertifying for Lifeline support.

9. Service Providers—To service providers and their registered representatives in states or territories where the National Verifier is operating where the service provider is using the carrier eligibility and status check Application Programming Interface (API) to initiate Lifeline applications and eligibility checks and complete benefit transfer requests. To service providers who have been designated as ETCs to facilitate the provision of service, allow for the service provider to receive reimbursement through the Lifeline Program, to provide information to the relevant ETC about an ETC representative whose account has been disabled for cause, and provide enrollment and other selected reports to service providers.

10. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of the Communications Act of 1934, as amended, or FCC regulations or orders (FCC Rules and Regulations) by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant in filing his or her complaint explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

11. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

12. Government-Wide Program Management and Oversight—To the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

13. Other Federal Program Eligibility—To disclose an individual's Lifeline participation or qualification status to a Federal agency or contractor when a federal program administered by the agency or its contractor uses qualification for Lifeline as an eligibility criterion.

14. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation and determines that a record in this system, either alone or in conjunction with other information, indicates a violation or potential violation of law, regulation, policy, consent decree, order, or other compulsory obligation, the FCC may disclose pertinent information as it deems necessary to the target of an investigation, as well as with the appropriate Federal (including the Internal Revenue Service to investigate income eligibility verification), State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, order, or other compulsory obligation.

15. Litigation—To disclose records to DOJ when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the DOJ is for a purpose that is compatible with the purpose for which the FCC collected the records.

16. Adjudication—To disclose records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

17. Breach Notification—To appropriate agencies, entities (including USAC), and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

18. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity or USAC, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

19. Computer Matching Program Disclosure—To Federal, State, and local agencies, and USAC, their employees, and agents for the purpose of developing and conducting computer matching programs as regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a).

20. Prevention of Fraud, Waste, and Abuse Disclosure—To Federal agencies, non-Federal entities, their employees, and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom the FCC or USAC has a contract, service agreement, cooperative agreement, or computer matching agreement for the purpose of: (1) detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in Federal programs administered by a Federal agency or non- Federal entity; (3) detection of fraud, waste, and abuse by individuals in their operations and programs, but only to the extent that the information shared is necessary and relevant to verify pre- award and prepayment requirements prior to the release of Federal funds, prevent and recover improper payments for services rendered under programs of the FCC or of those Federal agencies and non-Federal entities to which the FCC or USAC provides information under this routine use.

21. Non-Federal Personnel—To disclose information to non-Federal personnel, including FCC or USAC contractors, other vendors (*e.g.,* identity verification services), grantees, or volunteers who have been engaged to

assist the FCC or USAC in the performance of a contract service, grant, cooperative agreement, or other activity related to this system of records that has not been otherwise identified in this Notice and who need to have access to the records in order to perform their activity.

22. Consumer Survey Development and Execution—To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract service, grant, or cooperative agreement with the FCC or USAC, when necessary to develop and conduct consumer surveys as described in this system of records. Individuals who are provided information under these routine use conditions are subject to Privacy Act requirements and disclosure limitations imposed on the Commission.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The information pertaining to the Lifeline Program includes electronic records, files, data, paper documents, records, and may include audio recordings of calls. Records are maintained in secure, limited access areas. Physical entry by unauthorized persons is restricted through use of locks, passwords, and other security measures. Both USAC and its contractors will jointly manage the electronic data housed at USAC and at the contractors' locations. Paper documents and other physical records (*i.e.,* tapes, compact discs, etc.) will be kept in locked, controlled access areas. Paper documents submitted by applicants to the Lifeline Program will be digitized, and paper copies will be immediately destroyed.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information in the Lifeline Program system of records may be retrieved by various identifiers, including, but not limited to the individual's name, last four digits of the Social Security Number (SSN), Tribal identification number, date of birth, phone number, residential address, and Lifeline subscriber identification number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this system is maintained and disposed of in accordance with the National Archives and Records Administration (NARA) Records Schedule DAA–0173–2017–0001–0002 (Universal Service).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, data, and files are maintained in the FCC and the USAC computer network databases, which are protected by the FCC's privacy safeguards, a comprehensive and dynamic set of safety and security protocols and features that are designed to meet all Federal privacy standards, including those required by OMB, the National Institute of Standard and Technology (NIST) and the Federal Information Security Modernization Act of 2014 (FISMA). In addition, access to the electronic files is restricted to authorized USAC and contractors' supervisors and staff and to the FCC's IT supervisors and staff and to the IT contractors who maintain these computer databases. Other FCC employees and contractors may be granted access only on a ''need-to-know'' basis. In addition, data in the network servers for both USAC and its contractors will be routinely backed-up. The servers will be stored in secured environments to protect the data.

The paper documents and files are maintained in file cabinets in USAC and the contractors' office suites. The file cabinets are locked when not in use and at the end of the business day. Access to these files is restricted to authorized USAC and its contractors' staffs.

RECORDS ACCESS PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedure below.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request an amendment of records about themselves should follow the Notification Procedure below.

NOTIFICATION PROCEDURES:

Individuals wishing to determine whether this system of records contains information about themselves may do so by writing to *privacy@fcc.gov.* Individuals requesting access must also comply with the FCC's Privacy Act regulations regarding verification of identity to gain access to the records (47 CFR part 0, subpart E).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

86 FR 11526 (Feb. 25, 2021).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2024–08378 Filed 4–18–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 214885]

Privacy Act of 1974; System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of a modified system of records.

SUMMARY: The Federal Communications Commission (FCC or Commission or Agency) is modifying a system of records, FCC/WCB–3, Affordable Connectivity Program, subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The Affordable Connectivity Program (''ACP''), the successor to the Commission's Emergency Broadband Benefit Program, provides discounts for broadband internet access service (''BIAS'') to qualifying households. A household may qualify for the ACP if an individual in the household has applied for and has been approved to receive benefits under the free and reduced price lunch program, receives assistance through the special supplemental nutritional program for women, infants, and children (''WIC''), receives a Pell Grant, qualifies for the Lifeline program, meets certain income requirements, or qualifies for a low-income program offered by internet service providers. The ACP is administered by the Universal Service Administrative Company (USAC) under the direction of the Commission and, by delegation, of the Commission's Wireline Competition Bureau (WCB). This system of records contains information about individual ACP applicants and participants, providers' claims and certifying officers, and providers' enrollment representatives.

DATES: This modified system of records will become effective on April 19, 2024. Written comments on the routine uses are due by May 20, 2024. The routine uses in this action will become effective on May 20, 2024 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Brendan McTaggart, Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554, or to *privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Brendan McTaggart, (202) 418–1738, or *privacy@fcc.gov.*

SUPPLEMENTARY INFORMATION: This notice modifies the FCC/WCB–3 system of records as a result of necessary changes and updates. The substantive changes and modifications to the previously published version of the FCC/WCB–3 system of records include:

1. Updating the Categories of Records to include identifying numbers assigned by USAC to applicants and subscribers such as ''Application ID,'' ''Eligibility Check ID'' or ''eligibility ID'' numbers and to accommodate FCC implementation of the Safe Connections Act, which, among other things, designates the Lifeline program to provide emergency communications support to survivors of domestic violence;

2. Adding one new routine use (listed by the routine use number provided in this notice): (2) Application, Enrollment, and Recertification, which permits disclosure of records to the individual to whom those records pertain in order to facilitate the application, enrollment, or recertification processes;

3. Updating and/or revising language in the following routine uses (listed by the routine use number provided in this notice): (4) Federal, State, and Local Agencies, Tribal Nations and Agencies, and Other Authorized Government Entities; (5) Social Service Agencies, Housing Agencies, and Other Approved Third Parties; (12) Law Enforcement and Investigation; and (18) Non-Federal Personnel (formerly named ''Contract Services, Grants, or Cooperative Agreements'');

4. Updating the SORN to include the National Archives and Records Administration (NARA) Records Schedule DAA–0173–2021–0022, Emergency Broadband Benefit Program (EBB Program)/Affordable Connectivity Program (ACP).

SYSTEM NAME AND NUMBER:

FCC/WCB–3, Affordable Connectivity Program.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005; and Wireline Competition Bureau (WCB), Federal Communications Commission (FCC), 45 L Street NE, Washington, DC 20554.

SYSTEM MANAGER(S):

USAC administers the ACP for the FCC. Address inquiries to the Universal Service Administrative Company (USAC), 700 12th Street NW, Suite 900, Washington, DC 20005; or Wireline Competition Bureau (WCB), 45 L Street NE, Washington, DC 20554.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 U.S.C. 151–154, 201–205, 214, 403; Consolidated Appropriations Act, 2021, Public Law 116–260 sec. 904; Infrastructure Investment and Jobs Act, Public Law 117–58 secs. 60501 *et seq.;* 47 CFR 54.400, 54.401, 54.404, 54.407, 54.409, 54.410, 54.417, 54.419, 54.420, 54.1800–54.1814.

PURPOSE(S) OF THE SYSTEM:

This system of records is maintained for use in determining whether a member of a household meets the eligibility criteria to qualify for and/or recertify for a discount on the cost of internet service and a subsidy for low-cost devices such as computers and tablets; ensuring benefits are not duplicated; dispute resolution regarding eligibility for the ACP; customer surveys and program notifications; audit; verification of a provider's representative identity; and statistical studies.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals in this system include, but are not limited to, those individuals who have applied for the ACP; are individuals currently receiving ACP benefits; are individuals who enable another individual to qualify for benefits, including veterans or their beneficiaries; are minors whose status qualifies a household for benefits; are individuals who have received benefits under the Lifeline Program, including survivors, as that term is defined in the Safe Connections Act (SCA) and FCC regulations or orders, receiving emergency communications support; or are individuals acting on behalf of a participating provider as enrollment representatives who have enrolled or verified the eligibility of a household in the ACP.

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in the system include an applicant's first and last name; email address; residential address; information on whether the individual resides on Tribal lands or certain high-cost areas; information on whether the address is temporary and/or descriptive and whether it includes coordinates; mailing address (if different); address based on geographic coordinates (geocoding); internet Protocol (IP) address; date of birth; last four digits of social security number, full Tribal identification number, or identification number assigned by the Veterans Administration; telephone number; full name of the qualifying person (if different from the individual applicant); qualifying person's date of birth; qualifying person's email address; qualifying person's residential address; qualifying person's mailing address; the last four digits of the qualifying person's social security number, their full Tribal identification number, or identification number assigned by the Veterans Administration; information on whether the qualifying person resides on Tribal lands or certain high cost areas; full name of the veteran (if different from the individual applicant and qualifying person); veteran's date of birth (if different from the individual applicant and qualifying person); the veteran's identification number assigned by the Veterans Administration; veteran's email address; the veteran's residential address (if different from the individual applicant and qualifying person); the veteran's mailing address; means of qualification for the ACP (*i.e.,* participation in Lifeline (including survivors of domestic violence receiving emergency communications support, whose eligibility records include documentation related to the submission of a legitimate line separation request to a telecommunications provider and documentation of financial hardship), receipt of a Pell Grant, qualification for Federal nutrition programs, etc.); documents demonstrating eligibility; ACP subscriber identification number; ACP application number; identifying numbers assigned by USAC, such as Application ID, Eligibility Check ID, or eligibility ID numbers; security question; answer to security question; user name; password; agent identification information (if an agent is assisting in completing the application); individual applicant's eligibility certifications; individual applicant's signature and date of application; ACP service initiation date and termination date; amount of discount received; and amount of device benefit received.

For participating provider enrollment representatives who register to access the National Verifier or National Lifeline Accountability Database the following information may be collected: first and last name, date of birth, the last four digits of his or her social security number, email address, and address, or other identity proof documentation.

RECORD SOURCE CATEGORIES:

Participating providers and their registered enrollment representatives; individuals applying on behalf of a household; schools; Lifeline databases; and State, Federal, Local and Tribal

Government databases; and third-party identity verifiers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. Program Management—To USAC employees to conduct official duties associated with the management, operation, and oversight of the ACP, the National Lifeline Accountability Database (NLAD), the National Verifier, and the Representative Accountability Database (RAD), as directed by the Commission.

2. Application, Enrollment, and Recertification—To facilitate the ACP application, enrollment, or recertification processes, records from this system may be disclosed to the individual who originally submitted the records, to the individual to whom the records pertain, or to an authorized representative, entity or organization supporting the individual in the application, enrollment, or recertification process.

3. Third Party Contractors—To an employee of a third-party contractor engaged by USAC or a participating provider, or to a subcontractor engaged by a third-party contractor engaged by USAC, to, among other things, develop the ACP Eligibility Database, perform and review eligibility evaluations where the National Verifier conducts such processes for purposes of performing manual eligibility verification (when needed), conduct the eligibility verification or recertification process, run call center and email support operations, assist in dispute resolution, and develop, test, and operate the database system and network.

4. Federal, State, and Local Agencies, Tribal Nations and Agencies, and Other Authorized Government Entities—For purposes of (a) eligibility verification and recertification, including through a computer matching program, (b) providing enrollment and other selected reports, or (c) comparing information contained in NLAD and ACP eligibility, to designated Tribal Nations; designated Federal, State, Local, and Tribal agencies, including public utility commissions and departments of health and human services; and other authorized governmental entities that share data with USAC or the FCC.

5. Social Service Agencies, Housing Agencies, and Other Approved Third Parties—To social service or housing agencies and other third parties (including nonprofit organizations) that have been approved by the FCC or USAC for purposes of assisting individuals in applying for and recertifying for the ACP.

6. Tribal Nations—To Tribal Nations for purposes of assisting individuals in applying for and recertifying for the ACP.

7. Service Providers—To broadband providers, and their registered representatives, in order to confirm an individual's eligibility, complete benefit transfer requests, facilitate the provision of service, complete de-enrollments, allow for the provider to receive reimbursement through the ACP, to provide information to the relevant provider about a registered enrollment representative whose account has been disabled for cause, and provide enrollment and other selected reports.

8. Other Federal Program Eligibility—To disclose an individual's ACP participation status to a Federal agency or contractor, including through a computer matching program, when a Federal program administered by the agency or its contractor uses qualification for the ACP as an eligibility criterion.

9. FCC Enforcement Actions—When a record in this system involves an informal complaint filed alleging a violation of the Communications Act of 1934, as amended, or FCC regulations or orders (FCC Rules and Regulations) by an applicant, licensee, certified or regulated entity, or an unlicensed person or entity, the complaint may be provided to the alleged violator for a response. Where a complainant in filing his or her complaint explicitly requests confidentiality of his or her name from public disclosure, the Commission will endeavor to protect such information from public disclosure. Complaints that contain requests for confidentiality may be dismissed if the Commission determines that the request impedes the Commission's ability to investigate and/or resolve the complaint.

10. Congressional Inquiries—To provide information to a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the written request of that individual.

11. Government-Wide Program Management and Oversight—To the Department of Justice (DOJ) to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or the Office of Management and Budget (OMB) to obtain that office's advice regarding obligations under the Privacy Act.

12. Law Enforcement and Investigation—When the FCC investigates any violation or potential violation of a civil or criminal law, regulation, policy, executed consent decree, order, or any other type of compulsory obligation and determines that a record in this system, either alone or in conjunction with other information, indicates a violation or potential violation of law, regulation, policy, consent decree, order, or other compulsory obligation, the FCC may disclose pertinent information as it deems necessary to the target of an investigation, as well as with the appropriate Federal (including the Internal Revenue Service to investigate income eligibility verification), State, local, Tribal, international, or multinational agencies, or a component of such an agency, responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, order, or other compulsory obligation.

13. Litigation—To disclose the records to the Department of Justice (DOJ) when: (a) the FCC or any component thereof; (b) any employee of the FCC in his or her official capacity; (c) any employee of the FCC in his or her individual capacity where the DOJ or the FCC has agreed to represent the employee; or (d) the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and the use of such records by the Department of Justice is for a purpose that is compatible with the purpose for which the FCC collected the records.

14. Adjudication—To disclose the records in a proceeding before a court or adjudicative body, when: (a) the FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity; or (d) the United States Government, is a party to litigation or has an interest in such litigation, and by careful review, the FCC determines that the records are both relevant and necessary to the litigation, and that the use of such records is for a purpose that is compatible with the purpose for which the agency collected the records.

15. Breach Notification—To appropriate agencies, entities (including USAC), and persons when: (a) the Commission suspects or has confirmed that there has been a breach of the

system of records; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

16. Assistance to Federal Agencies and Entities Related to Breaches—To another Federal agency or Federal entity or USAC, when the Commission determines that information from this system is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, program, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

17. Prevention of Fraud, Waste, and Abuse Disclosure—To Federal agencies, non-Federal entities, their employees, and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom the FCC or USAC has a contract, service agreement, cooperative agreement, or computer matching agreement for the purpose of: (1) detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in Federal programs administered by a Federal agency or non-Federal entity; (3) detection of fraud, waste, and abuse by individuals in their operations and programs, but only to the extent that the information shared is necessary and relevant to verify pre-award and prepayment requirements prior to the release of Federal funds, prevent and recover improper payments for services rendered under programs of the FCC or of those Federal agencies and non-Federal entities to which the FCC or USAC provides information under this routine use.

18. Non-Federal Personnel—To disclose information to non-Federal personnel, including FCC or USAC contractors, other vendors (*e.g.,* identity verification services), grantees, or volunteers who have been engaged to assist the FCC or USAC in the performance of a contract service, grant, cooperative agreement, or other activity related to this system of records that has not been otherwise identified in this Notice and who need to have access to the records in order to perform their activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The information pertaining to the ACP includes electronic records, files, data, paper documents, records, and may include audio recordings of calls. Records are maintained in secure, limited access areas. Physical entry by unauthorized persons is restricted through use of locks, passwords, and other security measures. Both USAC and its contractors will jointly manage the electronic data housed at USAC and at the contractors' locations. Paper documents and other physical records (*i.e.,* tapes, compact discs, etc.) will be kept in locked, controlled access areas. Paper documents submitted by applicants to the ACP and provider representatives will be digitized, and paper copies will be immediately destroyed after digitization.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information in the ACP system of records may be retrieved by various identifiers, including, but not limited to the individual's name, last four digits of the social security number, Tribal identification number, identification number assigned by the Veterans Administration, date of birth, email address, phone number, address, and ACP subscriber identification number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The information in this system is maintained and disposed of in accordance with the National Archives and Records Administration (NARA) Records Schedule DAA–0173–2021–0022, Emergency Broadband Benefit Program (EBB Program)/Affordable Connectivity Program (ACP).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records, data, and files are maintained in the FCC and the USAC computer network databases, which are protected by the FCC's and USAC's privacy safeguards, a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal IT privacy standards, including those required by OMB, the National Institute of Standard and Technology (NIST) and the Federal Information Security Modernization Act of 2014 (FISMA). In addition, access to the electronic files is restricted to authorized USAC and contractors' supervisors and staff and to the FCC's supervisors and staff in WCB and to the IT contractors who maintain these computer databases. Other FCC employees and contractors may be granted access only on a ''need-to-know'' basis. In addition, data in the network servers for both USAC and its contractors will be routinely backed-up. The servers will be stored in secured environments to protect the data. The paper documents and files are maintained in file cabinets in USAC and the contractors' office suites. The file cabinets are locked when not in use and at the end of the business day. Access to these files is restricted to authorized USAC and its contractors' staffs.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to and/or amendment of records about themselves should follow the Notification Procedures below.

CONTESTING RECORD PROCEDURES:

Individuals wishing to request an amendment of records about themselves should follow the Notification Procedures below.

NOTIFICATION PROCEDURES:

Individuals wishing to determine whether this system of records contains information about themselves may do so by writing to *privacy@fcc.gov.* Individuals requesting access must also comply with the FCC's Privacy Act regulations regarding verification of identity to gain access to the records (47 CFR part 0, subpart E).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

86 FR 71494 (Dec. 16, 2021).

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2024–08375 Filed 4–18–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS24–10]

Agency Information Collection Activities; Reporting Information for the AMC Registry

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Request for comment.

SUMMARY: The Appraisal Subcommittee (ASC) is issuing this Notice of Request

(Notice) for public comment on the reporting information for the National Registry of Appraisal Management Companies (AMC Registry) to the Office of Management and Budget (OMB) of proposed collection of information. In conjunction with the Paperwork Reduction Act of 1995, the ASC submitted to the OMB a request for review of approval of information collection listed below. The purpose of this Notice is to allow an additional 30 days for public comment from all interested individuals and organizations.

DATES: Written comments must be received on or before May 20, 2024 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection 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.

FOR FURTHER INFORMATION CONTACT: For information, contact Lori Schuster, Management and Program Analyst, ASC at (202) 595–7578 or *Lori@asc.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** on February 5, 2024, at 89 FR 7707 and allowed 60 days for public comment. No comments were received to that notice.

Title: Reporting Information for the AMC Registry.

The Dodd-Frank Act requires the ASC to maintain the AMC Registry of those AMCs that are either: (1) registered with and subject to supervision by a State that has elected to register and supervise AMCs; or (2) are Federally regulated AMCs. In order for a State that elected to register and supervise AMCs to enter an AMC on the AMC Registry, the following items are required entries by the State via extranet application on the AMC Registry:

State Abbreviation
State Registration Number for AMC
Employer Identification Number (EIN)
AMC Name
  Street Address
  City
  State
  Zip
License or Registration Status
  Effective Date
  Expiration Date
AMC Type (State or multi-State)
Disciplinary Action
  Effective Date
  Expiration Date
Number of Appraisers (for invoicing registry fee)

States listing AMCs on the AMC Registry enter the above information for each AMC for the initial entry only. After the initial entry, the information is retained on the AMC Registry, and will be amended, if necessary, by the State. Currently, 51 States have elected to register and supervise AMCs with 50 States currently entering data in the AMC Registry.

OMB Number: 3139–0009.

Burden Estimates

Type of Review: Regular.
Affected Public: States.
Estimated Number of Respondents: 51 States.
Estimated Burden per Response: 15 minutes.
Frequency of Response: Annually and on occasion.
Estimated Total Annual Burden Hours: We estimate that a State will spend approximately 25.25 hours annually submitting data to the ASC for a total of 1,287.75 hours.

* * * * *

By the Appraisal Subcommittee.

James R. Park,

Executive Director.

[FR Doc. 2024–08377 Filed 4–18–24; 8:45 am]

BILLING CODE 6700–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve a revision of the currently approved information collection project: ''Medical Expenditures Panel Survey—Household and Medical Provider Components.'' In accordance with the Paperwork Reduction Act of 1995, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by June 18, 2024.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *REPORTSCLEARANCEOFFICER@ahrq.hhs.gov*.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *REPORTSCLEARANCEOFFICER@ahrq.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Proposed Project

Medical Expenditures Panel Survey—Household and Medical Provider Components

AHRQ requests that OMB approve a revision to AHRQ's collection of information for the Medical Expenditures Panel Survey—Household and Medical Provider Components: OMB Control number 0935–0118, expiration November 30, 2025. Requested changes are for the Household Component (MEPS–HC) only.

The MEPS was initiated in 1996. Each year a new panel of sample households is selected. Recent annual MEPS–HC sample sizes average about 13,500 households. Data can be analyzed at either the person, family, or event level. The panel design of the survey, which includes 5 rounds of interviews covering 2 full calendar years, provides data for examining person level changes in selected variables such as expenditures, health insurance coverage, and health status.

This Research Has the Following Goals

(1) To produce nationally representative estimates of health care use, expenditures, sources of payment, and health insurance coverage for the U.S. civilian noninstitutionalized population.

(2) To produce nationally representative estimates of respondents' health status, demographic and socio-economic characteristics, employment, access to care, and satisfaction with health care.

Proposed Changes for the 2025 MEPS–HC

• *Core MEPS Interview and Adult SAQ*—The Core interview and the Adult Self-Administered Questionnaire (SAQ) include four questions from the Consumer Assessment of Healthcare Providers and Systems 5.0 (CAHPS 5.0). These questions will have wording changes to update them to CAHPS 5.1. These wording changes will help identify telehealth utilization and access, as well as maintain consistency between CAHPS and MEPS–HC questionnaire items. Below are the four

questions, both the current version and the proposed version:

Current: In the last 12 months, did {you/{PERSON}} have an illness, injury or condition that needed care right away in a clinic, emergency room, or doctor's office?

Proposed: In the last 12 months, did {you/{PERSON}} have an illness, injury, or condition that needed care right away?

Current: In the last 12 months, did you make any appointments for a check-up or routine care for {yourself/{PERSON}} at a doctor's office or clinic?

Proposed: In the last 12 months, did you make any in-person, phone, or video appointments for a check-up or routine care for {yourself/{PERSON}}?

Current: Looking at card CS–2, in the last 12 months, how often did you get an appointment for a check-up or routine care for {yourself/{PERSON}} at a doctor's office or clinic as soon as {you/he/she} needed?

Proposed: Looking at card CS–2, in the last 12 months, how often did you get an appointment for a check-up or routine care for {yourself/{PERSON}} as soon as {you/he/she} needed?

Current: Looking at card CS–3, in the last 12 months, not counting times {you/{PERSON}} went to an emergency room, how many times did {you/he/she} go to a doctor's office or clinic to get health care?

Proposed: Looking at card CS–3, in the last 12 months, not counting the times {you/{PERSON}} went to an emergency room, how many times did {you/he/she} get health care in person, by phone, or by video?

• *Burdens and Economic Impacts of Medical Care Self-Administered Questionnaire (ESAQ)*—The Office of the Secretary—Patient Centered Outcomes Research Trust Fund is funding this SAQ to expand the collection of economic outcomes data for patient-centered outcomes research (PCOR) via the Medical Expenditure Panel Survey (MEPS).

The ESAQ will be completed during Round 3, Panel 30 and Round 5, Panel 29 (Spring 2025) by adult household members (aged 18 and over). The ESAQ will be administered in a mixed-mode of paper and online. Respondents will be offered a $20.00 monetary incentive to complete the ESAQ. This is a one-time data collection and the ESAQ will be removed from the MEPS after the 2025 fielding. The goal of the ESAQ is to enhance the MEPS data by adding new domains related to the economic burdens of seeking and receiving health care, to study economic outcomes in patient-centered outcomes research.

There is no other survey that is now or has been recently conducted that will meet the objectives of the ESAQ. The ESAQ will supplement MEPS data on direct care expenditures with data on major indirect costs, including time costs of getting care and administrative hassles; lost work productivity due to presenteeism, lost productivity in non-market activities, and time costs of informal care. With this new data, researchers will be able to better examine health care economic burdens and equity in health care access, utilization, and outcomes, for example to aggregate social costs of health care and poor health, examine indirect costs associated with common conditions, and analyze disparities and equity in indirect costs.

In developing the ESAQ, AHRQ consulted with several experts in the area and used their expertise to identify priority topics and questions that have already been tested and widely accepted. Nearly all items are either from Federal surveys, federally funded surveys, or adapted from instruments that have been carefully validated. Two questions related to affordability and access are from Kaiser Family Foundation surveys. One question about informal care was cognitively tested in a prior question development project. One question on the high-priority topic of administrative hassles of health insurance was developed from phrases from the carefully tested and widely accepted Consumer Assessment of Health Plans and Systems.

• *Cancer Self-Administered Questionnaire (CSAQ)*—The CSAQ will be removed from the 2025 MEPS–HC.

This study is being conducted by AHRQ through its contractor, Westat, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the cost and use of health care services and with respect to health statistics and surveys. 42 U.S.C. 299a(a)(3) and (8); 42 U.S.C. 299b–2.

Method of Collection

The MEPS–HC uses a combination of computer assisted personal interviewing (CAPI), computer assisted video interviewing (CAVI), and self-administered paper and web questionnaires, to collect information about each household member, and the survey builds on this information from interview to interview. CAVI is a new data collection technology and offers the best of both telephone and in-person interviewing, while offering opportunities for cost savings and more accurate reporting.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in the MEPS–HC and the MEPS–MPC.

MEPS–HC

• *MEPS–HC Core Interview*—completed by 12,218 ''family level'' respondents. Since the MEPS–HC typically consists of 5 rounds of interviewing covering a full two years of data, the annual average number of responses per respondent is 2.5 responses per year. The MEPS–HC core requires an average response time of 88 minutes to administer.

• *Adult SAQ*—completed once during the 2-year panel, in rounds 2 and 4 during odd numbered years, making the annualized average 0.5 times per year. The Adult SAQ will be completed by 11,912 adults and requires an average of 7 minutes to complete.

• *Preventive Care SAQ (PSAQ)*—completed once during the 2-year panel, in rounds 2 and 4 during even numbered years, making the annualized average 0.5 times per year. The PSAQ will be completed by 11,912 adults and requires an average of 7 minutes to complete.

• *Diabetes Care Survey (DCS)*—completed by 1,195 persons each year and requires 3 minutes to complete.

• *Burdens and Economic Impacts of Medical Care SAQ*—completed by 15,577 and is estimated to take 10 minutes to complete. This SAQ will be completed only once in 2025 and will be removed in 2026; to annualize the burden hours the number of responses per respondent is 0.5 times per year.

• *Authorization forms for the MEPS–MPC and Pharmacy Survey*—completed by 6,769 respondents. Each respondent will complete an average of 5.7 forms each year, with each form requiring an average of 3 minutes to complete.

• *Validation interview*—conducted with approximately 1,759 respondents each year and requires 5 minutes to complete. The total annual burden hours for the respondent's time to participate in the MEPS–HC is estimated to be 49,149 hours.

MEPS–MPC

• *Contact Guide/Screening Call*—conducted with 38,683 providers and pharmacies each year and requires 5 minutes to complete.

• *Home Care Providers Event Form*—completed by 540 providers, with each provider completing an average of 5

forms and each form requiring 3 minutes to complete.

• *Office-based Providers Event Form*—completed by 9,300 providers. Each provider will complete an average of 2.8 forms and each form requires 3 minutes to complete.

• *Separately Billing Doctors Event Form*—will be completed by 4,676 providers, with each provider completing 1.2 forms on average, and each form requiring 3 minutes to complete.

• *Hospital Event Form*—completed by 3,935 hospitals or HMOs. Each hospital or HMO will complete 5.9 forms on average, with each form requiring 3 minutes to complete.

• *Institutions (non-hospital) Event Form*—completed by 86 institutions, with each institution completing 1.3 forms on average, and each form requiring 3 minutes to complete.

• *Pharmacy Event Form*—completed by 6,112 pharmacies. Each pharmacy will complete 31.3 forms on average, with each form requiring 3 minutes to complete.

The total burden hours for the respondent's time to participate in the MEPS–MPC is estimated to be 15,674 hours. The total annual burden hours for the MEPS–HC and MPC is estimated to be 64,832 hours.

EXHIBIT 1—MEPS–HC AND MPC ESTIMATED ANNUALIZED RESPONDENTS AND BURDEN HOURS, 2025 TO 2027

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
MEPS–HC				
.				
MEPS–HC Core Interview	12,218	2.5	88/60	44,799
Adult SAQ *	11,912	0.5	7/60	695
Preventive Care SAQ (PSAQ) **	11,912	0.5	7/60	695
Diabetes Care Survey (DCS)	1,195	1	3/60	60
Burdens and Economic Impacts of Medical Care SAQ	15,577	0.5	10/60	1,298
Authorization forms for the MEPS–MPC Provider and Pharmacy Survey	6,769	5.7	3/60	1,455
MEPS Validation Interview	1,759	1	5/60	147
Subtotal for the MEPS–HC	61,342	.....	.....	49,149
MEPS–MPC				
Contact Guide/Screening Call	38,683	1	5/60	3,224
Home Care Providers Event Form	540	5.0	3/60	135
Office-based Providers Event Form	9,300	2.8	3/60	1,302
Separately Billing Doctors Event Form	4,676	1.2	3/60	281
Hospitals & HMOs (Hospital Event Form)	3,935	5.9	3/60	1,161
Institutions (non-hospital) Event Form	86	1.3	3/60	6
Pharmacies Event Form	6,112	31.3	3/60	9,565
Subtotal for the MEPS–MPC	63,332	.....	.....	15,674
Grand Total	124,674	.....	.....	64,832

* The Adult SAQ is completed once every two years, on the odd numbered years.
** The PSAQ is completed once every two years, on the even numbered years.

Exhibit 2 shows the estimated annual cost burden associated with the respondents' time to participate in this information collection. The annual cost burden for the MEPS–HC is estimated to be $1,462,674 and the annual cost burden for the MEPS–MPC is estimated to be $306,285. The total annual cost burden for the MEPS–HC and MPC is estimated to be $1,768,959.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Total burden hours	Average hourly wage rate	Total cost burden
MEPS–HC			
MEPS–HC Core Interview	44,799	* $29.76	$1,333,218
Adult SAQ	695	* 29.76	20,683
Preventive Care SAQ (PSAQ)	695	* 29.76	20,683
Diabetes Care Survey (DCS)	60	* 29.76	1,786
Burdens and Economic Impacts of Medical Care SAQ	1,298	* 29.76	38,628
Authorization forms for the MEPS–MPC Provider and Pharmacy Survey	1,455	* 29.76	43,301
MEPS Validation Interview	147	* 29.76	4,375
Subtotal for the MEPS–HC	49,149	.....	1,462,674
MEPS–MPC			
MPC Contact Guide/Screening Call	3,224	** 19.84	63,964
Home care Providers Event Form	135	** 19.84	2,678
Office-based Providers Event Form	1,302	** 19.84	25,832

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN—Continued

Form name	Total burden hours	Average hourly wage rate	Total cost burden
Separately Billing Doctors (SBD) Event Form	281	** 19.84	5,575
Hospitals & HMOs (Hospital Event Form	1,161	** 19.84	23,034
Institutions (non-hospital) Event Form	6	** 19.84	119
Pharmacies Event Form	9,565	*** 19.35	185,083
Subtotal for the MEPS–MPC	15,674		306,285
Grand Total	64,832		1,768,959

* Mean hourly wage for All Occupations (00–0000)
** Mean hourly wage for Medical Secretaries (43–6013)
*** Mean hourly wage for Pharmacy Technicians (29–2052)
Occupational Employment Statistics, May 2022 National Occupational Employment and Wage Estimates United States, U.S. Department of Labor, Bureau of Labor Statistics.

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 15, 2024.

Mamatha Pancholi,

Deputy Director.

[FR Doc. 2024–08431 Filed 4–18–24; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on Migrant Health

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

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Secretary's National Advisory Council on Migrant Health (NACMH or Council) has scheduled a public meeting. Information about NACMH and the agenda for this meeting can be found on the NACMH website at: *https://www.hrsa.gov/advisory-committees/migrant-health.*

DATES: May 15–16, 2024; 8 a.m.–5 p.m. Pacific Time.

ADDRESSES: This meeting will be held in-person and via webinar. The meeting address is DoubleTree by Hilton Hotel Sacramento, 2001 Point West Way, Sacramento, CA 95815. Instructions for joining the meeting by webinar are posted on the NACMH website. For meeting information updates, visit the NACMH website at: *https://www.hrsa.gov/advisory-committees/migrant-health.*

FOR FURTHER INFORMATION CONTACT: Liz Rhee, NACMH Designated Federal Official (DFO), Office of Policy and Program Development, Bureau of Primary Health Care, HRSA, 5600 Fishers Lane, Rockville, MD 20857; *lrhee@hrsa.gov,* or 301–443–1082.

SUPPLEMENTARY INFORMATION: NACMH advises, consults with, and makes recommendations to the Secretary of Health and Human Services on policy, program development, and other matters of significance concerning the activities under section 217 of the Public Health Service Act, as amended (42 U.S.C. 218). Specifically, NACMH provides recommendations concerning policy related to the organization, operation, selection, and funding of migrant health centers and other entities that receive grants and contracts under section 330 of the Public Health Service Act (42 U.S.C. 54b). NACMH meets twice each calendar year, or at the discretion of the DFO in consultation with NACMH's Chair.

Agenda items for the meeting may include topics and issues related to migratory and seasonal agricultural worker health. Refer to the NACMH website listed above for information concerning the May 2024 NACMH meeting, including a draft agenda and meeting materials.

Members of the public will have the opportunity to provide comments at the meeting. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments at the NACMH meeting should be sent to Liz Rhee, DFO, using the contact information above at least 3 business days prior to the meeting.

Individuals who plan to attend and need special assistance or another reasonable accommodation should notify Liz Rhee using the contact information listed above at least 10 business days prior to the meeting. Registration is required to attend the meeting. Registration and meeting attendance instructions are posted on the NACMH website.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2024–08345 Filed 4–18–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

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

ACTION: Notice.

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

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08W–25A, Rockville, Maryland 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

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

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

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on March 1, 2024, through March 31, 2024. This list provides the name of the petitioner, city, and state of vaccination (if unknown then the city and state of the person or attorney filing the claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

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

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

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

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

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

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

Carole Johnson,

Administrator.

List of Petitions Filed

1. Michelle Montgomery, Philadelphia, Pennsylvania, Court of Federal Claims No: 24–0323V
2. Lauryn Thomas, Los Angeles, California, Court of Federal Claims No: 24–0324V
3. William Cook, West Des Moines, Iowa, Court of Federal Claims No: 24–0326V
4. Alfred D. Coriale, Kittanning, Pennsylvania, Court of Federal Claims No: 24–0328V
5. John Battaglia, Port Matilda, Pennsylvania, Court of Federal Claims No: 24–0329V
6. Jon Jameson, Eugene, Oregon, Court of Federal Claims No: 24–0330V
7. Amy Meyerhofer, Appleton, Wisconsin, Court of Federal Claims No: 24–0331V
8. Jennifer L. Zinn, Mukwonago, Wisconsin, Court of Federal Claims No: 24–0332V
9. Victoria Napolitano, Greensboro, North Carolina, Court of Federal Claims No: 24–0333V
10. Jill Duffield, Alum Creek, West Virginia, Court of Federal Claims No: 24–0336V
11. Michele Bisordi, Bethel, Connecticut, Court of Federal Claims No: 24–0338V
12. Tina Nackos, Provo, Utah, Court of Federal Claims No: 24–0341V
13. Amna Ahmed, M.D., Sugar Land, Texas, Court of Federal Claims No: 24–0342V
14. John Ingrao, Dresher, Pennsylvania, Court of Federal Claims No: 24–0343V
15. Destinee Ober, Danielson, Connecticut, Court of Federal Claims No: 24–0344V
16. Carla Kohler, Fogelsville, Pennsylvania, Court of Federal Claims No: 24–0347V
17. Maryann Nadeau, Boston, Massachusetts, Court of Federal Claims No: 24–0348V
18. Viola Leonard, Stockton, California, Court of Federal Claims No: 24–0349V
19. Michele L. Sabbia, Plymouth, New Hampshire, Court of Federal Claims No: 24–0353V
20. Suriya Sortheppharak and Jade Castaneda on behalf of J. S., Maricopa, Arizona, Court of Federal Claims No: 24–0358V
21. David Phillips, Cranston, Rhode Island, Court of Federal Claims No: 24–0359V
22. Raymond Wright, Winter Haven, Florida, Court of Federal Claims No: 24–0360V
23. Shannon Pesce, Greenwich, Connecticut, Court of Federal Claims No: 24–0363V
24. Steven Koran, Boston, Massachusetts, Court of Federal Claims No: 24–0368V
25. Tina Rodrigues, Athol, Massachusetts, Court of Federal Claims No: 24–0369V
26. Kerryington P. Pedigo, Charlotte, North Carolina, Court of Federal Claims No: 24–0373V
27. Karen Salberg, Highlands Ranch, Colorado, Court of Federal Claims No: 24–0374V
28. Joseph Martins on behalf of Z. M., Bayside, New York, Court of Federal Claims No: 24–0375V
29. Nicole Palmieri, Los Angeles, California, Court of Federal Claims No: 24–0377V
30. Candy Speagle, Los Angeles, California, Court of Federal Claims No: 24–0378V
31. Patricia Whittemire, Key West, Florida,

Court of Federal Claims No: 24–0379V
32. Claudia Jeffries, Tampa, Florida, Court of Federal Claims No: 24–0380V
33. Ryan Guzek, Warren, Michigan, Court of Federal Claims No: 24–0381V
34. Nicole Bialeschki, Boston, Massachusetts, Court of Federal Claims No: 24–0382V
35. Arthur Culley, Rising Sun, Maryland, Court of Federal Claims No: 24–0383V
36. Sarah Pappalardo, Los Angeles, California, Court of Federal Claims No: 24–0386V
37. Michael P. Duren, Sterling, Virginia, Court of Federal Claims No: 24–0387V
38. Chantel Price on behalf of N.W. Azle, Texas, Court of Federal Claims No: 24–0389V
39. Michael Semegran, Harrington Park, New Jersey, Court of Federal Claims No: 24–0390V
40. Amir Goldkorn, Los Angeles, California, Court of Federal Claims No: 24–0392V
41. Gayle Kirschenbaum, New York, New York, Court of Federal Claims No: 24–0393V
42. Erin Severens, Worcester, Massachusetts, Court of Federal Claims No: 24–0394V
43. John Charles Zimmerman, West New York, New Jersey, Court of Federal Claims No: 24–0398V
44. Scott Youngmark, Boscobel, Wisconsin, Court of Federal Claims No: 24–0399V
45. Faith Matter, Los Angeles, California, Court of Federal Claims No: 24–0400V
46. Rafaela Torres, Houston, Texas, Court of Federal Claims No: 24–0401V
47. Donald Treat, Crestwood, Kentucky, Court of Federal Claims No: 24–0403V
48. Marangelis Berrios-Cruz, Moncks Corner, South Carolina, Court of Federal Claims No: 24–0405V
49. Nicole O'Donnell, Alexandria, Virginia, Court of Federal Claims No: 24–0409V
50. Ekaterina Pushkarnaya, San Francisco, California, Court of Federal Claims No: 24–0410V
51. Saira Javaid, Windsor Mill, Maryland, Court of Federal Claims No: 24–0411V
52. Janna Henry, Fort Worth, Texas, Court of Federal Claims No: 24–0412V
53. Celia Fernandez, Chicago, Illinois, Court of Federal Claims No: 24–0414V
54. James Socha, Waupun, Wisconsin, Court of Federal Claims No: 24–0416V
55. Jessica Berthold, San Francisco, California, Court of Federal Claims No: 24–0417V
56. Sharelle Silas, New York, New York, Court of Federal Claims No: 24–0418V
57. Eric P. Rast, Rochester, New York, Court of Federal Claims No: 24–0419V
58. Trina Daily, Los Angeles, California, Court of Federal Claims No: 24–0420V
59. Danel Brunell, Ogden, Utah, Court of Federal Claims No: 24–0421V
60. Rebecca Beisel, Crozet, Virginia, Court of Federal Claims No: 24–0423V
61. Lisa Soriano, Durham, North Carolina, Court of Federal Claims No: 24–0425V
62. Cassandra Bynum, Memphis, Tennessee, Court of Federal Claims No: 24–0428V
63. Angela J. German, Seattle, Washington, Court of Federal Claims No: 24–0429V
64. Sarah Horvat, Twinsburg, Ohio, Court of Federal Claims No: 24–0430V
65. Leonora Briggs, Kansas City, Kansas, Court of Federal Claims No: 24–0431V
66. Destiny Wisniewski, The Woodlands, Texas, Court of Federal Claims No: 24–0432V
67. Kimberly Palmer, Trinidad, Colorado, Court of Federal Claims No: 24–0433V
68. Barry Stoddard, Kansas City, Kansas, Court of Federal Claims No: 24–0434V
69. Kathy Mergel, Boston, Massachusetts, Court of Federal Claims No: 24–0435V
70. Sally Nellson-Barrett, Boston, Massachusetts, Court of Federal Claims No: 24–0437V
71. Benjamin Mayberry, Dresher, Pennsylvania, Court of Federal Claims No: 24–0438V
72. Lea Cross, Weston, West Virginia, Court of Federal Claims No: 24–0441V
73. Kristin Labelle, Mount Pleasant, Michigan, Court of Federal Claims No: 24–0443V
74. Alix Riske on behalf of C. ., Valencia, California, Court of Federal Claims No: 24–0444V
75. Stephina Fuller, Moorestown, New Jersey, Court of Federal Claims No: 24–0445V
76. Daniel Bartelt, Waupun, Wisconsin, Court of Federal Claims No: 24–0449V
77. Tessa Wells, Aspen, Colorado, Court of Federal Claims No: 24–0450V
78. Julia Seibert, Dallas, Oregon, Court of Federal Claims No: 24–0453V
79. Kathleen David-Geisner, Allentown, Pennsylvania, Court of Federal Claims No: 24–0454V
80. William Silver, Loveland, Colorado, Court of Federal Claims No: 24–0457V
81. Jana Janco, Poughkeepsie, New York, Court of Federal Claims No: 24–0459V
82. Bertina Chian, Los Altos, California, Court of Federal Claims No: 24–0460V
83. Steven Appleget, Phoenix, Arizona, Court of Federal Claims No: 24–0464V
84. Macaylee Nikolov, Los Angeles, California, Court of Federal Claims No: 24–0465V
85. Stephen Erickson, Peoria, Arizona, Court of Federal Claims No: 24–0466V
86. Peter Tatum, Boulder, Colorado, Court of Federal Claims No: 24–0472V
87. Thomas McGrath, Toms River, New Jersey, Court of Federal Claims No: 24–0473V
88. Stephanie Ervin, East Orange, New Jersey, Court of Federal Claims No: 24–0474V
89. Ranae Baltrush, Farmington, Missouri, Court of Federal Claims No: 24–0478V
90. Derek Troccia, Peterborough, New Hampshire, Court of Federal Claims No: 24–0479V
91. Deborah Johnson, Portsmouth, Virginia, Court of Federal Claims No: 24–0484V
92. Kaye L. Aston, Austin, Texas, Court of Federal Claims No: 24–0486V

[FR Doc. 2024–08398 Filed 4–18–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Development of a Universal Symbol for Language Assistance Services in Health Settings

AGENCY: Office of Minority Health, U.S. Department of Health and Human Services.

ACTION: Request for information.

SUMMARY: The U.S. Department of Health and Human Services (HHS) Office of Minority Health (OMH) seeks input from language access stakeholders, including organizations representing and/or serving communities with Limited English Proficiency (LEP), to inform the development of a universal symbol informing people about the availability of language assistance services in health settings. This is NOT a solicitation for proposals or proposal abstracts.

DATES: Written comments must be submitted and received at the address provided below, no later than 11:59 p.m. on May 20, 2024.

ADDRESSES: OMH invites the submission of the requested information through one of the following methods:

- *Preferred method:* Submit information through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submissions.
- *Email:* Send comments to *minorityhealth@hhs.gov* with the subject line ''OMH RFI: Universal Symbol for Language Assistance Services in Health Settings.''

Submissions received after the deadline will not be reviewed. Respond concisely and in plain language. You may use any structure or layout that presents your information well. You may respond to some or all of our questions, and you can suggest other factors or relevant questions. You may also include links to online material or interactive presentations. Clearly mark any proprietary information and place it in its own section or file. Your response will become government property, and we may publish some of its non-proprietary content.

FOR FURTHER INFORMATION CONTACT: Leandra Olson, 1101 Wootton Parkway, Suite 100, Rockville, MD 20852, *Leandra.Olson@hhs.gov,* (301) 348–3577.

SUPPLEMENTARY INFORMATION:

Please Note: This request is for information (RFI) and is for planning purposes only. It is not a notice for a proposal and does not commit the Federal Government to issue a

solicitation, make an award, or pay any costs associated with responding to this announcement. All submitted information shall remain with the Federal Government and will not be returned. All responses will become part of the public record and will not be held confidential. The Federal Government reserves the right to use information provided by respondents for purposes deemed necessary and legally appropriate. Respondents are advised that the Federal Government is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted. Responses will not be accepted after the due date.

I. Background Information

The Office of Minority Health (OMH)

Authorized under section 1707 of the Public Health Service Act, 42 U.S.C. 300u–6, as amended, the mission of OMH is to improve the health of racial and ethnic minority and American Indian and Alaska Native populations through the development of health policies and programs that help eliminate health disparities. OMH awards and other activities are intended to support the identification of effective policies, programs and practices for improving health outcomes and to promote sustainability and dissemination of these approaches.

Universal Symbol for Language Assistance Services

Under Fiscal Year 2023 Appropriations, Congress called upon OMH to research, develop, and test methods of informing LEP individuals about the availability of language assistance services. The Congressional report noted that the goal of this research would preferably be to develop a universal symbol informing people about the availability of language access services.

II. Request for Information

Through this RFI, OMH seeks to obtain information from language access stakeholders, including organizations representing and/or serving communities with LEP, to guide the development and implementation of a symbol informing people about the availability of language assistance services in health settings, including for health services, programs, and/or products.

III. Questions

- What methods do you or your organization currently use to inform individuals with LEP about the availability of services in their preferred language?
  - How effective are these methods?
- What are the challenges to implementing these methods? Do you believe a new graphic symbol informing people about the availability of language assistance services would increase the rate at which people request language assistance services and thereby increase access to information about health services, programs, and/or products?
- Are you aware of any previous or existing symbols used to inform people about the availability of language assistance services (*e.g.,* used in the health sector or other sectors)?
  - If yes, please share any information you have regarding the development and implementation of the symbol, including best practices, challenges, and effectiveness or impact.
- What should be considered in the development of a new graphic symbol informing people about the availability of language assistance services in health settings? Please add any specific suggestions you have for the symbol design and usability testing.
- What steps do you recommend for implementing, disseminating, and ensuring effectiveness of a new symbol for language assistance services, including utilization by LEP individuals, healthcare providers, public health departments, and other entities engaged in health care?
- Are there frameworks or standards that should be considered to support the development, testing, implementation, and dissemination of a new symbol for language assistance services?

IV. Definitions

For the purposes of this RFI, the following working definitions apply:

Language Assistance Services—All oral, written, and signed language services needed to assist individuals with LEP and people with disabilities to communicate effectively. Examples of language assistance services include oral interpretation services and written translations of materials.

Limited English Proficiency (LEP)—An individual who does not speak English as their preferred language and who has a limited ability to read, write, speak or understand English in a manner that permits them to communicate effectively and have meaningful access to and participate in the services, activities, programs, or other benefits administered in a health setting. Individuals with LEP may be competent in English for certain types of communication (*e.g.,* speaking or understanding) but have limited proficiency in English in other areas (*e.g.,* reading or writing). LEP designations are also context-specific; an individual may possess sufficient English language skills to function in one setting (*e.g.,* conversing in English with coworkers), but these skills may be insufficient in other settings (*e.g.,* addressing court proceedings). An individual who is deaf or hard of hearing may also have limited proficiency in spoken or written English.

Dated: April 10, 2024.

Leandra Olson,

Policy Team Lead, Office of Minority Health.

[FR Doc. 2024–08409 Filed 4–18–24; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Integrative Health; 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 Complementary and Integrative Health Special Emphasis Panel Institutional Research Training Grants (IT)

Date: May 22, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Complementary and Integrative Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892, (Virtual Meeting).

Contact Person: MICHAEL ERIC AUTHEMENT, Ph.D., Scientific Review Officer Office of Scientific Review Division of Extramural Activities 6707 Democracy Boulevard Bethesda, MD 20817 *michael.authement@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: April 15, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–08286 Filed 4–17–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License, Inter-Institutional Agreement-Institution Lead: Polyvalent Vaccines and Methods for Making Them

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institute of Allergy and Infectious Diseases, an institute of the National Institutes of Health, Department of Health and Human Services, on behalf of the Centers for Disease Control and Prevention, Department of Health and Human Services, is contemplating the grant of an exclusive, sublicensable patent license to University Health Network, located in Toronto, Canada, its rights to the technologies and the patent applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Only written comments and/or applications for a license which are received by the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases on or before May 6, 2024 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated exclusive patent license should be directed to: Ann Marie Flammang Ph.D., Senior Technology Transfer Patent Specialist, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Suite 2G, MSC9804, Rockville, MD 20852–9804, phone number 301–761–6682, or *annmarie.flammang@nih.gov.*

SUPPLEMENTARY INFORMATION: The following represents the intellectual property to be licensed under the prospective agreement: United States Provisional Patent Application Number 63/278,467, filed November 11, 2021, entitled ''Polyvalent Vaccines and Methods for Making Them'' (HHS Reference No. E–091–2024–0–US–01), and Patent Cooperation Treaty Patent Application Number PCT/CA2022/051680, filed November 14, 2022, entitled ''Polyvalent Vaccines and Methods for Making Them'' (HHS Reference No. E–091–2024–0–PC–01). All patent rights in these inventions have been assigned to University Health Network, University of Liverpool, The Governing Council of the University of Toronto, and Centers for Disease Control and Prevention.

The prospective patent license will be for the purpose of consolidating the patent rights to University Health Network, the co-owners of said rights, for commercialization. Consolidation of these co-owned rights is intended to expedite development of the technology, consistent with the goals of the Bayh-Dole Act codified as 35 U.S.C. 200–212.

The prospective patent license will be worldwide, exclusive, and may be limited to those fields of use commensurate in scope with the patent rights. It will be sublicensable, and any sublicenses granted by University Health Network will be subject to the provisions of 37 CFR part 404.

The technology is a strategy to overcome the challenge of virus heterogeneity against hepatitis C virus (HCV). Using a model of hypervariable region 1 (HRV1) genetic variability and observed discrete, genotype-independent clusters, sequences were selected to synthesize peptides for vaccination. The pentavalent mixture resulted in an antibody response that was more broadly neutralizing than each individual variant or pooled sera, indicating a synergistic interaction among immune responses to related, but distinct, HVR1 variants. These findings open a new path for the development of an HCV vaccine using sequence complementary variants of genetically divergent HVR1 antigenic epitopes. A method was developed for producing a multivariant vaccine comprised of a plurality of peptides or the nucleic acids encoding them.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Insitute of Allergy and Infectious Diseases receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

Complete license applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under *the Freedom of Information Act,* 5 U.S.C. 552.

Dated: April 15, 2024.

Surekha Vathyam,

Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.

[FR Doc. 2024–08361 Filed 4–18–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR 6453–N–01]

Announcement of Tenant Protection Voucher Funding Awards for Fiscal Year 2023 for the Housing Choice Voucher Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of fiscal year 2023 awards.

SUMMARY: In accordance with the Department of Housing and Urban Development Reform Act of 1989, this document notifies the public of Tenant Protection Voucher (TPV) funding awards for fiscal year (FY) 2023 to public housing agencies (PHAs) under the Section 8 Housing Choice Voucher Program (HCVP). The purpose of this notice is to publish the names, addresses of awardees, and the amount of their non-competitive funding awards for assisting households affected by housing conversion actions, public housing relocations and replacements, and moderate rehabilitation replacements. This notice also includes a link to the TPV awards issued since FY 2020, which can be sorted by PHAs, project name and identification number, by category of TPVs such as Multifamily or Public Housing, and by state and by HUD regions.

FOR FURTHER INFORMATION CONTACT: Danielle L. Bastarache, Deputy Assistant Secretary, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW, Room 4204, Washington, DC 20410–5000, telephone (202) 402–1380. HUD welcomes and is prepared to receive calls from individuals who are

deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: The regulations governing the HCVP are published at 24 CFR 982. The purpose of the rental assistance program is to assist eligible families to pay their rent for decent, safe, and sanitary housing in the private rental market.

The FY 2023 awardees announced in this notice were provided HCVP tenant protection vouchers (TPVs) funds on an as-needed, non-competitive basis. TPV awards made to PHAs for program actions that displace families living in public housing were made on a first-come, first-served basis in accordance with PIH Notice 2018–04, ''Voucher Funding in Connection with the Demolition or Disposition of Occupied Public Housing Units.'' In addition, TPV awards for actions such as section 8 project-based contract expirations and terminations were made in accordance with PIH Notice 2022–14, ''Implementation of the Federal Fiscal Year (FFY) 2022 Funding Provisions for the Housing Choice Voucher Program.'' Lastly, awards for certain project under the Second Component of the Rental Assistance Demonstration were provided consistent with PIH Notice H–2020–09 PIH–2020–23(HA), REV–4, ''Rental Assistance Demonstration-Final Implementation, Revision 4.'' Announcements of awards provided under the NOFA process for Mainstream, Designated Housing, Family Unification (FUP), and Veterans Assistance Supportive Housing (VASH) programs will be published in a separate **Federal Register** notice.

Awards published under this notice were provided (1) to assist families living in HUD-owned properties that are being sold; (2) to assist families affected by the expiration or termination of their Project-based Section 8 and Moderate Rehabilitation contracts; (3) to assist families in properties where the owner has prepaid the HUD mortgage; (4) to assist families in projects where the Rental Supplement and Rental Assistance Payments contracts are expiring (RAD—Second Component); (5) to provide replacement housing assistance for single room occupancy (SRO) units that fail housing quality standards (HQS); and (6) to assist families in Public Housing developments that received HUD approval for the following actions: (a) units scheduled for demolition or disposition approved under section 18, (b) required conversions approved under section 33, (c) voluntary conversions approved under section 22, (d) homeownership plans approved under section 32, (e) removals authorized under Choice Neighborhood, and (f) public housing developments in connection with a HUD-approved HOPE VI revitalization or demolition grant.

A special administrative fee of $200 per occupied unit was provided to PHAs to compensate for any extraordinary HCVP administrative costs associated with the Multifamily Housing conversion actions.

The Department awarded new budget authority in the amount of $139,642,219 to recipients under all the above-mentioned categories for 12,694 housing choice vouchers. For further information about these TPV awards, and for awards since FY 2020, please use the TPV Dashboard log using this link: *https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/fmd.* You can sort the awards by PHA, project name and identification number, and by state and HUD regions.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses of awardees, and their award amounts in appendix A. The awardees are listed alphabetically by State for each type of TPV award.

Dominique Blom,

General Deputy Assistant Secretary for Public and Indian Housing.

BILLING CODE 4210–67–P

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	**Housing Agency**	**Address**	**Units**	**HAP Award**	**Fee Award**
Public Housing Tenant Protection Actions					
		Choice Neighborhood Relocation		**HAP**	**Not Applicable**
NE001	NE: OMAHA HOUSING AUTHORITY	1823 HARNEY STREET, OMAHA, NE 68102	16	$ 149,475	
NC013	NC: HA DURHAM	330 E MAIN STREET PO BOX 1726, DURHAM, NC 27702	25	$ 229,545	
		Total for Choice Neighborhood Relocation	**41**	**379,020**	
		Choice Neighborhood Replacement			
AZ001	AZ: CITY OF PHOENIX	NEIGHBORHOOD IMPROVEMENT HSG D 251 W. WASHINGTON ST., 4TH FL, PHOENIX, AZ 85003	74	$ 1,139,526	
MO001	MO: ST. LOUIS HOUSING AUTHORITY	3520 PAGE BOULEVARD, ST. LOUIS, MO 63106	67	$ 302,102	
		Total for Choice Neighborhood Replacement	**141**	**1,441,628**	
		MTW Relocation/Replacement			
GA006	GA: HA ATLANTA GA	230 JOHN WESLEY DOBBS AVE. NE, ATLANTA, GA 30303	44	$ 552,922	
HI901	HI: HAWAII PUBLIC HOUSING AUTHORITY	1002 NORTH SCHOOL ST., HONOLULU, HI 96817	43	$ 660,537	
CA008	CA: HOUSING AUTHORITY COUNTY OF KERN	601 24TH STREET, BAKERSFIELD, CA 93301	118	$ 980,863	
CT002	CT: NORWALK HOUSING AUTHORITY	24 1/2 MONROE STREET, NORWALK, CT 06856	54	$ 1,065,941	
FL004	FL: ORLANDO H/A	390 NORTH BUMBY AVENUE, ORLANDO, FL 32803	163	$ 1,610,121	
MA003	MA: CAMBRIDGE HOUSING AUTHORITY	675 MASSACHUSETTS AVENUE, CAMBRIDGE, MA 02139	29	$ 479,377	
		Total for MTW Relocation/Replacement	**451**	**5,349,761**	
		Relocation-Sunset			
IN015	IN: SOUTH BEND HA	PO BOX 11057, SOUTH BEND, IN 46010	64	$ 129,541	
PA006	PA: ALLEGHENY COUNTY HOUSING AUTHORITY	625 STANWIX ST, 12TH FLOOR, PITTSBURGH, PA 15222	13	$ 84,405	
RI005	RI: NEWPORT HOUSING AUTHORITY	120B HILLSIDE AVENUE, NEWPORT, RI 02840	11	$ 33,871	
TX046	TX: MISSION HA	1300 E 8TH STREET, MISSION, TX 78572	25	$ 124,694	
VA016	VA: CHARLOTTESVILLE REDEVELOPMENT & H/A	605 EAST MAIN STREET,ROOM A040 P.O. BOX 1405, CHARLOTTESVILLE, VA 22902	20	$ 179,000	
		Total for Relocation-Sunset	**133**	**$ 551,511**	
		Replacement			
AL002	AL: MOBILE HOUSING AUTHORITY	P O BOX 1345, MOBILE, AL 36633	210	$ 852,070	
AR002	AR: HSG AUTH OF THE CITY OF NORTH LITTLE ROCK	PO BOX 516, NORTH LITTLE ROCK, AR 72115	92	$ 605,007	
CA001	CA: SAN FRANCISCO HSG AUTH	1815 EGBERT AVE., SAN FRANCISCO, CA 94124	52	$ 6,789,256	
CA004	CA: CITY OF LOS ANGELES HSG AUTH	2600 WILSHIRE BLVD., 3RD FLOOR, LOS ANGELES, CA 90057	76	$ 1,073,971	
CA048	CA: REGIONAL HOUSING AUTHORITY	1455 BUTTE HOUSE ROAD, YUBA CITY, CA 95593		$ 269,459	
CA074	CA: H.A. OF THE CITY OF LIVERMORE	3203 LEAHY WAY, LIVERMORE, CA 94550	125	$ 2,527,605	
CO001	CO: HOUSING AUTHORITY OF THE CITY AND COUNTY OF DENVER	1035 OSAGE ST, DENVER, CO 80204	125	$ 1,785,509	
CO041	CO: FORT COLLINS HSG AUTH	1715 W. MOUNTAIN AVE., FORT COLLINS, CO 80521	14	$ 151,490	
FL007	FL: HA DAYTONA BEACH	211 NORTH RIDGEWOOD AVENUE SUITE 200, DAYTONA BEACH, FL 32114	22	$ 148,577	
IL026	IL: WAUKEGAN HOUSING AUTHORITY	215 S. MARTIN LUTHER KING AVE, WAUKEGAN, IL 60085	32	$ 62,774	
IL053	IL: JACKSON COUNTY HOUSING AUTHORITY	P O BOX 1209 300 N 7TH STREET, MURPHYSBORO, IL 62966	61	$ 49,410	
IN015	IN: SOUTH BEND HA	PO BOX 11057, SOUTH BEND, IN 46010	107	$ 479,044	

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	**Housing Agency**	**Address**	**Units**	**HAP Award**	**Fee Award**
LA004	LA: LAKE CHARLES HOUSING AUTHORITY	P O BOX 1206, LAKE CHARLES, LA 70602	39	$ 52,745	
MA002	MA: BOSTON HOUSING AUTHORITY	52 CHAUNCY STREET, BOSTON, MA 02111	371	$ 7,359,573	
MA033	MA: BROOKLINE HOUSING AUTHORITY	90 LONGWOOD AVE, BROOKLINE, MA 02146		$ 189,195	
MD001	MD: HOUSING AUTHORITY OF THE CITY OF ANNAPOLIS	1217 MADISON STREET, ANNAPOLIS, MD 21403	92	$ 1,152,554	
MD002	MD: HOUSING AUTHORITY OF BALTIMORE CITY	417 EAST FAYETTE STREET, BALTIMORE, MD 21201	285	$ 3,981,804	
ME003	ME: PORTLAND HSG AUTHORITY	14 BAXTER BOULEVARD, PORTLAND, ME 04101	139	$ 1,890,223	
ME020	ME: SOUTH PORTLAND HOUSING AUTHORITY	51 LANDRY CIRCLE, SOUTH PORTLAND, ME 04106		$ 95,626	
MI058	MI: LANSING HOUSING COMMISSION	419 CHERRY STREET, LANSING, MI 48933	191	$ 1,362,296	
NC167	NC: NORTH WESTERN REGIONAL HOUSING AUTHORITY	ADDISON EXE OFFICE BLDG, 869 HWY 105 EXT OR PO BOX 2510, BOONE, NC 28607	27	$ 12,283	
ND019	ND: TRAIL COUNTY HOUSING AUTHORITY	230 8TH AVENUE WEST, WEST FARGO, ND 58078	13	$ 54,673	
NJ023	NJ: MORRISTOWN HOUSING AUTHORITY	31 EARLY STREET, MORRISTOWN, NJ 07960	160	$ 2,197,056	
NJ037	NJ: IRVINGTON HOUSING AUTHORITY	624 NYE AVENUE, IRVINGTON, NJ 07111	85	$ 167,428	
NY005	NY: NEW YORK CITY HOUSING AUTHORITY	90 CHURCH STREET, 9TH FLOOR LEASED HOUSING, NEW YORK, NY 10007	2,321	$ 36,299,640	
NY020	NY: HA OF SARATOGA SPRINGS	ONE SOUTH FEDERAL STREET, SARATOGA SPRINGS, NY 12866	36	$ 46,900	
NY022	NY: HA OF COHOES	ADMINISTRATIVE BUILDING 100 MANOR SITES, COHOES, NY 12047	13	$ 89,785	
OK073	OK: TULSA HOUSING AUTHORITY	P O BOX 6369, TULSA, OK 74148	147	$ 1,047,204	
PA083	PA: COLUMBIA COUNTY HOUSING AUTHORITY	700 SAW MILL ROAD, BLOOMSBURG, PA 17815		$ 31,687	
VA007	VA: RICHMOND REDEVELOPMENT & H/A	901 CHAMBERLAYNE PARKWAY P.O. BOX 26887, RICHMOND, VA 23261	65	$ 638,923	
VA020	VA: PETERSBURG REDEVELOPMENT & H/A	P.O. BOX 311 128 SO. SYCAMORE ST., PETERSBURG, VA 23803	89	$ 627,380	
WA001	WA: SEATTLE HOUSING AUTHORITY	190 QUEEN ANNE AVE. NORTH PO BOX 19028, SEATTLE, WA 98109	127	$ 1,668,643	
WV037	WV: HOUSING AUTHORITY OF MINGO COUNTY	P O BOX 120 5026 HELENA AVENUE, DELBARTON, WV 25670	35	$ 185,489	
KS001	KS: KANSAS CITY HOUSING AUTHORITY	1124 NORTH NINTH STREET, KANSAS CITY, KS 66101	69	$ 591,027	
NC013	NC: HA DURHAM	330 E MAIN STREET PO BOX 1726, DURHAM, NC 27702	14	$ 128,546	
PA006	PA: ALLEGHENY COUNTY HOUSING AUTHORITY	625 STANWIX ST, 12TH FLOOR, PITTSBURGH, PA 15222	179	$ 1,162,198	
RI005	RI: NEWPORT HOUSING AUTHORITY	120B HILLSIDE AVENUE, NEWPORT, RI 02840	62	$ 794,092	
TX046	TX: MISSION HA	1300 E 8TH STREET, MISSION, TX 78572	53	$ 264,354	
AL007	AL: DOTHAN H/A	P O BOX 1727, DOTHAN, AL 36302	117	$ 699,767	
CA007	CA: COUNTY OF SACRAMENTO HOUSING AUTHORITY	801 12TH STREET, SACRAMENTO, CA 95814	45	$ 614,072	
CA021	CA: COUNTY OF SANTA BARBARA HSG AUTH	815 W OCEAN P O BOX 397, LOMPOC, CA 93438	54	$ 869,201	
CT029	CT: WEST HAVEN HOUSING AUTHORITY	15 GLADE STREET, WEST HAVEN, CT 06516	26	$ 293,941	
DE002	DE: DOVER HOUSING AUTHORITY	76 STEVENSON DRIVE, DOVER, DE 19901	30	$ 253,343	
IL014	IL: HSG AUTHORITY FOR LASALLE COUNTY	P O BOX 782 526 EAST NORRIS DRIVE, OTTAWA, IL 61350	95	$ 679,531	
IL056	IL: HSG AUTHORITY OF THE COUNTY OF LAKE	33928 N. US HIGHWAY 45, GRAYSLAKE, IL 60030	24	$ 240,704	
MA015	MA: MEDFORD HOUSING AUTHORITY	121 RIVERSIDE AVENUE, MEDFORD, MA 02155	170	$ 4,771,560	
MD003	MD: HOUSING AUTHORITY OF THE CITY OF FREDERICK	209 MADISON STREET, FREDERICK, MD 21701	88	$ 1,113,024	
MI005	MI: PONTIAC HOUSING COMMISSION	132 FRANKLIN BOULEVARD, PONTIAC, MI 48341	186	$ 1,449,662	
MN193	MN: RICE COUNTY HRA	320 NW 3RD STREET, SUITE 5, FARIBAULT, MN 55021	39	$ 281,301	
MO188	MO: JOPLIN HOUSING AUTHORITY	1834 WEST 24TH ST, JOPLIN, MO 64804	30	$ 137,121	
NV018	NV: SOUTHERN NEVADA REGIONAL HOUSING AUTHORITY	340 NORTH 11TH ST., LAS VEGAS, NV 89104	120	$ 1,317,614	
NY038	NY: HA OF MOUNT KISCO	200 CARPENTER AVE., MOUNT KISCO, NY 10549	75	$ 1,213,056	
NY045	NY: KINGSTON HOUSING AUTHORITY	132 RONDOUT DRIVE, KINGSTON, NY 12401	162	$ 1,049,329	
OH008	OH: TRUMBULL MHA	4076 YOUNGSTOWN ROAD SE, WARREN, OH 44484	152	$ 803,362	

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	Housing Agency	Address	Units	HAP Award	Fee Award
OH015	OH: BUTLER MET.HA	4110 HAMILTON MIDDLETOWN ROAD, HAMILTON, OH 45011	216	$ 1,776,323	
OH032	OH: HOCKING MET HA	33601 PINE RIDGE DRIVE, LOGAN, OH 43138	7	$ 31,172	
OK027	OK: MIAMI HOUSING AUTHORITY	PO BOX 848 205 B STREET NE, MIAMI, OK 74354	162	$ 774,564	
OR001	OR: HOUSING AUTHORITY OF THE COUNTY OF CLACKAMAS	PO BOX 1510, OREGON CITY, OR 97045	54	$ 655,842	
SC004	SC: HA GREENVILLE	122 EDINBURGH COURT, GREENVILLE, SC 29607	125	$ 991,575	
TX001	TX: AUSTIN HOUSING AUTHORITY	P O BOX 41119, AUSTIN, TX 78704	50	$ 578,053	
TX003	TX: HOUSING AUTHORITY OF EL PASO	5300 PAISANO, EL PASO, TX 79905	144	$ 863,118	
TX322	TX: ROUND ROCK HOUSING AUTHORITY	P O BOX 781, ROUND ROCK, TX 78680	12	$ 127,475	
WA054	WA: PIERCE COUNTY HOUSING AUTHORITY	603 S POLK STREET PO BOX 45410, TACOMA, WA 98445	36	$ 402,899	
WY004	WY: HOUSING AUTHORITY OF THE CITY OF CASPER	1514 E. 12TH STREET, SUITE 105, CASPER, WY 82601	25	$ 138,723	
KY009	KY: OWENSBORO HOUSING AUTHORITY	2161 EAST 19TH STREET, OWENSBORO, KY 42303	198	$ 76,087	
AR004	AR: HOUSING AUTHORITY OF THE CITY OF LITTLE ROCK	100 S. ARCH STREET, LITTLE ROCK, AR 72201	47	$ 135,907	
		Total for Replacement	**8,017**	**$ 99,223,822**	
		SRO-Relocation/Replacement			
MA002	MA: BOSTON HOUSING AUTHORITY	52 CHAUNCY STREET, BOSTON, MA 02111	36	$ 621,386	
VT901	VT: VERMONT STATE HOUSING AUTHORITY	ONE PROSPECT STREET, MONTPELIER, VT 05602	18	$ 151,470	
WV004	WV: HUNTINGTON WV HOUSING AUTHORITY	PO BOX 2183 300 7TH AVENUE WEST, HUNTINGTON, WV 25722	10	$ 190,224	
AL001	AL: HSG AUTH OF BIRMINGHAM DISTRICT	1826 3RD AVE. SOUTH, BIRMINGHAM, AL 35233	17	$ 148,304	
MA046	MA: BARNSTABLE HSG AUTHORITY	146 SOUTH ST, HYANNIS, MA 02601	10	$ 123,999	
TN004	TN: CHATTANOOGA H/A	P O BOX 1486, CHATTANOOGA, TN 37402	10	$ 29,583	
TX441	TX: HARRIS COUNTY HSG AUTHORITY	P.O. BOX 53028, HOUSTON, TX 77052	72	$ 734,438	
		Total for Choice Neighborhood Relocation	**173**	**1,999,404**	
		Mod Replacements			
CA002	CA: LA COUNTY DEVELOPMENT AUTH	C.D.C. COUNTY OF LOS ANGELES 700 W. MAIN STREET, ALHAMBRA, CA 91801	10	$ 113,425	
FL005	FL: MIAMI DADE HOUSING AUTHORITY	701 NW 1ST COURT, 16TH FLOOR, MIAMI, FL 33136	103	$ 1,500,208	
IA087	IA: DUBUQUE DEPT OF HUMAN RIGHTS	350 W. 6TH STREET - SUITE 312, DUBUQUE, IA 52001	8	$ 54,989	
IL002	IL: CHICAGO HOUSING AUTHORITY	60 EAST VAN BUREN ST 11TH FLOOR, CHICAGO, IL 60605	38	$ 459,735	
MA901	MA: MASSACHUSETTS EXEC. OFFICE HOUSING & LIVABLE COMM	100 CAMBRIDGE STREET, BOSTON, MA 02114	7	$ 109,501	
ME005	ME: LEWISTON HOUSING AUTHORITY	1 COLLEGE STREET, LEWISTON, ME 04240	9	$ 74,628	
ME901	ME: MAINE STATE HSG AUTHORITY	353 WATER STREET, AUGUSTA, ME 04330	16	$ 109,562	
ND013	ND: RAMSEY COUNTY HOUSING AUTHORITY	BOX 691, DEVILS LAKE, ND 58301	18	$ 77,423	
PA002	PA: PHILADELPHIA HOUSING AUTHORITY	12 SOUTH 23RD STREET, PHILADELPHIA, PA 19103	41	$ 311,043	
TN076	TN: HSG DEV AGENCY ELIZABETHTON	P. O. BOX 637, ELIZABETHTON, TN 37644	8	$ 36,326	
UT004	UT: HOUSING AUTHORITY OF SALT LAKE CITY	1776 SW TEMPLE, SALT LAKE CITY, UT 84115	78	$ 835,221	
WI901	WI: WISCONSIN HOUSING & ECONOMIC	DEVELOPMENT AUTHORITY P O BOX 1728, MADISON, WI 53701	34	$ 198,382	
MT901	MT: MT DEPARTMENT OF COMMERCE	POB 200545 301 S. PARK, HELENA, MT 59620	27	$ 148,289	
ME009	ME: BANGOR HOUSING AUTHORITY	161 DAVIS ROAD, BANGOR, ME 04401	5	$ 33,324	
MT004	MT: HELENA HOUSING AUTHORITY	812 ABBEY ST, HELENA, MT 59601	11	$ 30,893	
NJ204	NJ: GLOUCESTER HOUSING AUTHORITY	100 POP MOYLAN BOULEVARD, DEPTFORD, NJ 08096	6	$ 64,511	
NY049	NY: HA OF BEACON	1 FORRESTAL HEIGHTS, BEACON, NY 12508	14	$ 162,359	

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	**Housing Agency**	**Address**	**Units**	**HAP Award**	**Fee Award**
NY561	NY: TOWN OF STILLWATER	C/O J. MASTRIANNI INC 11 FEDERAL STREET, SARATOGA SPRINGS, NY 12866	6	$ 50,754	
OH018	OH: STARK METROPOLITAN HOUSING AUTH.	400 EAST TUSCARAWAS STREET, CANTON, OH 44702	2	$ 10,942	
OR028	OR: NORTHWEST OREGON HOUSING AGENCY	PO BOX 1149 147 SOUTH MAIN AVE, WARRENTON, OR 97146	59	$ 425,025	
PA006	PA: ALLEGHENY COUNTY HOUSING AUTHORITY	625 STANWIX ST, 12TH FLOOR, PITTSBURGH, PA 15222	32	$ 168,810	
RI001	RI: PROVIDENCE H A	100 BROAD ST, PROVIDENCE, RI 02903	26	$ 255,815	
SD016	SD: SIOUX FALLS HOUSING & REDEVELOPMENT COMMISSION	630 SOUTH MINNESOTA, SIOUX FALLS, SD 57104	11	$ 72,608	
IN003	IN: KNOXVILLE COMMUNITY DEVEL CORP	P O BOX 3550, KNOXVILLE, IN 37927	26	$ 220,209	
TX005	TX: HOUSTON HOUSING AUTHORITY	2640 FOUNTAIN VIEW, HOUSTON, TX 77057	176	$ 1,660,718	
TX011	TX: LAREDO HOUSING AUTHORITY	2000 SAN FRANCISCO AVENUE, LAREDO, TX 78040	9	$ 63,245	
TX509	TX: CAMERON COUNTY HSG AUTHORITY	P O BOX 5806, BROWNSVILLE, TX 78520	13	$ 74,438	
WV001	WV: CHARLESTON/KANAWHA HA	1525 WASHINGTON STREET WEST PO BOX 86, CHARLESTON, WV 25387	4	$ 26,689	
		Total for Choice Neighborhood Relocation	**797**	**7,349,072**	
		Total for Public Housing	**9,753**	**$ 116,294,218**	
		Multifamily Housing Conversion Actions			
		Certain At-Risk Households Low Vacancy			
CA003	CA: OAKLAND HOUSING AUTHORITY	1619 HARRISON ST, OAKLAND, CA 94612	9	$ 174,064	$ 1,800
CA067	CA: ALAMEDA COUNTY HSG AUTH	22941 ATHERTON STREET, HAYWARD, CA 94541	42	$ 894,731	$ 8,400
DC001	DC: D.C HOUSING AUTHORITY	303 7TH STREET, WASHINGTON, DC 20024	19	$ 393,279	$ 3,800
FL011	FL: CITY OF LAKELAND H/A	P O BOX 1009 430 S. HARTSELL AVENUE, LAKELAND, FL 33815	82	$ 736,790	$ 16,400
FL080	FL: HA PALM BEACH COUNTY	3432 W 45TH STREET, WEST PALM BEACH, FL 33407	112	$ 1,501,221	$ 22,400
ID016	ID: SOUTHWESTERN IDAHO COOPERATIVE HOUSING AUTHORITY	377 CORNELL STREET, MIDDLETON, ID 83644	30	$ 251,543	$ -
MA034	MA: NORTH ADAMS HOUSING AUTHORITY	150 ASHLAND STREET BOX 666, NORTH ADAMS, MA 01247	14	$ 21,393	$ 2,800
NY904	NY: NYS HSG TRUST FUND CORPORATION	38-40 STATE STREET, ALBANY, NY 12207	262	$ 1,481,155	$ 52,400
PA002	PA: PHILADELPHIA HOUSING AUTHORITY	12 SOUTH 23RD STREET, PHILADELPHIA, PA 19103	45	$ 404,163	$ 9,000
VA901	VA: VIRGINIA HOUSING DEVELOPMENT AUTHORITY	601 SOUTH BELVIDERE STREET, RICHMOND, VA 23220	35	$ 26,001	$ 7,000
		Total For Certain At-Risk Households Low Vacancy	**650**	**$ 5,884,340**	**$ 124,000**
		Mod Rehab SRO - RAD			
AZ001	AZ: CITY OF PHOENIX	NEIGHBORHOOD IMPROVEMENT HSG D 251 W. WASHINGTON ST., 4TH FL, PHOENIX, AZ 85003	44	$ 498,870	$ 7,400
FL017	FL: HA MIAMI BEACH	200 ALTON ROAD, MIAMI BEACH, FL 33139	8	$ 105,157	$ 1,600
MA002	MA: BOSTON HOUSING AUTHORITY	52 CHAUNCY STREET, BOSTON, MA 02111	8	$ 27,617	$ 1,600
MA023	MA: LYNN HOUSING AUTHORITY	10 CHURCH STREET, LYNN, MA 01902	43	$ 161,508	$ 8,600
MA901	MA: MASSACHUSETTS EXEC. OFFICE HOUSING & LIVABLE COMM	100 CAMBRIDGE STREET, BOSTON, MA 02114	10	$ 161,442	$ 2,000
NY110	NY: THE CITY OF NEW YORK	DEPT OF HSG PRESERVATION & DEV 100 GOLD STREET ROOM 501, NEW YORK, NY 10038	240	$ 3,472,999	$ 46,400
OR002	OR: HOME FORWARD (PORTLAND HOUSING AUTHORITY)	135 SW ASH STREET, PORTLAND, OR 97204	75	$ 69,906	$ 9,400
OR015	OR: HOUSING AUTHORITY OF JACKSON COUNTY	2231 TABLE ROCK ROAD, MEDFORD, OR 97501	23	$ 42,179	$ 4,600
UT002	UT: HA OF CITY OF OGDEN	1100 GRANT AVE., OGDEN, UT 84404	42	$ 314,506	$ 8,400
		Total for Mod Rehab SRO - RAD	**493**	**$ 4,854,184**	**$ 90,000**

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	Housing Agency	Address	Units	HAP Award	Fee Award
		Pre-payment Vouchers			
KS001	KS: KANSAS CITY HOUSING AUTHORITY	1124 NORTH NINTH STREET, KANSAS CITY, KS 66101	86	$ 817,716	$ 26,600
FL072	FL: HA DELAND	1450 SOUTH WOODLAND BOULEVARD SUITE 200A, DE LAND, FL 32720	133	$ 209,576	$ 16,400
		Total for Pre-payment Vouchers	**219**	**$ 1,027,292**	**$ 43,000**
		Termination/Opt-out Vouchers			
AR170	AR: JACKSONVILLE HOUSING AUTHORITY	PO BOX 734, JACKSONVILLE, AR 72076	48	$ 307,837	$ 2,400
CA056	CA: SAN JOSE HOUSING AUTHORITY	505 WEST JULIAN STREET, SAN JOSE, CA 95110	56	$ -	$ 11,200
CO001	CO: HOUSING AUTHORITY OF THE CITY AND COUNTY OF DENVER	1035 OSAGE ST, DENVER, CO 80204		$ 60,514	$ -
CO911	CO: COLORADO DIVISION OF HOUSING	1313 SHERMAN STREET R00M 518, DENVER, CO 80203	13	$ 134,123	$ 1,800
CT020	CT: DANBURY HOUSING AUTHORITY	2 MILL RIDGE ROAD P.O. BOX 86, DANBURY, CT 06810	(9)	$ (48,359)	$ 800
DC001	DC: D.C HOUSING AUTHORITY	303 7TH STREET, WASHINGTON, DC 20024	38	$ 741,233	$ 7,000
GA006	GA: HA ATLANTA GA	230 JOHN WESLEY DOBBS AVE. NE, ATLANTA, GA 30303	44	$ 450,083	$ 8,800
GA901	GA: GEORGIA DEPT. OF COMMUNITY AFFAIRS-RENTAL ASSIST.	60 EXECUTIVE PARK SOUTH, NE SUITE 250, ATLANTA, GA 30329	193	$ 2,037,061	$ 38,600
HI901	HI: HAWAII PUBLIC HOUSING AUTHORITY	1002 NORTH SCHOOL ST., HONOLULU, HI 96817	8	$ 118,769	$ 1,600
IA129	IA: NORTHWEST IOWA REGIONAL HA	P O BOX 446 919 2ND AVENUE, SW, SPENCER, IA 51301	41	$ 165,093	$ 6,200
IL087	IL: HSG AUTHORITY OF THE COUNTY OF SHELBY	P O BOX 252, SHELBYVILLE, IL 62565	6	$ 21,486	$ 1,200
IL101	IL: DUPAGE COUNTY HOUSING AUTHORITY	711 EAST ROOSEVELT ROAD, WHEATON, IL 60187	78	$ 927,978	$ 15,600
IN022	IN: BLOOMINGTON HOUSING AUTHORITY	1007 N SUMMIT STREET, BLOOMINGTON, IN 47404	30	$ 216,151	$ 6,000
MI073	MI: GRAND RAPIDS HSG. COMM.	1420 FULLER AVE SE, GRAND RAPIDS, MI 49507	7	$ 25,453	$ 1,400
MI901	MI: MICHIGAN STATE HSG. DEV. AUTH.	P.O. BOX 30044, LANSING, MI 48909	66	$ 56,002	$ 13,200
MN034	MN: WORTHINGTON HRA	819 TENTH STREET, WORTHINGTON, MN 56187	16	$ 89,750	$ 1,400
MN219	MN: SOUTH CENTRAL MULTI COUNTY HRA	422 BELGRADE AVENUE, SUITE 102, NORTH MANKATO, MN 56003	16	$ 96,079	$ 1,800
MO002	MO: HOUSING AUTHORITY OF KANSAS CITY, MISSOURI	3822 SUMMIT, KANSAS CITY, MO 64111	26	$ 205,689	$ 2,200
MT001	MT: HOUSING AUTHORITY OF BILLINGS	2415 1ST AVE NORTH, BILLINGS, MT 59101	23	$ 151,866	$ 2,800
MT901	MT: MT DEPARTMENT OF COMMERCE	POB 200545 301 S. PARK, HELENA, MT 59620	19	$ 117,395	$ 2,400
ND011	ND: GREAT PLAINS HOUSING HOUSING AUTHORITY	300 2ND ST NE - 200, JAMESTOWN, ND 58401	21	$ 102,705	$ 2,200
ND049	ND: WALSH COUNTY HOUSING AUTHORITY	600 E 9TH ST, GRAFTON, ND 58237	4	$ 16,936	$ 800
NE104	NE: COLUMBUS HOUSING AUTHORITY	2554 40TH AVENUE, COLUMBUS, NE 68601	8	$ 46,059	$ 1,600
NE114	NE: BEATRICE HOUSING AUTHORITY	205 NORTH 4TH STREET, BEATRICE, NE 68310	22	$ 76,747	$ 4,400
NH010	NH: KEENE HOUSING	831 COURT STREET, KEENE, NH 03431	9	$ 63,216	$ 1,600
NH901	NH: NEW HAMPSHIRE HOUSING FINANCE AUTH	P.O. BOX 5087, MANCHESTER, NH 03108	7	$ 81,794	$ 1,400
NY001	NY: HA OF SYRACUSE	516 BURT STREET, SYRACUSE, NY 13202	7	$ 12,280	$ 1,400
NY409	NY: CITY OF BUFFALO	C/O RENTAL ASST CORP 470 FRANKLIN ST, BUFFALO, NY 14202	12	$ 83,743	$ 1,400
OH022	OH: GREENE METRO HSG AUTH	538 NORTH DETROIT ST., XENIA, OH 45385	21	$ 135,667	$ 4,200
OK073	OK: TULSA HOUSING AUTHORITY	P O BOX 6369, TULSA, OK 74148	104	$ 657,035	$ 19,800
OK099	OK: MUSKOGEE HOUSING AUTHORITY	220 N 40TH, MUSKOGEE, OK 74401	92	$ 463,978	$ 18,400
OR027	OR: HOUSING AUTHORITY OF MALHEUR COUNTY	959 FORTNER ST, ONTARIO, OR 97914	13	$ 90,611	$ 2,400
SD011	SD: MADISON HOUSING & REDEVELOPMENT COMMISSION	111 S. WASHINGTON AVE., MADISON, SD 57042	24	$ 8,065	$ 3,400
TN001	TN: MEMPHIS HOUSING AUTHORITY	P.O. BOX 3664, MEMPHIS, TN 38103	299	$ 2,183,657	$ 42,000
TX537	TX: HALE COUNTY HOUSING AUTHORITY	P. O. BOX 99 123 E. 6TH. ST., PLAINVIEW, TX 79073	19	$ 86,982	$ 2,000
VA038	VA: BIG STONE GAP REDEVELOPMENT AND	HOUSING AUTHORITY P.O. BOX 536, BIG STONE GAP, VA 24219	42	$ 195,164	$ 8,400

Section 8 Rental Assistance Programs Announcement of Awards for Fiscal Year 2023					
PHA #	Housing Agency	Address	Units	HAP Award	Fee Award
VT001	VT: BURLINGTON HOUSING AUTHORITY	65 MAIN STREET, BURLINGTON, VT 05401	13	$ 11,002	$ 2,200
WA008	WA: HOUSING AUTHORITY OF THE CITY OF VANCOUVER	2500 MAIN STREET, #200, VANCOUVER, WA 98660	52	$ 493,105	$ 10,400
WI237	WI: PORTAGE COUNTY HA	1001 MAPLE BLUFF RD SUITE 1, STEVENS POINT, WI 54482	49	$ 223,316	$ 7,000
WV037	WV: HOUSING AUTHORITY OF MINGO COUNTY	P O BOX 120 5026 HELENA AVENUE, DELBARTON, WV 25670	4	$ 5,300	$ 800
		Total for Termination/Opt-out Vouchers	**1,541**	**$ 10,911,565**	**$ 262,200**
		PD Relocation Vouchers			
MD002	MD: HOUSING AUTHORITY OF BALTIMORE CITY	417 EAST FAYETTE STREET, BALTIMORE, MD 21201	38	$ 670,620	$ 9,600
		Total for SRO-Relocation/Replacement	**38**	**$ 670,620**	**$ 9,600**
		Total for Multifamily Housing Conversion Actions	**2,941**	**$ 23,348,001**	**$ 528,800**
		Grand Total IPV HAP and Fees	**12,694**	**$ 139,642,219**	**$ 528,800**

[FR Doc. 2024–08440 Filed 4–18–24; 8:45 am]
BILLING CODE 4210–67–C

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[BLM_HQ–FRN_MO4500178304]

Adoption of Categorical Exclusions Under Section 109 of the National Environmental Policy Act

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of adoption of categorical exclusions under section 109 of the National Environmental Policy Act.

SUMMARY: The Department of the Interior (Department) is adopting the United States Forest Service's (USFS) categorical exclusion for short-term mineral, energy, or geothermal investigations and the Department of the Navy's (DON) categorical exclusion for pre-lease upland exploration activities for oil, gas, or geothermal reserves, (*e.g.,* geophysical surveys) pursuant to section 109 of the National Environmental Policy Act (NEPA) to use for proposed Bureau of Land Management (BLM) approval of geothermal exploration operations. This notice describes the limited categories of proposed actions for which the BLM intends to use the USFS and DON categorical exclusions and details the consultation between the respective agencies.

DATES: The adoption takes effect on April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Lorenzo Trimble, Geologist—National

Geothermal Program Lead, National Renewable Energy Coordination Office (330), telephone: 775–224–0267, or email: *ltrimble@blm.gov.*

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. National Environmental Policy Act and Categorical Exclusions

NEPA (42 U.S.C. 4321–4347, as amended) requires all Federal agencies to consider the environmental impact of their proposed actions before deciding whether and how to proceed. 42 U.S.C. 4321, 4332. NEPA's aims are to ensure that agencies consider the potential environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4332. NEPA created the Council on Environmental Quality (CEQ), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review for a proposed action. Where required, these levels of review may be documented in an environmental impact statement (EIS), an environmental assessment (EA), or by reliance on a categorical exclusion. 40 CFR 1501.3. If a proposed action is likely to have significant environmental effects, the agency will prepare an EIS and document its decision in a record of decision. 40 CFR 1502, 1505.2. If the proposed action is not likely to have significant environmental effects or where the level of significance is unknown, the agency will prepare an EA, which involves a more concise analysis and process than an EIS. 40 CFR 1501.5. Following preparation of an EA, the agency may reach a finding of no significant impact if the analysis shows that the action will have no significant effects. 40 CFR 1501.6. If, following preparation of an EA, the agency finds that the proposed action may have significant effects, it will prepare an EIS before issuing any decision to authorize the action.

Under NEPA and CEQ's implementing regulations, a Federal agency can establish categorical exclusions—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in its agency NEPA procedures. 42 U.S.C. 4336(e)(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a categorical exclusion covers a proposed action, the agency then evaluates the proposed action for any extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). Responsible Officials in the Department's bureaus evaluate proposed actions for the presence of extraordinary circumstances in accordance with the Department's NEPA implementing regulations at 43 CFR 46.205 and 46.215. If no extraordinary circumstances are present or if further analysis determines that the extraordinary circumstances do not involve the potential for significant environmental impacts, the agency may rely on the categorical exclusion to approve the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If any extraordinary circumstances are present, the agency may nonetheless categorically exclude the proposed action if it determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects. 40 CFR 1501.4(b)(1).

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to ''adopt a categorical exclusion listed in another agency's NEPA procedures for a category of proposed agency actions for which the categorical exclusion was established.'' 42 U.S.C. 4336c. To adopt another agency's categorical exclusion under section 109, the adopting agency: (1) identifies the relevant categorical exclusion listed in another agency's (''establishing agency'') NEPA procedures ''that covers a category of proposed actions or related actions''; (2) consults with the establishing agency ''to ensure that the proposed adoption of the categorical exclusion for a category of actions is appropriate''; (3) ''identif[ies] to the public the categorical exclusion that the [adopting] agency plans to use for its proposed actions''; and (4) documents adoption of the categorical exclusion. 42 U.S.C. 4336c. This notice documents the Department's adoption of the USFS categorical exclusion for short-term mineral, energy, or geothermal investigations and the DON categorical exclusion for pre-lease exploration activities for use by the BLM.

The Department's NEPA procedures are found at 43 CFR part 46. These procedures address compliance with NEPA. The Department maintains a list of categorical exclusions available to all Department bureaus and offices at 43 CFR 46.210. Additional Department-wide NEPA policy is found in the Departmental Manual (DM), in chapters 1 through 4 of part 516, available at *https://www.doi.gov/document-library.* The NEPA procedures for individual bureaus in the Department are published in additional chapters of part 516 of the DM. Chapter 11 of the 516 DM sets forth the BLM's NEPA procedures, and the BLM categorical exclusions are listed in 516 DM 11.9 and 11.10. (See *https://www.doi.gov/document-library/departmental-manual/516-dm-11-managing-nepa-process-bureau-land-management.*)

II. Identification of the Categorical Exclusions

USFS Categorical Exclusion for Short-Term Mineral, Energy, or Geophysical Investigations

The USFS categorical exclusion for short-term mineral, energy, or geophysical investigations is found at 36 CFR 220.6(e)(8), and states as follows:

> Short-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads. Examples include but are not limited to:
>
> (i) Authorizing geophysical investigations which use existing roads that may require incidental repair to reach sites for drilling core holes, temperature gradient holes, or seismic shot holes;
>
> (ii) Gathering geophysical data using shot hole, vibroseis, or surface charge methods;
>
> (iii) Trenching to obtain evidence of mineralization;
>
> (iv) Clearing vegetation for sight paths or from areas used for investigation or support facilities;
>
> (v) Redesigning or rearranging surface facilities within an approved site;
>
> (vi) Approving interim and final site restoration measures; and
>
> (vii) Approving a plan for exploration which authorizes repair of an existing road and the construction of 1/3 mile of temporary road; clearing vegetation from an acre of land for trenches, drill pads, or support facilities.

The USFS conducts review of any proposed reliance on its categorical exclusion according to its extraordinary circumstances review protocol found at 36 CFR 220.6.

DON Categorical Exclusion for Pre-Lease Upland Exploration Activities for Oil, Gas or Geothermal Reserves

The DON categorical exclusion for pre-lease exploration activities is found at 32 CFR 775.6(f)(39), and states as follows:

''Pre-lease upland exploration activities for oil, gas or geothermal reserves (*e.g.,* geophysical surveys).''

The DON conducts review of any proposed reliance on its categorical exclusion according to its extraordinary circumstances review protocol found at 32 CFR 775.6(e).

Proposed Department Category of Actions

Both the USFS and the DON categorical exclusions allow for pre-leasing exploration activities, geophysical surveys, or geophysical investigations. Those activities are included in the BLM's definition of geothermal ''exploration operations.'' See 43 CFR 3200.1. The DON categorical exclusion broadly allows activities meeting the BLM's definition of geothermal ''exploration operations,'' but specifies that these be conducted at the pre-leasing stage. Both the USFS and DON categorical exclusions could be applied to the BLM's approval of geothermal exploration operations as provided for under the regulations implementing the Geothermal Steam Act of 1970 as amended, 30 U.S.C. 1001 *et seq.,* Public Law 91–581, 84 Stat. 1566, and the Department intends for the BLM to use these adopted categorical exclusions exclusively to facilitate approval of such geothermal exploration operations, and not to use them for oil and gas or other mineral activities. Geothermal exploration operations do not contact or directly test a geothermal resource. The BLM Geothermal Resource Leasing regulations are found at 43 CFR part 3200 and include provisions defining the scope of *geothermal exploration operations* as follows:

> . . . any activity relating to the search for evidence of geothermal resources, where you are physically present on the land and your activities may cause damage to those lands. Exploration operations include, but are not limited to, geophysical operations, drilling temperature gradient wells, drilling holes used for explosive charges for seismic exploration, core drilling or any other drilling method, provided the well is not used for geothermal resource production. It also includes related construction of [routes] and trails, and cross-country transit by vehicles over public land. Exploration operations do not include the direct testing of geothermal resources or the production or utilization of geothermal resources.

43 CFR 3200.1. (The substitution of the term ''routes'' reflects current BLM terminology indicating the limited use and temporary nature of resource access routes.)

The BLM intends to rely on these adopted categorical exclusions as appropriate to support approval of Notices of Intent to Conduct Geothermal Exploration Operations (Form 3200–9) (NOIs). Requirements for reclamation are provided on Form 3200–9 and in the applicable regulations (See 43 CFR 3251.11(g)). Applications for NOI permits may be submitted for conforming activities on any federal lands or interests in lands open to geothermal development (43 CFR 3250.11) and do not require a lease. The NOI permit application and the associated regulations governing geothermal exploration operations permitting do not expressly limit the timeframe for activities. However, if the BLM were to rely on the adopted USFS categorical exclusion to approve such a permit, those exploration activities would have to be concluded within a 1-year timeframe. Implementation of reclamation plans can take longer, however, and may require extended monitoring to evaluate the success of the reclamation.

Responsible Officials in the Department will be able to rely on either the USFS or the DON categorical exclusions, as appropriate, to process NOIs for qualifying geothermal exploration operations. Responsible Officials in the Department will document such reliance, including describing how the proposed action conforms to the terms of whichever (the USFS or DON) categorical exclusion is relied upon, in accordance with any applicable Departmental NEPA or BLM NEPA or geothermal program guidance.

III. Consideration of Extraordinary Circumstances

When applying these categorical exclusions, Responsible Officials in the Department will evaluate the proposed actions to ensure evaluation of whether there are any extraordinary circumstances. The Department's extraordinary circumstances are listed at 43 CFR 46.215 and include, in part, consideration of impacts on public health and safety; natural resources and unique geographic characteristics as historic or cultural resources; park, recreation, or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands; floodplains; national monuments; migratory birds; and other ecologically significant or critical areas; unresolved conflicts concerning alternative uses of available resources; unique or unknown environmental risks; precedent for future decision-making; historic properties; listed species or critical habitat; low income or minority populations; access by Indian religious practitioners to, and for ceremonial use of, Indian sacred sites and the physical integrity of those sites; and contribution to the introduction, continued existence, or spread of invasive weeds or non-native invasive species. Responsible Officials in the Department are required to review any proposed action for which they intend to rely on a categorical exclusion, as provided at 43 CFR 46.205, by comparing it with the list at 43 CFR 46.215 and documenting that review in accordance with any applicable Departmental or bureau NEPA or program guidance.

The Department's list of extraordinary circumstances is comparable to those of the USFS, found at 36 CFR 220.6(b) and of the DON, found at 32 CFR 775.6(e); therefore, Responsible Officials in the Department intending to rely on either the USFS or the DON categorical exclusion will need to review the proposed action only in accordance with the Department's NEPA regulations at 43 CFR 46.205 and 46.215. The Responsible Official will assess whether an extraordinary circumstance is present, and if so, whether there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects, consistent with 40 CFR 1501.4(b). If the Responsible Official cannot rely on a categorical exclusion to support a decision on a particular proposed action due to extraordinary circumstances, the Responsible Official will prepare an EA or EIS, consistent with 40 CFR 1501.4(b)(2) and 43 CFR 46.205(c).

IV. Consultation With USFS and DON and Determination of Appropriateness

In January and February of 2024, the Department consulted with the USFS and the DON about the appropriateness of the Department's adoption of their respective categorical exclusions. Those consultations each included a review of the USFS's and the DON's experience in establishing and applying the categorical exclusions, as well as the types of actions for which the BLM plans to use the categorical exclusions. Based on those consultations and reviews, the Department has determined that the types of activities the BLM proposes to authorize as geothermal exploration operations are substantially similar to the geothermal resource-related activities for which the USFS and the DON have applied their respective categorical exclusions. Accordingly, the impacts of the BLM-authorized geothermal exploration operations, including the types of pre-lease exploration activities described in the DON categorical exclusion and the examples of activities described in the

USFS categorical exclusion, would be substantially similar to the impacts of these USFS and the DON actions, which are not significant, absent extraordinary circumstances. Therefore, the Department has determined that its proposed use of the USFS and the DON categorical exclusions to support BLM permitting decisions for qualifying geothermal exploration operations, as described in this notice, is appropriate. BLM will not rely on either the USFS or the DON categorical exclusions to support approval of other mineral or non-geothermal energy activities. Extending the BLM's use of the USFS and the DON categorical exclusions to other mineral or non-geothermal energy activities would require the agency to complete a separate process to adopt those categorical exclusions for that purpose in accordance with the requirements of Section 109 of NEPA.

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document the Department's adoption of the USFS categorical exclusion for short-term mineral, energy, or geophysical investigations and the DON categorical exclusion for pre-lease upland exploration activities for oil, gas, or geothermal reserves and identifies the types of actions to which Responsible Officials in the Department will apply the categorical exclusions, including only approval of permitting for geothermal exploration operations, and the considerations Responsible Officials in the Department will use in determining whether an action is within the scope of the categorical exclusions. Upon issuance of this notice, the adopted USFS and DON categorical exclusions will be available to the Department for the BLM to rely upon to authorize geothermal exploration operations and will be accessible in 516 DM 11, found at *https://www.blm.gov/programs/planning-and-nepa/what-informs-our-plans/nepa* and at *https://www.doi.gov/oepc/nepa/categorical-exclusions.*

VI. Proposed Text for the Departmental Manual

The Department will add the following text to chapter 11 of part 516 of the Departmental Manual:

11.11 Categorical Exclusions Adopted Through NEPA Section 109

Responsible Officials will document reliance on the categorical exclusions listed below, including describing how the proposed action conforms to the terms of the categorical exclusion relied upon and application of extraordinary circumstances review consistent with 43 CFR 46.215.

A. Geothermal Exploration Operations

The Department has adopted the following categorical exclusions for the limited purpose of approving Notices of Intent to Conduct Geothermal Exploration Operations (Form 3200–9).

(1) U.S. Forest Service, 36 CFR 220.6(e)(8):

Short-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of temporary road, or use and minor repair of existing roads. Examples include, but are not limited to:

(i) Authorizing geophysical investigations which use existing roads that may require incidental repair to reach sites for drilling core holes, temperature gradient holes, or seismic shot holes;

(ii) Gathering geophysical data using shot hole, vibroseis, or surface charge methods;

(iii) Trenching to obtain evidence of mineralization;

(iv) Clearing vegetation for sight paths or from areas used for investigation or support facilities;

(v) Redesigning or rearranging surface facilities within an approved site;

(vi) Approving interim and final site restoration measures; and

(vii) Approving a plan for exploration which authorizes repair of an existing road and the construction of ⅓ mile of temporary road; clearing vegetation from an acre of land for trenches, drill pads, or support facilities.

and

(2) Department of the Navy, 32 CFR 775.6(f)(39):

Pre-lease upland exploration activities for oil, gas, or geothermal reserves, (*e.g.,* geophysical surveys).

(Authority: 42 U.S.C. 4336c)

Stephen G. Tryon,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 2024–08382 Filed 4–18–24; 8:45 am]

BILLING CODE 4331–29–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NF_FRN_MO4500178506]

Notice of Availability of the Draft Resource Management Plan Amendment and Environmental Impact Statement for the GridLiance West Core Upgrades Transmission Line Project in Nye and Clark Counties, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

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) has prepared a Draft Resource Management Plan (RMP) Amendment and Draft Environmental Impact Statement (EIS) for the GridLiance West Core Upgrades Transmission Line Project and by this notice is providing information announcing the opening of the comment period on the Draft RMP Amendment/EIS.

DATES: This notice announces the opening of a 90-day comment period for the Draft RMP Amendment/EIS beginning with the date following the Environmental Protection Agency's (EPA) publication of its Notice of Availability (NOA) in the **Federal Register**. The EPA usually publishes its NOAs on Fridays.

To afford the BLM the opportunity to consider comments in the Proposed RMP Amendment/Final EIS, please ensure your comments are received prior to the close of the 90-day comment period or 15 days after the last public meeting, whichever is later.

The BLM will hold two public meetings. One meeting will be held at the Pahrump Nugget Hotel and Casino, 681 NV–160, Pahrump, NV 89048 on Thursday, May 9, 2024 from 6 p.m. to 8 p.m. Pacific Time. A second meeting will be held virtually via Zoom on Tuesday, May 7, 2024 at 6 p.m. to 8 p.m. Pacific Time. Additional information on the meetings, including how to register, can be found on the BLM National NEPA Register at: *https://eplanning.blm.gov/eplanning-ui/project/2025248/510.*

ADDRESSES: The Draft RMP Amendment/EIS is available for review on the BLM National NEPA Register at *https://eplanning.blm.gov/eplanning-ui/project/2025248/510.*

Written comments related to the GridLiance West Core Upgrades

Transmission Line Project may be submitted by any of the following methods:

- *Website: https://eplanning.blm.gov/eplanning-ui/project/2025248/510.*
- *Email: BLM_NV_SNDO_NEPA_Comments@blm.gov.*
- *Mail:* BLM, Southern Nevada District Office, Attn: GridLiance West Core Upgrades Transmission Line Project, 4701 North Torrey Pines Drive, Las Vegas, NV 89130–2301.

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/project/2025248/510* and at the Southern Nevada District Office.

FOR FURTHER INFORMATION CONTACT: Lisa Moody, Realty Specialist, telephone 702–515–5000; address BLM, Southern Nevada District Office, Attn: GridLiance West Core Upgrades Transmission Line Project, 4701 North Torrey Pines Drive, Las Vegas, NV 89130–2301; email *emoody@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Ms. Moody. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Nevada State Director has prepared a Draft RMP Amendment/EIS and provides information announcing the opening of the comment period on the Draft RMP Amendment/EIS.

The RMP Amendment is being considered to allow the BLM to evaluate the right-of-way (ROW) application submitted by GridLiance LLC to construct, operate, maintain, and decommission approximately 155 miles of transmission system upgrades across BLM-administered lands, which would require amending the existing 1998 Las Vegas RMP.

The planning area is located in Clark and Nye Counties, Nevada and encompasses approximately 4,309 acres of public land.

Purpose and Need

In accordance with FLPMA, the BLM is authorized to grant ROWs on public lands for systems of generation, transmission, and distribution of electric energy (Section 501(a)(4)). The BLM's purpose and need for this action is to respond to the FLPMA ROW amendment applications submitted by GridLiance under Title V of FLPMA (43 U.S.C. 1761) to construct, operate, maintain, and decommission approximately 155 miles of transmission system upgrades on approximately 4,900 acres in Clark and Nye Counties, Nevada. Proposed changes to the existing ROW grants require a plan amendment to the 1998 Record of Decision for the Approved Las Vegas Resource Management Plan and Final Environmental Impact Statement (the Las Vegas RMP) (BLM 1998), which is analyzed in this Draft EIS.

Propose Action and Alternatives, Including the Preferred Alternative

The BLM has analyzed eight alternatives, including the no action alternative and the Proposed Action.

The Proposed Action is to amend portions of existing BLM ROW grants to construct, operate, maintain, and decommission approximately 155 miles of upgraded alternating current overhead transmission lines on lands administered by the BLM, BIA, DoD, State of Nevada, and Clark County, as well as private lands, in Clark and Nye Counties, Nevada. Authorization of this proposal would require amendments to the Las Vegas RMP to modify some Visual Resource Management class locations. The Project is an upgrade of an existing overhead transmission system that currently consists of a single-circuit 230-kV transmission line system and seven substations. The proposed upgrade consists of four segments:

- *Segment 1:* Sloan Canyon Switchyard to Trout Canyon Switchyard. Includes upgrades and expansions at both switchyards. This segment would be upgraded to a double-circuit 500-kV transmission line, regardless of the voltage option chosen for the remainder of the system.
- *Segment 2:* Trout Canyon Switchyard to Wheeler Pass Substation. Includes upgrades and expansion at the Gamebird Substation. This segment would be upgraded to a double-circuit 500-kV (the 500kV option) or a double-circuit 230-kV (the 230-kV option) transmission line.
- *Segment 3:* Wheeler Pass Substation to Innovation Substation. Includes construction of the Wheeler Pass Substation, potential construction of the Johnnie Corner Substation, and upgrades at the Innovation Substation. Between Wheeler Pass Substation and Johnnie Corner Substation, the transmission line would be upgraded to a double-circuit capable, single-circuit 500-kV (the 500-kV option) or a double-circuit capable, single-circuit 230-kV (the 230-kV option) line; however, the proposed Johnnie Corner Substation would not be constructed if the transmission line is approved by CAISO as 230 kV. The portion from the proposed Johnnie Corner Substation to Innovation Substation would be upgraded to a double-circuit capable, single-circuit 230-kV system, regardless of the voltage option chosen for the remainder of the system.
- *Segment 4:* Innovation Substation to Northwest Substation. Includes upgrades at the Desert View Substation. This segment would be upgraded to a double-circuit 230-kV transmission line, regardless of the voltage option chosen for the remainder of the system.

Alternatives 1 through 6 each contain modifications to the Proposed Action, such as to the alignment of a particular segment, the types of facilities or structures utilized, or the types of transmission lines to be installed.

Alternative 1 involves a modification of Segment 2. This alternative is identical to the Proposed Action in all ways, including the need for an amendment to the Las Vegas RMP (BLM 1998), with the exception of a reroute that follows the designated utility corridor approximately 0.5 mile farther north before turning west to approach the proposed Wheeler Pass Substation. This alternative route utilizes more of the designated utility corridor and has two less angle structures and two more tangent structures than the Proposed Action.

Alternative 2 involves a modification to Segment 1 to ensure compatibility with the proposed Southern Nevada Supplemental Airport (SNSA) and avoid future potential hazards to air navigation. Alternative 2 is identical to the Proposed Action in all ways, including the need for an amendment to the Las Vegas RMP, with the exception of the following. Alternative 2 involves installation of two single-circuit 500-kV transmission lines with a horizontal conductor configuration. This adjustment would necessitate a 500-foot-wide ROW (a 250-foot-wide ROW for each of the two single-circuit lines), in contrast to the single 275-foot-wide ROW required for the double-circuit configuration for the Proposed Action. The structures associated with Alternative 2 in the airspace constrained area would be single-circuit tubular steel 500-kV H-frame structures and 500-kV horizontal dead-ends.

Alternative 3 is identical to Alternative 2 except it would have a slightly different alignment than Alternative 2. This alternative maintains the upgraded GridLiance transmission line on the north side of the existing double-circuit 230-kV NV Energy transmission line until exiting the SNSA

air navigation surfaces. Under this alternative, the acreage and locations where the RMP Amendment would apply would be identical to those described under the Proposed Action.

Alternative 4 involves relocating the Wheeler Pass Substation to an alternative location on privately owned lands. Under this alternative, the RMP Amendment would be the same as described under the Proposed Action, with modifications to bring additional areas into compliance. Design considerations common to the design of Alternative 4 and Alternative 5 include longer tie lines between the existing Pahrump Substation and the proposed Wheeler Pass Substation. Because of this increased distance, double-circuit 230-kV structures would be required to construct the tie lines. There would be no other modifications to the structure types, span lengths, or work areas compared to the Proposed Action.

Alternative 5 involves relocating the Wheeler Pass Substation to an alternative location on BLM-administered lands. Under this alternative, the RMP amendment would be the same as described under the Proposed Action, with modifications to bring additional areas into compliance.

Alternative 6 would be designed and built using tubular transmission structures when the project area passes through: (1) the Ivanpah ACEC; (2) areas designated as critical habitat; and (3) areas where the transmission line route is not parallel with other existing lattice structures. Under this alternative, only structures TC–SC276 to TC–SC290 and TC–SC207 to TC–SC238 would remain as lattice structures, and all others would be tubular transmission structures. Alternative 6 would only be required for the 500-kV option and is not necessary for the 230-kV option.

The BLM further considered five additional alternatives but dismissed these alternatives from detailed analysis as explained in the Draft RMP Amendment/EIS.

The State Director has identified the preferred alternative as the Proposed Action in combination with the modifications proposed in Alternatives 3, 4, and 6. Alternatives 3, 4, and 6, when taken together, were found to best meet the State Director's planning guidance. Alternative 3 would ensure compatibility with the proposed SNSA and avoid crossing the existing double-circuit 230-kV NV Energy transmission line within SNSA air navigation surfaces; Alternative 4 would avoid potential challenges with local government entitlements and land acquisition, as well as reduce long-term impacts to Mojave desert tortoise habitat; and Alternative 6 would further reduce long-term impacts to Mojave desert tortoise habitat.

Mitigation

No mitigation measures have been identified in the Draft RMP Amendment/EIS for the action alternatives. However, the alternatives were developed in order to address potential resource conflicts. Specifically, to avoid creating a hazard to air navigation, Alternatives 2 and 3 would prohibit structure heights from exceeding 130 feet above ground level. Alternative 6 uses tubular transmission structures, (*e.g.,* tubular H-frame, three pole dead-end, or monopole structures) as opposed to lattice structures, in certain locations to minimize impacts on Mojave desert tortoise due to raven predation.

Schedule for the Decision-Making Process

The BLM will provide additional opportunities for public participation consistent with the NEPA and land use planning processes, including a 30-day public protest period and a 60-day Governor's consistency review on the Proposed RMP Amendment. The Proposed RMP Amendment/Final EIS is anticipated to be available for public protest January 2025 with an Approved RMP and Record of Decision in March 2025.

Along with the ROW grant issued by the BLM, GridLiance anticipates needing the following authorizations and permits for the proposed project: construction authorization from the Bureau of Indian Affairs; clearance for survey and construction on Department of Defense lands; biological opinion and incidental take permit(s) from the U.S. Fish and Wildlife Service (USFWS) for Endangered Species Act compliance; USFWS Migratory Bird Treaty Act compliance; USFWS Bald and Golden Eagle Protection Act compliance; section 404 permit from the U.S. Army Corps of Engineers for Clean Water Act compliance; effect concurrence from the Nevada State Historic Preservation Office for National Historic Preservation Act compliance; No Hazard Declaration from the Federal Aviation Administration; Department of Homeland Security consultation regarding military radar; Utilities Environmental Protection Act Permit to Construct from the Public Utilities Commission of Nevada; Rare and Endangered Plant Permit from the Nevada State Division of Forestry; Desert Tortoise and Gila Monster Handling Permit from the Nevada Department of Wildlife; Native Cacti and Yucca Commercial Salvaging and Transportation Permit from the Nevada Division of Forestry; Special Permit for Capture, Removal, or Destruction of Animal Threatened with Extinction from the Nevada Department of Wildlife; Clean Water Act, section 401 Compliance with the Nevada Division of Environmental Protection (NDEP) and Bureau of Water Quality Planning; Notification for Stormwater Management During Construction for the Clean Water Act, section 402 permit for stormwater discharge from NDEP; Groundwater Discharge Permit from NDEP; ROW Occupancy Permit from the Nevada Department of Transportation; Over Legal Size/Load Permit from the Nevada Department of Transportation; Uniform Permit (for transportation of hazardous materials) from the Nevada Department of Public Safety; NDEP Phase 1 Environmental Site Assessment; Clark County Dust Control Permit; Clark County Grading Permit; Clark County Building Permit; Nye County Dust Control Permit; Nye County Grading Permit; and other permits as necessary. Further details on these permitting requirements may be found in the relevant Plans of Development submitted to the BLM by GridLiance.

Public meetings are listed in the **DATES** section of this notice. The date(s) and location(s) of any additional meetings will be announced at least 15 days in advance through the BLM National NEPA Register, news release, and BLM social media pages.

The BLM will continue to 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.

The purpose of public review of the Draft RMP Amendment/EIS is to provide an opportunity for meaningful collaborative public engagement and for the public to provide substantive comments, such as identification of factual errors, data gaps, input on the identified BLM preferred alternative, relevant methods, or scientific studies. You may submit comments at any time during the 90-day comment period by using any of the methods listed in the **ADDRESSES** section of this notice. The BLM will respond to substantive comments by making appropriate revisions to the EIS or explaining why a comment did not warrant a change.

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 1506.6, 40 CFR 1506.10, 43 CFR 1610.2)

Jon K. Raby,

State Director.

[FR Doc. 2024–08241 Filed 4–18–24; 8:45 am]

BILLING CODE 4331–21–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NV_FRN_4500178518]

Notice of Availability of the Draft Environmental Impact Statement for the Rhyolite Ridge Lithium-Boron Mine Project, Esmeralda County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance 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) announces the availability of the Draft Environmental Impact Statement (EIS) for the Rhyolite Ridge Lithium-Boron Mine Project proposed by Ioneer Rhyolite Ridge LLC (Ioneer) in Esmeralda County, Nevada.

DATES: To afford the BLM the opportunity to consider comments in the Final EIS, please ensure that the BLM receives your comments within *45* days following the date the Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) of the Draft EIS in the **Federal Register** or 15 days after the last public meeting, whichever is later. The EPA usually publishes its NOAs on Fridays.

ADDRESSES: The Draft EIS and documents pertinent to this proposal are available for review on the BLM's National NEPA Register (ePlanning) at *https://eplanning.blm.gov/eplanning-ui/project/2012309/510.*

Written comments related to the Rhyolite Ridge Lithium-Boron Mine Project may be submitted by any of the following methods:

- *BLM's National NEPA Register (ePlanning) at: https://eplanning.blm.gov/eplanning-ui/project/2012309/510.*
- *Email: BLM_NV_BMDO_P&EC_NEPA@blm.gov.*
- *Mail:* Rhyolite Ridge Lithium-Boron Mine EIS c/o BLM Battle Mountain District Office, 50 Bastian Road, Battle Mountain, NV 89820.
- *By fax at:* (775) 635–4034.

FOR FURTHER INFORMATION CONTACT: For further information or to have your name added to the mailing list, please send requests to: Scott Distel, Supervisory Project Manager, at telephone (775) 635–4093; address 50 Bastian Road, Battle Mountain, NV 89820; or email *sdistel@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Purpose and Need

The BLM's purpose for the action is to respond to Ioneer's proposal, as described in its proposed plan of operations, and to analyze the potential environmental effects associated with the proposed action and alternatives to the proposed action as required by NEPA. The BLM's need for the action is established by the BLM's responsibilities under Section 302 of FLPMA and the BLM surface management regulations at 43 CFR subpart 3809 to respond to a proposed plan of operations.

Alternatives A, B, and C

Under *Alternative A,* the proposed action, Ioneer is proposing to construct, operate, close, and reclaim a new lithium-boron mine project in Esmeralda County, Nevada. The proposed Rhyolite Ridge Lithium-Boron Mine Project plan of operations boundary would encompass 7,166 acres, which consists of a 6,369-acre operational project area and a 797-acre access road and infrastructure corridor. The total surface disturbance associated with Alternative A, including existing and reclassified disturbance and exploration, would be 2,306 acres of BLM-administered public lands and private land.

The Rhyolite Ridge Lithium-Boron Mine Project would employ a workforce of approximately 400 to 500 employees during initial construction, including both Ioneer staff and contracted personnel, and approximately 350 employees during operations. The Rhyolite Ridge Lithium-Boron Mine Project would operate 24 hours per day, 365 days per year. The total life of the Rhyolite Ridge Lithium-Boron Mine Project would be 23 years, including four years of construction (years 1 through 4), 17 years of quarrying (years 1 through 17), 13 years of ore processing (years 4 through 17), and six additional years of reclamation (years 18 through 23). Reclamation of disturbed areas would be completed in accordance with BLM and Nevada Division of Environmental Protection regulations. Concurrent reclamation would take place where practicable and safe.

The proposed facilities and activities associated with the Rhyolite Ridge Lithium-Boron Mine Project would include:

- A quarry, including a quarry berm and water storage tanks;
- A processing facility, including a contact water pond and diversion channels;
- Three overburden storage facilities (OSF) (North, West, and Quarry Infill), including contact water ponds and diversion channels;
- One spent ore storage facility, including an underdrain pond and diversion channels;
- Project Area exploration, including access routes and drill sites with sumps;
- Haul roads, service roads, and public road realignment;
- Buckwheat exclusion area and critical habitat fencing; and
- Ancillary facilities including an explosives storage area, communication towers including all-terrain vehicle trails, batch plant, proposed water supply testing and facilities including pipelines, sewage system including septic leach fields, dewatering pipeline, growth media stockpiles, stormwater controls and diversions, monitoring wells, laydown yards, and fencing.

Under *Alternative B,* the North and South OSF Alternative, all mine components and operations would be the same as Alternative A, but the facility layout would be modified to reduce surface disturbance within Tiehm's buckwheat (*Eriogonum tiemii*) designated critical habitat. Surface disturbance under Alternative B would be less than Alternative A and total approximately 2,271 acres.

Under *Alternative C,* the No Action Alternative, the development of the Rhyolite Ridge Lithium-Boron Mine Project would not be authorized and Ioneer would not construct, operate, and close a new lithium-boron mine project.

Lead and Cooperating Agencies

The BLM Battle Mountain District Office is the lead agency for the Draft

EIS. The Nevada Department of Wildlife, the Nevada Division of Forestry, the U.S. Department of Energy, the U.S. Fish and Wildlife Service—Ecological Services, the U.S. Fish and Wildlife Service—Migratory Birds Program, the U.S. Environmental Protection Agency, and the Esmeralda County Board of County Commissioners participated in this environmental analysis as cooperating agencies. Several Native American Tribes have also requested to participate in the environmental analysis.

Schedule for the Decision-Making Process

Consistent with NEPA and the BLM's land use planning regulations, the BLM will announce a 30-day public availability period when the Final EIS and NOA for the Final EIS is published by the BLM. The Final EIS is anticipated to be available in September of 2024.

Public Involvement Process

The BLM will announce the dates and times of the public meetings for the Draft EIS at least 15 days in advance of the meetings on the BLM's National NEPA Register (ePlanning) website at *https://eplanning.blm.gov/eplanning-ui/project/2012309/510.* The BLM will hold one in-person public meeting and one virtual public meeting. Information on how to register for the virtual meeting will be posted on the above website.

The purpose of public review of the Draft EIS is to provide an opportunity for meaningful public engagement and for the public to provide substantive comments, such as identification of factual errors, data gaps, relevant methods, or scientific studies. The BLM will respond to substantive comments by making appropriate revisions to the EIS or explaining why a comment did not warrant a change.

The BLM has and will continue to conduct government-to-government consultation with Tribes per Executive Order 13175 and other policies. Agencies will give due consideration to Tribal concerns, including impacts on Indian trust assets and treaty rights and potential impacts to cultural resources.

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 1506.6, 40 CFR 1506.10)

Douglas W. Furtado,

District Manager.

[FR Doc. 2024–08233 Filed 4–18–24; 8:45 am]

BILLING CODE 4331–21–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AZ_FRN_MO4500178666]

Notice of Availability of the Draft Environmental Impact Statement for the Jove Solar Project, La Paz County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

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) announces the availability of the Draft Environmental Impact Statement (EIS) for the Jove Solar Project, La Paz County, Arizona.

DATES: To afford the BLM the opportunity to consider comments in the Final EIS, please ensure that the BLM receives your comments within 45 days following the date the Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) of the Draft EIS in the **Federal Register**. The EPA usually publishes its NOAs on Fridays.

ADDRESSES: The Draft EIS is available for review on the BLM project website at *https://eplanning.blm.gov/eplanning-ui/project/2017881/510.*

Written comments related to the Jove Solar Project may be submitted by any of the following methods:

- *Website: https://eplanning.blm.gov/eplanning-ui/project/2017881/510.*
- *Email: blm_az_crd_solar@blm.gov.*
- *Mail:* BLM Yuma Field Office, Attention: Jove Solar Project, 7341 E 30th Street, Yuma, AZ 85365.

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/project/2017881/510* and at the Yuma Field Office.

FOR FURTHER INFORMATION CONTACT: Derek Eysenbach, Project Manager, at *deysenbach@blm.gov,* the mailing address above, or by phone at (602) 417–9505. 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. Eysenbach. 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:

Purpose and Need for the Proposed Action

The BLM's purpose for the action is to respond to the applicant's application for a right-of-way (ROW) grant to construct, own, operate, maintain, and decommission a utility-scale solar photovoltaic (PV) energy generating facility on public lands administered by the BLM Yuma Field Office (YFO). The need for the BLM action is established by the BLM's responsibility under FLPMA and the Energy Policy Act of 2005 to respond to applications that promote grid reliability and renewable energy development and to designate corridors for electricity transmission and distribution facilities.

Proposed Action and Alternatives

Jove Solar, LLC (Applicant) (a wholly owned subsidiary of 174 Power Global, LLC, which is a wholly owned subsidiary of Hanwha Energy USA Holdings Corp.) is seeking a 30-year ROW to use 3,495 acres administered by the BLM alongside 38 acres administered by La Paz County to construct, operate and maintain, and decommission a utility-scale solar photovoltaic facility, called the Jove Solar Project (the Project). The Project would be located in southeastern La Paz County, Arizona, south of Interstate-10 midway between Phoenix and the California border, approximately 22 miles east-southeast of the community of Brenda and the I–10/Highway 60 junction, and 30 miles west of the community of Tonopah. The Project's proposed action would consist of up to 1.2 million solar PV modules and associated infrastructure, including new and improved roads, powerlines for collection and transmission of electricity, operation and maintenance facilities, and a battery energy storage system. The Project would interconnect at the Cielo Azul Substation, to be built adjacent to the Ten West Link 500-kilovolt (kV) transmission line, and have a generation capacity of 600 megawatts or more. The initial application in 2019 was received under the company name Taurus Solar; the project name was revised to Jove Solar in an amended application August 9, 2022. The Project is proposed within a solar variance area identified in the BLM Western Solar Plan (2012), and the BLM has processed the application

consistent with the variance process established in that Plan.

The BLM has prepared a Draft EIS with input from cooperating agencies and public comments collected during scoping to address the direct, indirect, and cumulative impacts of the Project. The Draft EIS analyzes three alternatives:

- No Action, in which the BLM would not authorize construction, operation and maintenance, and decommissioning of the Project;
- Proposed Action, in which the BLM would authorize construction, operation and maintenance, and decommissioning of the Project consistent with the detailed Project description below; and
- Wash Avoidance Alternative, which carries over the design of the Proposed Action, but avoids construction in a desert wash within the Project Area and near known sensitive sites, using specified setbacks to enhance resource conservation opportunities.

The BLM has identified the Wash Avoidance Alternative as the agency's preferred alternative. Information acquired during the Draft EIS public comment period will inform the BLM's ultimate decision to select any of the three alternatives.

Under the Proposed Action, the BLM would grant a ROW for the Project, which would have a net generating capacity of up to 600 megawatts alternating current (MWac) and span 3,495 acres administered by BLM and 38 acres of La Paz County land. The Project would include solar PV modules, direct current cabling and combining switchgear, inverters, voltage collection systems, transformers, monitoring and controls systems, operations and maintenance facilities, above-ground electrical connection lines, and potentially a battery energy storage system and substation. The Project would use a substation on an adjacent approved solar facility and connect into the regional transmission system via the Cielo Azul 500 kV switching station and Ten West Link 500 kV transmission line (construction ongoing). Overhead 69 kV connection lines would extend approximately 2 miles in a proposed utility easement on La Paz County land to the Cielo Azul switching station. The Applicant has incorporated numerous design features into the Proposed Action to avoid or minimize adverse environmental effects during construction, operation, and decommissioning. These plans and procedures are provided as appendices to the Proposed Plan of Development and the Draft EIS. The Wash Avoidance Alternative would employ the same technology and design as the Proposed Action but avoid construction impacts to a desert wash to maintain wildlife habitat connectivity and preserve natural features. All design features for the Proposed Action would apply to the Wash Avoidance Alternative.

Important Issues Identified During Scoping

During scoping, several issues were raised including for the following resource areas: air quality/greenhouse gas/climate change; biological resources; environmental justice/socioeconomics; fuels and fire management; livestock grazing; Native American, religious, and traditional cultural resources; recreation; soil resources; vegetation; visual resources; waste/hazardous waste; and water resources. The BLM reviewed all scoping comments and incorporated comments into the Draft EIS where applicable.

Lead and Cooperating Agencies

The BLM's Yuma Field Office is the lead Federal agency for the Draft EIS. The Arizona Department of Transportation, Arizona Game and Fish Department, La Paz County, Fort Yuma-Quechan Tribe, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and U.S. Fish and Wildlife Service have also requested to participate in the environmental analysis as cooperating agencies. The BLM has a signed memorandum of understanding with each cooperating agency to identify its roles and responsibilities and those of the BLM in the process.

Public Involvement Process

A virtual public meeting will be held 2 to 3 weeks after publication of this notice; the meeting date will be announced on the Project ePlanning website at least 15 days prior to the meeting. The public meeting will include a presentation and opportunity to speak with the project team. The date(s) and location(s) of any additional meetings will be announced in advance through the Project ePlanning website (see **ADDRESSES**).

The BLM encourages the public to review the Draft EIS and provide comments on the adequacy of the alternatives, analysis of effects, and any new information that would help the BLM disclose potential impacts of the Project in the Final EIS.

The BLM will continue to 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 potential impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration.

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 1506.6, 40 CFR 1506.10)

Raymond Suazo,

State Director.

[FR Doc. 2024–07868 Filed 4–18–24; 8:45 am]

BILLING CODE 4331–12–P

DEPARTMENT OF LABOR

Privacy Act of 1974; System of Records

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Notice of a modified system of records.

SUMMARY: The Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A–108 requires that each agency publish notice of a new or modified system of records that it maintains. This notice proposes to modify an existing system of records to add three additional statutes to the ''Authority'' section of the system, and to add two new routine uses and revise one routine use for the Department of Labor (DOL), Occupational Safety and Health Administration (OSHA), *Retaliation Complaint File,* DOL/OSHA–1, as well as to make general updates to provide more detail and clarity regarding OSHA's practices for disclosing, storing, retaining, and disposing of records in this system and the technical, physical, and administrative safeguards that OSHA relies on to protect records in this system from unauthorized disclosure.

DATES: Comments must be received no later than May 20, 2024. This modification is effective upon publication of this Notice. If no public comments are received, the new routine uses will be effective beginning May 20, 2024. If DOL receives public comments, DOL will review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: We invite you to submit comments on this notice. You may

submit comments by any of the following methods:

- *Federal e-Rulemaking Portal: https://www.regulations.gov* or *https://www.federalregister.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery, or Courier:* 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210. In your comment, specify ''Retaliation Complaint File, DOL/OSHA–1.''

All comments will be made public and will be posted without change to *https://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the system, contact Lee Martin by telephone at 202–693–2199 or by email at *osha.dwpp@dol.gov.* Please include ''Retaliation Complaint File, DOL/OSHA–1'' in the submission.

SUPPLEMENTARY INFORMATION: The Retaliation Complaint File, DOL/OSHA–1 modified system of records includes three additional OSHA statutes and two new routine uses. The new statutes to be added are: The Taxpayer First Act (26 U.S.C. 7623(d)); The Criminal Antitrust Anti-Retaliation Act (15 U.S.C. 7a–3); and The Anti-Money Laundering Act (31 U.S.C. 5323(a)(5), (g) & (j)). DOL is adding routine uses e. and f. regarding disclosure of records, as needed, to address a suspected breach of DOL's or another agency's records systems. DOL has also revised routine use c. to note that disclosure of appropriate, relevant, necessary, and compatible investigative records may be made to OSHA-approved occupational safety and health State Plan agencies (State Plans), as well as Federal agencies, responsible for investigating, prosecuting, enforcing, or implementing laws related to one or more of the statutes listed under AUTHORITY FOR MAINTENANCE OF THE SYSTEM where OSHA deems such disclosure compatible with the purpose for which the records were collected. Former routine use e. (permitting disclosure of statistical reports containing aggregated results of program activities and outcomes to the media, researchers, or other interested parties) is being re-designated as routine use g. Additionally, DOL is making general updates to provide more detail and clarity regarding OSHA's practices for storing, retaining, and disposing of records in this system and the technical, physical, and administrative safeguards that OSHA relies on to protect records in this system from unauthorized disclosure.

SYSTEM NAME AND NUMBER:

Retaliation Complaint File, DOL/OSHA–1.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The system resides in a secure cloud service environment provided through Amazon Web Services (AWS). Records from the secure cloud service are accessed by DOL personnel located at the Occupational Safety and Health Administration (OSHA)'s national, regional, and area offices. Address information for regional and area offices can be found at: *https://www.osha.gov/contactus/bystate.* Pursuant to DOL's Flexiplace Programs (also known as ''telework'' pursuant to the Telework Enhancement Act), copies of records may be temporarily located at alternative worksites, including employees' homes or at geographically convenient satellite offices for periods of time. All appropriate safeguards are taken at these sites.

SYSTEM MANAGER(S):

Lee Martin, Director of the Directorate of Whistleblower Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3647, Washington, DC 20210.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

a. The Occupational Safety and Health Act (29 U.S.C. 660(c));
b. The Surface Transportation Assistance Act (49 U.S.C. 31105);
c. The Asbestos Hazard Emergency Response Act (15 U.S.C. 2651);
d. The International Safe Container Act (46 U.S.C. 80507);
e. The Safe Drinking Water Act (42 U.S.C. 300j–9(i));
f. The Federal Water Pollution Control Act (33 U.S.C. 1367);
g. The Toxic Substances Control Act (15 U.S.C. 2622);
h. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (49 U.S.C. 42121);
i. The Solid Waste Disposal Act (42 U.S.C. 6971);
j. The Clean Air Act (42 U.S.C. 7622);
k. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9610);
l. The Energy Reorganization Act of 1978 (42 U.S.C. 5851);
m. The Pipeline Safety Improvement Act of 2002 (49 U.S.C. 60129);
n. The Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1514A);
o. The Federal Railroad Safety Act (49 U.S.C. 20109);
p. The National Transit Systems Security Act (6 U.S.C. 1142);
q. The Consumer Product Safety Improvement Act (15 U.S.C. 2087);
r. The Affordable Care Act (29 U.S.C. 218C);
s. The Consumer Financial Protection Act of 2010 (12 U.S.C. 5567);
t. The Seaman's Protection Act (46 U.S.C. 2114);
u. The FDA Food Safety Modernization Act (21 U.S.C. 399d);
v. The Moving Ahead for Progress in the 21st Century Act (49 U.S.C. 30171);
w. The Taxpayer First Act (26 U.S.C. 7623(d));
x. The Criminal Antitrust Anti-Retaliation Act (15 U.S.C. 7a–3); and
y. The Anti-Money Laundering Act (31 U.S.C. 5323(a)(5), (g) & (j)).

PURPOSE(S) OF THE SYSTEM:

The records are used to support a determination by OSHA on the merits of a complaint alleging violation of the employee protection provisions of one or more of the statutes listed under AUTHORITY FOR MAINTENANCE OF THE SYSTEM. The records also are used as the basis of statistical reports on such activity by the system manager, national office administrators, regional administrators, investigators, and their supervisors in OSHA. The reports may be released to the public. The reports do not contain any identifying information and are generally used for statistical purposes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have filed complaints alleging retaliation against them by their employers, or by others, for engaging in activities protected under the various statutes set forth below, popularly referenced as whistleblower protection statutes are covered by the system. Complainants may file such claims with OSHA pursuant to the following statutes: The Occupational Safety and Health Act (29 U.S.C. 660(c)); the Surface Transportation Assistance Act (49 U.S.C. 31105); the Asbestos Hazard Emergency Response Act (15 U.S.C. 2651); the International Safe Container Act (46 U.S.C. 80507); the Safe Drinking Water Act (42 U.S.C. 300j–9(i)); the Federal Water Pollution Control Act (33 U.S.C. 1367); the Toxic Substances Control Act (15 U.S.C. 2622); the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (49 U.S.C. 42121); the Solid Waste Disposal Act (42 U.S.C. 6971); the Clean Air Act (42 U.S.C. 7622); the Comprehensive

Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9610); the Energy Reorganization Act of 1978 (42 U.S.C. 5851); the Pipeline Safety Improvement Act of 2002 (49 U.S.C. 60129); the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1514A); the Federal Railroad Safety Act (49 U.S.C. 20109); the National Transit Systems Security Act (6 U.S.C. 1142); the Consumer Product Safety Improvement Act (15 U.S.C. 2087); the Affordable Care Act (29 U.S.C. 218C); the Consumer Financial Protection Act of 2010 (12 U.S.C. 5567); the Seaman's Protection Act (46 U.S.C. 2114); the FDA Food Safety Modernization Act (21 U.S.C. 399d); the Moving Ahead for Progress in the 21st Century Act (49 U.S.C. 30171); the Taxpayer First Act (26 U.S.C. 7623(d)); the Criminal Antitrust Anti-Retaliation Act (15 U.S.C. 7a–3); and the Anti-Money Laundering Act (31 U.S.C. 5323(a)(5), (g) & (j)).

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system include the complainant's name, address, telephone numbers, occupation, place of employment, and other identifying data along with the allegation, OSHA forms, and evidence offered in the allegation's proof. Records in the system also includes the respondent's name, address, telephone numbers, response to notification of the complaint, statements, and any other evidence or background material submitted as evidence. This material includes records of interviews and other data gathered by the investigator.

RECORD SOURCE CATEGORIES:

Records contained in this system are obtained from individual complainants who filed allegation(s) of retaliation by employer(s) against employee(s) or persons who have engaged in protected activities. OSHA uses the OSHA Online Whistleblower Complaint Form (OSHA 8–60.1) approved under OMB Control No. 1218–0236 to collect initial complainant information. Records contained in this system are also obtained from employers, employees other than an individual complainant, and other witnesses.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to the disclosures permitted under 5 U.S.C. 552a(b), as well as those contained in DOL's Universal Routine Uses of Records,[1] a record from this system of records may be disclosed as follows:

a. Disclosure of the complaint, as well as the identity of the complainant, and any interviews, statements, or other information provided by the complainant, or information about the complainant given to OSHA, may be made to the respondent, so that the complaint can proceed to a resolution.

Note: Personal information about other employees that is contained in the complainant's file, such as statements taken by OSHA or information for use as comparative data, such as wages, bonuses, the substance of promotion recommendations, supervisory assessments of professional conduct and ability, or disciplinary actions generally may be withheld from the respondent when it could violate the other employee's privacy rights, cause intimidation or harassment to the other employee, or impair future investigations by making it more difficult to collect similar information from other employees.

b. Disclosure of the respondent's responses to the complaint and any other evidence it submits may be shared with the complainant so that the complaint can proceed to a resolution.

c. Disclosure of appropriate, relevant, necessary, and compatible investigative records may be made to other Federal agencies and State Plans responsible for investigating, prosecuting, enforcing, or implementing laws related to the statutes listed under AUTHORITY FOR MAINTENANCE OF THE SYSTEM where OSHA deems such disclosure compatible with the purpose for which the records were collected.

d. Disclosure of appropriate, relevant, necessary, and compatible investigative records may be made to another agency or instrumentality of any governmental jurisdiction within or under the control of the United States, for a civil or criminal law enforcement activity, if the activity is authorized by law, and if that agency or instrumentality has made a written request to OSHA, specifying the particular portion desired and the law enforcement activity for which the record is sought.

e. Disclosure of information contained in this system of records may be made to appropriate agencies, entities, and persons when (1) DOL suspects or confirms a breach of the system of records; (2) DOL determines as a result of the suspected or confirmed breach, there is a risk of harm to individuals, DOL (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 DOL's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

f. Disclosure of information contained in this system of records may be made to another Federal agency or Federal entity, when DOL 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.

g. Statistical reports containing aggregated results of program activities and outcomes may be disclosed to the media, researchers, or other interested parties. Disclosure may be in response to requests made by telephone, email, fax, or letter, by a mutually convenient method. Statistical data may also be posted by the system manager on the OSHA web page.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records in this system of records are stored on AWS, in a self-contained system. Limited paper case files may be used on a temporary basis and kept in locked offices. The system is contained behind the DOL firewall. Users access the system via their personal identity verification (PIV) card for internal federal users or through *login.gov* for State Plan users.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by complainant's name, respondent's name, or case number. The system is contained behind the DOL firewall. Users access the system via their personal identity verification (PIV) card for internal federal users or through *login.gov* for State Plan users.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained primarily in the DOL IT system on the AWS server. Limited paper case files may be maintained at applicable locations as set out above under the heading SYSTEM LOCATION. System records are destroyed five years after a case is closed, in accordance with Records Schedule Number DAA–0100–2018–0002–0009. Paper copies of case files that are not scanned are retained on-site until the five-year retention period has been met and then destroyed.

[1] *See https://www.dol.gov/general/privacy* under the heading ''System of Records Notices (SORNs).''

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DOL automated systems security and access policies. Access to the system containing the records is limited to those individuals deemed as authorized personnel. Records in the system are protected from unauthorized access and misuse through a combination of administrative, technical, and physical security measures. Administrative measures include policies that limit system access to individuals within an agency with a legitimate business need and regular review of security procedures and best practices to enhance security. Technical measures include system design that allows individuals within an agency access only to data for which they are responsible; role-based access controls that allow individuals access only to data for their agency or reporting unit; multi-factor authentication to access the system; and use of encryption for certain data transfers. Physical security measures include the use of DOL cloud data centers which meet government requirements for storage of sensitive data.

RECORD ACCESS PROCEDURES:

If an individual wishes to access their own data in the system, the individual should contact OSHA directly and follow the instructions for making a Privacy Act Request on DOL's web page at: *https://www.dol.gov/general/privacy/instructions.* DOL also describes its process for requesting records under the Privacy Act in regulations at 29 CFR 71.2. Individuals who need additional assistance may also reach out to DOL's Privacy Office by email at *privacy@dol.gov.*

CONTESTING RECORD PROCEDURES:

If an individual wishes to request a correction or amendment of a record, the individual should direct their request to OSHA directly. The request must be in writing and must identify:

- The name of the individual making the request,
- The particular record in question,
- The correction or amendment sought,
- The justification for the change, and
- Any other pertinent information to help identify the file.

Additional information can be found on DOL's web page at: *https://www.dol.gov/general/privacy/instructions.* DOL also describes its process for requesting a correction or amendment at 29 CFR 71.9. Individuals who need additional assistance may also reach out to DOL's Privacy Office by email at *privacy@dol.gov.*

NOTIFICATION PROCEDURES:

If an individual wishes to know if a system contains their information, the individual should contact OSHA directly and follow the instructions for making a Privacy Act Request on DOL's web page at: *https://www.dol.gov/general/privacy/instructions.* DOL also describes its process for requesting records under the Privacy Act in regulations at 29 CFR 71.2. Individuals who need additional assistance may also reach out to DOL's Privacy Office by email at *privacy@dol.gov.*

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

In accordance with 5 U.S.C. 552a(k)(2), investigatory material in this system of records compiled for law enforcement purposes is exempt from subsections (c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f) of 5 U.S.C. 552a.

However, if any individual is denied any right, privilege, or benefit that the individual would otherwise be entitled to by Federal law or for which the they would otherwise be eligible, such material shall be provided. 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 [2] that the identity of the source would be held in confidence, DOL will not furnish such records to the individual.

HISTORY:

This is a full publication of the modified SORN in its entirety that replaces the previously published SORN found at 81 FR 25765, 25853–54 (April 29, 2016).

Carolyn Angus-Hornbuckle,

Assistant Secretary for Administration and Management.

[FR Doc. 2024–08383 Filed 4–18–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the Rosebud Mining Company.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 20, 2024.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2024–0008 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2024–0008.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk, 4th Floor West. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. 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.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

[2] For sources who furnished information to the Government prior to January 1, 1975, the standard is an implied promise that the identity of the source would be held in confidence.

In addition, §§ 44.10 and 44.11 establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2024–004–C.

Petitioner: Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.

Mine: Fulton Run Mine, MSHA ID No. 36–10410, located in Indiana County, Pennsylvania.

Regulation Affected: 30 CFR 75.1700, Oil and gas wells.

Modification Request: The petitioner requests a modification of 30 CFR 75.1700 as it relates to oil and gas wells at the mine. Specifically, the petitioner is petitioning to mine within the 300-feet barrier established by 30 CFR 75.1700.

The petitioner states that:

(a) The mine will use a room and pillar method of mining.

(b) A continuous mining machine with attached haulage develops main entries. After the mains are established, butts, rooms, and/or panels are developed off the mains. The length of the rooms, and/or panels can typically extend 600 feet, depending on permit boundaries, projections, and conditions.

(c) The permit for the Fulton Run Mine contains oil or gas wells that have been depleted of production, producing wells, wells that may have been plugged not producing oil or gas, and coal bed methane (CBM) wells. These wells would alter the mining projections for the life of the mine and not allow for the most efficient use of air available to the mine, if the barrier established by 30 CFR 75.1700 were to remain in place. The presence of the 300-feet barrier would also limit the safest and most efficient use of in-seam CBM wells.

(d) Marcellus and Utica wells which may not be mined through are not contained within the mine permit, and are not subject to this petition.

(e) Plugging oil and gas wells provides an environmental benefit by eliminating gas emissions into the atmosphere from gas wells that are no longer maintained.

The petitioner proposes the following alternative method:

(a) A safety barrier of 300 feet in diameter (150 feet between any mined area and a well) shall be maintained around all oil and gas wells (including all active, inactive, abandoned, shut-in, previously plugged wells, water injection wells, and carbon dioxide sequestration wells) until approval to proceed with mining has been obtained from the District Manager.

(b) Prior to mining within the 300-feet safety barrier around any well that the mine plans to intersect, the mine operator shall provide to the District Manager a sworn affidavit or declaration executed by a company official stating that all mandatory procedures for cleaning out, preparing, and plugging each gas or oil well have been completed as described by the terms and conditions of the Proposed Decision and Order (PDO) granted by MSHA. The affidavit or declaration shall be accompanied by all logs described in the PDO granted by MSHA and any other records the District Manager may request. Once approved by the District Manager, the mine operator may mine within the safety barrier of the well, subject to the terms of the PDO granted by MSHA. If well intersection is not planned, the mine operator may request a permit to reduce the 300-feet diameter of the safety barrier that does not include intersection of the well. The District Manager may require documents and information to help verify the accuracy of the location of the well with respect to the mine maps and mining projections, including survey closure data, down-hole well deviation logs, and historical well intersection location data. If the District Manager approves, the mine operator may then mine within the safety barrier of the well. The following procedures shall be followed for cleaning out and preparing vertical oil and gas wells prior to plugging or re-plugging:

(1) The mine operator shall test for gas emissions inside the hole before cleaning out, preparing, plugging, and replugging oil and gas wells. The District Manager shall be contacted if gas is being produced.

(2) A diligent effort shall be made to clean the well to the original total depth. The mine operator shall contact the District Manager prior to stopping the operation to pull casing or clean out the total depth of the well. If this depth cannot be reached, and the total depth of the well is less than 4,000 feet, the operator shall completely clean out the well from the surface to at least 200 feet below the base of the lowest mineable coal seam, unless the District Manager requires cleaning to a greater depth based on the geological strata or pressure within the well. The operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. If the total depth of the well is 4,000 feet or greater, the operator shall completely clean out the well from the surface to at least 400 feet below the base of the lowest mineable coal seam. The operator shall remove all material from the entire diameter of the well, wall to wall. If the total depth of the well is unknown and there is no historical information, the mine operator must contact the District Manager before proceeding.

(3) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. In addition, a journal shall be maintained describing the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of the logs and provided to MSHA upon request.

(4) When cleaning out the well as detailed in section (d)(2), the operator shall make a diligent effort to remove all of the casing in the well. After the well is completely cleaned out and all the casing removed, the well shall be plugged to the total depth by pumping expanding cement slurry and pressurizing to at least 200 pounds per square inch (psi). If the casing cannot be removed, it shall be cut, milled, or perforated or ripped at all mineable coal seam levels to facilitate the removal of any remaining casing in the coal seam by the mining equipment. Any casing which remains shall be perforated or ripped to permit the injection of cement into voids within and around the well.

(5) All casing remaining at mineable coal seam levels shall be perforated or ripped at least every 5 feet from 10 feet below the coal seam to 10 feet above the coal seam. Perforations or rips are required at least every 50 feet from 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the uppermost mineable coal seam. The mine operator shall take appropriate steps to ensure that the annulus between the casing and the well walls is filled with expanding (minimum 0.5 percent expansion upon setting) cement and contains no voids. If it is not possible to remove all of the casing, the operator shall notify the District Manager before any other work is performed. If the well cannot be cleaned out or the casing removed, the operator shall prepare the well as described from the surface to at least 200 feet below the base of the lowest

mineable coal seam for wells less than 4,000 feet in depth and 400 feet below the lowest mineable coal seam for wells 4,000 feet or greater, unless the District Manager requires cleaning out and removal of casing to a greater depth based on the geological strata or the pressure within the well. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that all annuli in the well are already adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon(s), any remaining casing shall be ripped or perforated; then it shall be filled with expanding cement as previously detailed. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(6) If the District Manager concludes that the completely cleaned out well is emitting excessive amounts of gas, the operator must place a mechanical bridge plug in the well. It shall be placed in a competent stratum at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam, but above the top of the uppermost hydrocarbon-producing stratum, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The operator shall provide the District Manager with all information concerning the geological nature of the strata and the pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer shall be used. The mine operator shall document what has been done to ''kill the well'' and plug the carbon producing strata.

(7) If the upper-most hydrocarbon-producing stratum is within 300 feet of the base of the lowest minable coal seam, the operator shall properly place mechanical bridge plugs as described in section (d)(6) to isolate the hydrocarbon-producing stratum from the expanding cement plug. The operator shall place a minimum of 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well.

(e) The following procedures shall be followed for plugging or re-plugging oil or gas wells to the surface after completely cleaning out the well as previously specified:

(1) The operator shall pump expanding cement slurry down the well to form a plug which runs from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam (or lower if required by the District Manager based on the geological strata or pressure within the well) to the surface. The expanding cement shall be placed in the well under a pressure of at least 200 psi. Portland cement or a lightweight cement mixture shall be used to fill the area from 100 feet above the top of the uppermost mineable coal seam (or higher if required by the District Manager that a higher distance is required due to the geological strata or the pressure within the well) to the surface.

(2) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger diameter casing, set in cement, shall extend at least 36 inches above the ground level with the American Petroleum Institute (API) well number engraved or welded on the casing. When the hole cannot be marked with a physical monument (*e.g.,* prime farmland), high-resolution GPS coordinates (one-half meter resolution) shall be required.

(f) The following procedures shall be followed for plugging or re-plugging oil and gas wells for use as degasification wells after completely cleaning out the well as previously specified:

(1) The operator shall set a cement plug in the well by pumping an expanding cement slurry down the tubing to provide at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well. The expanding cement shall be placed in the well under a pressure of at least 200 psi. The top of the expanding cement shall extend at least 50 feet above the top of the coal seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well.

(2) The operator shall securely grout into the bedrock of the upper portion of the degasification well a suitable casing to protect it. The remainder of the well may be cased or uncased.

(3) The operator shall fit the top of the degasification casing with a wellhead equipped as required by the District Manager in the approved ventilation plan. Such equipment may include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(4) Operation of the degasification well shall be addressed in the approved ventilation plan. This may include periodic tests of methane levels and limits on the minimum methane concentrations that may be extracted.

(5) After the area of the coal mine that is degassed by a well is sealed or the coal mine is abandoned, the operator shall plug all degasification wells using the following procedures:

(i) The operator shall insert a tube to the bottom of the well or, if not possible, to within 100 feet above the coal seam being mined. Any blockage must be removed to ensure that the tube can be inserted to this depth.

(ii) The operator shall set a cement plug in the well by pumping Portland cement or a lightweight cement mixture down the tubing until the well is filled to the surface.

(iii) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level with the API well number engraved or welded on the casing.

(g) The following provisions apply to all wells which the operator determines, and with which the MSHA District Manager agrees, cannot be completely cleaned out due to damage to the well caused by subsidence, caving, or other factors.

(1) The operator shall drill a hole adjacent and parallel to the well to a depth of at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or pressure within the well.

(2) The operator shall use a geophysical sensing device to locate any casing which may remain in the well.

(3) If the well contains casing(s), the operator shall drill into the well from the parallel hole. From 10 feet below the coal seam to 10 feet above the coal seam, the operator shall perforate or rip all casings at least every 5 feet. Beyond this distance, the operator shall perforate or rip at least every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the seam being mined, unless the District Manager requires a greater distance based on the geological strata or pressure within the well. The operator shall fill the annulus between the casings and between the casings and the well wall with expanding (minimum 0.5

percent expansion upon setting) cement and shall ensure that these areas contain no voids. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that the annulus of the well is adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well or fill these areas with cement. When multiple casing and tubing strings are present in the coal horizon(s), any casing which remains shall be ripped or perforated and filled with expanding cement as previously indicated. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(4) Where the operator determines, and the District Manager agrees, that there is insufficient casing in the well to allow the method previously outlined to be used, then the operator shall use a horizontal hydraulic fracturing technique to intercept the original well. From at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam to a point at least 50 feet above the seam being mined, the operator shall fracture in at least six places at intervals to be agreed upon by the operator and the District Manager after considering the geological strata and the pressure within the well. The operator shall pump expanding cement into the fractured well in sufficient quantities and in a manner which fills all intercepted voids.

(5) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest minable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. The operator shall obtain the logs from the adjacent hole rather than the well if the condition of the well makes it impractical to insert the equipment necessary to obtain the log.

(6) A journal shall be maintained that describes: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning sealing the well. Invoices, workorders, and other records relating to all work on the well shall be also maintained as part of this journal and provided to MSHA upon request.

(7) After the operator has plugged the well, the operator shall plug the adjacent hole, from the bottom to the surface, with Portland cement or a lightweight cement mixture. The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4-inch or larger casing, set in cement, shall extend at least 36 inches above the ground level. A combination of the methods outlined previously may have to be used in a single well, depending upon the conditions of the hole and the presence of casings. The operator and the District Manager shall discuss the nature of each hole and if the District Manager requires more than one method be utilized. The mine operator may submit an alternative plan to the District Manager for approval to use different methods including certification by a registered petroleum engineer to support the proposed alternative methods to address wells that cannot be completely cleaned out.

(h) The following mandatory procedures shall be followed when mining within a 100-feet diameter around a well.

(1) A representative of the operator, a representative of the miners, the appropriate State agency, or the MSHA District Manager may request that a conference be conducted prior to intersecting any plugged or re-plugged well. The party requesting the conference shall notify all other parties listed above within a reasonable time prior to the conference to provide opportunity for participation. The purpose of the conference shall be to review, evaluate, and accommodate any abnormal or unusual circumstance related to the condition of the well or surrounding strata when such conditions are encountered.

(2) The operator shall intersect a well on a shift approved by the District Manager. The operator shall notify the District Manager and the miners' representative in sufficient time prior to intersecting a well to provide an opportunity to have representatives present.

(3) When using continuous mining methods, the operator shall install drivage sights at the last open crosscut near the place to be mined to ensure intersection of the well. The drivage sites shall not be more than 50 feet from the well.

(4) The operator shall ensure that fire-fighting equipment including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the well intersection (when either the conventional or continuous mining method is used) is available and operable during all well intersections. The fire hose shall be located in the last open crosscut of the entry or room. The operator shall maintain the water line to the belt conveyor tailpiece along with a sufficient amount of fire hose to reach the farthest point of penetration on the section.

(5) The operator shall ensure that sufficient supplies of roof support and ventilation materials shall be available and located at the last open crosscut. In addition, emergency plugs and suitable sealing materials shall be available in the immediate area of the well intersection.

(6) Within 12 hours prior to intersecting the well, the operator shall test all equipment and check it for permissibility. Water sprays, water pressures, and water flow rates used for dust and spark suppression shall be examined and any deficiencies corrected.

(7) The operator shall calibrate the methane monitor(s) on the longwall, continuous mining machine, or cutting machine and loading machine within 12 hours prior to intersecting the well.

(8) When mining is in progress, the operator shall perform tests for methane with a handheld methane detector at least every 10 minutes from the time that mining with the continuous mining machine is within 30 feet of the well until the well is intersected. During the actual cutting process, no individual shall be allowed on the return side until the well intersection has been completed and the area has been examined and declared safe. The operator's most current approved ventilation plan shall be followed at all times unless the District Manager requires a greater air velocity for the intersect.

(9) When using continuous or conventional mining methods, the working place shall be free from accumulations of coal dust and coal spillages, and rock dust shall be placed on the roof, rib, and floor to within 20 feet of the face when intersecting the well.

(10) When the well is intersected, the operator shall deenergize all equipment, and thoroughly examine and determine the area to be safe before permitting mining to resume.

(11) After a well has been intersected and the working place determined to be safe, mining shall continue inby the well a sufficient distance to permit adequate ventilation around the area of the well.

(12) When necessary, torches shall be used for inadequately or inaccurately

cut or milled casings. No open flame shall be permitted in the area until adequate ventilation has been established around the well bore and methane levels of less than 1.0 percent are present in all areas that will be exposed to flames and sparks from the torch. The operator shall apply a thick layer of rock dust to the roof, face, floor, ribs, and any exposed coal within 20 feet of the casing prior to the use of torches.

(13) Non-sparking (brass) tools shall be located on the working section and shall be used exclusively to expose and examine cased wells.

(14) No person shall be permitted in the area of the well intersection except those engaged in the operation, company personnel, representatives of the miners, personnel from MSHA, or personnel from the appropriate State agency.

(15) The operator shall alert all personnel in the mine to the planned intersection of the well prior to their going underground if the planned intersection is to occur during their shift. This warning shall be repeated for all shifts until the well has been mined through.

(16) The well intersection shall be under the direct supervision of a certified individual. Instructions concerning the well intersection shall be issued only by the certified individual in charge.

(17) If the mine operator cannot find the well in the middle of the panel or room and misses the anticipated intersection, mining shall cease and the District Manager shall be notified.

(i) A copy of the PDO granted by MSHA shall be maintained at the mine and be available to the miners.

(1) If the well is not plugged to the total depth of all minable coal seams identified in the core hole logs, any coal seams beneath the lowest plug shall remain subject to the barrier requirements of 30 CFR 75.1700.

(2) All necessary safety precautions and safe practices required by MSHA regulations and State regulatory agencies with jurisdiction over the plugging site shall be followed.

(j) All miners involved in the plugging or re-plugging operations shall be trained on the contents of the PDO granted by MSHA prior to starting the process.

(k) Mechanical bridge plugs should incorporate the best available technologies required or recognized by the State regulatory agency and/or oil and gas industry.

(l) Within 30 days after the PDO granted by MSHA becomes final, the operator shall submit proposed revisions for its approved 30 CFR part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training on compliance with the terms and conditions stated in the PDO granted by MSHA. The operator shall provide all miners involved in well intersection with training on the requirements of the PDO granted by MSHA prior to mining within 150 feet of a well intended to be mined through.

(m) The responsible person required under 30 CFR 75.1501 shall be responsible for well intersection emergencies. The well intersection procedures shall be reviewed by the responsible person prior to any planned intersection.

(n) Within 30 days after the PDO granted by MSHA becomes final, the operator shall submit proposed revisions for its approved mine emergency evacuation and firefighting program of instruction required under 30 CFR 75.1502. The operator shall revise the program of instruction to include the hazards and evacuation procedures to be used for well intersections. All underground miners shall be trained on the revised plan within 30 days of submittal.

(o) The procedure as specified in 30 CFR 48.3 for approval of proposed revisions to already approved training plans shall apply.

In support of the proposed alternative method, the petitioner has also submitted a labeled schematic indicating the plugging depth and rip locations and a mine map including initial projections with all spotted and surveyed gas wells in support of the proposed alternative method.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2024–08344 Filed 4–18–24; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

DATES: All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before May 20, 2024.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2024–0007 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2024–0007.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, 4th Floor West, Arlington, Virginia 22202–5452.

Attention: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk, 4th Floor West. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. 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.

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification.

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, §§ 44.10 and 44.11 establish the requirements for filing petitions for modification.

II. Petition for Modification

Docket Number: M–2024–003–C.

Petitioner: Elk Run Coal Company, LLC, P.O. Box 457, Whitesville, WV 25209.

Mine: Checkmate Powellton Mine, MSHA ID No. 46–09640, located in Boone County, West Virginia.

Regulation Affected: 30 CFR 75.1700, Oil and gas wells.

Modification Request: The petitioner requests a modification of 30 CFR 75.1700 as it relates to oil and gas wells. Specifically, the petitioner is proposing to mine through or near (within the 300 feet diameter safety barrier) plugged oil or gas wells.

The petitioner states that:

(a) The Checkmate Powellton Mine extracts coal from the Powellton coal seam. The mine operates one continuous mining machine section producing coal. Future workplans include adding an additional continuous mining machine.

(b) The mine will use a room and pillar method of mining.

(c) In the reserve area of the mine, many oil and gas wells exist.

The petitioner proposes the following alternative method:

(a) Prior to plugging an oil or gas well, the following procedures shall be followed:

(1) A diligent effort shall be made to clean the well to the original total depth. The mine operator shall contact the District Manager prior to stopping the operation to pull casing or clean out the total depth of the well.

(2) If this depth cannot be reached, and the total depth if the well is less than 4,000 feet, the operator shall completely clean out the well from the surface to at least 200 feet below the base of the lowest mineable coal seam, unless the District Manager requires cleaning to a greater depth based on the geological strata or pressure within the well.

(3) The operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. If the total depth of the well is 4,000 feet or greater, the operator shall completely clean out the well from the surface to at least 400 feet below the base of the lowest mineable coal seam. The operator shall remove all material from the entire diameter of the well, wall to wall. If the total depth of the well is unknown and there is no historical information, the mine operator must contact the District Manager before proceeding.

(4) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, a gamma log, a bond log, and deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest mineable coal seam, potential hydrocarbon producing strata, and the location for a bridge plug. In addition, a journal shall be maintained describing: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated, ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning the cleaning and sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of the logs and provided to MSHA upon request.

(5) When cleaning out the well as described in alternative method section (a), the operator shall make a diligent effort to remove all of the casing in the well. After the well is completely cleaned out and all the casing removed, the well shall be plugged to the total depth by pumping cement slurry and pressurizing to at least 200 pounds per square inch (psi). If the casing cannot be removed, it shall be cut, milled, perforated, or ripped at all mineable coal seam levels to facilitate the removal of any remaining casing in the coal seam by the mining equipment. Any casing which remains shall be perforated of ripped to permit the injection of cement into voids within and around the well.

(6) All casing remaining at mineable coal seam levels shall be perforated or ripped at least every 5 feet from 10 feet below the coal seam to 10 feet above the coal seam. Perforations or rips are required at least every 50 feet from 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the uppermost mineable coal seam. The mine operator shall take appropriate steps to ensure that the annulus between the casing and the well walls are filled with expanding (minimum 0.5 percent expansion upon setting) cement and contain no voids.

(7) If it is not possible to remove all of the casing, the operator shall notify the District Manager before any other work is performed. If the well cannot be cleaned out or the casing removed, the operator shall prepare the well as described from the surface to at least 200 feet below the base of the lowest mineable coal seam for wells 4,000 feet or greater, unless the District Manger requires cleaning out and removal of casing to a greater depth based on the geological strata or pressure within the well. If the operator, using a casing bond log can demonstrate to the satisfaction of the District Manager that all annuli in the well are already adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well. When multiple casing and tubing strings are present in the coal horizon(s), any casing which remains shall be ripped or perforated and filled with expanding cement as previously detailed. An acceptable casing bond log for each casing and tubing string shall be made if this is used in lieu of ripping or perforating multiple strings.

(8) If the District Manager concludes that the completely cleaned-out well is emitting excessive amounts of gas, the operator shall place a mechanical bridge plug in the well. It shall be placed in a competent stratum at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam, but above the top of the uppermost hydrocarbon producing stratum, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The operator shall provide the District Manager with all information it possesses concerning the geological nature of the strata and the pressure of the well. If it is not possible to set a mechanical bridge plug, an appropriately sized packer may be used. The mine operator shall document what has been done to ''kill the well'' and plug the hydrocarbon producing strata. If the upper-most hydrocarbon producing stratum is within 300 feet of the base of the lowest minable coal seam, the operator shall properly place mechanical bridge plugs as described in alternative method section (a) to isolate the hydrocarbon producing stratum from the expanding cement plug. The operator shall place a minimum of 200 feet (400 feet if the total well depth is 4,000 feet or greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well.

(b) The following procedures shall be followed for plugging or re-plugging oil or gas wells to the surface after completely cleaning out the well as previously specified:

(1) The operator shall pump expanding cement slurry down the well to form a plug which runs from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base

of the lowest mineable coal seam (or lower if required by the District Manager based on the geological strata or the pressure within the well) to the surface. The expanding cement will be placed in the well under a pressure of at least 200 psi. Portland cement or a lightweight cement mixture may be used to fill the area from 100 feet above the top of the uppermost mineable coal seam (or higher if required by the District Manager based on the geological strata or the pressure within the well) to the surface.

(2) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4 inch or larger diameter casing, set in cement, shall extend at least 36 inches above the ground level with the American Petroleum Institute (API) well number engraved or welded on the casing. When the hole cannot not be marked with a physical monument (*e.g.,* prime farmland), high-resolution GPS coordinates (one-half meter resolution) shall be required.

(c) The following procedures shall be followed for plugging or re-plugging oil and gas wells that are to be used as degasification boreholes after completely cleaning out the well as previously specified:

(1) The operator shall set a cement plug in the well by pumping an expanding cement slurry down the tubing to provide at least 200 feet (400 feet if the total well depth is 4,000 feet of greater) of expanding cement below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or the pressure within the well. The expanding cement will be placed in the well under a pressure of at least 200 psi. The top of the expanding cement shall extend at least 50 feet above the top of the coal seam being mined, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well.

(2) The operator shall securely grout into the bedrock of the upper portion of the degasification well a suitable casing to protect it. The remainder of the well may be cased or uncased.

(3) The operator shall fit the top of the degasification casing with a wellhead equipped as required by the District Manager in the approved ventilation plan. Such equipment may include check valves, shut-in valves, sampling ports, flame arrestor equipment, and security fencing.

(4) Operation of the degasification well shall be addressed in the approved ventilation plan.

(5) After the area of the coal mine that is degassed by a well is sealed or the coal mine is abandoned, the operator shall plug all degasification wells using the following procedures:

(i) The operator shall insert a tube to the bottom of the well or, if not possible, to at least 100 feet above the coal seam being mined. Any blockage must be removed to ensure that the tube can be inserted to this depth.

(ii) The operator shall set a cement plug in the well by pumping Portland cement or a lightweight cement mixture down the tubing until the well is filled to the surface.

(iii) The operator shall embed steel turnings or other small magnetic particles in the top of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4 inch or larger casing, set in cement, shall extend at least 36 inches above the ground level with the API well number engraved or welded on the casing.

(d) The following provisions shall apply to all wells which the operator determines, and the MSHA District Manager agrees, cannot be completely cleaned out due to damage to the well caused by subsidence, caving, or other factors.

(1) The operator shall drill a hole adjacent and parallel to the well to a depth of at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the lowest mineable coal seam, unless the District Manager requires a greater depth based on the geological strata or the pressure within the well.

(2) The operator shall use a geophysical sensing device to locate any casing which may remain in the well.

(3) If the well contains casings, the operator shall drill into the well from the parallel hole. From 10 feet below the coal seam to 10 feet above the coal seam, the operator shall perforate or rip all casings at intervals of at least every 5 feet. Beyond this distance, the operator shall perforate or rip at least every 50 feet from at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable coal seam up to 100 feet above the seam being mined, unless the District Manager requires a greater distance based on the geological strata or the pressure within the well. The operator shall fill the annulus between the casings and the well wall with expanding (minimum 0.5 percent expansion upon setting) cement and shall ensure that these areas contain no voids. If the operator, using a casing bond log, can demonstrate to the satisfaction of the District Manager that the annulus of the well is adequately sealed with cement, the operator shall not be required to perforate or rip the casing for that particular well or fill these areas with cement. When multiple casing and tubing strings are present in the coal horizon(s), any remaining casing shall be ripped or perforated and filled with expanding cement. An acceptable casing bond log for each casing and tubing string can be used in lieu of ripping or perforating multiple strings.

(4) Where the operator determines, and the District Manager agrees, that there is insufficient casing in the well to allow the methods previously outlined to be used, the operator shall use a horizontal hydraulic fracturing technique to intercept the original well. From at least 200 feet (400 feet if the total well depth is 4,000 feet or greater) below the base of the lowest mineable seam to a point at least 50 feet above the seam being mined, the operator shall fracture in at least 6 places at intervals to be agree upon by the operator and the District Manager after considering the geological strata and the pressure within the well. The operator shall pump expanding cement into the fractured well in sufficient quantities and in a manner which fills all intercepted voids.

(5) The operator shall prepare down-hole logs for each well. Logs shall consist of a caliper survey, gamma log, a bond log, and a deviation survey for determining the top, bottom, and thickness of all coal seams down to the lowest mineable coal seam, potential hydrocarbon producing strata, and the location of any existing bridge plug. The operator shall obtain the logs from the adjacent hole rather than the well if the condition of the well makes it impractical to insert the equipment necessary to obtain the log.

(6) A journal shall be maintained describing: the depth of each material encountered; the nature of each material encountered; bit size and type used to drill each portion of the hole; length and type of each material used to plug the well; length of casing(s) removed, perforated, or ripped, or left in place; any sections where casing was cut or milled; and other pertinent information concerning sealing the well. Invoices, work-orders, and other records relating to all work on the well shall be maintained as part of this journal and provided to MSHA upon request.

(7) After the operator has plugged the well, the operator shall plug the adjacent hole, from the bottom to the surface, with Portland cement or a lightweight cement mixture. The operator shall embed steel turnings or other small magnetic particles in the top

of the cement near the surface to serve as a permanent magnetic monument of the well. In the alternative, a 4 inch or larger casing, set in cement, shall extend at least 36 inches above the ground level. A combination of the methods outlined previously may have to be used in a single well, depending upon the conditions of the hole and the presence of casings. The operator and the District Manager shall discuss the nature of each hole and if the District Manager requires more than one method be utilized. The mine operator may submit an alternative plan to the District Manager for approval to use different methods to address wells that cannot be completely cleaned out. Additional documentation and certification by a registered petroleum engineer to support the proposed alternative methods shall be submitted if required by the District Manager.

(e) The following procedures shall be followed after approval has been granted by the District Manager to mine within the safety barrier established by 30 CFR 75.1700 or to mine through a plugged or re-plugged well.

(1) A representative of the operator, a representative of the miners, the appropriate State agency, or the MSHA District Manager may request that a conference be conducted prior to intersecting through any plugged or re-plugged well. The party requesting the conference shall notify all other parties listed above within a reasonable time prior to the conference to provide opportunity for participation. The purpose of the conference shall be to review, evaluate, and accommodate any abnormal or unusual circumstance related to the condition of the well or surrounding strata when such conditions are encountered.

(2) The operator shall intersect a well on a shift approved by the District Manager. The operator shall notify the District Manager and the miners' representative in sufficient time prior to intersecting a well to provide an opportunity to have representatives present.

(3) When using continuous mining methods, the operator shall install drivage sights at the last open crosscut near the place to be mined to ensure intersection of the well. The drivage sites shall not be more than 50 feet from the well.

(4) When using longwall mining methods, distance markers shall be installed on 5-foot centers for a distance of 50 feet in advance of the well in the headgate entry and in the tailgate entry.

(5) The operator shall ensure that fire-fighting equipment including fire extinguishers, rock dust, and sufficient fire hose to reach the working face area of the well intersection (when either the conventional or continuous mining method is used) is available and operable during all well intersections. The fire hose shall be located in the last open crosscut of the entry or room. The operator shall maintain the water line to the belt conveyor tailpiece along with a sufficient amount of fire hose to reach the farthest point of penetration on the section. When the longwall mining method is used, a hose to the longwall water supply is sufficient.

(6) The operator shall ensure that sufficient supplies of roof support and ventilation materials shall be available and located at the last open crosscut. In addition, emergency plugs and suitable sealing materials shall be available in the immediate area of the well intersection.

(7) On the shift prior to intersecting the well, the operator shall test all equipment and check it for permissibility. Water sprays, water pressures, and water flow rates used for dust and spark suppression shall be examined and any deficiencies corrected.

(8) The operator shall calibrate the methane monitor(s) on the longwall, continuous mining machine, or cutting machine and loading machine on the shift prior to intersecting the well.

(9) When mining is in progress, the operator shall perform tests for methane with a handheld methane detector at least every 10 minutes from the time that mining with the continuous mining machine or longwall face is within 30 feet of the well until the well is intersected. During the actual cutting process, no individual shall be allowed on the return side until the well intersection has been completed, and the area has been examined and declared safe. All workplace examinations on the return side of the shearer will be conducted while the shearer is idle. The operator's most current approved ventilation plan will be followed at all times unless the District Manager requires a greater air velocity for the intersect.

(10) When using continuous or conventional mining methods, the working place shall be free from accumulations of coal dust and coal spillages, and rock dust shall be placed on the roof, rib, and floor to within 20 feet of the face when intersecting the well. On longwall sections, rock dusting shall be conducted and placed on the roof, rib, and floor up to both the headgate and tailgate gob.

(11) When the well is intersected, the operator shall de-energize all equipment and thoroughly examine and determine the area is safe before permitting mining to resume.

(12) After a well has been intersected and the working place determined to be safe, mining shall continue inby the well a sufficient distance to permit adequate ventilation around the area of the well.

(13) When necessary, torches shall be used for inadequately or inaccurately cut or milled casings. No open flame shall be permitted in the area until adequate ventilation has been established around the well bore and methane levels of less than 1.0 percent are present in all areas that will be exposed to flames and sparks from the torch. The operator shall apply a thick layer of rock dust to the roof, face, floor, ribs and any exposed coal within 20 feet of the casing prior to any use of torches.

(14) Non-sparking (brass) tools shall be located on the working section and shall be used exclusively to expose and examine cased wells.

(15) No person shall be permitted in the area of the well intersection except those engaged in the operation, including company personnel, representatives of the miners, MSHA personnel, and personnel from the appropriate State agency.

(16) The operator shall alert all personnel in the mine to the planned intersection of the well prior to their going underground if the planned intersection is to occur during their shift. This warning shall be repeated for all shifts until the well has been mined through.

(17) The well intersection shall be under the direct supervision of a certified individual. Instructions concerning the well intersection shall be issued only by the certified individual in charge.

(18) If the mine operator cannot find the well in the middle of the panel or a gate section misses the anticipated intersection, mining shall cease and the District Manager shall be notified.

(f) A copy of the PDO granted by MSHA shall be maintained at the mine and be available to the miners.

(g) If the well is not plugged to the total depth of all mineable coal seams identified in the core hole logs, any coal seams beneath the lowest plug shall remain subject to the barrier requirements of 30 CFR 75.1700.

(h) All necessary safety precautions and safe practices required by MSHA regulations and State regulatory agencies with jurisdiction over the plugging site shall be followed.

(i) All miners involved in the plugging or re-plugging operations shall be trained on the contents of the PDO

granted by MSHA prior to starting the process.

(j) Mechanical bridge plugs shall incorporate the best available technologies required or recognized by the State regulatory agency and/or oil and gas industry.

(k) Within 30 days after the PDO granted by MSHA becomes final, the operator shall submit proposed revisions for its approved 30 CFR part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training on compliance with the terms and conditions stated in the PDO granted by MSHA. The operator shall provide all miners involved in well intersection with training on the requirements of the PDO granted by MSHA prior to mining within 150 feet of the next well intended to be mined through.

(l) The responsible person required under 30 CFR 75.1501 shall be responsible for well intersection emergencies. The well intersection procedures shall be reviewed by the responsible person prior to any planned intersection.

(m) Within 30 days after the PDO granted by MSHA becomes final, the operator shall submit proposed revisions for its approved mine emergency evacuation and firefighting program of instruction required under 30 CFR 75.1502. The operator shall revise the program of instruction to include the hazards and evacuation procedures to be used for well intersections. All underground miners will be trained in this revised plan within 30 days of the submittal.

In support of the proposed alternative method, the petitioner submitted a gas well map that provides details and locations of gas wells.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

Song-ae Aromie Noe,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2024–08346 Filed 4–18–24; 8:45 am]

BILLING CODE 4520–43–P

MERIT SYSTEMS PROTECTION BOARD

Notice of Opportunity To File Amicus Briefs

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

The Merit Systems Protection Board (MSPB or the Board) announces the opportunity to file amicus briefs in the matter of *Mary Reese* v. *Department of the Navy*, MSPB Docket No. DC–1221–21–0203–W–1, currently pending before the Board on petition for review. The *Reese* appeal presents a question regarding the scope of 5 U.S.C. 2302(b)(9)(C), which prohibits reprisal for ''cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law.'' Given the limited precedent addressing the types of activities covered or excluded from section 2302(b)(9)(C), the Board is seeking the input of interested parties, including the Office of Special Counsel.

DATES: All briefs submitted in response to this notice must be received by the Clerk of the Board on or before May 20, 2024.

ADDRESSES: Briefs must be submitted to Gina K. Grippando, Clerk of the Board, Merit Systems Protection Board, by email to *mspb@mspb.gov*; by mail to Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419; or by fax to (202) 653–7130.

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; email: *mspb@mspb.gov*.

SUPPLEMENTARY INFORMATION: The Board has thus far issued limited precedent addressing the types of activities covered or excluded from section 5 U.S.C. 2302(b)(9)(C). Because the *Reese* appeal may present an opportunity to do so, the Board is seeking input from interested parties about the proper interpretation and application of the provision.

The first question of law presented in *Reese* is whether an employee's informal complaints of a climate of sexual harassment made to her supervisors and others (but not through the equal employment opportunity process) on behalf of herself and other employees might constitute ''the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation'' so as to be covered by section 2302(b)(9)(A), and thus precluding coverage under section 2302(b)(9)(C). In the context of an employee's formal administrative grievance, the Board has found that such actions are covered by section 2302(b)(9)(A) rather than section 2302(b)(9)(C). *McCray* v. *Department of the Army,* 2023 MSPB 10, ¶¶ 26–29. However, the Board has limited precedent otherwise analyzing the type of appeal, complaint, or grievance covered under section 2302(b)(9)(A). *See Marcell* v. *Department of Veterans Affairs,* 2022 MSPB 33, ¶ 6 (finding that an employee's request for FMLA leave and a OWCP claim did not fall under section 2302(b)(9)(A) because neither constituted an initial step toward taking legal action against the agency for the perceived violation of the employee's rights).

The second question of law presented in *Reese* concerns whether activity that falls within the protections of title VII may also be protected by section 2302(b)(9)(C). The U.S. Court of Appeals for the Federal Circuit has held that disclosures of violations of antidiscrimination laws made in equal employment opportunity (EEO) complaints, which are protected under antiretaliation provisions specific to the EEO process, are excluded from the protections of 5 U.S.C. 2302(b)(8). *Spruill* v. *Merit Systems Protection Board,* 978 F.2d 679, 692 (Fed. Cir. 1992). The court has also affirmed a Board decision, *Edwards* v. *Department of Labor,* 2022 MSPB 9, which held that verbal complaints of discrimination to supervisors are similarly excluded from the protections of 5 U.S.C. 2302(b)(8), *Edwards* v. *Merit Systems Protection Board,* No. 2022–1967, 2023 WL 4398002 (Fed. Cir. July 7, 2023). The question is whether the court's reasoning extends to 5 U.S.C. 2302(b)(9)(C).

The third question of law presented in *Reese* is whether the language of section 2302(b)(9)(C), ''cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law,'' encompasses (1) an informal discussion with someone from the kind of agency component that might conduct investigations or (2) a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component within an agency. The Board has recognized that the scope of this statutory language is not defined elsewhere in the statute or in the associated legislative history. *McCray,* 2023 MSPB 10, ¶ 27.

Required Format for Briefs

All briefs shall be captioned ''*Mary Reese* v. *Department of the Navy*'' and entitled ''Amicus Brief.'' Only one copy of the brief need be submitted. The

Board encourages interested persons or organizations to submit amicus briefs as attachments to email sent to *mspb@mspb.gov*. An email should contain a subject line indicating that the submission contains an amicus brief in the *Reese* case. Any commonly used word processing format or PDF format is acceptable; text formats are preferable to image formats. Briefs shall not exceed 30 pages in length and the text must be formatted as double-spaced, except for quotations and footnotes, on 8½ by 11 inch paper with one inch margins on all four sides. Regardless of the method used for submitting briefs, all submissions will be posted, without change, to MSPB's website (*www.mspb.gov*) and will include any personal information you provide. Therefore, submitting this information makes it public.

Gina K. Grippando,

Clerk of the Board.

[FR Doc. 2024–08353 Filed 4–18–24; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIME AND DATE: The Members of the National Council on Disability (NCD) will hold a quarterly business meeting on Thursday, May 9, 2024, 1:00 p.m.–5:00 p.m., eastern daylight time (EDT).

PLACE: This meeting will occur via Zoom videoconference. Registration is required. Interested parties are encouraged to join the meeting in an attendee status by Zoom Desktop Client, Mobile App, or Telephone to dial-in. Updated information is available on NCD's event page at *https://www.ncd.gov/meeting/2024-05-09-may-9-2024-council-meeting/*. To register for the Zoom webinar, please use the following URL: *https://www.zoomgov.com/webinar/register/WN_C-wldbB6SKedo9Ap4o6k-Q#/registration.*

In the event of audio disruption or failure, attendees can follow the meeting by accessing the Communication Access Realtime Translation (CART) link provided. CART is text-only translation that occurs real time and is not an exact transcript.

MATTERS TO BE CONSIDERED: Following welcome remarks and introductions, the Executive Committee will provide their report; followed by the Chair's report; policy updates; a break; followed by policy proposals for fiscal year 2025; a presentation by the Intertribal Disability Advisory Council (IDAC) on living with a disability on tribal lands, followed by Council member Q&A; a public comment session focused on public facilities and public transportation; and Council Member training on National Archives and Records Administration (NARA) requirements; then adjournment.

Agenda: The times provided below are approximations for when each agenda item is anticipated to be discussed (all times eastern daylight time):

Thursday, May 9, 2024

1:00–1:10 p.m.—Welcome and Call to Order
1:10–1:25 p.m.—Executive Committee Reports
1:25–1:35 p.m.—Chair's Report
1:35–2:05 p.m.—Policy Updates
2:05–2:15 p.m.—BREAK
2:15–3:15 p.m.—FY2025 Policy Proposals
3:15–4:00 p.m.—Presentation by Intertribal Disability Advisory Council (IDAC): Living with a disability on tribal lands, and Council member Q&A
4:00–4:30 p.m.—Public comment on public facilities, public transportation
4:30–5:00 p.m.—NARA training for Council members
5:30 p.m.—Adjournment

Public Comment: Your participation during the public comment period provides an opportunity for us to hear from you—individuals, businesses, providers, educators, parents and advocates. Your comments are important in bringing to the Council's attention and issues and priorities of the disability community.

For the May 9 Council meeting, NCD will have a public comment session to receive input on experiences with public facilities and public transportation. Additional information on specifics of the topic and guidelines are available on NCD's public comment page at *https://www.ncd.gov/public-comment/.*

Please share your experiences and/or knowledge on the accessibility of municipal/county or private recreation facilities regarding: buildings (accessibility of buildings, locker rooms, weight rooms, exercise areas); fitness equipment (exercise machines, weight machines); exercise classes (integrated classes, modifications); swimming facilities (pool lifts, entry ramps); and other accessibility comments on private or federally financed recreation facilities. NCD also continues to seek public comment on ground transportation. Please provide comments about: the accessibility of rental cars (reservations, hand-controls, cars available for rental); and the accessibility of hotel shuttles or other public shuttles.

Because of the virtual format, the Council will receive public comment by email or by video or audio over Zoom. To provide public comment during an NCD Council Meeting, NCD now requires advanced registration by sending send an email to *PublicComment@ncd.gov* with the subject line ''Public Comment'' and your name, organization, state, and topic of comment included in the body of your email. Deadline for registration is May 8, 8:00 p.m. EDT.

While public comment can be submitted on any topic over email, comments during the meeting should be specific to ground transportation experiences, as the input is needed for an upcoming report.

If any time remains following the conclusion of the comments of those registered, NCD may call upon those who desire to make comments but did not register.

CONTACT PERSON FOR MORE INFORMATION: Nicholas Sabula, Public Affairs Specialist, NCD, 1331 F Street NW, Suite 850, Washington, DC 20004; 202–272–2004 (V), or *nsabula@ncd.gov.*

Accommodations: An ASL interpreter will be on-camera during the entire meeting, and CART has been arranged for this meeting and will be embedded into the Zoom platform as well as available via streamtext link. The web link to access CART (in English) is: *https://www.streamtext.net/player?event=NCD.*

If you require additional accommodations, please notify Stacey Brown by sending an email to *sbrown@ncd.gov* as soon as possible, no later than 24 hours before the meeting.

Due to last-minute confirmations or cancellations, NCD may substitute items without advance public notice.

Dated: April 17, 2024.

Anne C. Sommers McIntosh,

Executive Director.

[FR Doc. 2024–08581 Filed 4–17–24; 4:15 pm]

BILLING CODE 8421–02–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of Humanities Panel

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities (NEH) will hold one additional meeting, by video conference, of the Humanities Panel, a Federal advisory committee, in April 2024. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5:00 p.m. on the dates specified below.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. 10), notice is hereby given of the following meetings:

1. Date: April 30, 2024

This video meeting will discuss an application for the State Projects grant program, submitted to the Office of Federal State Partnership.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chair's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: April 16, 2024.

Jessica Graves,

Paralegal Specialist, National Endowment for the Humanities.

[FR Doc. 2024–08429 Filed 4–18–24; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[License No. 52–31453–01; EA–2023–016; NRC–2024–0066]

In the Matter of Almonte Geo Service Group; Order Imposing Civil Monetary Penalty

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an Order to Almonte Geo Service Group (Almonte), imposing a civil monetary penalty of $17,500. The NRC issued a Notice of Violation and Proposed Imposition of Civil Penalty on November 9, 2023, to Almonte. The violation involved the failure by Almonte to complete decommissioning no later than 24 hours following the initiation of decommissioning as required by NRC regulations. This order is effective on the date of issuance.

DATES: This order became effective on April 11, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0066 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–2024–0066. 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 order imposing civil monetary penalty of $17,500 is available in ADAMS under Package Accession No. ML24089A031.
- *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: Carmen Rivera-Diaz, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–0296, email: *Carmen.RiveraDiaz@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the order is attached.

Dated: April 15, 2024.

For the Nuclear Regulatory Commission.

David L. Pelton,

Director, Office of Enforcement.

Attachment—Order Imposing Civil Monetary Penalty of $17,500

United States of America

Nuclear Regulatory Commission

In the Matter of: Almonte Geo Service Group, Toa Alta, Puerto Rico, Docket No. 03038488, License No. 52–31453–01, EA–23–016

Order Imposing Civil Monetary Penalty

I

Almonte Geo Service Group (Licensee) is the holder of Nuclear Materials License No. 52–31453–01 issued on October 4, 2011, by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to Part 30 of Title 10 of the Code of Federal Regulations (10 CFR). The license authorizes the possession and use of radioactive sources contained in portable nuclear moisture density gauges in accordance with conditions specified therein. The facility is located on the Licensee's site in Toa Alta, Puerto Rico.

II

The NRC inspected the Licensee's activities between March 1, 2023, and June 14, 2023. The results of this inspection indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated November 9, 2023 (ML23310A012).[1] The Notice states the nature of the violation, the provision of the NRC's requirements that the Licensee violated, and the amount of the civil penalty proposed for the violation.

Namely, the Notice describes that the Licensee failed to complete decommissioning no later than 24 months following the initiation of decommissioning as required by 10 CFR 30.36(h). In particular, the Licensee has not disposed of or transferred its licensed material despite having had its license revoked more than seven years ago and having initiated decommissioning activities almost four years ago. The Notice also documents that the NRC's primary interest in this matter is ensuring that the Licensee meets its obligation to transfer or dispose of the licensed material in its

[1] Designation in parentheses refers to an Agency-wide Documents Access and Management System (ADAMS) accession number. Documents referenced in this letter are publicly-available using the accession number in ADAMS.

possession and complete decommissioning of its site. Therefore, the civil penalty would not have been imposed if the Licensee (1) had properly disposed of or transferred the remaining sealed radioactive source possessed under the NRC license and (2) had sent information documenting that the material had been transferred or disposed of to the NRC within 60 days of the date of the letter transmitting the Notice (*i.e.,* by January 8, 2024).

The Licensee responded to the Notice in an email dated December 9, 2023 (ML23345A099). In its response, the Licensee requested additional time to save money to pay for proper disposal of the remaining sealed radioactive source in its possession. As of the date of this Order, the Licensee remains in possession of the sealed radioactive source.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined that the violation occurred as stated and that the penalty proposed for the violation designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, IT IS HEREBY ORDERED THAT:

The Licensee shall pay the civil penalty in the amount of $17,500 within 30 days of the date of the publication of this Order in the **Federal Register** through one of the following two methods:

1. Submit the payment with the enclosed invoice to this Order (EA–23–016) to the following address: Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, P.O. Box 979051, St. Louis, MO 63197 or,

2. Submit the payment in accordance with NUREG/BR–0254.

In addition, at the time payment is made, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

V

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within 30 days of its publication in the **Federal Register**. In addition, the Licensee and any other person adversely affected by this Order may request a hearing on this Order within 30 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system timestamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where

you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute Fair Use applications, participants should not include copyrighted materials in their submission.

If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which their interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by a licensee or a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings.

If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. If payment has not been made by the time specified above, the matter may be referred to the Attorney General, for collection.

For the Nuclear Regulatory Commission.

/RA/,

David L. Pelton,

Director, Office of Enforcement.

Dated this 11 day of April, 2024.

[FR Doc. 2024–08348 Filed 4–18–24; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99962; File No. SR–CboeBZX–2024–025]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 15, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2024, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/BZX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (''BZX Equities'') to increase its monthly fee assessed on Members' MPIDs. The Exchange proposes to implement these changes effective April 1, 2024.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange further notes that broker-dealers are not compelled to be Members of the Exchange, and a significant proportion of broker-dealers that trade U.S. equity securities have, in fact, chosen not to apply for membership on the Exchange.

By way of background, an MPID is a four-character unique identifier that is approved by the Exchange and assigned to a Member for use on the Exchange to identify the Member firm on the orders sent to the Exchange and resulting executions. Members may choose to request more than one MPID as a unique identifier(s) for their transactions on the Exchange. The Exchange notes that a Member may have multiple MPIDs for use by separate business units and trading desks or to support Sponsored Participant access.[4] Certain members currently leverage multiple MPIDs to obtain benefits from and added value in

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (March 20, 2024), available at *https://www.cboe.com/us/equities/market_statistics/*.

[4] A Sponsored Participant is a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3, which permits a Sponsored Participant to obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members. *See* Rules 1.5(z) and 11.3.

their participation on the Exchange. Multiple MPIDs provide unique benefits to and efficiencies for Members by allowing: (1) Members to manage their trading activity more efficiently by assigning different MPIDs to different trading desks and/or strategies within the firm; and (2) Sponsoring Members [5] to segregate Sponsored Participants by MPID to allow for detailed client-level reporting, billing, and administration, and to market the ability to use separate MPIDs to Sponsored Participants, which, in turn, may serve as a potential incentive for increased order flow traded through the Sponsoring Member.

The Exchange currently assesses a fee applicable to Members that use multiple MPIDs to facilitate their trading on the Exchange. Specifically, the Exchange assesses a monthly MPID Fee of $350 per MPID per Member, with a Member's first MPID provided free of charge. The MPID Fee is assessed on a pro-rated basis for new MPIDs by charging a Member based on the trading day in the month during which an additional MPID becomes effective for use. If a Member cancels an additional MPID on or after the first business day of the month, the Member will be required to pay the entire MPID Fee for that month.

The Exchange now proposes to increase the monthly MPID Fee from $350 per MPID per Member to $450 per MPID per Member. The Exchange believes the proposed increase continues to align with the additional value and benefits provided to Members that choose to utilize more than one MPID to facilitate their trading on the Exchange. The Exchange also believes that continuing to assess a fee on additional MPIDs will be beneficial because such fee will promote efficiency in MPID use.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4) [9] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient.

The Exchange believes that the proposed MPID Fee is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the benefits provided to Members that choose to utilize multiple MPIDs to facilitate their trading on the Exchange. While each Member must have an MPID to participate on the Exchange, additional MPIDs are optional and will be assessed the fee, as amended. Additional MPIDs currently allow for Members to realize certain benefits from and added value to their participation on the Exchange but also require the Exchange to allocate additional administrative resources to manage each MPID that a Member chooses to use for its trading activity. Therefore, the Exchange believes that it is reasonable to assess a modest fee on any additional MPIDs that Members choose to use to facilitate their trading. The Exchange again notes that it is optional for a Member to request and employ additional MPIDs, and a large portion (approximately 69%) of the Exchange's Members currently utilize just the one MPID necessary to participate on the Exchange.

The Exchange also believes that assessing a fee on additional MPIDs continues to be reasonably designed to promote efficiency in MPID use. When the Exchange first implemented the current MPID Fee,[10] it observed as a result that Members were incentivized to more effectively administer their MPIDs and reduce the number of under-used or superfluous MPIDs, or MPIDs that did not contribute additional value to a Member's participation on the Exchange. Reduction of such MPIDs, in turn, reduces Exchange resources allocated to administration and maintenance of those MPIDs. In particular, the Exchange observed that within the first few months of introducing the previous MPID Fee, the number of MPIDs on the Exchange decreased by approximately 17%, demonstrating that Members may choose to be more efficient in their use of MPIDs in response to an MPID Fee, such as that proposed in this fee change.[11]

The Exchange further believes the proposed MPID Fee change is reasonable because the amount assessed continues to be less than the analogous fees charged by at least one other market; namely, Nasdaq Stock Market LLC (''Nasdaq'').[12] The Exchange's proposed MPID Fee increase to $450 a month per MPID, with no charge associated with a Members' first MPID, continues to be lower than Nasdaq's MPID fee of $550 per MPID, which is charged for all MPIDs used by a Nasdaq member, including a member's first MPIDs.

The Exchange believes that the proposed MPID Fee change is equitable and not unfairly discriminatory because it will apply equally to all Members that choose to employ two or more MPIDs based on the number of additional MPIDs that they use to facilitate their trading on the Exchange. As stated, additional MPIDs beyond a Member's first MPID are optional, and Members may choose to trade using such additional MPIDs to achieve additional benefits and added value to support their individual business needs. Moreover, the Exchange believes the proposed fee is equitable and not unfairly discriminatory because it is proportional to the potential value or benefit received by Members with a greater number of MPIDs. That is, those

[5] A Sponsoring Member is a Member that is a registered broker-dealer and that has been designated by a Sponsored Participant to execute, clear and settle transactions resulting from the System. The Sponsoring Member shall be either (i) a clearing firm with membership in a clearing agency registered with the Commission that maintains facilities through which transactions may be cleared or (ii) a correspondent firm with a clearing arrangement with any such clearing firm. See Rule 1.5(aa).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 90944 (January 19, 2021), 86 FR 7127 (January 26, 2021) (SR–CboeBZX–2021–011).

[11] The reduction in MPIDs may also demonstrate that Members are free to cancel MPIDs on the Exchange and choose, instead, to utilize unique identifiers associated with participation on other exchanges.

[12] *See* Nasdaq Price List, MPID Fees, available at *https://nasdaqtrader.com/Trader.aspx?id=PriceList Trading2*.

Members that choose to employ a greater number of additional MPIDs have the opportunity to more effectively manage firm-wide trading activity and client-level administration, as well as potentially appeal to customers through the use of separate MPIDs, which may result in increased order flow through a Sponsoring Member. A Member may request at any time that the Exchange terminate an MPID, including MPIDs that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed change will apply equally to all Members that choose to employ additional MPIDs and equally to each additional MPID. As stated, additional MPIDs are optional and Members may choose to utilize additional MPIDs, or not, based on their view of the additional benefits and added value provided by utilizing the single MPID necessary to participate on the Exchange. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Members with a greater number of MPIDs and notes that a Member may continue to request at any time that the Exchange terminate any MPID, including those that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market, including competition for exchange memberships. Members have numerous alternative venues that they may participate on, including 15 other equities exchanges, as well as off-exchange venues, including alternative trading systems, where competitive products are available for trading. Indeed, participants can readily choose to submit their order flow to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In addition to this the Exchange notes that at least one other exchange currently has higher MPID fees in place, which have been previously filed with the Commission. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities* and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[14] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and paragraph (f) of Rule 19b–4 [16] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeBZX–2024–025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2024–025. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2024–025 and should be submitted on or before May 10, 2024.

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[14] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08359 Filed 4–18–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99961; File No. SR–CboeBYX–2024–011]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 15, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2024, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/BYX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (''BYX Equities'') to increase its monthly fee assessed on Members' MPIDs. The Exchange proposes to implement these changes effective April 1, 2024.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange further notes that broker-dealers are not compelled to be Members of the Exchange, and a significant proportion of broker-dealers that trade U.S. equity securities have, in fact, chosen not to apply for membership on the Exchange.

By way of background, an MPID is a four-character unique identifier that is approved by the Exchange and assigned to a Member for use on the Exchange to identify the Member firm on the orders sent to the Exchange and resulting executions. Members may choose to request more than one MPID as a unique identifier(s) for their transactions on the Exchange. The Exchange notes that a Member may have multiple MPIDs for use by separate business units and trading desks or to support Sponsored Participant access.[4] Certain members currently leverage multiple MPIDs to obtain benefits from and added value in their participation on the Exchange. Multiple MPIDs provide unique benefits to and efficiencies for Members by allowing: (1) Members to manage their trading activity more efficiently by assigning different MPIDs to different trading desks and/or strategies within the firm; and (2) Sponsoring Members[5] to segregate Sponsored Participants by MPID to allow for detailed client-level reporting, billing, and administration, and to market the ability to use separate MPIDs to Sponsored Participants, which, in turn, may serve as a potential incentive for increased order flow traded through the Sponsoring Member.

The Exchange currently assesses a fee applicable to Members that use multiple MPIDs to facilitate their trading on the Exchange. Specifically, the Exchange assesses a monthly MPID Fee of $150 per MPID per Member, with a Member's first MPID provided free of charge. The MPID Fee is assessed on a pro-rated basis for new MPIDs by charging a Member based on the trading day in the month during which an additional MPID becomes effective for use. If a Member cancels an additional MPID on or after the first business day of the month, the Member will be required to pay the entire MPID Fee for that month.

The Exchange now proposes to increase the monthly MPID Fee from $150 per MPID per Member to $250 per MPID per Member. The Exchange believes the proposed increase continues to align with the additional value and benefits provided to Members that choose to utilize more than one MPID to facilitate their trading on the Exchange. The Exchange also believes that continuing to assess a fee on additional MPIDs will be beneficial because such fee will promote efficiency in MPID use.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically,

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (March 20, 2024), available at *https://www.cboe.com/us/equities/market_statistics/*.

[4] A Sponsored Participant is a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3, which permits a Sponsored Participant to obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members. *See* Rules 1.5(z) and 11.3.

[5] A Sponsoring Member is a Member that is a registered broker-dealer and that has been designated by a Sponsored Participant to execute, clear and settle transactions resulting from the System. The Sponsoring Member shall be either (i) a clearing firm with membership in a clearing agency registered with the Commission that maintains facilities through which transactions may be cleared or (ii) a correspondent firm with a clearing arrangement with any such clearing firm. See Rule 1.5(aa).

[6] 15 U.S.C. 78f(b).

the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)[9] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient.

The Exchange believes that the proposed MPID Fee is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the benefits provided to Members that choose to utilize multiple MPIDs to facilitate their trading on the Exchange. While each Member must have an MPID to participate on the Exchange, additional MPIDs are optional and will be assessed the fee, as amended. Additional MPIDs currently allow for Members to realize certain benefits from and added value to their participation on the Exchange but also require the Exchange to allocate additional administrative resources to manage each MPID that a Member chooses to use for its trading activity. Therefore, the Exchange believes that it is reasonable to assess a modest fee on any additional MPIDs that Members choose to use to facilitate their trading. The Exchange again notes that it is optional for a Member to request and employ additional MPIDs, and a large portion (approximately 68%) of the Exchange's Members currently utilize just the one MPID necessary to participate on the Exchange.

The Exchange also believes that assessing a fee on additional MPIDs continues to be reasonably designed to promote efficiency in MPID use. When the Exchange first implemented the current MPID Fee,[10] it observed as a result that Members were incentivized to more effectively administer their MPIDs and reduce the number of under-used or superfluous MPIDs, or MPIDs that did not contribute additional value to a Member's participation on the Exchange. Reduction of such MPIDs, in turn, reduces Exchange resources allocated to administration and maintenance of those MPIDs. In particular, the Exchange observed that within the first few months of introducing the previous MPID Fee, the number of MPIDs on the Exchange decreased by approximately 18%, demonstrating that Members may choose to be more efficient in their use of MPIDs in response to an MPID Fee, such as that proposed in this fee change.[11]

The Exchange further believes the proposed MPID Fee change is reasonable because the amount assessed continues to be less than the analogous fees charged by at least one other market; namely, Nasdaq Stock Market LLC (''Nasdaq'').[12] The Exchange's proposed MPID Fee increase to $250 a month per MPID, with no charge associated with a Members' first MPID, continues to be lower than Nasdaq's MPID fee of $550 per MPID, which is charged for all MPIDs used by a Nasdaq member, including a member's first MPIDs.

The Exchange believes that the proposed MPID Fee change is equitable and not unfairly discriminatory because it will apply equally to all Members that choose to employ two or more MPIDs based on the number of additional MPIDs that they use to facilitate their trading on the Exchange. As stated, additional MPIDs beyond a Member's first MPID are optional, and Members may choose to trade using such additional MPIDs to achieve additional benefits and added value to support their individual business needs. Moreover, the Exchange believes the proposed fee is equitable and not unfairly discriminatory because it is proportional to the potential value or benefit received by Members with a greater number of MPIDs. That is, those Members that choose to employ a greater number of additional MPIDs have the opportunity to more effectively manage firm-wide trading activity and client-level administration, as well as potentially appeal to customers through the use of separate MPIDs, which may result in increased order flow through a Sponsoring Member. A Member may request at any time that the Exchange terminate an MPID, including MPIDs that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed change will apply equally to all Members that choose to employ additional MPIDs and equally to each additional MPID. As stated, additional MPIDs are optional and Members may choose to utilize additional MPIDs, or not, based on their view of the additional benefits and added value provided by utilizing the single MPID necessary to participate on the Exchange. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Members with a greater number of MPIDs and notes that a Member may continue to request at any time that the Exchange terminate any MPID, including those that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market, including competition for exchange memberships. Members have numerous alternative venues that they may participate on, including 15 other equities exchanges, as well as off-exchange venues, including alternative trading systems, where competitive products are available for trading. Indeed, participants can readily choose to submit their order flow to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In addition

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 90943 (January 19, 2021), 86 FR 7146 (January 26, 2021) (SR–CboeBYX–2021–004).

[11] The reduction in MPIDs may also demonstrate that Members are free to cancel MPIDs on the Exchange and choose, instead, to utilize unique identifiers associated with participation on other exchanges.

[12] *See* Nasdaq Price List, MPID Fees, available at *https://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.*

to this the Exchange notes that at least one other exchange currently has higher MPID fees in place, which have been previously filed with the Commission. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[14] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and paragraph (f) of Rule 19b–4 [16] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBYX–2024–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBYX–2024–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBYX–2024–011 and should be submitted on or before May 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08357 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[14] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99959; File No. SR–CboeEDGA–2024–011]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 15, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2024, Cboe EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (''EDGA Equities'') to increase its monthly fee assessed on Members' MPIDs. The Exchange proposes to implement these changes effective April 1, 2024.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange further notes that broker-dealers are not compelled to be Members of the Exchange, and a significant proportion of broker-dealers that trade U.S. equity securities have, in fact, chosen not to apply for membership on the Exchange.

By way of background, an MPID is a four-character unique identifier that is approved by the Exchange and assigned to a Member for use on the Exchange to identify the Member firm on the orders sent to the Exchange and resulting executions. Members may choose to request more than one MPID as a unique identifier(s) for their transactions on the Exchange. The Exchange notes that a Member may have multiple MPIDs for use by separate business units and trading desks or to support Sponsored Participant access.[4] Certain members currently leverage multiple MPIDs to obtain benefits from and added value in their participation on the Exchange. Multiple MPIDs provide unique benefits to and efficiencies for Members by allowing: (1) Members to manage their trading activity more efficiently by assigning different MPIDs to different trading desks and/or strategies within the firm; and (2) Sponsoring Members[5] to segregate Sponsored Participants by MPID to allow for detailed client-level reporting, billing, and administration, and to market the ability to use separate MPIDs to Sponsored Participants, which, in turn, may serve as a potential incentive for increased order flow traded through the Sponsoring Member.

The Exchange currently assesses a fee applicable to Members that use multiple MPIDs to facilitate their trading on the Exchange. Specifically, the Exchange assesses a monthly MPID Fee of $150 per MPID per Member, with a Member's first MPID provided free of charge. The MPID Fee is assessed on a pro-rated basis for new MPIDs by charging a Member based on the trading day in the month during which an additional MPID becomes effective for use. If a Member cancels an additional MPID on or after the first business day of the month, the Member will be required to pay the entire MPID Fee for that month.

The Exchange now proposes to increase the monthly MPID Fee from $150 per MPID per Member to $250 per MPID per Member. The Exchange believes the proposed increase continues to align with the additional value and benefits provided to Members that choose to utilize more than one MPID to facilitate their trading on the Exchange. The Exchange also believes that continuing to assess a fee on additional MPIDs will be beneficial because such fee will promote efficiency in MPID use.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)[9] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient.

The Exchange believes that the proposed MPID Fee is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the benefits provided to Members that choose to utilize multiple MPIDs to facilitate their trading on the Exchange. While each Member must have an MPID to participate on the Exchange, additional MPIDs are optional and will be assessed the fee, as amended. Additional MPIDs currently allow for Members to realize certain benefits from and added value to their participation on the Exchange but also require the Exchange to allocate additional administrative resources to manage each MPID that a Member chooses to use for its trading activity. Therefore, the Exchange believes that it is reasonable to assess a modest fee on any additional MPIDs that Members choose to use to facilitate their trading. The Exchange again notes that it is optional for a Member to request and employ additional MPIDs, and a large portion (approximately 68%) of the Exchange's Members currently utilize

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (March 20, 2024), available at *https://www.cboe.com/us/equities/market_statistics/*.

[4] A Sponsored Participant is a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3, which permits a Sponsored Participant to obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members. *See* Rules 1.5(z) and 11.3.

[5] A Sponsoring Member is a Member that is a registered broker-dealer and that has been designated by a Sponsored Participant to execute, clear and settle transactions resulting from the System. The Sponsoring Member shall be either (i) a clearing firm with membership in a clearing agency registered with the Commission that maintains facilities through which transactions may be cleared or (ii) a correspondent firm with a clearing arrangement with any such clearing firm. *See* Rule 1.5(aa).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

just the one MPID necessary to participate on the Exchange.

The Exchange also believes that assessing a fee on additional MPIDs continues to be reasonably designed to promote efficiency in MPID use. When the Exchange first implemented the current MPID Fee,[10] it observed as a result that Members were incentivized to more effectively administer their MPIDs and reduce the number of under-used or superfluous MPIDs, or MPIDs that did not contribute additional value to a Member's participation on the Exchange. Reduction of such MPIDs, in turn, reduces Exchange resources allocated to administration and maintenance of those MPIDs. In particular, the Exchange observed that within the first few months of introducing the previous MPID Fee, the number of MPIDs on the Exchange decreased by approximately 17%, demonstrating that Members may choose to be more efficient in their use of MPIDs in response to an MPID Fee, such as that proposed in this fee change.[11]

The Exchange further believes the proposed MPID Fee change is reasonable because the amount assessed continues to be less than the analogous fees charged by at least one other market; namely, Nasdaq Stock Market LLC (''Nasdaq'').[12] The Exchange's proposed MPID Fee increase to $250 a month per MPID, with no charge associated with a Members' first MPID, continues to be lower than Nasdaq's MPID fee of $550 per MPID, which is charged for all MPIDs used by a Nasdaq member, including a member's first MPIDs.

The Exchange believes that the proposed MPID Fee change is equitable and not unfairly discriminatory because it will apply equally to all Members that choose to employ two or more MPIDs based on the number of additional MPIDs that they use to facilitate their trading on the Exchange. As stated, additional MPIDs beyond a Member's first MPID are optional, and Members may choose to trade using such additional MPIDs to achieve additional benefits and added value to support their individual business needs. Moreover, the Exchange believes the proposed fee is equitable and not unfairly discriminatory because it is proportional to the potential value or benefit received by Members with a greater number of MPIDs. That is, those Members that choose to employ a greater number of additional MPIDs have the opportunity to more effectively manage firm-wide trading activity and client-level administration, as well as potentially appeal to customers through the use of separate MPIDs, which may result in increased order flow through a Sponsoring Member. A Member may request at any time that the Exchange terminate an MPID, including MPIDs that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed change will apply equally to all Members that choose to employ additional MPIDs and equally to each additional MPID. As stated, additional MPIDs are optional and Members may choose to utilize additional MPIDs, or not, based on their view of the additional benefits and added value provided by utilizing the single MPID necessary to participate on the Exchange. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Members with a greater number of MPIDs and notes that a Member may continue to request at any time that the Exchange terminate any MPID, including those that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market, including competition for exchange memberships. Members have numerous alternative venues that they may participate on, including 15 other equities exchanges, as well as off-exchange venues, including alternative trading systems, where competitive products are available for trading. Indeed, participants can readily choose to submit their order flow to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In addition to this the Exchange notes that at least one other exchange currently has higher MPID fees in place, which have been previously filed with the Commission. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[14] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and paragraph (f) of Rule 19b–4 [16] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[10] *See* Securities and Exchange Release No. 90964 (January 21, 2021), 86 FR 7324 (January 27, 2021) (SR–CboeEDGA–2021–004).

[11] The reduction in MPIDs may also demonstrate that Members are free to cancel MPIDs on the Exchange and choose, instead, to utilize unique identifiers associated with participation on other exchanges.

[12] *See* Nasdaq Price List, MPID Fees, available at *https://nasdaqtrader.com/Trader.aspx?id=PriceList Trading2.*

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[14] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGA–2024–011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGA–2024–011. 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–CboeEDGA–2024–011 and should be submitted on or before May 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08358 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–86, OMB Control No. 3235–0080]

Submission for OMB Review; Comment Request; Extension: Rule 12d2–2 and Form 25

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 12d2–2 (17 CFR 240.12d2–2) and Form 25 (17 CFR 249.25) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

On February 12, 1935, the Commission adopted Rule 12d2–2 [1] and Form 25, under the Securities Exchange Act of 1934 (''Act''), to establish the conditions and procedures under which a security may be delisted from an exchange and withdrawn from registration under Section 12(b) of the Act.[2] The Commission adopted amendments to Rule 12d2–2 and Form 25 in 2005.[3] Under the amended Rule 12d2–2, all issuers and national securities exchanges seeking to delist and deregister a security in accordance with the rules of an exchange must file the adopted version of Form 25 with the Commission. The Commission also adopted amendments to Rule 19d–1 under the Act to require exchanges to file the adopted version of Form 25 as notice to the Commission under Section 19(d) of the Act. Finally, the Commission adopted amendments to exempt standardized options and security futures products from Section 12(d) of the Act. These amendments were intended to simplify the paperwork and procedure associated with a delisting and to unify general rules and procedures relating to the delisting process.

Form 25 is useful because it informs the Commission and members of the public that a security previously traded on an exchange is no longer traded. In addition, Form 25 enables the Commission to verify that the delisting and/or deregistration has occurred in accordance with the rules of the exchange. Further, Form 25 helps to focus the attention of delisting issuers to make sure that they abide by the proper procedural and notice requirements associated with a delisting and/or deregistration. Without Rule 12d2–2 and Form 25, as applicable, the Commission would be unable to fulfill its statutory responsibilities.

There are 24 national securities exchanges that could possibly be respondents complying with the requirements of Rule 12d2–2 and Form 25.[4] The burden of complying with Rule 12d2–2 and Form 25 is not evenly distributed among the exchanges, however, since there are many more securities listed on the New York Stock Exchange, the NASDAQ Stock Market, and NYSE American than on the other exchanges. However, for purposes of this filing, the Commission staff has assumed that the number of responses is evenly divided among the exchanges. Since approximately 985 responses under Rule 12d2–2 and Form 25 for the purpose of delisting and/or deregistration of equity securities are received annually by the Commission from the national securities exchanges, the resultant aggregate annual reporting hour burden would be, assuming on average one hour per response, 985 annual burden hours for all exchanges (24 exchanges × an average of 41.04 responses per exchange × 1 hour per response). In addition, since approximately 117 responses are received by the Commission annually from issuers wishing to remove their

[17] 17 CFR 200.30–3(a)(12).

[1] *See* Securities Exchange Act Release No. 98 (Feb. 12, 1935).

[2] *See* Securities Exchange Act Release No. 7011 (Feb. 5, 1963), 28 FR 1506 (Feb. 16, 1963).

[3] *See* Securities Exchange Act Release No. 52029 (Jul. 14, 2005), 70 FR 42456 (Jul. 22, 2005).

[4] The staff notes that a few of these 24 registered national securities exchanges only have rules to permit the listing of standardized options, which are exempt from Rule 12d2–2 under the Act. Nevertheless, the staff counted national securities exchanges that can only list options as potential respondents because these exchanges could potentially adopt new rules, subject to Commission approval under Section 19(b) of the Act, to list and trade equity and other securities that have to comply with Rule 12d2–2 under the Act. Notice registrants that are registered as national securities exchanges solely for the purposes of trading securities futures products have not been counted since, as noted above, securities futures products are exempt from complying with Rule 12d–2–2 under the Act and therefore do not have to file Form 25.

securities from listing and registration on exchanges, the Commission staff estimates that the aggregate annual reporting hour burden on issuers would be, assuming on average one reporting hour per response, 117 annual burden hours for all issuers (117 issuers × 1 response per issuer × 1 hour per response). Accordingly, the total annual hour burden for all respondents to comply with Rule 12d2–2 is 1,102 hours (985 hours for exchanges + 117 hours for issuers). The total related internal compliance cost associated with these burden hours is $269,852 ($226,796 for exchanges plus $43,056 for issuers).

The collection of information obligations imposed by Rule 12d2–2 and Form 25 are mandatory. The response will be available to the public and will not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by May 20, 2024 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street, NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: April 16, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08381 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99955; File No. SR–MIAX–2024–20]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Fees and Rebates for QCC and cQCC Orders

April 15, 2024.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 8, 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 is filing a proposal to amend the MIAX Fee Schedule (''Fee Schedule'') to amend fees and rebates for QCC and cQCC Orders. The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/all-options-exchanges/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 Sections 1)a)vii)–viii) of the Fee Schedule to modify certain fees and rebates applicable to Qualified Contingent Cross (''QCC'') Orders and Complex Qualified Contingent Cross (''cQCC'') Orders (defined and described below). The Exchange previously filed this proposal on March 28, 2024 (SR–MIAX–2024–18). On April 8, 2024, the Exchange withdrew SR–MIAX–2024–18 and resubmitted this proposal.

Background

A QCC Order is comprised of an originating order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade, coupled with a contra-side order or orders totaling an equal number of contracts.[3] A ''qualified contingent trade'' is a transaction consisting of two or more component orders, executed as agent or principal, where: (a) at least one component is an NMS Stock, as defined in Rule 600 of Regulation NMS under the Exchange Act; (b) all components are effected with a product or price contingency that either has been agreed to by all the respective counterparties or arranged for by a broker-dealer as principal or agent; (c) the execution of one component is contingent upon the execution of all other components at or near the same time; (d) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined by the time the contingent order is placed; (e) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or cancelled; and (f) the transaction is fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade.[4]

Section 1)a)vii) of the Fee Schedule provides certain fees and rebates applicable to QCC Orders. Currently, the Exchange provides rebates to the Member[5] firm that enters the QCC Order into the MIAX System,[6] with the rebates only paid on the initiating side (the ''initiator'') of the QCC transaction. However, no rebates are paid for QCC Orders for which both the initiator and contra-side orders are Priority Customers.[7] The Exchange notes that with regard to order entry, the first order submitted into the System is marked as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 516(j).

[4] *See* Exchange Rule 516, Interpretation and Policy .01.

[5] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[6] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[7] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). The number of orders shall be counted in accordance with the Interpretation and Policy .01. *See* Exchange Rule 100.

the initiating side and the second order is marked as the contra-side.

A cQCC Order is comprised of an originating complex order[8] to buy or sell where each component is at least 1,000 contracts that is identified as being part of a qualified contingent trade[9] coupled with a contra-side complex order or orders totaling an equal number of contracts.[10]

Section 1)a)viii) of the Fee Schedule provides certain fees and rebates applicable to cQCC Orders. Currently, for cQCC Orders, all fees and rebates are per contract per leg. The Exchange provides rebates to the Member firm that enters the order into the MIAX System, with rebates only paid on the initiating side of the cQCC Order. However, no rebates are paid for cQCC Orders for which both the initiator and contra-side orders are Priority Customers.

Proposal To Amend QCC Order Fees and Rebates

The Exchange proposes to amend the fees and rebates applicable to QCC Orders. Currently, the Exchange assesses initiator fees as follows: $0.00 per contract for the Priority Customer origin; and $0.15 per contract for all other market participant origins (*i.e.,* a Public Customer[11] that is not a Priority Customer, MIAX Market Makers,[12] non-MIAX Market Makers, non-Member Broker-Dealers, and Firm).[13] The Exchange assesses contra-side fees as follows: $0.00 per contract for the Priority Customer origin; and $0.17 per contract for all other types of market participant origins. The Exchange provides an initiator rebate of $0.14 per contract for all origins. The Exchange also provides the following initiator rebates when the contra-side is an origin other than a Priority Customer: $0.14 per contract for a Priority Customer; $0.27 per contract for a Public Customer that is not a Priority Customer; and $0.22 per contact for a Professional.

First, the Exchange proposes to clarify and amend the fees for initiators of a QCC Order so that the per contract side will be stated in the heading of the first column of fees in the table for QCC Orders. The Exchange proposes to assess initiator fees for all market participant origins, except the Priority Customer origin, as follows: $0.12 per contract side for the Public Customer that is not a Priority Customer origin; and $0.20 per contract side for Professional origins. The Exchange does not propose to charge an initiator fee for the Priority Customer origin.

Next, the Exchange proposes to clarify and amend the fees for the contra-side of a QCC Order so that the per contract side will be stated in the heading of the second column of fees in the table for QCC Orders. The Exchange proposes to assess contra-side fees for all market participant origins, except the Priority Customer origin, as follows: $0.12 per contract side for the Public Customer that is not a Priority Customer origin; and $0.20 per contract side for Professional origins.

Next, the Exchange proposes to amend the columns for rebates to clarify that rebates are paid to the Electronic Exchange Member (''EEM'')[14] that entered the QCC Order, depending upon the origin type and the origin type on the contra-side. In particular, the Exchange proposes to amend the heading of the third column of rebates in the table for QCC Orders to now state as follows: ''Per Contract Rebate for EEM when Contra is a Priority Customer''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is a Priority Customer: $0.00 per contract for the Priority Customer origin; $0.07 per contract for the Public Customer that is not a Priority Customer origin; and $0.17 per contract for Professional origins. The Exchange also proposes to amend the heading of the fourth column of rebates in the table for QCC Orders to now state as follows: ''Per Contract Rebate for EEM when Contra is a Public Customer that is not a Priority Customer''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is a Public Customer that is not Priority Customer: $0.07 per contract for the Priority Customer origin; $0.17 per contract for the Public Customer that is not a Priority Customer origin; and $0.25 per contract for Professional origins. Finally, the Exchange proposes to create a new fifth column of rebates in the table for QCC Orders, which will state as follows: ''Per Contract Rebate for EEM when Contra is all Other Origins''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is all other origins (*i.e.,* neither a Priority Customer nor a Public Customer that is not a Priority Customer): $0.17 per contract for the Priority Customer origin; $0.25 per contract for the Public Customer that is not a Priority Customer origin; and $0.30 per contract for Professional origins.

The Exchange also proposes to amend the notes below the table of fees and rebates for QCC Orders. The Exchange proposes to specify that per contract rebates will be paid to the EEM that enters the QCC Order into the MIAX System. In connection with this change, the Exchange proposes to delete the following sentences as they are no longer applicable in light of the changes described above: ''Rebates will be delivered to the Member firm that enters the order into the MIAX system, but will only be paid on the initiating side of the QCC transaction. However, no rebates will be paid for QCC transactions for which both the initiator and contra-side orders are Priority Customers.'' The Exchange notes that these are non-substantive changes to remove redundant information, which is already provided in the table of fees and rebates for QCC Orders. The Exchange believes that the way the table of fees and rebates for QCC Orders is arranged more clearly expresses these two points. The Exchange also proposes to delete the references to mini-option contracts as the Exchange no longer offers mini-option contracts.

Proposal To Amend cQCC Order Fees and Rebates

The Exchange proposes to amend the fees and rebates applicable to cQCC Orders, which are assessed per contract per leg. Currently, the Exchange assesses initiator fees as follows: $0.00 per contract for the Priority Customer origin; and $0.15 per contract for all other market participant origins. The Exchange assesses contra-side fees as follows: $0.00 per contract for the Priority Customer origin; and $0.17 per contract for all other types of market participant origins. The Exchange provides an initiator rebate of $0.14 per contract for all origins. The Exchange also provides the following initiator rebates when the contra-side is an origin other than a

[8] In sum, a ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order), for the same account, in a conforming or non-conforming ratio for the purposes of executing a particular investment strategy. *See* Exchange Rule 518(a)(5). A complex order can also be a ''stock-option order'' with a conforming or non-conforming ratio as defined in Exchange Rule 518. *See id.*

[9] *See supra* note 4.

[10] Trading of cQCC Orders is governed by Exchange Rule 515(h)(4).

[11] The term ''Public Customer'' means a person that is not a broker or dealer in securities. *See* Exchange Rule 100.

[12] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[13] For the purposes of this filing, the origins comprising MIAX Market Makers, non-MIAX Market Makers, non-Member broker-dealers and firms will be referred to as ''Professional.''

[14] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

Priority Customer: $0.14 per contract for a Priority Customer; $0.27 per contract for a Public Customer that is not a Priority Customer; and $0.22 per contact for Professionals.

The Exchange proposes to clarify and amend the fees for initiators of a cQCC Order so that the per contract side will be stated in the heading of the first column of fees in the table for cQCC Orders. The Exchange proposes to assess initiator fees for all market participants, except the Priority Customer origin, as follows: $0.12 per contract side for the Public Customer that is not a Priority Customer origin; and $0.20 per contract side for Professional origins. The Exchange does not propose to charge an initiator fee for the Priority Customer origin.

Next, the Exchange proposes to clarify and amend the fees for the contra-side of a cQCC Order so that the per contract side will be stated in the heading of the second column of fees in the table for cQCC Orders. The Exchange proposes to assess contra-side fees for all market participants, except the Priority Customer origin, as follows: $0.12 per contract side for the Public Customer that is not a Priority Customer origin; and $0.20 per contract side for Professional origins.

Next, the Exchange proposes to amend the columns for rebates to clarify that rebates are paid to the EEM that entered the cQCC Order, depending upon the origin type and the origin type on the contra-side. In particular, the Exchange proposes to amend the heading of the third column of rebates in the table for cQCC Orders to now state as follows: ''Per Contract Rebate for EEM when Contra is a Priority Customer''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is a Priority Customer: $0.00 per contract for the Priority Customer origin; $0.07 per contract for the Public Customer that is not a Priority Customer origin; and $0.17 per contract for Professional origins. The Exchange also proposes to amend the heading of the fourth column of rebates in the table for cQCC Orders to now state as follows: ''Per Contract Rebate for EEM when Contra is a Public Customer that is not a Priority Customer''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is a Public Customer that is not Priority Customer: $0.07 per contract for the Priority Customer origin; $0.17 per contract for the Public Customer that is not a Priority Customer origin; and $0.25 per contract for Professional origins. Finally, the Exchange proposes to create a new fifth column of rebates in the table for cQCC Orders, which will state as follows: ''Per Contract Rebate for EEM when Contra is all Other Origins''. The Exchange proposes to provide the following rebates for an EEM when the contra-side is all other origins (*i.e.,* neither a Priority Customer nor a Public Customer that is not a Priority Customer): $0.17 per contract for the Priority Customer origin; $0.25 per contract for the Public Customer that is not a Priority Customer origin; and $0.30 per contract for Professional origins.

The Exchange also proposes to amend the notes below the table of fees and rebates for cQCC Orders. The Exchange proposes to specify that per contract rebates will be paid to the EEM that enters the cQCC Order into the MIAX System. In connection with this change, the Exchange proposes to delete the following sentences as they are no longer applicable in light of the changes described above: ''Rebates will be delivered to the Member firm that enters the order into the MIAX system, but will only be paid on the initiating side of the cQCC transaction. However, no rebates will be paid for cQCC transactions for which both the initiator and contra-side orders are Priority Customers.'' The Exchange notes that these are non-substantive changes to remove redundant information, which is already provided in the table of fees and rebates for cQCC Orders. The Exchange believes that the way the table of fees and rebates for cQCC Orders is arranged more clearly expresses these two points.

The Exchange also proposes to add the following reference sentence at the end of the notes section following the table of fees and rebates for cQCC Orders: ''The stock handling fee for the stock leg of cQCC transactions is described in Section 1)a)x) of the Fee Schedule.'' The purpose of this change is clarify and help signal to market participants that the stock handling fees for the stock leg of cQCC transactions will continue to be contained in Section 1)a)x) of the Fee Schedule and that this proposal does not amend or change that fee.

The purpose of all of the changes to the fees and rebates for QCC Orders and cQCC Orders is for business and competitive reasons. The Exchange believes the proposed changes will increase competition and potentially attract additional QCC and cQCC Order flow from various origins to the Exchange, which will grow the Exchange's market share in this segment. The Exchange also believes it is appropriate to provide higher rebates for QCC and cQCC Orders for EEMs that trade against origins other than Priority Customer or Public Customer because Priority Customer and Public Customer QCC and cQCC Orders are already incentivized with reduced fees for the initiator and contra-side of such orders. The Exchange believes it is reasonable to provide higher rebates for all origins other than Priority Customer QCC and cQCC Orders for EEMs that trade against the Priority Customer origin because Priority Customer orders are already incentivized with no fees for the initiator and contra-side of such orders. The Exchange also notes that competing exchanges provide similar rebate and fee structures and amounts for QCC and cQCC Orders on those exchanges.[15]

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[16] in general, and furthers the objectives of Section 6(b)(4) of the Act[17] in particular, in that it is an equitable allocation of reasonable dues, 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

[15] *See e.g.,* BOX Exchange LLC (''BOX'') Fee Schedule (dated January 2, 2024), Section IV.D., Qualified Contingent Cross (''QCC'') Transactions, *available at https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-January-2-2024-2.pdf.* BOX does not assess any fee for QCC orders from public customers and professional customers and assesses broker-dealers and market makers a $0.20 fee per contract for their agency (originating) and contra-side QCC orders. BOX provides tiered rebates depending on the parties to each QCC transaction. For example, when only one side of a QCC transaction is a broker-dealer or market maker, BOX provides rebates ranging from $0.14 per contract to $0.17 per contract. When both parties to a QCC transaction are a broker-dealer or market maker (*i.e.,* professionals), BOX provides higher rebates ranging from $0.22 per contract to $0.27 per contract, similar to the Exchange's proposed rebate structure. *See also* NYSE American LLC (''NYSE American'') Options Exchange Fee Schedule (dated March 1, 2024), Section I.F., Qualified Contingent Cross (''QCC'') Fees & Credits, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.* NYSE American does not assess any fee for QCC orders from customers or professional customers and assesses market makers, firms and broker-dealers a $0.20 fee per contract side for their QCC orders. NYSE American provides rebates depending on the parties to each QCC transaction. For example, when a Floor Broker executes a customer or professional customer QCC order when the contra-side is a market maker, firm or broker-dealer, NYSE American provides a lower rebate of $0.12 per contract. When a Floor Broker executes a market maker, firm or broker-dealer QCC order when the contra-side is another market maker, firm or broker-dealer, NYSE American provides a higher rebate of $0.18 per contract.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

Section 6(b)(5) of the Act [18] 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 the proposed changes to the fees and rebates for QCC and cQCC Orders is reasonable because the Exchange believes the proposed changes will increase competition and potentially attract additional QCC and cQCC Order flow from various origins to the Exchange, which will grow the Exchange's market share in this segment. The Exchange also believes it is reasonable and not unfairly discriminatory to provide higher rebates for QCC and cQCC Orders for EEMs that trade against origins other than Priority Customer or Public Customer because Priority Customer and Public Customer QCC and cQCC Orders are already incentivized with reduced fees for the initiator and contra-side of such orders. The Exchange believes that it is equitable and not unfairly discriminatory to assess lower fees to Priority Customer QCC and cQCC Order than to Professional QCC and cQCC Orders because a Priority Customer is by definition not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).[19] This limitation does not apply to Professionals, who will generally submit a higher number of orders than Priority Customers. Further, the Exchange believes that it is equitable and not unfairly discriminatory that Priority Customer and Public Customer origins be treated differently than Professional origins, who are assessed higher fees for QCC and cQCC Orders. The exchanges, in general, have historically aimed to improve markets for investors and develop various features within their market structure for customer benefit. Priority Customer and Public Customer liquidity benefits all market participants by providing more trading opportunities. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange also believes its proposed fee and rebate structure is reasonable, equitably allocated and not unfairly discriminatory because competing exchanges provide similar rebate and fee structures and amounts for QCC and cQCC Orders on those exchanges.[20]

Further, the Exchange believes its proposal provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory since the Exchange has different net transaction revenues based on different combinations of origins and contra-side orders. For example, when a Priority Customer is both the initiator and contra-side, no rebates are paid (for both QCC and cQCC transactions). This combination is in the current version of the Exchange's Fee Schedule and in competitors' fee schedules as well.[21] The Exchange notes that Priority Customers are generally assessed a $0.00 transaction fee. Accordingly, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to provide the proposed higher EEM rebates for QCC and cQCC Orders for Public Customer and Professional origins when they trade against an origin other than Priority Customer, in order to increase competition and potentially attract different combinations of additional QCC and cQCC Order flow to the Exchange. The Exchange also believes it is reasonable, equitable, and not unfairly discriminatory to continue to provide higher rebates for EEMs for QCC and cQCC Orders for Professionals when they trade against origins other than Priority Customers or Public Customers because Priority Customers and Public Customers are already incentivized by reduced fees for submitting QCC and cQCC Orders, as compared to Professionals that submit QCC and cQCC Orders.

The Exchange also believes its proposal is consistent with Section 6(b)(5) of the Act [22] and is designed to prevent fraudulent and manipulative acts and practices, promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in regulating, clearing, setting, processing information with respect to, and facilitating transaction in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest; and is not designed to permit unfair discrimination. This is because the Exchange believes the proposed changes will continue to incentivize QCC and cQCC Order flow and an increase in such order flow will bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads. To the extent QCC and cQCC Order flow is increased by the proposal, market participants will increasingly compete for the opportunity to trade on the Exchange including sending more orders and providing narrower and larger-sized quotations in the effort to trade with such order flow.

Cleanup

The Exchange believes its proposal to delete the references to mini-option contracts in the notes for QCC Orders is reasonable because the Exchange no longer offers mini-option contracts. Further, the Exchange believes its proposal to delete certain sentences from the notes sections below the tables of fees and rebates for QCC and cQCC Orders, as described above, are reasonable because they are non-substantive changes to remove redundant information, which is already provided in the tables of fees and rebates for QCC and cQCC Orders. The Exchange believes that the way the tables of fees and rebates for QCC and cQCC Orders are arranged more clearly expresses the point of the sentences that the Exchange proposes to delete. Accordingly, the proposed changes will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule, including by removing outdated references to mini-options, which no longer trade on the Exchange.

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 changes do not impose an undue burden on intra-market competition because the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. The Exchange believes that the proposed changes will encourage market participants to send their QCC and cQCC Orders to the Exchange for execution in order to obtain greater rebates and lower their costs. The Exchange believes the proposed changes to the fees and rebates for QCC and cQCC Orders will not impose an undue burden on intra-market competition because the proposed changes will increase competition and potentially

[18] 15 U.S.C. 78f(b)(5).

[19] *See supra* note 7.

[20] *See supra* note 15.

[21] *See id.*

[22] 15 U.S.C. 78f(b)(1) *and* (b)(5).

attract different combinations of additional QCC and cQCC order flow to the Exchange, which will grow the Exchange's market share in this segment. The Exchange's proposal to provide higher rebates for QCC and cQCC Orders for EEMs that trade against origins other than Priority Customer or Public Customer does not impose an undue burden on intra-market competition because Priority Customer and Public Customer QCC and cQCC Orders are already incentivized with reduced fees for such orders. The Exchange's proposed fee and rebate structure is similar to that of competing exchanges that offer QCC and cQCC transaction fees and rebates.[23]

Inter-Market Competition

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. There are currently 17 registered options exchanges competing for order flow. For the month of February 2024, based on publicly-available information, and excluding index-based options, no single exchange exceeded approximately 13–14% of the market share of executed volume of multiply-listed equity and exchange-traded fund (''ETF'') options.[24] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, for the month of February 2024, the Exchange had a total market share of 6.67% for all equity options volume.[25] In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because they modify the Exchange's fees in a manner that encourages market participants to provide QCC and cQCC liquidity and to send order flow to the Exchange. To the extent this is achieved, all the Exchange's market participants should benefit from the improved market quality.

Cleanup

The Exchange believes its proposal to delete the references to mini-option contracts in the notes for QCC Orders will not impose any burden on intra-market or inter-market competition because the Exchange does not offer mini-option contracts. Further, the Exchange believes its proposal to delete certain sentences from the notes sections below the tables of fees and rebates for QCC and cQCC Orders, as described above, will not impose any burden on intra-market or inter-market competition because they are non-substantive changes to remove redundant information, which is already provided in the tables of fees and rebates for QCC and cQCC Orders. The Exchange believes that the way the tables of fees and rebates for QCC and cQCC Orders are arranged more clearly expresses the point of the sentences that the Exchange proposes to delete. Accordingly, the proposed changes will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule by removing outdated references to mini-options, which no longer trade on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[26] and Rule 19b–4(f)(2)[27] 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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email *to rule-comments@sec.gov.* Please include File Number SR–MIAX–2024–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MIAX–2024–20. 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–2024–20 and should be submitted on or before May 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08354 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

[23] *See supra* note 15.

[24] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[25] *See id.*

[26] 15 U.S.C. 78s(b)(3)(A)(ii).

[27] 17 CFR 240.19b–4(f)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–095, OMB Control No. 3235–0084]

Proposed Collection; Comment Request; Extension: Rule 17Ac2–1

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17Ac2–1 (17 CFR 240.17Ac2–1), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17Ac2–1, pursuant to Section 17A(c) of the Exchange Act, generally requires transfer agents for whom the Commission is the transfer agent's Appropriate Regulatory Agency (''ARA''), to file an application for registration with the Commission on Form TA–1 and to amend their registrations under certain circumstances.

Specifically, Rule 17Ac2–1 requires transfer agents to file a Form TA–1 application for registration with the Commission where the Commission is their ARA. Such transfer agents must also amend their Form TA–1 if the existing information on their Form TA–1 becomes inaccurate, misleading, or incomplete within 60 days following the date the information became inaccurate, misleading, or incomplete. Registration filings on Form TA–1 and amendments thereto must be filed with the Commission electronically, absent an exemption, on EDGAR pursuant to Regulation S–T (17 CFR 232).

The Commission annually receives approximately 209 filings on Form TA–1 from transfer agents required to register as such with the Commission. Included in this figure are approximately 196 amendments made annually by transfer agents to their Form TA–1 as required by Rule 17Ac2–1(c) to address information that has become inaccurate, misleading, or incomplete and approximately 13 new applications by transfer agents for registration on Form TA–1 as required by Rule 17Ac2–1(a). Based on past submissions, the staff estimates that on average approximately twelve hours are required for initial completion of Form TA–1 and that on average one and one-half hours are required for an amendment to Form TA–1 by each such firm. Thus, the subtotal burden for new applications for registration filed on Form TA–1 each year is approximately 156 hours (12 hours times 13 filers = 156) and the subtotal burden for amendments to Form TA–1 filed each year is approximately 294 hours (1.5 hours × 196 filers = 294). The cumulative total is approximately 450 burden hours per year (156 hours plus 294 hours).

Of the approximately 450 hours per year associated with Rule 17Ac2–1, the Commission staff estimates that (i) sixty percent (270 hours) are spent by compliance staff at an estimated hourly wage of $344, for a total of $92,880 per year (270 hours × $344 per hour = $92,880 per year; (ii) forty percent (180 hours) are spent by attorneys at an estimated hourly wage of $462, for a total of $83,160 per year (180 hours × $462 per hour = $83,160 per year); and (iii) the total internal cost of compliance associated with the Rule is thus approximately $176,040 per year ($92,880 in compliance staff costs + $83,160 in attorney costs = $176,040 per year).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by June 18, 2024.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: April 16, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08413 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99960; File No. SR–CboeEDGX–2024–019]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

April 15, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2024, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (''EDGX Equities'') to increase its monthly fee assessed on Members' MPIDs. The Exchange proposes to implement these changes effective April 1, 2024.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange further notes that broker-dealers are not compelled to be Members of the Exchange, and a significant proportion of broker-dealers that trade U.S. equity securities have, in fact, chosen not to apply for membership on the Exchange.

By way of background, an MPID is a four-character unique identifier that is approved by the Exchange and assigned to a Member for use on the Exchange to identify the Member firm on the orders sent to the Exchange and resulting executions. Members may choose to request more than one MPID as a unique identifier(s) for their transactions on the Exchange. The Exchange notes that a Member may have multiple MPIDs for use by separate business units and trading desks or to support Sponsored Participant access.[4] Certain members currently leverage multiple MPIDs to obtain benefits from and added value in their participation on the Exchange. Multiple MPIDs provide unique benefits to and efficiencies for Members by allowing: (1) Members to manage their trading activity more efficiently by assigning different MPIDs to different trading desks and/or strategies within the firm; and (2) Sponsoring Members[5] to segregate Sponsored Participants by MPID to allow for detailed client-level reporting, billing, and administration, and to market the ability to use separate MPIDs to Sponsored Participants, which, in turn, may serve as a potential incentive for increased order flow traded through the Sponsoring Member.

The Exchange currently assesses a fee applicable to Members that use multiple MPIDs to facilitate their trading on the Exchange. Specifically, the Exchange assesses a monthly MPID Fee of $350 per MPID per Member, with a Member's first MPID provided free of charge. The MPID Fee is assessed on a pro-rated basis for new MPIDs by charging a Member based on the trading day in the month during which an additional MPID becomes effective for use. If a Member cancels an additional MPID on or after the first business day of the month, the Member will be required to pay the entire MPID Fee for that month.

The Exchange now proposes to increase the monthly MPID Fee from $350 per MPID per Member to $450 per MPID per Member. The Exchange believes the proposed increase continues to align with the additional value and benefits provided to Members that choose to utilize more than one MPID to facilitate their trading on the Exchange. The Exchange also believes that continuing to assess a fee on additional MPIDs will be beneficial because such fee will promote efficiency in MPID use.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)[9] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient.

The Exchange believes that the proposed MPID Fee is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the benefits provided to Members that choose to utilize multiple MPIDs to facilitate their trading on the Exchange. While each Member must have an MPID to participate on the Exchange, additional MPIDs are optional and will be assessed the fee, as amended. Additional MPIDs currently allow for Members to realize certain benefits from and added value to their participation on the Exchange but also require the Exchange to allocate additional administrative resources to manage each MPID that a Member chooses to use for its trading activity. Therefore, the Exchange believes that it is reasonable to assess a modest fee on any additional MPIDs that Members choose to use to facilitate their trading. The Exchange again notes that it is optional for a Member to request and employ additional MPIDs, and a large portion (approximately 69%) of the Exchange's Members currently utilize just the one MPID necessary to participate on the Exchange.

The Exchange also believes that assessing a fee on additional MPIDs

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (March 20, 2024), available at *https://www.cboe.com/us/equities/market_statistics/*.

[4] A Sponsored Participant is a person which has entered into a sponsorship arrangement with a Sponsoring Member pursuant to Rule 11.3, which permits a Sponsored Participant to obtain authorized access to the System only if such access is authorized in advance by one or more Sponsoring Members. *See* Rules 1.5(z) and 11.3.

[5] A Sponsoring Member is a Member that is a registered broker-dealer and that has been designated by a Sponsored Participant to execute, clear and settle transactions resulting from the System. The Sponsoring Member shall be either (i) a clearing firm with membership in a clearing agency registered with the Commission that maintains facilities through which transactions may be cleared or (ii) a correspondent firm with a clearing arrangement with any such clearing firm. See Rule 1.5(aa)

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

continues to be reasonably designed to promote efficiency in MPID use. When the Exchange first implemented the current MPID Fee,[10] it observed as a result that Members were incentivized to more effectively administer their MPIDs and reduce the number of under-used or superfluous MPIDs, or MPIDs that did not contribute additional value to a Member's participation on the Exchange. Reduction of such MPIDs, in turn, reduces Exchange resources allocated to administration and maintenance of those MPIDs. In particular, the Exchange observed that within the first few months of introducing the previous MPID Fee, the number of MPIDs on the Exchange decreased by approximately 14%, demonstrating that Members may choose to be more efficient in their use of MPIDs in response to an MPID Fee, such as that proposed in this fee change.[11]

The Exchange further believes the proposed MPID Fee change is reasonable because the amount assessed continues to be less than the analogous fees charged by at least one other market; namely, Nasdaq Stock Market LLC (''Nasdaq'').[12] The Exchange's proposed MPID Fee increase to $450 a month per MPID, with no charge associated with a Members' first MPID, continues to be lower than Nasdaq's MPID fee of $550 per MPID, which is charged for all MPIDs used by a Nasdaq member, including a member's first MPIDs.

The Exchange believes that the proposed MPID Fee change is equitable and not unfairly discriminatory because it will apply equally to all Members that choose to employ two or more MPIDs based on the number of additional MPIDs that they use to facilitate their trading on the Exchange. As stated, additional MPIDs beyond a Member's first MPID are optional, and Members may choose to trade using such additional MPIDs to achieve additional benefits and added value to support their individual business needs. Moreover, the Exchange believes the proposed fee is equitable and not unfairly discriminatory because it is proportional to the potential value or benefit received by Members with a greater number of MPIDs. That is, those Members that choose to employ a greater number of additional MPIDs have the opportunity to more effectively manage firm-wide trading activity and client-level administration, as well as potentially appeal to customers through the use of separate MPIDs, which may result in increased order flow through a Sponsoring Member. A Member may request at any time that the Exchange terminate an MPID, including MPIDs that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

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 intramarket competition that is not necessary in furtherance of the purposes of the Act because the proposed change will apply equally to all Members that choose to employ additional MPIDs and equally to each additional MPID. As stated, additional MPIDs are optional and Members may choose to utilize additional MPIDs, or not, based on their view of the additional benefits and added value provided by utilizing the single MPID necessary to participate on the Exchange. The Exchange believes the proposed fee will be assessed proportionately to the potential value or benefit received by Members with a greater number of MPIDs and notes that a Member may continue to request at any time that the Exchange terminate any MPID, including those that may be under-used or superfluous, or that do not contribute additional value to a Member's participation on the Exchange.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market, including competition for exchange memberships. Members have numerous alternative venues that they may participate on, including 15 other equities exchanges, as well as off-exchange venues, including alternative trading systems, where competitive products are available for trading. Indeed, participants can readily choose to submit their order flow to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In addition to this the Exchange notes that at least one other exchange currently has higher MPID fees in place, which have been previously filed with the Commission. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[14] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and paragraph (f) of Rule 19b–4 [16] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of

[10] *See* Securities and Exchange Release No. 90970 (January 22, 2021), 86 FR 7440 (January 28, 2021) (SR–CboeEDGX–2021–007).

[11] The reduction in MPIDs may also demonstrate that Members are free to cancel MPIDs on the Exchange and choose, instead, to utilize unique identifiers associated with participation on other exchanges.

[12] *See* Nasdaq Price List, MPID Fees, available at *https://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2*.

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[14] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGX–2024–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2024–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2024–019 and should be submitted on or before May 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–08355 Filed 4–18–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20272 and #20273; CALIFORNIA Disaster Number CA–20012]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of California (FEMA–4769–DR), dated 04/13/2024.

Incident: Severe Winter Storms, Tornadoes, Flooding, Landslides, and Mudslides.

Incident Period: 01/31/2024 through 02/09/2024.

DATES: Issued on 04/13/2024.

Physical Loan Application Deadline Date: 06/12/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/13/2025.

ADDRESSES: Visit the MySBA Loan Portal at *https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/13/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Butte, Glenn, Los Angeles, Monterey, San Luis Obispo, Santa Barbara, Santa Cruz, Sutter, Ventura.

[17] 17 CFR 200.30–3(a)(12).

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 202729 and for economic injury is 202730.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator,Office of Disaster Recovery & Resilience.

[FR Doc. 2024–08400 Filed 4–18–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20221 and #20222; New Hampshire Disaster Number NH–20003]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New Hampshire

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Hampshire (FEMA–4761–DR), dated 02/27/2024.

Incident: Severe Storms and Flooding.

Incident Period: 12/17/2023 through 12/21/2023.

DATES: Issued on 02/27/2024.

Physical Loan Application Deadline Date: 04/29/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 11/27/2024.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Vanessa Morgan, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 02/27/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online

using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Carroll, Coos, Grafton.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere ...	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere ...	3.250

The number assigned to this disaster for physical damage is 202216 and for economic injury is 202220.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–08407 Filed 4–18–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20185 and #20186; Maine Disaster Number ME–20004]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Maine

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Maine (FEMA–4754–DR), dated 01/30/2024.

Incident: Severe Storms and Flooding.

Incident Period: 12/17/2023 through 12/21/2023.

DATES: Issued on 02/28/2024.

Physical Loan Application Deadline Date: 04/01/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 10/30/2024.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of MAINE, dated 01/30/2024, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Kennebec.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–08404 Filed 4–18–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20260 and #20261; Washington Disaster Number WA–20007]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Washington

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Washington (FEMA–4759–DR), dated 04/03/2024.

Incident: Wildfires.

Incident Period: 08/18/2023 through 08/25/2023.

DATES: Issued on 04/03/2024.

Physical Loan Application Deadline Date: 06/03/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/03/2025.

ADDRESSES: Visit the MySBA Loan Portal at *https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/03/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Spokane, Whitman.

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.375
Non-Profit Organizations without Credit Available Elsewhere ...	2.375
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere ...	2.375

The number assigned to this disaster for physical damage is 202605 and for economic injury is 202610.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–08408 Filed 4–18–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20270 and #20271; OREGON Disaster Number OR–20003]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Oregon

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Oregon (FEMA–4768–DR), dated 04/13/2024.

Incident: Severe Winter Storms, Straight-line Winds, Landslides, and Mudslides.

Incident Period: 01/10/2024 through 01/22/2024.

DATES: Issued on 04/13/2024.

Physical Loan Application Deadline Date: 06/12/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/13/2025.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster

Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/13/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Benton, Clackamas, Coos, Hood River, Lane, Lincoln, Linn, Multnomah, Sherman, Tillamook, Wasco, and the Confederated Tribes of Siletz Indians.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 202709 and for economic injury is 202710.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–08397 Filed 4–18–24; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12379]

Exchange Visitor Program

ACTION: Notice of a Memorandum of Cooperation (MOC) between the Government of the United States and the Government of Japan and waiver of a regulatory requirement.

SUMMARY: In accordance with the requirements of the Exchange Visitor Program regulations, the Assistant Secretary for Educational and Cultural Affairs (ECA), U.S. Department of State, has waived a regulatory provision to establish an international exchange program to promote closer cooperation between the people of Japan and the people of the United States. The program authorizes an exception under the Specialist category regulations to permit Japanese language and culture specialists to stay up to 36 months in the United States on a J–1 visa.

DATES: This action was effective on April 5, 2024.

FOR FURTHER INFORMATION CONTACT: Rebecca Pasini, Deputy Assistant Secretary for Private Sector Exchange at 2200 C Street NW, SA–5, 5th Floor, Washington, DC 20522 via telephone: (202) 826–4364, or via email: *JExchanges@state.gov.*

SUPPLEMENTARY INFORMATION: The United States and Japan have established a new program in accordance with existing Exchange Visitor Program regulations (22 CFR part 62), including regulations applying to the Specialist category (22 CFR 62.26). Through the program, the United States supports the purposes of the Fulbright-Hayes Act by facilitating the exchange of Japanese language and culture specialists to observe U.S. institutions and methods of practice in their educational fields and to share their specialized knowledge of Japanese education with their U.S. colleagues. The Japan Specialist Program will expand educational and cultural exchange opportunities between the people of the United States and Japan, promote the interchange of knowledge and skills among foreign and U.S. specialists, and foster long-term mutual understanding and international cooperation with U.S. communities across the United States. The MOC will authorize an exception under the Specialist category of the Exchange Visitor Program regulations to permit qualifying Japanese specialists to conduct their programs for up to 36 months in the United States on a J–1 visa.

During their program, exchange visitors from Japan will share their specialized knowledge of Japanese language and education in the United States at community based, non-profit organizations, U.S. Government offices, secondary schools, or post-secondary academic institutions offering Japanese, and similar types of institutions to increase U.S. local communities' understanding of Japan, its culture, and language. Selected experts in Japanese culture and language will gain a better understanding of U.S. culture and society and promote mutual enrichment by enhancing U.S. knowledge of Japanese culture, language, and educational systems.

Consistent with this program, the Assistant Secretary for Educational and Cultural Affairs waives certain provisions set forth in 22 CFR 62.26. Regulations at 22 CFR 62.26(i) provide that specialists shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete the program, which shall not exceed one year. Accordingly, the Department waives subsection (i) of 22 CFR 62.26 with respect to this program to allow participants to conduct their programs for up to 36 months.

Lee A. Satterfield,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2024–08410 Filed 4–18–24; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 12380]

Notice of Public Meeting: International Information and Communications Policy Division Stakeholder Briefing

ACTION: Notice of public meeting.

SUMMARY: The State Department will hold a public meeting at 2 p.m.—3:30 p.m. (ET) on WebEx with the Bureau of Cyberspace and Digital Policy's International Information and Communications Policy (CDP/ICP) division. The purpose of the meeting is to brief stakeholders on CDP/ICP's past and upcoming international engagements. These include engagement at the United Nations, International Telecommunication Union (ITU), the Organization of American States Inter-American Telecommunication Commission (CITEL), the Organization for Economic Cooperation and Development (OECD), the Asia Pacific Economic Cooperation (APEC) Forum Telecommunications and Information Working Group, the Group of Seven (G7) Digital & Tech Working Group, the Group of Twenty (G20) Digital Economy Working Group, and other multilateral processes and bilateral digital and ICT dialogues.

DATES: The meeting will be on May 13, 2024.

FOR FURTHER INFORMATION CONTACT: Please contact Daniel Oates, Global Technology Policy Advisor, CDP/ICP, at *OatesDM@state.gov* or 202–436–5516.

SUPPLEMENTARY INFORMATION: Additional information about the

Bureau of Cyberspace and Digital Policy is accessible at *https://www.state.gov/bureaus-offices/deputy-secretary-of-state/bureau-of-cyberspace-and-digital-policy/.*

We encourage anyone wanting to attend this virtual meeting to register using the following link by 5 p.m. Thursday, May 9: *https://statedept.webex.com/weblink/register/r1998313a5baf14626f69e67867736ed1.*

Requests for reasonable accommodation made after April 29 will be considered but might not be able to be accommodated. The public may have an opportunity to provide comments at this meeting.

Agenda

Monday, May 13, at 2 p.m. (ET)

Opening Remarks
Briefings on CDP/ICP's past and upcoming activities
Public Comment
Adjournment

(Authority: 5 U.S.C. 552 and 22 U.S.C. 2707)

Stephan A. Lang,

Deputy Assistant Secretary, International Information and Communications Policy, Bureau of Cyberspace and Digital Policy, Department of State.

[FR Doc. 2024–08352 Filed 4–18–24; 8:45 am]

BILLING CODE 4710–10–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36763]

The Lowville & Beaver River Railroad Company—Acquisition Exemption—Lewis County Industrial Development Agency

The Lowville & Beaver River Railroad Company (LBRR) has filed a verified notice of exemption pursuant to 49 CFR 1150.41 [1] for authority after-the-fact to acquire approximately 10.61 miles of rail line between milepost 0.0 and milepost 10.57 between the Village of Lowville, N.Y., and the Village of Croghan, N.Y., including a secondary branch line of 0.4 miles extending towards Beaver Falls, N.Y.,[2] in Lewis County, N.Y. (the Line).

According to LBRR, it had been leasing the Line from the Lewis County Industrial Development Agency (LCID) since 1991 but the lease expired on December 31, 2015. LBRR states that the terms of the lease gave LCID authority to convey title to the Line to LBRR upon expiration of the lease, and when the parties were unable to reach an agreement to extend the lease, a deed was recorded conveying title of the Line to LBRR in July 2016. LBRR now seeks after-the-fact Board authorization for its 2016 acquisition. LBRR states that it intends to abandon the Line and to sell it to Lewis County, which intends to build a recreational trail on the right of way.[3]

LBRR certifies that it will not be subject to any limitations on its ability to interchange with a third-party connecting carrier. LBRR also certifies that its projected annual revenues are not expected to exceed $5 million and that the proposed transaction will not result in LBRR's becoming a Class I or Class II rail carrier.

The effective date of this exemption will be May 4, 2024 (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than April 26, 2024 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36763, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street, SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on LBRR's representative, John K. Fiorilla, Esq., Dyer & Peterson PC, 605 Main Street, Suite 104, Riverton, NJ 08077–1440.

According to LBRR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: April 15, 2024.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2024–08412 Filed 4–18–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No.: FAA–2024–0919; Summary Notice No.—2024–15]

Petition for Exemption; Summary of Petition Received; Moore County Airport

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before May 9, 2024.

ADDRESSES: Send comments identified by docket number FAA–2024–0919 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey

[1] LBRR states that it is seeking an operation exemption pursuant to 49 CFR 1150.31. However, because LBRR is already a Class III carrier, it must seek this authority pursuant to 49 CFR 1150.41. As such, the notice will be considered filed under 49 CFR 1150.41 instead.

[2] By decision in *The Lowville & Beaver River Railroad Co.—Abandonment Exemption—in Lewis County, N.Y.,* AB 180X (STB served Jan. 22, 2024), the Board directed LBRR to clarify the location of the 1.15-mile branch line at Beaver Falls that was referenced in Docket No. FD 31825. Specifically, the Board directed LBRR to clarify whether that line is the same one as the 0.40-mile rail line shown on the Federal Rail Administration (FRA) Safety Map that branches off from the Lowville-Croghan Line at Deveines Road, extends northward over a bridge on the Beaver River, and then terminates in Beaver Falls. In a supplemental environmental and historic report filed in that docket, LBRR refers to the line shown on the FRA Safety Map as the ''Beaver Falls Branch.'' Although LBRR does not explain the reference in Docket No. FD 31825 to the 1.15-mile branch line, the Board presumes that the lines are the same.

[3] On September 11, 2023, the Mohawk, Adirondack & Northern Railroad Corporation filed a verified notice of exemption to abandon a connected line, the Lowville-Carthage Line, as well as a separate segment, the Lyons Falls Track, in *Mohawk, Adirondack & Northern Railroad Corp.—Abandonment Exemption—in Lewis & Jefferson Counties, N.Y.,* AB 768X. The next day, LBRR filed a verified notice of exemption to abandon the Line in *The Lowville & Beaver River Railroad—Abandonment Exemption—in Lewis County, N.Y.,* AB 180X. By decision served on January 22, 2024, those dockets were held in abeyance and the carriers were directed to take certain actions, one of which was for LBRR to seek after-the-fact authority to acquire the Line. The issuance of this notice does not alter the status of either of those abandonment proceedings; both abandonment dockets remain in abeyance pending further Board order in those dockets.

Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Nia Daniels, (202) 267–7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

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

Brandon L. Roberts,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2024–0919.

Petitioner: Moore County Airport.

Section of 14 CFR Affected: 139.101.

Description of Relief Sought: Moore County Airport (KSOP) petitions for an exemption from 14 Code of Federal Regulations § 139.101 to allow it to permit certain unscheduled air carrier operations at KSOP at limited times during the week of the US Golf Association, US Open Pinehurst Resort June 10 through June 17, 2024.

[FR Doc. 2024–08425 Filed 4–18–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No.: FAA–2024–0960; Summary Notice No. 2024–13]

Petition for Exemption; Summary of Petition Received; Delta Air Lines, Inc.

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before May 9, 2024.

ADDRESSES: Send comments identified by docket number FAA–2024–0960 using any of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.

• *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean O'Tormey at 202–267–4044, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

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

Brandon Roberts

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2024–0960.

Petitioner: Delta Air Lines, Inc.

Section of 14 CFR Affected: § 121.621(a)(1).

Description of Relief Sought: Petitioner requests an exemption from § 121.621(a)(1) to allow the petitioner to modify the existing weather requirements for operating without a destination alternate to at least a 1,000-foot ceiling and at least 3 statue mile visibility. The requested exemption would apply to flights scheduled for less than six hours.

[FR Doc. 2024–08426 Filed 4–18–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2024–0109]

Agency Information Collection Activities; Request Approval of a New Information Collection: FMCSA Registration System (FRS)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval for a new ICR titled ''FMCSA Registration System (FRS)''. FMCSA is replacing its Unified Registration System (URS), with a new, online registration system, which will be named the ''FMCSA Registration

System'' (FRS). The new system will allow all persons required to register under the Agency's commercial or safety jurisdiction to do so online. Specifically, this new ICR will apply to: new registrants applying for safety and/or operating authority registration for the first time from FMCSA; existing registrants (*i.e.,* entities that already have a USDOT number and/or operating authority) that are subject to FMCSA's registration and certification regulations that wish to apply for additional authorities; Mexico-domiciled carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones; registrants seeking to process name changes, address changes, and reinstatements of operating authority for motor carriers, freight forwarders, and brokers; registrants which are requesting to voluntarily suspend their safety and/or operating authority registration with FMCSA; and motor carriers, brokers and freight forwarders that must designate an agent on whom service of notices in proceedings before the Secretary may be made. It will also apply to designated agents and those entities providing proof of financial responsibility requirements, such as insurance companies and bond agents.

DATES: Comments on this notice must be received on or before June 18, 2024.

ADDRESSES: You may submit comments identified by Federal Docket Management System Docket Number FMCSA–2024–0109 using any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Office of Registration, Chief, Registration Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; 202–385–2367; *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov,* and follow the online instructions for accessing the docket, or go to the street address listed above.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2024-0109/document,* click on this notice, click ''Comment,'' and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

Background: FMCSA registers for-hire motor carriers of regulated commodities and of passengers, under 49 United States Code (U.S.C.) 13902(a); surface freight forwarders, under 49 U.S.C. 13903; property brokers, under 49 U.S.C. 13904; certain Mexico-domiciled motor carriers, under 49 U.S.C. 13902(c), and cargo tank motor vehicle manufacturers, assemblers, repairers, inspectors, testers, and design certifying engineers under 49 U.S.C. 5121a, 49 CFR 1.87, and 49 CFR part 107, subpart F. These motor carriers may conduct transportation services in the United States only if they are registered with FMCSA. Each registration is effective from the date specified and remains in effect for such period as the Secretary of Transportation (Secretary) determines by regulations.

Motor carriers, freight forwarders, and property brokers are required to request a name or address change and to request reinstatement of a revoked operating authority. Procedures for changing the name or business form of a motor carrier, freight forwarder, or property broker (49 CFR 365.413T) states that motor carriers, forwarders, and brokers must submit the required information to FMCSA's Office of Registration requesting the change.

Subsection (d) of 49 U.S.C. 13905 also provides that on application of the registrant, the Secretary may amend or revoke a registration, and hence the registrant's operating authority. These registrants may apply to voluntarily revoke their operating authority or parts thereof. If the registrant fails to maintain evidence of the required level of insurance coverage on file with FMCSA, its operating authority will be revoked involuntarily. Although the effect of both types of revocation is the same, some registrants prefer to request voluntary revocation. For various business reasons, a registrant may request revocation of part, but not all, of its operating authority.

Registered motor carriers, brokers and freight forwarders must designate an agent on whom service of notices in proceedings before the Secretary may be made (49 U.S.C. 13303). Registered motor carriers must also designate an agent for every State in which they operate and traverse in the United States during such operations, on whom process issued by a court may be served in actions brought against the registered motor carrier (49 U.S.C. 13304, 49 CFR 366.4T). Every broker shall make a designation for each State in which its offices are located or in which contracts are written (49 U.S.C. 13304, 49 CFR 366.4T). Regulations governing the designation of process agents are found at 49 CFR part 366.

FMCSA requests information to identify the applicant, the nature and scope of its proposed operations, safety-related details, and information regarding the drivers and vehicles it plans to use in U.S. operations. FMCSA and the States use registration information collected to track motor carriers, freight forwarders, brokers, and other entities they regulate. Registering motor carriers is essential to being able to identify carriers so that their safety performance can be tracked and evaluated. The data makes it possible to link individual trucks to the responsible motor carrier, thus implementing the mandate under 49 U.S.C. 31136(a)(1); that is, ensuring that commercial motor vehicles are maintained and operated safely. In general, registration information collected informs prioritization of the Agency's activities and aids in assessing and statistically analyzing the safety outcomes of those activities.

The final rule titled ''Unified Registration System,'' (78 FR 52608) dated August 23, 2013, implemented statutory provisions for an online registration system for entities that are subject to FMCSA's licensing, registration, and certification

regulations. When developing URS, FMCSA planned that the OP–1 series of forms (except for OP–1(MX)) would ultimately be folded into one overarching form (MCSA–1), which would be used by all motor carriers seeking authority.

FMCSA began a phased rollout of URS in 2015. The first phase, which became effective on December 12, 2015, impacted only first-time applicants seeking an FMCSA-issued registration. FMCSA had planned subsequent rollout phases for existing registrants; however, there were substantial delays, and subsequent phases have not been rolled out to date. On January 17, 2017, FMCSA issued a final rule titled ''Unified Registration System; Suspension of Effectiveness,'' which indefinitely suspended URS effectiveness dates for existing registrants only (82 FR 5292).

Pursuant to this final rule, FMCSA was accepting forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA) for existing registrants wishing to apply for additional authorities. Separately, FMCSA requires Form OP–1(MX) for Mexico-domiciled carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. Forms in the OP–1 series request information to identify the applicant, the nature and scope of its proposed operations, a narrative description of the applicant's safety policies and procedures, and information regarding the drivers and vehicles it plans to use in U.S. operations. The OP–1 series also requests information on the applicant's familiarity with relevant safety requirements, the applicant's willingness to comply with those requirements during its operations, and the applicant's willingness to meet any specific statutory and regulatory requirements applicable to its proposed operations. Information collected through these forms aids FMCSA in determining the type of operation a company may run, the cargo it may carry, and the resulting level of insurance coverage the applicant will be required to obtain and maintain to continue its operating authority.

In addition, FMCSA accepted Form MCS–150 (Motor Carrier Identification Report, Application for USDOT Number), Form MCS–150B (Combined Motor Carrier Identification Report and Hazardous Materials Permit Application), and MCS–150C (Intermodal Equipment Provider Identification Report, Application for USDOT Number). Title 49, U.S.C. 504(b)(2) provides the Secretary with authority to require carriers, lessors, associations, or classes of these entities to file annual, periodic, and special reports containing answers to questions asked by the Secretary. Existing registrants use the MCS–150 or MCS–150B to update their information in the Motor Carrier Management Information System, while applicants filing for the first time were required to file on-line using URS. Form MCS–150 or MCS–150B is also used for Mexico-domiciled carriers that seek authority to operate beyond the United States municipalities on the United States-Mexico border and their commercial zones.

Registered motor carriers, brokers, and freight forwarders must designate an agent on whom service of notices in proceedings before the Secretary may be made through filing the Form BOC–3, Designation of Agents for Service of Process. Registered motor carriers must designate an agent for every State in which they operate and traverse in the United States during such operations, on whom process issued by a court may be served in actions brought against the registered motor carrier (49 U.S.C. 13304, 49 CFR 366.4T). Every broker must also make a designation for each State in which its offices are located or in which contracts are written (49 U.S.C. 13304, 49 CFR 366.4T).

New Collection: As described above, only first-time applicants seeking an FMCSA-issued registration must apply for authority via URS, while existing registrants used several forms to update their information, apply for additional authorities, and designate process agents. Under the new FRS, all forms described above will be integrated into the online system through a series of questions that will be asked, using smart logic. The only exception will be the Form OP–2, Application for Mexican Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers under 49 U.S.C. 13902. Information collection activities associated with the Form OP–2 are covered under a different ICR, titled ''Application for Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers,'' OMB Control No. 2126–0019, which will continue in effect.

This new ICR impacts several currently approved collections of information, listed below. However, until the new FRS is completed, FMCSA cannot estimate the burden, in hours or expense, that FRS users will be required to endure in comparison to the burdens associated for the approved collections listed below. FMCSA is developing FRS in such a way as to save users as much time as possible. However, FMCSA expects that, at worst, the time and effort required to complete an application, update, or process agent designation in FRS will be the same as it is to complete in the URS or using a paper form. Thus, for purposes of this new collection, FMCSA assumes the same time and cost burdens as were previously listed in the approved collections. In the future, during routine renewals and/or revisions for this new collection, and as FMCSA gathers information on average time per transaction in FRS, FMCSA expects to be able to refine these estimates.

It is expected that FMCSA will eliminate the following collections, along with all associated forms, as users will instead use the FRS to collect the information previously submitted using the listed forms. However, until FMCSA completes a regulatory change to remove reference to these forms from regulation, registrants may continue to use these forms to request the appropriate registration action.

Information collection approval No.	Information collection title	Associated forms
2126–0013	Motor Carrier Identification Report	MCS–150, MCS–150B and MCS–150C.
2126–0015	Designation of Agents, Motor Carriers, Brokers and Freight Forwarders	BOC–3.
2126–0016	Licensing Applications for Motor Carriers Operating Authority	OP–1 series.
2126–0018	Request for Revocation of Authority Granted	OCE–46.
2126–0051	FMCSA Registration/Updates	MCSA–1.
2126–0060	Motor Carrier Records Change Form	MCSA–5889.

The current information collection supports the DOT Strategic Goal of Safety. It streamlines registration processes and ensures that FMCSA can more efficiently track motor carriers, freight forwarders, brokers, and other entities regulated by the Agency.

Title: FMCSA Registration System.

OMB Control Number: 2126–00XX.

Type of Request: New ICR.

Respondents: Motor carriers, freight forwarders, brokers, and other entities regulated by the Agency.

Estimated Number of Respondents: 648,928.

Estimated Time per Response: Varies.

Expiration Date: This is a new ICR.

Frequency of Response: Annual.

Estimated Total Annual Burden: 417,741 Hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this ICR.

Issued under the authority of 49 CFR 1.87.

Kenneth H. Riddle,

Director, Office of Registration.

[FR Doc. 2024–08439 Filed 4–18–24; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2023–0095]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 17, 2023, Amtrak petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 229 (Railroad Locomotive Safety Standards). FRA assigned the petition Docket Number FRA–2023–0095.

Amtrak's petition seeks FRA approval to install on its locomotive fleet, equipment designed to improve shunting of railroad track circuits and reduce the potential for a loss of shunt (LoS) incident (a shunt enhancer antenna). LoS within a track circuit causes a signal system or grade crossing system to not detect the presence of a train, significantly increasing the risk of train-to-train collisions and crossing accidents. Known causes of LoS include contaminants on the wheel or rail and locomotive weight, with contributing factors including the number of axles in a train, train speed, wheel profile, and weather. FRA recognizes that a LoS event is a significant safety concern, resulting in both activation failures at equipped highway-rail grade crossings and false proceed signals.

Over the last five years, an industry-led working group, the LoS Committee, supported by FRA, has expended significant effort and funding to investigate LoS events, evaluate LoS causes, identify potential solutions, and to test those solutions. The shunt enhancer antenna has been identified, tested, and recommended by the LoS Committee. The LoS Committee confirmed that the shunt enhancer antenna ''reliably demonstrate[s] improvement of a vehicle's interaction with the wayside track circuits.''

Amtrak seeks relief from 49 CFR 229.71, *Clearance above top of rail,* to implement the locomotive-mounted shunt enhancer antenna. Section 229.71 states that no part or appliance of a locomotive (excepting ''the wheels, flexible nonmetallic sand pipe extension tips, and trip cock arms'') may be within 2.5 inches from the top of rail. Amtrak seeks to install the shunt enhancers on its fleet of Siemens Charger SF4 locomotives. Amtrak explains that under conditions of worn wheels and dynamic profiles, the mechanical and electrical hardware of the truck-mounted antenna devices could protrude below 2.5 inches from the top of rail.

FRA understands the proposed shunt enhancer antenna is a truck-mounted antenna that injects a 2–4 amp, 165kHz signal into the rail.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by June 18, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2024–08365 Filed 4–18–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: March 13, 2024.

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.:

202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On March 13, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Individuals

1. GOLIC, Srebrenka (Cyrillic: ГОЛИЋ, Сребренка), Bosnia and Herzegovina; DOB 29 Jul 1958; nationality Bosnia and Herzegovina; Gender Female (individual) [BALKANS-EO14033].

   Designated pursuant to section 1(a)(iii) of Executive Order 14033 of June 8, 2021, "Blocking Property and Suspending Entry into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans" (E.O. 14033), 86 FR 31079 (June 10, 2021), 3 CFR 2021 Comp., p. 591, for being responsible for or complicit in, or having directly or indirectly engaged in, a violation of, or an act that has obstructed or threatened the implementation of, any regional security, peace, cooperation, or mutual recognition agreement or framework or accountability mechanism related to the Western Balkans, including the Prespa Agreement of 2018; the Ohrid Framework Agreement of 2001; United Nations Security Council Resolution 1244; the Dayton Accords; or the Conclusions of the Peace Implementation Conference Council held in London in December 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council, or its Steering Board; or the International Criminal Tribunal for the former Yugoslavia, or, with respect to the former Yugoslavia, the International Residual Mechanism for Criminal Tribunals.

2. OKUKA, Branislav, Bosnia and Herzegovina; DOB 07 Jan 1967; nationality Bosnia and Herzegovina; citizen Bosnia and Herzegovina; Gender Male; Passport B2721680 (Bosnia and Herzegovina) expires 21 Oct 2030 (individual) [BALKANS-EO14033] (Linked To: DODIK, Milorad).

   Designated pursuant to section 1(a)(vii) of E.O. 14033 for having been owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Milorad Dodik, a person whose property and interests in property are blocked pursuant to E.O. 14033.

3. PAJIC BASTINAC, Jelena (Cyrillic: ПАЈИЋ БАШТИНАЦ, Јелена), Banja Luka, Bosnia and Herzegovina; DOB 01 Dec 1982; POB Bijeljina, Bosnia and Herzegovina; nationality Bosnia and Herzegovina; Gender Female; Passport B1606358 (Bosnia and Herzegovina) expires 11 Jul 2027 (individual) [BALKANS-EO14033].

   Designated pursuant to section 1(a)(iii) of E.O. 14033 for being responsible for or complicit in, or having directly or indirectly engaged in, a violation of, or an act that has obstructed or threatened the implementation of, any regional security, peace, cooperation, or mutual recognition agreement or framework or accountability mechanism related to the Western Balkans, including the Prespa Agreement of 2018; the Ohrid Framework Agreement of 2001; United Nations Security Council Resolution 1244; the Dayton Accords; or the Conclusions of the Peace Implementation Conference Council held in London in December 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council, or its Steering Board; or the International Criminal Tribunal for the former Yugoslavia, or, with respect to the former Yugoslavia, the International Residual Mechanism for Criminal Tribunals.

Dated: April 15, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–08349 Filed 4–18–24; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On April 15, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and entities are blocked under the relevant sanctions authorities listed below.

Individuals

1. ALI, Alhaitham Al (a.k.a. AL ALI, Al Haytham; a.k.a. AL–ALI, Al Haitham), Slovakia; DOB 17 Mar 1972; nationality Slovakia; Gender Male; Passport BA4490378 (Slovakia) expires 13 Jan 2027 (individual) [BELARUS–EO14038] (Linked To: BLACK SHIELD COMPANY FOR GENERAL TRADING LLC).

Designated pursuant to section 1(a)(vi) of Executive Order 14038 of August 9, 2021, ''Blocking Property of Additional Persons Contributing to the Situation in Belarus,'' 86 FR 43905, 3 CFR, 2021 Comp., p. 626 (E.O. 14038) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, BLACK SHIELD COMPANY FOR GENERAL TRADING LLC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

2. DEIRY, Mohamad Majd (a.k.a. DAYRI, Muhammad Husayn; a.k.a. DEIRY, Mohamad Majd Hussen), Syria; DOB 06 Jun 1961; nationality Syria; Gender Male; Passport 010213193 (Syria) expires 22 Jul 2017; alt. Passport 011786268 (Syria) expires 24 Oct 2019 (individual) [BELARUS–EO14038] (Linked To: BLACK SHIELD COMPANY FOR GENERAL TRADING LLC).

Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of BLACK SHIELD COMPANY FOR GENERAL TRADING LLC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

3. PROTOPOVICH, Tatyana (a.k.a. PROTOPOVICH, Tayuana), Praspiekt Dziarzynsakaha, 82, Flat 227, Minsk 22089, Belarus; DOB 24 Mar 1996; nationality Belarus; Gender Female; Passport MP4133985 (Belarus); National ID No. 4240396A013PB6 (Belarus) (individual) [BELARUS–EO14038] (Linked To: CENTURONIC LTD).

Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of CENTURONIC LTD, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

4. RAYYA, Samer (a.k.a. RAYYA, Samer Samir), Maroun al Nakkash, Beirut, Lebanon; DOB 15 Aug 1979; nationality Lebanon; Gender Male; Passport PR0157356 (Lebanon) expires 24 Aug 2022 (individual) [BELARUS–EO14038] (Linked To: BLACK SHIELD COMPANY FOR GENERAL TRADING LLC).

Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of BLACK SHIELD COMPANY FOR GENERAL TRADING LLC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

5. YAGMUR, Nora (a.k.a. YAGMUR, Nure), Turkey; DOB 01 Jan 1977; POB Upsala Isvech, Sweden; nationality Sweden; Gender Female; Passport 94954203 (Sweden) expires 29 Jun 2023; National ID No. 22121484408 (Turkey) (individual) [BELARUS–EO14038] (Linked To: RAYYA DANISMANLIK HIZMETLERI LIMITED SIRKETI).

Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of RAYYA DANISMANLIK HIZMETLERI LIMITED SIRKETI, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

Entities

1. BLACK SHIELD COMPANY FOR GENERAL TRADING LLC (a.k.a. BLACK SHIELD COMPANY LTD.), Villa S6/35, New Azadi Atconz, Ainkawa, Erbil, Iraq; Business Registration Number 21756 (Iraq) [BELARUS–EO14038] (Linked To: KIDMA TECH OJSC).

Designated pursuant to section 1(a)(vi) of E.O. 14038 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, KIDMA TECH OJSC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

2. CENTURONIC LTD, ABC Business Centre, Flat No: Flat 15, Floor No: Floor 1st, Charalampou Moyskou 20, Paphos 8010, Cyprus; Organization Established Date 23 Mar 2018; Business Registration Number 382931 (Cyprus) [BELARUS–EO14038] (Linked To: RAYYA, Samer).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, RAYYA, Samer, an individual whose property and interests in property are blocked pursuant to E.O. 14038.

3. PHOENIX LINES S.R.O., Dunajska 7614/8, Bratislava 81108, Slovakia; Organization Established Date 13 Oct 2016; Business Registration Number 50546813 (Slovakia) [BELARUS–EO14038] (Linked To: ALI, Alhaitham Al).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, ALI, Alhaitham Al, an individual whose property and interests in property are blocked pursuant to E.O. 14038.

4. RAYYA DANISMANLIK HIZMETLERI LIMITED SIRKETI, B–48, No. 3 Maltepe Mahallesi, Istanbul 34010, Turkey; Organization Established Date 14 Dec 2018; Business Registration Number 9418 (Turkey) [BELARUS–EO14038] (Linked To: RAYYA, Samer).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, RAYYA, Samer, an individual whose property and interests in property are blocked pursuant to E.O. 14038.

5. S. GROUP AIRLINES LTD, ABC Business Centre, Flat No: Flat 105, Floor No: Floor 1st, Charalampou Moyskou 20, Paphos 8010, Cyprus; Organization Established Date 23 Apr 2018; Business Registration Number 382880 (Cyprus) [BELARUS–EO14038] (Linked To: RAYYA, Samer).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, RAYYA, Samer, an individual whose property and interests in property are blocked pursuant to E.O. 14038.

Dated: April 15, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–08351 Filed 4–18–24; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On April 15, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and entities are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Individuals

1. AKSIANCHUK, Aliaksandra (a.k.a. AKSIANCHUK, Aliaksandra Iharauna (Cyrillic: АКСЯНЧУК, АЛЯКСАНДРА ІГАРАЎНА); a.k.a. OKSENCHUK, Aleksandra Igorevna (Cyrillic: ОКСЕНЧУК, АЛЕКСАНДРА ИГОРЕВНА)), Odintsova L.E. Street, 113 Apartments 3, 4, Minsk, Belarus; DOB 16 Oct 1992; nationality Belarus; Gender Female; Passport MP4034627 (Belarus); National ID No. 4161092C013PB1 (Belarus) (individual) [BELARUS-EO14038] (Linked To: SHENZHEN 5G HIGH-TECH INNOVATION CO., LIMITED).

   Designated pursuant to section 1(a)(i)(B) of Executive Order 14038 of August 9, 2021, "Blocking Property of Additional Persons Contributing to the Situation in Belarus," 86 FR 43905, 3 CFR, 2021 Comp., p. 626 (E.O. 14038) for being or having been a leader, official, senior executive officer, or member of the board of directors of SHENZHEN 5G HIGH-TECH INNOVATION CO., LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

2. BRAIM, Dmitry (a.k.a. BRAIM, Dmitry Vladimirovich (Cyrillic: БРАИМ, ДМИТРИЙ ВЛАДИМИРОВИЧ); a.k.a. BRAIM, Dzmitryri Uladzimiravich (Cyrillic: БРАІМ, ДЗМІТРЫЙ УЛАДЗІМІРАВІЧ)), P.A. Miroshnichenko Street, 27, ap. 106, Minsk, Belarus; DOB 18 Apr 1976; nationality Belarus; Gender Male; National ID No. 3180476A073PB3 (Belarus) (individual) [BELARUS-EO14038] (Linked To: PELENG JSC).

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of PELENG JSC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

3. YURCHIK, Oleg (a.k.a. YURCHIK, Oleg Nikolaevich (Cyrillic: ЮРЧИК, ОЛЕГ НИКОЛАЕВИЧ); a.k.a. YURCHYK, Aleh Mikalaevich (Cyrillic: ЮРЧЫК, АЛЕГ МІКАЛАЕВІЧ)), 4 ap. 99 Repina Street, Minsk, Belarus; DOB 16 Aug 1979; nationality Belarus; Gender Male; National ID No. 3160879B005PB4 (Belarus) (individual) [BELARUS-EO14038] (Linked To: SHENZHEN 5G HIGH-TECH INNOVATION CO., LIMITED).

   Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of SHENZHEN 5G HIGH-TECH INNOVATION CO., LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

4. CHARHEIKA, Siarhei (a.k.a. CHARHEIKA, Siarhei Viktaravich (Cyrillic: ЧАРГЕЙКА, СЯРГЕЙ ВІКТАРАВІЧ); a.k.a. CHERGEIKO, Sergey Viktorovich (Cyrillic: ЧЕРГЕЙКО, СЕРГЕЙ ВИКТОРОВИЧ); a.k.a. "CHERGEIKO, S.V."), Academic Vyotsky St 3 apt. 114, Minsk, Belarus; DOB 27 Aug 1986; POB Mochulino Village, Belarus; nationality Belarus; citizen Belarus; Gender Male; Passport KH2638135

(Belarus); National ID No. 3270886K030PB1 (Belarus) (individual) [BELARUS-EO14038] (Linked To: PELENG JSC).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, PELENG JSC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

5. MIKHALTSOU, Dzmitry (Cyrillic: МІХАЛЬЦОЎ, ДЗМІТРЫЙ) (a.k.a. MIKHALTSOU, Dzmitry Viktaravich (Cyrillic: МІХАЛЬЦОЎ, ДЗМІТРЫЙ ВІКТАРАВІЧ); a.k.a. MIKHALTSOV, Dmitry Viktorovich (Cyrillic: МИХАЛЬЦОВ, ДМИТРИЙ ВИКТОРОВИЧ)), Ostroshitskaya Street 6, Apartment 104, Minsk, Belarus; DOB 27 Nov 1979; POB Tursk Village, Belarus; nationality Belarus; citizen Belarus; Gender Male; Passport MP3861223 (Belarus); National ID No. 3271179H010PB4 (Belarus) (individual) [BELARUS-EO14038] (Linked To: JSC MINSK MECHANICAL PLANT NAMED AFTER S.I. VAVILOV MANAGEMENT COMPANY OF BELOMO HOLDING).

Designated pursuant to section 1(a)(i)(B) of E.O. 14038 for being or having been a leader, official, senior executive officer, or member of the board of directors of JSC MINSK MECHANICAL PLANT NAMED AFTER S.I. VAVILOV MANAGEMENT COMPANY OF BELOMO HOLDING, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

Entities

1. OJSC AGAT-CONTROL SYSTEM-MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING (Cyrillic: ОАО АГАТ-СИСТЕМЫ УПРАВЛЕНИЯ-УПРАВЛЯЮЩАЯ КОМПАНИЯ ХОЛДИНГА ГЕОИНФОРМАЦИОННЫЕ СИСТЕМЫ УПРАВЛЕНИЯ) (a.k.a. ASU-UKKH-GISU OAO; f.k.a. OJSC AGAT-CONTROL SYSTEMS; a.k.a. OTKRYTOYE AKTSIONERNOYE OBSHCHESTVO AGAT-SISTEMY UPRAVLENIYA-UPRAVLYAYUSHCHAYA KOMPANIYA KHOLDINGA GEOINFORMATSIONNYYE SISTEMY UPRAVLENIYA (Cyrillic: ААТ АГАТ СІСТЭМЫ КІРАВАННЯ КІРУЮЧАЯ КАМПАНІЯ ХОЛДЫНГУ ГЕАІНФАРМАЦЫЙНЫЯ СІСТЭМЫ КІРАВАННЯ)), 117 Nezavisimosti Ave., Minsk 220114, Belarus; Target Type State-Owned Enterprise; Tax ID No. 100230547 (Belarus) [BELARUS-EO14038].

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus.

2. JSC AGAT-SYSTEM (Cyrillic: ОАО АГАТ-СИСТЕМ; Cyrillic: ААТ АГАТ-СІСТЭМ) (a.k.a. OTKRYTOYE AKTSIONERNOYE OBSHCHESTVO AGAT-SISTEM), 51 Skoriny str, Minsk 220141, Belarus; Target Type State-Owned Enterprise; Tax ID No. 100230470 (Belarus) [BELARUS-EO14038] (Linked To: OJSC AGAT-CONTROL SYSTEM-MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, OJSC AGAT-CONTROL SYSTEM- MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

3. JOINT STOCK COMPANY COMMUNICATION EQUIPMENT (a.k.a. AAT TEKHNIKA SUVYAZI (Cyrillic: ААТ ТЭХНІКА СУВЯЗІ); a.k.a. OAO TEKHNIKA SVYAZI (Cyrillic: ОАО ТЕХНИКА СВЯЗИ); a.k.a. TEKHNIKA SVYAZI JSC), 1 Naberezhnaya str., Baran, Vitebsk Region 211011, Belarus; Target Type State-Owned Enterprise; Tax ID No. 300209010 (Belarus) [BELARUS-EO14038] (Linked To: OJSC AGAT-CONTROL SYSTEM-MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING).

   Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, OJSC AGAT-CONTROL SYSTEM- MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

4. JSC NIIEVM (Cyrillic: ОАО НИИЭВМ; Cyrillic: ААТ НДІЭВМ) (a.k.a. AAT NAVUKOVA-DASLEDCHY INSTYTUT ELEKTRONNYKH VYLICHALNYKH MASHYN; a.k.a. COMPUTER RESEARCH INSTITUTE NIIEVM; a.k.a. OAO NAUCHNO-ISSLEDOVATELSKIY INSTITUT ELEKTRONNYKH VYCHISLITELNYKH MASHIN (Cyrillic: ОАО НАУЧНО-ИССЛЕДОВАТЕЛЬСКИЙ ИНСТИТУТ ЭЛЕКТРОННЫХ ВЫЧИСЛИТЕЛЬНЫХ МАШИН); a.k.a. OPEN JOINT STOCK COMPANY RESEARCH INSTITUTE OF ELECTRONIC COMPUTERS), 155 Bogdanovicha St., Minsk 220040, Belarus; Target Type State-Owned Enterprise; Tax ID No. 100219724 (Belarus) [BELARUS-EO14038] (Linked To: OJSC AGAT-CONTROL SYSTEM-MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING).

   Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, OJSC AGAT-CONTROL SYSTEM- MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

5. LLC INNOTECH SOLUTIONS (a.k.a. OBSHCHESTVO S OGRANICHENNOY OTVETSTVENNOSTYU INNOTEKH SOLYUSHNS (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ ИННОТЕХ СОЛЮШНС)), 104-105, Pobediteley avenue, Minsk 220062, Belarus; 21B-4, 9, Kulman Street, Minsk 220100, Belarus; Organization Established Date Oct 2018; Target Type State-Owned Enterprise; Tax ID No. 193156727 (Belarus) [BELARUS-EO14038] (Linked To: OJSC AGAT-CONTROL SYSTEM-MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING).

Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, OJSC AGAT-CONTROL SYSTEM- MANAGING COMPANY OF GEOINFORMATION CONTROL SYSTEMS HOLDING, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

6. SHENZHEN 5G HIGH-TECH INNOVATION CO., LIMITED (Chinese Simplified: 深圳五力高科创新科技有限公司) (a.k.a. SHENZHEN WU LI GAO KE INNOVATION SCIENCE AND TECHNOLOGY CO., LTD; a.k.a. SHENZHEN WU LI GAOKE CHUANGXIN YOUXIAN GONGSI), 502, Block B, Rongchaolong Building, Longfu Road, Shangjing Community, Longcheng Street, Longgang District, Shenzhen, China; 306 No. 66 Huayuan Road, Pingxi Community, Pingdi Street, Longgang District, Shenzhen, Guangdong Province, China; Organization Established Date 13 Dec 2022; Unified Social Credit Code (USCC) 91440300MA5HLP0L6L (China) [BELARUS-EO14038] (Linked To: PELENG JSC).

   Designated pursuant to section 1(a)(vi) of E.O. 14038 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PELENG JSC, an entity whose property and interests in property are blocked pursuant to E.O. 14038.

7. OPEN JOINT STOCK COMPANY STANKOGOMEL (a.k.a. OAO STANKOGOMEL (Cyrillic: ОАО СТАНКОГОМЕЛЬ); a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO STANKOGOMEL (Cyrillic: ОТКРЫТОЕ АКЦИОНЕРНОЕ ОБЩЕСТВО СТАНКОГОМЕЛЬ)), D. 10, Nezhiloe pomeshchenie, ul. Internatsionalnaya, Gomel 246640, Belarus; Organization Established Date 07 Dec 1995; Target Type State-Owned Enterprise; Tax ID No. 400085002 (Belarus) [BELARUS-EO14038].

   Designated pursuant to section 1(a)(vii) of E.O. 14038 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus.

Dated: April 15, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2024–08350 Filed 4–18–24; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Bureau of Fiscal Service Information Collection Request

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: The Department of the Treasury 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. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before May 20, 2024 to be assured of consideration.

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

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Bureau of the Fiscal Service (BFS)

Title: Treasury Hunt Follow-Up.

OMB Number: 1530–New.

Form Number: FS Form 000140.

Abstract: The information is requested to verify a user's claim and process any associated transactions when a potential match is identified by using the Treasury Hunt online search tool to search for unredeemed bonds and holdings.

Current Actions: New collection.

Type of Review: Regular.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 20,000.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 3,333.

(Authority: 44 U.S.C. 3501 *et seq.*)

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2024–08360 Filed 4–18–24; 8:45 am]

BILLING CODE 4810–AS–P

UNITED STATES INSTITUTE OF PEACE

Notice Regarding Board of Directors Meetings

AGENCY: United States Institute of Peace (USIP) and Endowment of the United States Institute of Peace.

ACTION: Announcement of meeting.

SUMMARY: USIP announces the next meeting of the Board of Directors.

DATES: Friday, April 19, 2024 (9:00 a.m.–12:30 p.m.). The next meeting of the Board of Directors will be held October 25, 2024.

ADDRESSES: 2301 Constitution Avenue NW, Washington DC 20037.

FOR FURTHER INFORMATION CONTACT: Corinne Graff, 202–429–7895, *cgraff@usip.org.*

SUPPLEMENTARY INFORMATION: Open Session—Portions may be closed pursuant to subsection (c) of section 552b of title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Authority: 22 U.S.C. 4605(h)(3).

Dated: April 1, 2024.

Rebecca Fernandes,

Director of Accounting.

[FR Doc. 2024–08406 Filed 4–18–24; 8:45 am]

BILLING CODE 2810–03–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0886]

Agency Information Collection Activity Under OMB Review: Decision Review Request: Supplemental Claim

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

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. Refer to ''OMB Control No. 2900–0886.

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. 2900–0886'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 115–55, sec 2, 38 U.S.C. 5108, 38 CFR 3.2501.

Title: Decision Review Request: Supplemental Claim (VA Form 20–0995).

OMB Control Number: 2900–0886.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 20–0995 is used by a claimant and/or beneficiary to formally request a review of an initial VA decision, based on new and relevant evidence, in accordance with the Appeals Modernization Act. Without the information solicited by this form, VA would be unable to initiate the 'Supplemental Claim' on behalf of the claimant or determine the issues for which the claimant seeks review.

This proposed revision consists of; non-substantive edits to the 'Instructions' to help clarify the content, a new question that helps identify what benefit type the claimant is requesting, a new section that separates Veteran from claimant, a new section identifying if the claimant is homeless or at risk of becoming homeless, a new section that provides an option to the claimant to check a box if they want VBA to notify the Veteran Health Administration about certain upcoming event(s) during the claim and/or appeal process, and a witness signature section, alternate signer signature section, and a power of attorney signature section has been added to help clarify who is signing the form. The respondent burden has increased due to the estimated number of receivables averaged over the past year.

The frequency of collection depends solely upon the desire of VA claimants to seek review of an initial VA decision in the Supplemental Claim Lane. In that sense, VA does not control the frequency of collection.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 89 FR 10161 on Tuesday, February 13, 2024.

Affected Public: Individuals or households.

Estimated Annual Burden: 160,119.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 640,477.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–08343 Filed 4–18–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0859]

Agency Information Collection Activity Under OMB Review: Education Benefit Entitlement Restoration Request Due to School Closure, Program Suspension or Withdrawal

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link *www.reginfo.gov/public/do/PRAMain,* select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–0859.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *Maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0859'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 115–48; title 38 U.S.C. 3699.

Title: Education Benefit Entitlement Restoration Request Due to School Closure, Program Suspension or Withdrawal, VA Form 22–0989.

OMB Control Number: 2900–0859.

Type of Review: Revision of a currently approved collection.

Abstract: The VA Form 22–0989 allows students to apply for restoration of entitlement for VA education benefits used at a school that closed, suspended, or had its approval to receive VA benefits withdrawn.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 89 FR 12420 on Friday, February 16, 2024, Pages 12420–12421.

Affected Public: Individuals and households.

Estimated Annual Burden: 658 hours.

Estimated Average Burden Time per Respondent: 15 minutes.

Frequency of Response: Once on occasion.

Estimated Number of Respondents: 2,634.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer,Office of Enterprise and Integration, Data Governance Analytics,Department of Veterans Affairs.

[FR Doc. 2024–08401 Filed 4–18–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 89 Friday,
No. 77 April 19, 2024

Part II

Department of Energy

10 CFR Part 430
Energy Conservation Program: Energy Conservation Standards for General Service Lamps; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2022–BT–STD–0022]

RIN 1904–AF43

Energy Conservation Program: Energy Conservation Standards for General Service Lamps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including general service lamps (''GSLs''). EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more stringent standards would be technologically feasible and economically justified and would result in significant energy savings. In this final rule, DOE is adopting amended energy conservation standards for GSLs. DOE has determined that the amended energy conservation standards for these products would result in significant conservation of energy and are technologically feasible and economically justified.

DATES: The effective date of this rule is July 3, 2024. Compliance with the amended standards established for GSLs in this final rule is required on and after July 25, 2028.

The incorporation by reference of certain material listed in this rule is approved by the Director of the Federal Register on July 3, 2024. The incorporation by reference of certain other material listed in this rule was approved by the Director of the Federal Register as of September 30, 2022.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2022-BT-STD-0022.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Laura Zuber, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 306–7651. Email: *Laura.Zuber@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE maintains a previously approved incorporation by reference for: ANSI C78.79–2014 (R2020) and incorporates by reference the following industry standard into 10 CFR part 430:

UL 1598C, *Standard for Safety for Light-Emitting Diode (LED) Retrofit Luminaire Conversion Kits,* First edition, dated January 16, 2014 (including revisions through November 17, 2016) (''UL 1598C–2016'').

A copy of UL 1598C may be obtained from the Underwriters Laboratories, Inc. (UL), 2600 NW Lake Rd., Camas, WA 98607–8542 (*www.UL.com*).

For a further discussion of this standard, see section VI.M of this document.

Table of Contents

I. Synopsis of the Final Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include GSLs, the subject of this rulemaking.

This is the second rulemaking cycle for GSLs. As a result of the first rulemaking cycle initiated per 42 U.S.C. 6295(i)(6)(A), on May 9, 2022, DOE codified a prohibition on the sale of any GSLs that do not meet a minimum efficacy standard of 45 lumens per watt. (87 FR 27439) There are existing DOE energy conservation standards higher than 45 lumens per watt for medium base compact fluorescent lamps (''MBCFLs''), which are types of GSLs. 70 FR 60407 (Oct. 18, 2005). DOE is issuing this final rule pursuant to multiple provisions in EPCA. First, EPCA requires that DOE initiate a second rulemaking cycle by January 1, 2020, to determine whether standards in effect for general service incandescent lamps (''GSILs'') should be amended with more stringent energy conservation standards and if the exemptions for certain incandescent lamps should be maintained or discontinued. Consistent with the first review, this second review of energy conservation standards, the scope of rulemaking is not limited to incandescent technologies. (42 U.S.C. 6295(i)(6)(B)(ii))

Second, EPCA also provides that not later than 6 years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)) Third, pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in a significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) Lastly, when DOE proposes to adopt an amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such a product. (42 U.S.C. 6295(p)(1))

In accordance with these and other statutory provisions discussed in this document, DOE analyzed the benefits and burdens of six trial standard levels (''TSLs'') for GSLs. The TSLs and their associated benefits and burdens are discussed in detail in sections V.A through V.C of this document. As discussed in section V.C of this document, DOE has determined that TSL 6 represents the maximum improvement in energy efficiency that is technologically feasible and economically justified. The adopted standards, which are expressed in minimum lumens (''lm'') output per watt (''W'') of a lamp or lamp efficacy (''lm/W''), are shown in table I.1. These standards apply to all products listed in table I.1 and manufactured in, or imported into, the United States starting on July 25, 2028.

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[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, part B was redesignated part A.

Table I.1 Energy Conservation Standards for GSLs (Compliance Starting July 25, 2028)

Product Class	Adopted Energy Conservation Standards - Efficacy Equation (lm/W)	Example Efficacy for Common Lumen Lamp
Integrated Omnidirectional Short GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 25.9$	124.6 lm/W (810 lumens)
Integrated Omnidirectional Short GSLs, With Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 17.1$	115.7 lm/W (810 lumens)
Integrated Directional GSLs, No Standby Power	$\text{Efficacy} = \frac{73}{0.5 + e^{-0.0021(\text{Lumens}+1000)}} - 47.2$	96.0 lm/W (1200 lumens)
Integrated Directional GSLs, With Standby Power	$\text{Efficacy} = \frac{73}{0.5 + e^{-0.0021(\text{Lumens}+1000)}} - 50.9$	92.3 lm/W (1200 lumens)
Integrated Omnidirectional Long GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 71.7$	174.1 lm/W (1625 lumens)
Non-integrated Omnidirectional Long GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 93.0$	195.4 lm/W (1625 lumens)
Non-integrated Omnidirectional Short GSLs, No Standby Power	$\text{Efficacy} = \frac{122}{0.55 + e^{-0.003(\text{Lumens}+250)}} - 83.4$	133.3 lm/W (1200 lumens)
Non-integrated Directional GSLs, No Standby Power	$\text{Efficacy} = \frac{67}{0.45 + e^{-0.00176(\text{Lumens}+1310)}} - 53.1$	83.3 lm/W (500 lumens)

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A. Benefits and Costs to Consumers

Table I.2 summarizes DOE's evaluation of the economic impacts of the adopted standards on consumers of GSLs, as measured by the average life-cycle cost (''LCC'') savings and the simple payback period (''PBP'').[3] The average LCC savings are positive for all product classes, and the PBP is less than the average lifetime of GSLs, which varies by product class and efficiency level (*see* section IV.F.5 of this document).

[3] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the first full compliance year in the absence of new or amended standards (*see* section IV.F.9 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (*see* section IV.D of this document).

Table I.2 Impacts of Adopted Energy Conservation Standards on Consumers of GSLs

Product Class	Average LCC Savings *2022$*	Simple Payback Period *years*
Integrated Omnidirectional Short	0.60	0.9
Integrated Omnidirectional Long	4.00	3.4
Integrated Directional	3.23	0.0
Non-Integrated Omnidirectional	6.67	2.4
Non-Integrated Directional	0.37	3.8

DOE's analysis of the impacts of the adopted standards on consumers is described in section V.B.1 of this document.

B. Impact on Manufacturers

The industry net present value (''INPV'') is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2024–2058). Using a real discount rate of 6.1 percent, DOE estimates that the INPV for manufacturers of GSLs in the case without new and amended standards is $2,108 million in 2022$. Under the adopted standards, DOE estimates the change in INPV to range from −15.3 percent to −7.3 percent, which is approximately −$322 million to −$155 million. In order to bring products into compliance with new and amended standards, it is estimated that industry will incur total conversion costs of $430 million.

DOE's analysis of the impacts of the adopted standards on manufacturers is described in sections IV.J and V.B.2 of this document.

C. National Benefits and Costs[4]

DOE's analyses indicate that the adopted energy conservation standards for GSLs would save a significant amount of energy. Relative to the case without amended standards, the lifetime energy savings for GSLs purchased in the 30-year period that begins in the anticipated first full year of compliance with the amended standards (2029–2058) amount to 4.0 quadrillion British thermal units (''Btu''), or quads.[5] This represents a savings of 17 percent relative to the energy use of these products in the case without amended standards (referred to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the standards for GSLs ranges from $8.5 billion (at a 7-percent discount rate) to $22.2 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product costs for GSLs purchased during the period 2029–2058.

In addition, the adopted standards for GSLs are projected to yield significant environmental benefits. DOE estimates that the standards will result in cumulative emission reductions (over the same period as for energy savings) of 70.3 million metric tons (''Mt'')[6] of carbon dioxide (''CO_2''), 22.1 thousand tons of sulfur dioxide (''SO_2''), 133.3 thousand tons of nitrogen oxides (''NO_X''), 608.1 thousand tons of methane (''CH_4''), 0.70 thousand tons of nitrous oxide (''N_2O''), and 0.15 tons of mercury (''Hg'').[7] The estimated cumulative reduction in CO_2 emissions through 2030 amounts to 0.61 Mt, which is equivalent to the emissions resulting from the annual electricity use of more than one hundred thousand homes.

DOE estimates the value of climate benefits from a reduction in greenhouse gases (''GHG'') using four different estimates of the social cost of CO_2 (''SC–CO_2''), the social cost of methane (''SC–CH_4''), and the social cost of nitrous oxide (''SC–N_2O''). Together these represent the social cost of GHG (''SC–GHG''). DOE used interim SC–GHG values (in terms of benefit per ton of GHG avoided) developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (''IWG'').[8] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are estimated to be $3.8 billion. DOE does not have a single central SC–GHG point estimate and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates.

DOE estimated the monetary health benefits of SO_2 and NO_X emissions reductions, using benefit per ton estimates from the Environmental Protection Agency (''EPA''),[9] as discussed in section IV.L of this document. DOE estimated the present value of the health benefits would be $2.9 billion using a 7-percent discount rate, and $7.5 billion using a 3-percent discount rate.[10] DOE is currently only

[4] All monetary values in this document are expressed in 2022 dollars.

[5] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section 0 of this document.

[6] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[7] DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2023* (''*AEO2023*''). *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the Inflation Reduction Act. *See* section IV.K of this document for further discussion of *AEO2023* assumptions that affect air pollutant emissions.

[8] To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Documents: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG. (''February 2021 SC–GHG TSD''). Available at *www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

[9] U.S. Environmental Protection Agency. Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors.*

[10] DOE estimates the economic value of these emissions reductions resulting from the considered TSLs for the purpose of complying with the requirements of Executive Order 12866.

monetizing health benefits from changes in ambient fine particulate matter (''$PM_{2.5}$'') concentrations from two precursors (SO_2 and NO_X), and from changes in ambient ozone from one precursor (for NO_X), but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table 1.3 summarizes the monetized benefits and costs expected to result from the amended standards for GSLs. There are other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants and other emissions, unquantified energy security benefits, and distributional effects among others.

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Table I.3 Summary of Monetized Benefits and Costs of Adopted Energy Conservation Standards for GSLs (2029-2058)

	Billion $2022
3% discount rate	
Consumer Operating Cost Savings	27.2
Climate Benefits*	3.8
Health Benefits**	7.5
Total Benefits†	38.5
Consumer Incremental Product Costs‡	5.1
Net Benefits	33.5
Change in Producer Cashflow (INPV)‡‡	(0.3) – (0.2)
7% discount rate	
Consumer Operating Cost Savings	11.3
Climate Benefits* (3% discount rate)	3.8
Health Benefits**	2.9
Total Benefits†	18.0
Consumer Incremental Product Costs‡	2.9
Net Benefits	15.1
Change in Producer Cashflow (INPV)‡‡	(0.3) – (0.2)

Note: This table presents the costs and benefits associated with GSLs shipped during the period 2029–2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped during the period 2029–2058.

* Climate benefits are calculated using four different estimates of the social cost of carbon (SC-CO_2), methane (SC-CH_4), and nitrous oxide (SC-N_2O) (model average at 2.5-percent, 3-percent, and 5-percent discount rates; 95th percentile at a 3-percent discount rate) (*see* section IV.L of this final rule). Together these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3-percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with a 3-percent discount rate.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating cost savings are calculated based on the life-cycle cost analysis and national impact analysis

as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impact analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cashflow, including changes in production costs, capital expenditures, and manufacturer profit margins. Change in INPV is calculated using the industry weighted average cost of capital value of 6.1 percent that is estimated in the MIA (*see* chapter 11 of the final rule technical support document ("TSD") for a complete description of the industry weighted average cost of capital). For GSLs, the change in INPV ranges from -$322 million to -$155 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the change in INPV into the net benefit calculation for this final rule, the net benefits would range from $33.2 billion to $33.3 billion at a 3-percent discount rate and would range from $14.8 billion to $14.9 billion at a 7-percent discount rate. Parentheses () indicate negative values.

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The benefits and costs of the amended standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the value of climate and health benefits of emission reductions, all annualized.[11]

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of GSLs shipped during the period 2029–2058. The benefits associated with reduced emissions achieved as a result of the adopted standards are also calculated based on the lifetime of GSLs shipped during the period 2029–2058. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with a 3-percent discount rate. Estimates of SC–GHG values are presented for all four discount rates in section V.B.8 of this document.

Table I.4 presents the total estimated monetized benefits and costs associated with the amended standard, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced NO_X and SO_2 emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards adopted in this rule is $301.4 million per year in increased equipment costs, while the estimated annual benefits are $1,193.6 million in reduced equipment operating costs, $217.7 million in climate benefits, and $303.2 million in health benefits. In this case, the net benefit would amount to $1,413.1 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is $292.2 million per year in increased equipment costs, while the estimated annual benefits are $1,564.6 million in reduced operating costs, $217.7 million in climate benefits, and $430.8 million in health benefits. In this case, the net benefit would amount to $1,920.9 million per year.

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[11] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2024, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2024. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

Table I.4 Annualized Benefits and Costs of Adopted Standards for GSLs (2029-2058)

	Million 2022$/year		
	Primary Estimate	**Low Net Benefits Estimate**	**High Net Benefits Estimate**
3% discount rate			
Consumer Operating Cost Savings	1,564.6	1,473.8	1,639.9
Climate Benefits*	217.7	213.0	220.6
Health Benefits**	430.8	421.6	436.3
Total Benefits†	2,213.1	2,108.4	2,296.8
Consumer Incremental Product Costs‡	292.2	279.0	304.4
Net Benefits	1,920.9	1,829.5	1,992.4
Change in Producer Cashflow (INPV)‡‡	(22.5) – (10.8)	(22.5) – (10.8)	(22.5) – (10.8)
7% discount rate			
Consumer Operating Cost Savings	1,193.6	1,129.5	1,248.5
Climate Benefits* (3% discount rate)	217.7	213.0	220.6
Health Benefits**	303.2	297.4	306.7
Total Benefits†	1,714.5	1,639.9	1,775.8
Consumer Incremental Product Costs‡	301.4	288.9	312.8
Net Benefits	1,413.1	1351.0	1,463.0
Change in Producer Cashflow (INPV)‡‡	(22.5) – (10.8)	(22.5) – (10.8)	(22.5) – (10.8)

Note: This table presents the costs and benefits associated with GSLs shipped during the period 2029−2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped during the period 2029−2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, LED lamp prices reflect a higher price learning rate in the Low Net Benefits Estimate, and a lower price learning rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.G of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (*see* section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.
‡ Costs include incremental equipment costs as well as installation costs.
‡‡ Operating cost savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impact analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 6.1 percent that is estimated in the MIA (*see* chapter 11 of the final rule TSD for a complete description of the industry weighted average cost of capital). For GSLs, the annualized change in INPV ranges from -$22.5 million to -$10.8 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the change in INPV into the annualized net benefit calculation for this final rule, the net benefits would range from $1,898.4 million to $1,910.1 million at 3-percent discount rate and would range from $1,390.6 million to $1,402.3 million at 7-percent discount rate. Parentheses () indicate negative values.

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DOE's analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

D. Conclusion

DOE concludes that the standards adopted in this final rule represent the maximum improvement in energy efficiency that is technologically feasible and economically justified and would result in the significant conservation of energy. Specifically, with regard to technological feasibility, products achieving these standard levels are already commercially available for all product classes covered by this final rule. As for economic justification, DOE's analysis shows that the benefits of the standards exceed, to a great extent, the burdens of the standards.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for GSLs is $301.4 million per year in increased GSL costs, while the estimated annual benefits are $1,193.6 million in reduced GSL operating costs, $217.7 million in climate benefits, and $303.2 million in health benefits. The net benefit amounts to $1,413.1 million per year. While DOE presents monetized climate benefits, DOE would reach the same conclusion presented in this rulemaking in the absence of the benefits of the social cost of greenhouse gases.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[12] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the standards are projected to result in estimated national energy savings of 4.0 quad full-fuel-cycle (''FFC''), the equivalent of the primary annual energy use of 261 million homes. In addition, they are projected to reduce CO_2 emissions by 70.3 Mt. Based on these findings, DOE has determined the energy savings from the standard levels adopted in this final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for these conclusions is contained in the remainder of this document and the accompanying TSD.

[12] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

II. Introduction

The following section briefly discusses the statutory authority underlying this final rule, as well as some of the relevant historical background related to the establishment of standards for GSLs.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include GSLs, the subject of this document. (42 U.S.C. 6295 (i) (6)) EPCA directs DOE to conduct future rulemakings to determine whether to amend these

standards. *Id.* EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking (''NOPR'') including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1))

EPCA directs DOE to conduct two rulemaking cycles to evaluate energy conservation standards for GSLs. (42 U.S.C. 6295(i)(6)(A)–(B)) For the first rulemaking cycle, EPCA directed DOE to initiate a rulemaking process prior to January 1, 2014, to determine whether: (1) to amend energy conservation standards for GSLs and (2) the exemptions for certain incandescent lamps should be maintained or discontinued. (42 U.S.C. 6295(i)(6)(A)(i)) That rulemaking was not to be limited to incandescent lamp technologies and was required to include a consideration of a minimum standard of 45 lm/W for GSLs. (42 U.S.C. 6295(i)(6)(A)(ii)) EPCA required that if the Secretary determined that the standards in effect for GSILs should be amended, a final rule must be published by January 1, 2017, with a compliance date at least 3 years after the date on which the final rule is published. (42 U.S.C. 6295(i)(6)(A)(iii)) The Secretary was also required to consider phased-in effective dates after considering certain manufacturer and retailer impacts. (42 U.S.C. 6295(i)(6)(A)(iv)) If DOE failed to complete a rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv), or if a final rule from the first rulemaking cycle did not produce savings greater than or equal to the savings from a minimum efficacy standard of 45 lm/W, the statute provides a ''backstop'' under which DOE was required to prohibit sales of GSLs that do not meet a minimum 45 lm/W standard. (42 U.S.C. 6295(i)(6)(A)(v)). DOE did not complete a rulemaking in accordance with the statutory criteria, and so accordingly codified this backstop requirement in a rule issued on May 9, 2022 (''May 2022 Backstop Final Rule''). 87 FR 27439.

EPCA further directs DOE to initiate a second rulemaking cycle by January 1, 2020, to determine whether standards in effect for GSILs (which are a subset of GSLs) should be amended with more stringent maximum wattage requirements than EPCA specifies, and whether the exemptions for certain incandescent lamps should be maintained or discontinued. (42 U.S.C. 6295(i)(6)(B)(i)) As in the first rulemaking cycle, the scope of the second rulemaking is not limited to incandescent lamp technologies. (42 U.S.C. 6295(i)(6)(B)(ii)) As previously stated in section I of this document, DOE is publishing this final rule pursuant to this second cycle of rulemaking, as well as section (m) of 42 U.S.C. 6295.

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d).)

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for GSLs appear at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendices R, W, BB, and DD.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including GSLs. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard (1) for certain products, including GSLs, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or, as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (''Secretary'') considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the

minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Finally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE determined that it is not feasible for GSLs included in the scope of this rulemaking to meet the off mode criteria because there is no condition in which a GSL connected to main power is not already in a mode accounted for in either active or standby mode. DOE notes the existence of commercially available GSLs that operate in standby mode. DOE's current test procedures and standards for GSLs address standby mode, as do the amended standards adopted in this final rule.

B. Background

1. Current Standards

This is the second cycle of energy conservation standards rulemakings for GSLs. As noted in section II.B.2 of this document, DOE has codified the statutory backstop requirement prohibiting sales of GSLs that do not meet a 45 lm/W requirement. Because incandescent and halogen GSLs are not able to meet the 45 lm/W requirement, they are not being considered in this analysis. The analysis does take into consideration existing standards for MBCFLs by ensuring that the adopted levels do not decrease the existing minimum required energy efficiency of MBCFLs in violation of EPCA's anti-backsliding provision, which precludes DOE from amending an existing energy conservation standard to permit greater energy use or a lesser amount of energy efficiency (*see* 42 U.S.C. 6295(o)(1)). The current standards for MBCFLs are summarized in table II.1. 10 CFR 430.32(u).

Table II.1 Existing Standards for MBCFLs

Lamp Configuration	Lamp Power (*W*)*	Minimum Efficacy (*lm/W*)
Bare Lamp	Lamp power < 15	45.0
	Lamp power ≥ 15	60.0
Covered Lamp, No Reflector	Lamp power < 15	40.0
	15 ≥ lamp power < 19	48.0
	19 ≥ lamp power < 25	50.0
	Lamp power ≥ 25	55.0
Lumen Maintenance at 1,000 Hours	≥ 90%	
Lumen Maintenance at 40% of Rated Lifetime	≥ 80%	
Rapid Cycle Stress Test	Each lamp must be cycled once for every 2 hours of lifetime.** At least 5 lamps must meet or exceed the minimum number of cycles.	
Lamp Lifetime**	≥ 6,000 hours	

*Use labeled wattage to determine the appropriate efficacy requirements in this table; do not use measured wattage for this purpose.

** Lifetime refers to lifetime of a compact fluorescent lamp as defined in 10 CFR 430.2.

MBCFLs fall within the Integrated Omnidirectional Short product class (*see* section IV.B.2 of this document for further details on product classes). Because DOE determined that a lamp cover (*i.e.,* bare or covered) is not a feature that justifies separate standards in this analysis, the baseline efficacy requirements are determined by lamp wattage. Therefore, for products with wattages less than 15 W that fall into the Integrated Omnidirectional Short product class, DOE set the baseline efficacy at 45 lm/W (the highest of the existing standards for that wattage range) to prevent increased energy usage in violation of EPCA's anti-backsliding provision. For products with wattages greater than or equal to 15 W that fall into the Integrated Omnidirectional Short product class, DOE set the baseline efficacy at 60 lm/W to prevent increased energy usage in violation of EPCA's anti-backsliding provision. Table II.2 shows the baseline efficacy requirements for the Integrated Omnidirectional Short product class.

Table II.2 Integrated Omnidirectional Short Current Standard Efficacy Requirements

Product Class	Lamp Power	Minimum Efficacy
	W	*lm/W*
Integrated GSLs	< 15	45.0
	≥ 15	60.0

2. History of Standards Rulemaking for GSLs

Pursuant to its statutory authority to complete the first cycle of rulemaking for GSLs, DOE published a NOPR on March 17, 2016 (''March 2016 NOPR''), that addressed the first question that Congress directed it to consider—whether to amend energy conservation standards for GSLs. 81 FR 14528, 14629–14630 (Mar. 17, 2016). In the March 2016 NOPR, DOE stated that it would be unable to undertake any analysis regarding GSILs and other incandescent lamps because of a then-applicable congressional restriction (''the Appropriations Rider''). *See* 81 FR 14528, 14540–14541. The Appropriations Rider prohibited expenditure of funds appropriated by that law to implement or enforce: (1) 10 CFR 430.32(x), which includes maximum wattage and minimum rated lifetime requirements for GSILs; and (2) standards set forth in section 325(i)(1)(B) of EPCA (42 U.S.C. 6295(i)(1)(B)), which sets minimum lamp efficiency ratings for incandescent reflector lamps (''IRLs''). Under the Appropriations Rider, DOE was restricted from undertaking the analysis required to address the first question presented by Congress, but was not so limited in addressing the second question—that is, DOE was not prevented from determining whether the exemptions for certain incandescent lamps should be maintained or discontinued. To address that second question, on October 18, 2016, DOE published a Notice of Proposed Definition and Data Availability (''October 2016 NOPDDA''), which proposed to amend the definitions of GSIL, GSL, and related terms. 81 FR 71794, 71815 (Oct. 18, 2016). The Appropriations Rider, which was originally adopted in 2011 and readopted and extended continuously in multiple subsequent legislative actions, expired on May 5, 2017, when the Consolidated Appropriations Act, 2017 was enacted.[13]

On January 19, 2017, DOE published two final rules concerning the definitions of GSL, GSIL, and related terms (''January 2017 Definition Final Rules''). 82 FR 7276; 82 FR 7322. The January 2017 Definition Final Rules amended the definitions of GSIL and GSL by bringing certain categories of lamps that had been excluded by statute from the definition of GSIL within the definitions of GSIL and GSL. DOE determined to use two final rules in 2017 to amend the definitions of GSIL and GSLs in order to address the majority of the definition changes in one final rule and the exemption for IRLs in the second final rule. These two rules were issued simultaneously, with the first rule eschewing a determination regarding the existing exemption for IRLs in the definition of GSL and the second rulemaking discontinuing that exemption from the GSL definition. 82 FR 7276, 7312; 82 FR 7322, 7323. As in the October 2016 NOPDDA, DOE stated that the January 2017 Definition Final Rules related only to the second question that Congress directed DOE to consider, *i.e.,* whether to maintain or discontinue ''exemptions'' for certain incandescent lamps. 82 FR 7276, 7277; 82 FR 7322, 7324 (*see* 42 U.S.C. 6295(i)(6)(A)(i)(II)). That is, neither of the two final rules issued on January 19, 2017, established energy conservation standards applicable to GSLs. DOE explained that the Appropriations Rider prevented it from establishing, or even analyzing, standards for GSILs. 82 FR 7276, 7278. Instead, DOE explained that it would either impose standards for GSLs in the future pursuant to its authority to develop GSL standards or apply the backstop standard prohibiting the sale of lamps not meeting a 45 lm/W efficacy standard. 82 FR 7276, 7277–7278. The two final rules were to become effective as of January 1, 2020.

On March 17, 2017, the National Electrical Manufacturers Association (''NEMA'') filed a petition for review of the January 2017 Definition Final Rules in the U.S. Court of Appeals for the Fourth Circuit. *National Electrical Manufacturers Association* v. *United States Department of Energy,* No. 17–1341. NEMA claimed that DOE ''amend[ed] the statutory definition of 'general service lamp' to include lamps that Congress expressly stated were 'not include[d]' in the definition'' and adopted an ''unreasonable and unlawful interpretation of the statutory definition.'' Pet. 2. Prior to merits briefing, the parties reached a settlement agreement under which DOE agreed, in part, to issue a notice of data availability requesting data for GSILs and other incandescent lamps to assist DOE in determining whether standards for GSILs should be amended (the first question of the rulemaking required by 42 U.S.C. 6295(i)(6)(A)(i)).

With the removal of the Appropriations Rider in the Consolidated Appropriations Act, 2017, DOE was no longer restricted from undertaking the analysis and decision-

[13] *See* Consolidated Appropriations Act of 2017 (Pub. L. 115–31, div. D, tit. III); *see also* Consolidated Appropriations Act, 2018 (Pub. L. 115–141).

making required to address the first question presented by Congress, *i.e.,* whether to amend energy conservation standards for GSLs, including GSILs. Thus, on August 15, 2017, DOE published a notice of data availability (''NODA'') and request for information seeking data for GSILs and other incandescent lamps (''August 2017 NODA''). 82 FR 38613.

The purpose of the August 2017 NODA was to assist DOE in determining whether standards for GSILs should be amended. (42 U.S.C. 6295(i)(6)(A)(i)(I)) Comments submitted in response to the August 2017 NODA also led DOE to reconsider the decisions it had already made with respect to the second question presented to DOE—whether the exemptions for certain incandescent lamps should be maintained or discontinued. 84 FR 3120, 3122 (*see* 42 U.S.C. 6295(i)(6)(A)(i)(II)). As a result of the comments received in response to the August 2017 NODA, DOE also reassessed the legal interpretations underlying certain decisions made in the January 2017 Definition Final Rules. *Id.*

On February 11, 2019, DOE published a NOPR that proposed to withdraw the revised definitions of GSL, GSIL, and the new and revised definitions of related terms that were to go into effect on January 1, 2020 (''February 2019 Definition NOPR''). 84 FR 3120. In a final rule published September 5, 2019, DOE finalized the withdrawal of the definitions in the January 2017 Definition Final Rules and maintained the existing regulatory definitions of GSL and GSIL, which are the same as the statutory definitions of those terms (''September 2019 Withdrawal Rule''). 84 FR 46661. The September 2019 Withdrawal Rule revisited the same primary question addressed in the January 2017 Definition Final Rules, namely, the statutory requirement for DOE to determine whether ''the exemptions for certain incandescent lamps should be maintained or discontinued.'' 42 U.S.C. 6295(i)(6)(A)(i)(II) (*see* 84 FR 46661, 46667). In the rule, DOE also addressed its interpretation of the statutory backstop at 42 U.S.C. 6295(i)(6)(A)(v) and concluded the backstop had not been triggered. 84 FR 46661, 46663–46664. DOE reasoned that 42 U.S.C. 6295(i)(6)(A)(iii) ''does not establish an absolute obligation on the Secretary to publish a rule by a date certain.'' 84 FR 46661, 46663. ''Rather, the obligation to issue a final rule prescribing standards by a date certain applies if, and only if, the Secretary makes a determination that standards in effect for GSILs need to be amended.'' *Id.* DOE further stated that, since it had not yet made the predicate determination on whether to amend standards for GSILs, the obligation to issue a final rule by a date certain did not yet exist and, as a result, the condition precedent to the potential imposition of the backstop requirement did not yet exist and no backstop requirement had yet been triggered. 84 FR 46661, 46664.

Similar to the January 2017 Definition Final Rules, the September 2019 Withdrawal Rule clarified that DOE was not determining whether standards for GSLs, including GSILs, should be amended. DOE stated it would make that determination in a separate rulemaking. 84 FR 46661, 46662. DOE initiated that separate rulemaking by publishing a notice of proposed definition (''NOPD'') on September 5, 2019 (''September 2019 NOPD''), regarding whether standards for GSILs should be amended. 84 FR 46830. In conducting its analysis for that notice, DOE used the data and comments received in response to the August 2017 NODA and relevant data and comments received in response to the February 2019 Definition NOPR, and DOE tentatively determined that the current standards for GSILs do not need to be amended because more stringent standards are not economically justified. 84 FR 46830, 46831. DOE finalized that tentative determination on December 27, 2019 (''December 2019 Final Determination''). 84 FR 71626. DOE also concluded in the December 2019 Final Determination that because it had made the predicate determination not to amend standards for GSILs, there was no obligation to issue a final rule by January 1, 2017, and, as a result, the backstop requirement had not been triggered. 84 FR 71626, 71636.

Two petitions for review were filed in the U.S. Court of Appeals for the Second Circuit challenging the September 2019 Withdrawal Rule. The first petition was filed by 15 States,[14] New York City, and the District of Columbia. *See New York* v. *U.S. Department of Energy,* No. 19–3652 (2d Cir., filed Nov. 4, 2019). The second petition was filed by six organizations [15] that included environmental, consumer, and public housing tenant groups. *See Natural Resources Defense Council* v. *U.S. Department of Energy,* No. 19–3658 (2d Cir., filed Nov. 4, 2019). The petitions were subsequently consolidated. On May 9, 2022, DOE published a final rule that revised the determination at issue in these consolidated cases and adopted new regulations in accordance with that revision. 87 FR 27439. In August 2022, the petitioners moved the court to dismiss the petitions for review, which the court granted.

Additionally, in two separate petitions also filed in the Second Circuit, groups of petitioners that were essentially identical to those that filed the lawsuit challenging the September 2019 Withdrawal Rule challenged the December 2019 Final Determination. *See Natural Resources Defense Council* v. *U.S. Department of Energy,* No. 20–699 (2d Cir., filed Feb. 25, 2020); *New York* v. *U.S. Department of Energy,* No. 20–743 (2d Cir., filed Feb. 28, 2020). These petitions were also dismissed in August 2022.

On January 20, 2021, President Biden issued Executive Order (''E.O.'') 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' 86 FR 7037. Section 1 of E.O. 13990 lists a number of policies related to the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation's resilience to climate change. 86 FR 7037, 7041. Section 2 of E.O. 13990 instructs all agencies to review ''existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies].'' *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.*

In accordance with E.O. 13990, DOE published a request for information (''RFI'') on May 25, 2021, initiating a reevaluation of its prior determination that the Secretary was not required to implement the statutory backstop requirement for GSLs (''May 2021 Backstop RFI''). 86 FR 28001. DOE solicited information regarding the availability of lamps that would satisfy a minimum efficacy standard of 45 lm/W, as well as other information that may be relevant to a possible implementation of the statutory backstop. *Id.* On December 13, 2021, DOE published a NOPR proposing to codify in the CFR the 45 lm/W backstop requirement for GSLs (''December 2021 Backstop

[14] The petitioning States are the States of New York, California, Colorado, Connecticut, Illinois, Maryland, Maine, Michigan, Minnesota, New Jersey, Nevada, Oregon, Vermont, and Washington and the Commonwealth of Massachusetts.

[15] The petitioning organizations are the Natural Resources Defense Council, Sierra Club, Consumer Federation of America, Massachusetts Union of Public Housing Tenants, Environment America, and U.S. Public Interest Research Group.

NOPR''). 86 FR 70755. On May 9, 2022, DOE published a final rule codifying the 45 lm/W backstop requirement (''May 2022 Backstop Final Rule''). 87 FR 27439. In the May 2022 Backstop Final Rule, DOE determined the backstop requirement applies because DOE failed to complete a rulemaking for GSLs in accordance with certain statutory criteria in 42 U.S.C. 6295(i)(6)(A). When DOE published the May 2022 Backstop Final Rule, it also released an enforcement policy statement for GSLs.[16] In response to lead-in time concerns raised by members of the industry and comments supporting immediate enforcement, DOE outlined a progressive enforcement model where it would exercise its discretion when taking enforcement action.

On August 19, 2021, DOE published a NOPR to amend the current definitions of GSL and GSIL and adopt associated supplemental definitions to be defined as previously set forth in the January 2017 Definition Final Rules (''August 2021 Definition NOPR''). 86 FR 46611. On May 9, 2022, DOE published a final rule adopting definitions of GSL and GSIL and associated supplemental definitions as set forth in the August 2021 Definition NOPR (''May 2022 Definition Final Rule''). 87 FR 27461.

Upon issuance of the May 2022 Backstop Final Rule and the May 2022 Definition Final Rule, DOE concluded the first cycle of GSL rulemaking required by 42 U.S.C. 6295(i)(6)(A). EPCA directs DOE to initiate this second cycle of rulemaking procedure no later than January 1, 2020. 42 U.S.C. 6295(i)(6)(B) However, DOE is delayed in initiating this second cycle because of the Appropriations Rider, DOE's evolving position under the first rulemaking cycle, and the associated delays that resulted in DOE certifying the backstop requirement for GSLs two years after the January 1, 2020, date specified in the statute.

On January 11, 2023, DOE published a NOPR (''January 2023 NOPR''), pursuant to this second cycle of rulemaking as well as 42 U.S.C. 6295(m). 88 FR 1638 (Jan. 11, 2023).

DOE received 17 comments in response to the January 2023 NOPR from the interested parties listed in table II.3. DOE also received 158 comments from private citizens.

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[16] Enforcement Policy Statement—General Service Lamps, April 26, 2022, available at: *www.energy.gov/sites/default/files/2022–04/GSL_EnforcementPolicy_4_25_22.pdf.*

Table II.3 List of Commenters with Written Submissions in Response to the January 2023 NOPR

Commenter(s)	Abbreviation	Comment No. in the Docket	Commenter Type
Appliance Standards Awareness Project ("ASAP"), American Council for an Energy-Efficient Economy ("ACEEE"), Northeast Energy Efficiency Partnerships ("NEEP"), Alliance to Save Energy ("ASE"), Natural Resources Defense Council ("NRDC"), Northwest Energy Efficiency Alliance ("NEEA")	ASAP *et al.*	174	Efficiency Organizations
Pacific Gas and Electric Company, Southern California Edison, San Diego Gas & Electric Company	CA IOUs	167	Utilities
California Energy Commission	CEC	176	State Official/Agency
Collaborative Labeling and Appliance Standards Program	CLASP	177	Energy Efficiency Organization
Earthjustice	Earthjustice	179	Energy Efficiency Organization
Edison Electric Institute	EEI	181	Energy Efficiency Organization
Institute for Policy Integrity at New York University School of Law	IPI	175	Energy Efficiency Organization
Lutron	Lutron	182	Manufacturer
National Electrical Manufacturers Association	NEMA	183	Trade Association
New York State Energy Research and Development Authority	NYSERDA	166	State Official/Agency
Soft Lights Foundation	Soft Lights	18, 19, 48, 50, 54, 114	Activist Organization
Friends of Merrymeeting Bay	Friends of Merrymeeting Bay	100	Energy Efficiency Organization

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A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[17] To the extent that interested parties have provided written comments that are substantively consistent with any oral comments provided during the February 1, 2023, public meeting, DOE cites the written comments throughout this final rule. Any oral comments provided during the webinar that are not substantively addressed by written comments are summarized and cited separately throughout this final rule.

[17] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for GSLs. (Docket No. EERE–2022–BT–STD–0022, which is maintained at *www.regulations.gov.*) The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

III. General Discussion

DOE developed this final rule after considering oral and written comments, data, and information from interested parties that represent a variety of interests. The following discussion addresses issues raised by these commenters.

A. General Comments

This section summarizes and discusses general comments received from interested parties. As specified in section I, the adopted standards in this final rule are expressed as lumens per watt (''lm/W'') of a lamp or lamp efficacy. In this document the terms efficacy and efficiency both refer to lm/W of the lamp.

NEMA supported DOE's statements in the January 2023 NOPR regarding EPCA's preemption provisions to state regulation. NEMA stated that in the final rule, DOE clearly specified the preemptive effect on all covered products that meet the Federal definition of a GSL in accordance with E.O. 13132 as well as the timing of the effect in accordance with E.O. 12988. NEMA stated that this clarification will prevent confusion that may otherwise arise due to a patchwork of differing State regulations that had previously been implemented prior to May 9, 2022, when DOE published the May 2022 Backstop Final Rule. (NEMA, No. 183 at p. 21)

Regarding comments received on Federal preemption, in the January 2023 NOPR (88 FR 1638, 1644) and in this final rule (*see* section II.A of this

document), DOE specifies that Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA (*see* 42 U.S.C. 6297(d)). For the first cycle of the GSL rulemaking, EPCA provided California and Nevada with certain preemption allowances (*see* 42 U.S.C. 6295(i)(6)(A)(vi)). However, these allowances do not apply to this second cycle of GSL rulemaking (*see* 42 U.S.C. 6295(i)(6)(B)).

CLASP recommended that DOE, in partnership with the U.S. Environmental Protection Agency (''EPA'') and the Consumer Product Safety Commission (''CPSC''), implement a national policy banning fluorescent lighting on the basis of toxicity due to the mercury content contained in all fluorescent lamps, which is already adopted in California and Vermont and is under consideration in several other States. CLASP commented that such a national regulation would help to accelerate market shift to LED lamps and promote even more cost-effective energy savings in the United States. CLASP recommended that DOE prioritize an advanced schedule for the phase-out of fluorescent lighting at increased rates of efficacy, as it would yield several benefits across various DOE objectives. CLASP stated that replacing fluorescent bulbs with retrofittable LED bulbs (*i.e.,* plug-and-play, drop-in replacements that require no rewiring) will eliminate mercury and cut lighting-related power consumption in half and will reduce CO_2 and Hg emissions from power stations. CLASP also noted that LED bulbs last 2–3 times longer than fluorescent bulbs, reducing the volume of municipal waste generated. CLASP further stated that LCC studies had shown LED bulbs to have the lowest associated energy utilization and lowest environmental impact compared to other lighting technologies. (CLASP, No. 177 at pp. 4–5)

CLASP also recommended that DOE work with EPA to update ENERGY STAR requirements for lamp efficacy levels to at least double the current level of 80 lm/W in an effort to further support this GSL regulation by creating a market 'pull' for higher efficacy lamps. CLASP stated that an update to ENERGY STAR is necessary to discontinue the inclusion of CFLs in the program, as seven fluorescent lamps are currently recognized by ENERGY STAR while Africa, Europe, and India are phasing out fluorescent lighting. (CLASP, No. 177 at p. 5) NEMA noted EPA's intention to sunset all ENERGY STAR lighting programs except for a new program for recessed lighting, recognizing its significant energy savings. NEMA supported the more focused continuation of this ENERGY STAR program to maintain minimum levels of quality and performance. (NEMA, No. 183 at p. 19)

The scope of this rule is to evaluate energy conservation standards for GSLs (*see* section II.A of this document) which does not include general service fluorescent lamps or other fluorescent lamps (*see* definition of GSLs at 10 CFR 430.2). DOE considers out-of-scope lamps such as fluorescent lamps in the shipment and NIA analyses (*see* respectively, sections IV.G and IV.H of this document). Additionally, the scope of this rule does not include updating requirements set by EPA's ENERGY STAR program. Note that on March 13, 2023, EPA announced it will be sunsetting ENERGY STAR specifications for lamps and luminaires effective December 31, 2024, with the exception of recessed downlights, which would be covered by a new specification.[18]

As noted in section II.A of this document and in the January 2023 NOPR per 42 U.S.C. 6295(i)(6)(B)(iv)(I)–(II), the Secretary shall consider phased-in effective dates after considering certain manufacturer and retailer impacts. In the January 2023 NOPR, DOE requested comments on whether phased-in effective dates were necessary for the proposed GSL standards. 88 FR 1638, 1656. Westinghouse stated its preference for a single effective date for the standard, as phased-in effective dates would make things more complicated. (Westinghouse, Public Meeting Transcript, No. 27 at p. 13). NEMA stated its support for the implementation of one effective date versus phased-in effective dates. (NEMA, No. 183 at p. 5) DOE did not receive any requests for a phased-in effective date approach. Regarding the standards being adopted in this final rule, DOE does not find any particular reason(s) that phased-in effective dates would be of value for manufacturers or retailers and thus has determined the adopted standards will become effective on one date. Specifically, DOE reviewed the market and did not find impacts on manufacturers and retailers would differ by product class.

Several comments from private citizens stated that free-market forces should direct the lighting market instead of government regulation and that there should be less government interference with consumer choices. Additionally, EEI commented that if the proposed standard is not revised, many consumers will realize direct economic losses, and that by setting the standard at near maximum TSLs, DOE will make it very difficult for electric companies to justify investments in future lighting efficiency rebate programs. EEI stated that according to a recent EEI report, electric companies spent nearly $7 billion on efficiency programs in 2021, saving 237 billion kWh of electricity—enough to power 33 million U.S. homes for one year. Citing a meta-analysis by the Lawerence Berkeley National Laboratory, from 2010 through 2018, EEI stated that residential lighting programs were responsible for 48 percent of all residential program savings (*i.e.,* 14.8 percent of all market sectors). EEI added that the levelized cost to save a kWh of electricity through residential lighting programs is extremely cost-effective at just over 1 cent per kWh. (EEI, No. 181 at pp. 2–3)

When evaluating energy conservation standards for products, DOE determines whether a standard is economically justified based on several factors, including consumer impacts and lessening of the utility or the performance likely to result from the imposition of the standard, as it did in this rulemaking. 42 U.S.C. 6295(o)(2)(B)(i). Therefore, DOE's analysis accounts for the impacts on consumers. Additionally, E.O. 12866 directs DOE to assess potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives (*see* chapter 16 of the final rule TSD).

In response to the January 2023 NOPR, DOE received several comments in support of the proposed rule including the proposed TSL. 88 FR 1638, 1706–1708. CLASP stated that it agreed with DOE's finding that setting new energy conservation standards for GSLs would benefit the United States by delivering significant, cost-effective energy savings that are both technologically feasible and economically justified. (CLASP, No. 177 at p. 1) Earthjustice commented that the January 2023 NOPR demonstrates that even with DOE's recent implementation of the EPCA statutory backstop

[18] ENERGY STAR Lighting Sunset—March 13, 2023. Available at: *www.energystar.gov/sites/default/files/asset/document/ENERGY%20STAR%20Lighting%20Sunset%20Memo.pdf.*

standard, GSLs continue to hold significant potential for additional cost-effective energy savings and air pollutant emissions reductions. (Earthjustice, No. 179 at p. 1) The CA IOUs stated that after DOE ends its enforcement discretion of the 45 lm/W backstop standard, all GSLs on the market will be light-emitting diode (''LED'') lamps or compact fluorescent lamps (''CFLs''), with LED GSLs offering many efficacies. The CA IOUs encouraged DOE to finalize this rule before June 2024 to ensure the legal durability of this and future GSL standards. (CA IOUs, No. 167 at p. 2) The CEC also stated its general support for DOE's efforts to improve the minimum efficacy for GSLs, which they stated will move the market to high-efficacy LED lighting. The CEC commented that California has been able to provide a test market as the world's fourth-largest economy for high-quality and high-efficacy LEDs since January 1, 2018. The CEC commented that the success of California's standards demonstrates the technological feasibility and economic justification of pursuing minimum efficacy standards for GSLs. (CEC, No. 176 at pp. 1–2)

NYSERDA stated its support for TSL 6 as proposed in the NOPR, as this TSL represents all product categories at their maximum technologically feasible (''max-tech'') standard efficiencies. (NYSERDA, No. 166 at pp. 1–2) NEMA stated that with the exception of the new product classes it had suggested, for all other product classes DOE should adopt TSL 5, because TSL 5 represents the maximum NPV and maintains design flexibility for lamps of varying lengths to produce sufficient light while meeting various application requirements. Specifically, NEMA stated that TSL 6 would require max-tech performance for linear LED lamps designed to replace fluorescent tubes. NEMA stated that linear LED lamps provide lower lumens, which may hinder manufacturers from producing lamps able to provide the appropriate amount of light to meet the max-tech performance standard of efficiency or efficacy level (''EL'') 7 (*see* section IV.D.1.d of this document for full comment and response). Finally, NEMA stated that because TSL 5 and TSL 6 save energy, have similar payback periods, and represent the maximum NPV, NEMA members believe DOE should adopt TSL 5 to best balance consumer cost and benefit. (NEMA, No. 183 at p. 20) ASAP *et al.* commented that DOE should not adopt TSL 5 as an alternative to TSL 6, as DOE should adopt the standard that represents the maximum improvement in energy efficiency that is technically feasible and economically justified, which is TSL 6. ASAP *et al.* commented that adopting a lower level would not fulfill DOE's statutory obligations and would needlessly result in additional energy waste and greenhouse gas and other emissions. (ASAP *et al.,* No. 174 at p. 5)

In this final rule DOE is adopting TSL 6 as proposed in the January 2023 NOPR. 88 FR 1638, 1708. DOE discusses the benefits and burdens of each TSL considered and DOE's conclusion in section V.C of this document. As discussed in that section, TSL 6 represents the maximum energy savings that are technically feasible and economically justified, as required by EPCA. Regarding requiring the max-tech level for linear LED lamps at TSL 6, all max-tech efficiency levels in this analysis are based on existing products available on the market.

B. Scope of Coverage

This rulemaking covers all consumer products that meet the definition of ''general service lamp'' as codified at 10 CFR 430.2. While all GSLs are subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd), not all GSLs are subject to the amended standards adopted in this final rule, though DOE may consider amended standards for them in a future rulemaking (*see* section IV.A.3 of this document).

C. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product. DOE's current energy conservation standards for GSLs are expressed in terms of lumens per watt (''lm/W''). GSILs and certain IRLs, CFLs, and LED lamps are GSLs. DOE's test procedures for GSILs and IRLs are set forth at 10 CFR part 430, subpart B, appendix R. DOE's test procedure for CFLs is set forth at 10 CFR part 430, subpart B, appendix W. DOE's test procedure for integrated LED lamps is set forth at 10 CFR part 430, subpart B, appendix BB. DOE's test procedure for GSLs that are not GSILs, IRLs, CFLs, or integrated LED lamps is set forth at 10 CFR part 430, subpart B, appendix DD.

D. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. *See* sections 6(b)(3)(i) and 7(b)(1) of appendix A to 10 CFR part 430, subpart C (''Process Rule'').

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety; and (4) unique-pathway proprietary technologies. *See* section 7(b)(2)–(5) of the Process Rule. Section IV.C of this document discusses the results of the screening analysis for GSLs, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this rulemaking, *see* chapter 4 of the final rule technical support document (''TSD'').

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt a new or amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for GSLs, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.D.1.c of this final rule and in chapter 5 of the final rule TSD.

E. Energy Savings

1. Determination of Savings

For each trial standard level (''TSL''), DOE projected energy savings from application of the TSL to GSLs purchased in the 30-year period that begins in the first full year of compliance with the amended standards (2029–2058).[19] The savings are measured over the entire lifetime of GSLs purchased in the 30-year analysis period, *i.e.,* including savings until the longest-lifetime GSL purchased in 2058 is retired from service in 2091. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of amended energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet models to estimate national energy savings (''NES'') from potential amended standards for GSLs. The NIA model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. For natural gas, the primary energy savings are considered to be equal to the site energy savings. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[20] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, *see* section IV.H.1 of this document.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B)).

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[21] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, and the need to confront the global climate crisis, among other factors.

As stated, the standard levels adopted in this final rule are projected to result in national energy savings of 4.0 quad, the equivalent of the primary annual energy use of 261 million homes. Based on the amount of FFC savings, the corresponding reduction in emissions, and the need to confront the global climate crisis, DOE has determined the energy savings from the standard levels adopted in this final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

F. Economic Justification

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of potential new or amended standards on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and payback period (''PBP'') associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared To Increase in Price (Life-Cycle Cost (''LCC'') and Payback Period Analysis (''PBP''))

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to

[19] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

[20] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

[21] The numeric threshold for determining the significance of energy savings established in a final rule published on February 14, 2020 (85 FR 8626, 8670), was subsequently eliminated in a final rule published on Dec. 13, 2021 (86 FR 70892).

recover the increased purchase cost (including installation) of a more efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first full year of compliance with new or amended standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

d. Lessening of Utility or Performance of Products

In establishing product classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards adopted in this document would not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) To assist the Department of Justice (''DOJ'') in making such a determination, DOE transmitted copies of its proposed rule and the NOPR TSD to the Attorney General for review, with a request that the DOJ provide its determination on this issue. In its assessment letter responding to DOE, DOJ concluded that it does not have evidence that the new proposed energy conservation standards for GSLs are substantially likely to adversely impact competition. DOE is publishing the Attorney General's assessment at the end of this final rule.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The adopted standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (''GHGs'') associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect potential amended energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F of this final rule.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this rulemaking with regard to GSLs. Separate subsections address each component of DOE's analyses.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended or new energy conservation standards. The national impact analysis uses a second spreadsheet set that provides shipments projections and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (GRIM), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=4.* Additionally, DOE used output from the latest version of the Energy Information Administration's (''EIA's'') *Annual*

Energy Outlook (''*AEO*'') for the emissions and utility impact analyses.

A. Scope of Coverage

This rulemaking covers all consumer products that meet the definition of ''general service lamps'' as codified at 10 CFR 430.2. While all GSLs are subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd), DOE is not adopting amended energy conservation standards in this final rule for all GSLs, though DOE may consider amended standards for them in a future rulemaking. In this rulemaking, DOE is analyzing and adopting amended standards for CFLs and general service LED lamps that have a lumen output within the range of 310–3,300 lumens; have an input voltage of 12 volts or 24 volts, at or between 100 to 130 volts, at or between 220 to 240 volts, or of 277 volts for integrated lamps, or are able to operate at any voltage for non-integrated lamps; and do not fall into any exclusion from the GSL definition at 10 CFR 430.2. In this rulemaking as specified in § 430.32(dd)(1)(iv)(C), DOE is not analyzing and adopting amended standards for general service organic LED lamps and any GSL that (1) is a non-integrated lamp that is capable of operating in standby mode and is sold in packages of two lamps or less; (2) is designed and marketed as a lamp that has at least one setting that allows the user to change the lamp's CCT and has no setting in which the lamp meets the definition of a colored lamp (as defined in 10 CFR 430.2); and is sold in packages of two lamps or less; (3) is designed and marketed as a lamp that has at least one setting in which the lamp meets the definition of a colored lamp (as defined in 10 CFR 430.2) and at least one other setting in which it does not meet the definition of colored lamp (as defined in 10 CFR 430.2) and is sold in packages of two lamps or less; or (4) is designed and marketed as a lamp that has one or more component(s) offering a completely different functionality (*e.g.,* a speaker, a camera, an air purifier, etc.) where each component is integrated into the lamp but does not affect the light output of the lamp (*e.g.,* does not turn the light on/off, dim the light, change the color of the light, etc.), is capable of operating in standby mode, and is sold in packages of two lamps or less. *See* section IV.A.3 of this document for further details. 42 U.S.C. 6295(i)(6)(B)(ii) of EPCA provides that this rulemaking's scope shall not be limited to incandescent technologies. In accordance with this provision, the scope of this rulemaking encompasses other GSLs in addition to GSILs.

General service lamp means a lamp that has an American National Standards Institute (''ANSI'') base; is able to operate at a voltage of 12 volts or 24 volts, at or between 100 to 130 volts, at or between 220 to 240 volts, or at 277 volts for integrated lamps, or is able to operate at any voltage for non-integrated lamps; has an initial lumen output of greater than or equal to 310 lumens (or 232 lumens for modified spectrum general service incandescent lamps) and less than or equal to 3,300 lumens; is not a light fixture; is not an LED downlight retrofit kit; and is used in general lighting applications. General service lamps include, but are not limited to, general service incandescent lamps, compact fluorescent lamps, general service light-emitting diode lamps, and general service organic light emitting diode lamps. General service lamps do not include: (1) Appliance lamps; (2) Black light lamps; (3) Bug lamps; (4) Colored lamps; (5) G shape lamps with a diameter of 5 inches or more as defined in ANSI C79.1–2002; (6) General service fluorescent lamps; (7) High intensity discharge lamps; (8) Infrared lamps; (9) J, JC, JCD, JCS, JCV, JCX, JD, JS, and JT shape lamps that do not have Edison screw bases; (10) Lamps that have a wedge base or prefocus base; (11) Left-hand thread lamps; (12) Marine lamps; (13) Marine signal service lamps; (14) Mine service lamps; (15) MR shape lamps that have a first number symbol equal to 16 (diameter equal to 2 inches) as defined in ANSI C79.1–2002, operate at 12 volts, and have a lumen output greater than or equal to 800; (16) Other fluorescent lamps; (17) Plant light lamps; (18) R20 short lamps; (19) Reflector lamps that have a first number symbol less than 16 (diameter less than 2 inches) as defined in ANSI C79.1–2002 and that do not have E26/E24, E26d, E26/50x39, E26/53x39, E29/28, E29/53x39, E39, E39d, EP39, or EX39 bases; (20) S shape or G shape lamps that have a first number symbol less than or equal to 12.5 (diameter less than or equal to 1.5625 inches) as defined in ANSI C79.1–2002; (21) Sign service lamps; (22) Silver bowl lamps; (23) Showcase lamps; (24) Specialty MR lamps; (25) T shape lamps that have a first number symbol less than or equal to 8 (diameter less than or equal to 1 inch) as defined in ANSI C79.1–2002, nominal overall length less than 12 inches, and that are not compact fluorescent lamps; and (26) Traffic signal lamps. 10 CFR 430.2.

The definitions for compact fluorescent lamps, general service light-emitting diode lamps, and general service organic light emitting diode lamps, and other terms used in the GSL definition are also specified in 10 CFR 430.2.

Additionally, 42 U.S.C. 6295(i)(6)(B)(i)(II) directs DOE to consider whether the exemptions for certain incandescent lamps should be maintained or discontinued. In the January 2023 NOPR, DOE reviewed the regulatory definitions of GSL, GSIL, and supporting definitions adopted in the May 2022 Definition Final Rule and determined that no amendments are needed with regards to the maintenance or discontinuation of exemptions for certain incandescent lamps. 88 FR 1638, 1651. DOE received no comments regarding this assessment. DOE maintains this assessment in this final rule.

1. Supporting Definitions

In the January 2023 NOPR, DOE proposed minor updates to clarify certain supplemental definitions adopted in the May 2022 Definition Final Rule. In the January 2023 NOPR, DOE proposed to amend the existing definition of LED downlight retrofit kit to specify that it must be a retrofit kit classified or certified to Underwriters Laboratories (''UL'') 1598C–2014.[22] 88 FR 1638, 1652.

NEMA requested that DOE reference UL 1598C generally, without reference to a specific publication year. NEMA noted that American National Standards publications (*e.g.,* ANSI/UL 1598C) are dynamic with revisions continuously evaluated, refined, voted upon, published, and implemented by subject matter experts seeking to improve the utility of these publications in the market. NEMA stated that by specifying a publication year, DOE would be unnecessarily forgoing the benefit of revisions to this important consumer safety standard and working against the standards' adoption in the broader market. (NEMA, No. 183 at p. 3).

The GSL definition states that a GSL is not an LED downlight retrofit kit. 10 CFR 430.2. Therefore, the definition of LED downlight retrofit kit informs what is or is not a GSL. DOE reviewed UL 1598C–2014 before proposing that a LED downlight retrofit kit be classified or certified to the standard. 88 FR 1638, 1652. DOE would need to review updates in any new version of the standard to assess any impacts on the LED downlight retrofit kit definition and subsequently on the GSL definition. If DOE does not specify the version of the UL 1598C standard, it may result in

[22] UL, UL1598C Standard for Safety Light-Emitting Diode (LED) Retrofit Luminaire Conversion Kits. Approved November 17, 2016.

changes to these definitions that have not been reviewed by DOE and/or put forth for public comment. Therefore, in this final rule, DOE is adopting the definition for LED downlight retrofit kit with reference to UL 1598C–2014 as proposed in the January 2023 NOPR. Further, note that the edition of UL 1598C DOE reviewed and proposed for incorporation in the January 2023 NOPR was the first edition dated January 16, 2014, including revisions through November 17, 2016. To ensure the appropriate version is being referenced and to align with the referencing of industry standards in other definitions, DOE is specifying the year when referencing UL 1598C in the LED downlight retrofit kit definition as UL 1598C–2016 in this final rule.

In the January 2023 NOPR, DOE also proposed to update the industry standards referenced in the definitions of ''Reflector lamp'' and ''Showcase lamp.'' Specifically, DOE proposed to remove the reference to ANSI C78.20–2003 [23] from the definitions of ''Showcase lamp'' and ''Reflector lamp.'' ANSI C78.20–2003 is an industry standard for A, G, PS, and similar shapes with E26 bases and therefore is not relevant to these lamp types. Further, ANSI has replaced another industry standard, ANSI C79.1–2002,[24] with ANSI C78.79–2014 (R2020).[25] Accordingly, DOE proposed to update the following supporting definitions that currently reference ANSI C79.1–2002 to reference ANSI C78.79–2014 (R2020): (1) ''Specialty MR lamp'' definition; (2) ''Reflector lamp'' definition; (3) ''General service incandescent lamp'' definition with respect to a G shape lamp with a diameter of 5 inches or more; and (4) ''General service lamp'' definition with respect to G shape lamps with a diameter of 5 inches or more; MR shape lamps that have a first number symbol equal to 16; Reflector lamps that have a first number symbol less than 16; S shape or G shape lamps that have a first number symbol less than or equal to 12.5; T shape lamps that have a first number symbol less than or equal to 8. 88 FR 1638, 1652. DOE received no comments on this proposal. Therefore, in this final rule, DOE adopts the updates to industry standards referenced in these supporting definitions as proposed in the January 2023 NOPR.

DOE received a comment regarding the term ''general service.'' Seasonal Specialties commented that there does not seem to be a definition for ''general service'', and it is unclear what ''general service'' includes and excludes. (Seasonal Specialties, Public Meeting Transcript, No. 27 at pp. 18–19)

As noted previously in section IV.A of this document, the definition of GSL in 10 CFR 430.2 specifies a GSL must have an ANSI base, operate in certain voltage ranges, and have lumens in certain lumens ranges. It also identifies lamp types that are GSLs as well as 26 lamp types that are exempt from the GSL definition. Hence, DOE finds that the GSL definition in 10 CFR 430.2 clearly specifies what is or is not a GSL and no other definitions are necessary.

Additionally, DOE received comments on the definition of standby power. NEMA recommended that DOE revise the definition of ''Standby mode,'' because the current definition focuses only on the energy consumption of a lamp's standby mode condition and not the reason that it operates on standby (*i.e.,* a lamp's functional capabilities). NEMA stated that the definition of ''Standby mode'' in the January 2023 NOPR TSD could become problematic and restrictive as the category more fully develops. NEMA recommended that DOE instead replace the term ''Standby mode'' with ''Lamp capable of operating in standby mode'' and to denote it as an ''an energy-using product.'' (NEMA, No. 183 at p. 9) Lutron commented that it supports NEMA's revisions to the January 2023 NOPR definition of ''standby mode.'' (Lutron, No. 182 at p. 8)

The definition of ''standby mode'' is a statutory definition specified in 42 U.S.C. 6295(gg)(1)(iii). In appendix A of the January 2023 NOPR TSD, DOE repeated this definition as it appears in 42 U.S.C. 6295(gg)(1)(iii) and is codified in 10 CFR 430.2. This definition specifies that standby mode means the condition in which an energy-using product is connected to a main power source; and offers certain user-oriented or protective functions. (*see* 42 U.S.C. 6295(gg)(1)(iii), 10 CFR 430.2)

NEMA's suggested changes would add language that states, ''Lamps capable of operating in standby mode.'' However, this definition applies to all covered products, not only lamps. Further, in the January 2023 NOPR, DOE proposed a table to codify the proposed GSL standards in the CFR. This table included the column ''Standby Mode Operation'' indicating the lamps that are capable of standby mode operation and those that are not and the standards to which they would be subject. 88 FR 1638, 1718. Therefore, proposed GSL standards and those adopted in this rulemaking would clearly indicate the difference between lamps capable of operating in standby mode and those that are not. NEMA also suggested adding language that specifies the product in standby mode as ''an energy-using product.'' This language is already present in the existing definition. Finally, NEMA's concern that the definition does not focus on the lamp's functional capabilities that require it to operate in standby mode is addressed in paragraph 2 of the definition, which describes the additional user-oriented or protective functions the product offers. Hence, because it is a statutory definition and changing it would not have a substantive impact on clarity or accuracy, DOE is not amending the definition of ''Standby mode'' in this final rule.

2. Definition of Circadian-Friendly Integrated Light-Emitting Diode (''LED'') Lamp

In the January 2023 NOPR, DOE proposed a definition for ''circadian-friendly integrated LED lamp'' and proposed that lamps meeting that definition be excluded from the GSL definition. DOE identified commercially available integrated LED lamps that are marketed as aiding in the human sleep-wake (*i.e.,* circadian) cycle by changing the light spectrum and also observed that their efficacies ranged from 47.8 lm/W to 85.7 lm/W. Specifically, DOE proposed to define ''circadian-friendly integrated LED lamp'' as an integrated LED lamp that (1) is designed and marketed for use in the human sleep-wake (circadian) cycle; (2) is designed and marketed as an equivalent replacement for a 40 W or 60 W incandescent lamp; (3) has at least one setting that decreases or removes standard spectrum radiation emission in the 440 nm to 490 nm wavelength range; and (4) is sold in packages of two lamps or less. 88 FR 1638, 1652. In addition, based on the potential utility they offer and DOE's tentative findings that such lamps did not have high efficacy values, DOE proposed to exclude them from meeting the definition of GSLs.

DOE received several comments regarding the proposed definition and exemption of the circadian-friendly integrated LED lamp, including

[23] American National Standards Institute, ANSI C78.20–2003 American National Standard for Electric Lamps—A, G, PS, and Similar Shapes with E26 Medium Screw Bases. Approved Oct. 30, 2003.

[24] American National Standards Institute, ANSI C79.1–2002 American National Standard For Electric Lamps—Nomenclature for Glass Bulbs Intended for Use with Electric Lamps. Approved Sept. 16, 2002.

[25] American National Standards Institute, ANSI C 78.79–2014 (R2020) American National Standard for Electric Lamps—Nomenclature for Envelope Shapes Intended for Use with Electric Lamps. Approved Jan. 17, 2020.

comments questioning DOE's authority to exempt them from the GSL definition.

Earthjustice and ASAP *et al.* stated that DOE lacks the legal authority to exempt these lamps and doing so would violate the anti-backsliding provision. (Earthjustice, No. 179 at pp. 1–3; ASAP *et al.,* No. 174 at pp. 1–2) Earthjustice commented that the proposed GSL exemption for circadian-friendly LED lamps would mean that these lamps would no longer be subject to the 45 lm/W backstop standard level or any standard, an action EPCA's anti-backsliding provision explicitly forbids. Regarding authority, Earthjustice commented that the January 2023 NOPR cited no EPCA provision for excluding circadian-friendly integrated LED lamps from the GSL definition, indicating that such authority does not exist. Earthjustice commented that EPCA grants DOE explicit authority to enlarge the scope of GSLs to encompass any lamps ''used to satisfy lighting applications traditionally served by general service incandescent lamps'' but offers limited authority to grant exemptions. Further, Earthjustice stated that the requirement per EPCA that DOE complete a rulemaking to consider whether ''the exemptions for certain incandescent lamps should be maintained or discontinued'' (*see* 42 U.S.C. 6295(i)(6)(A)(i)(II)) is not applicable in this case. Earthjustice stated that EPCA authorizes DOE to exclude: (1) from the term ''medium base compact fluorescent lamp'' any lamp that is ''designed for special applications'' and ''unlikely to be used in general purpose applications'' (*see* 42 U.S.C. 6291(30)(S)(ii)(II)); and (2) from the terms ''fluorescent lamp'' and ''incandescent lamp'' any lamp to which DOE makes ''a determination that standards for such lamp would not result in significant energy savings because such lamp is designed for special applications or has special characteristics not available in reasonably substitutable lamp types'' (*see* 42 U.S.C. 6291(30)(E)). Earthjustice stated that neither of these two provisions authorizes DOE to exclude products from the definition of GSLs because GSLs need not meet the definitions of MBCFL, fluorescent lamp, or incandescent lamp to be covered as GSLs. Earthjustice concluded by stating that because the proposed action for circadian-friendly LED lamps does not fit into one of the categories of exemptions DOE is statutorily authorized to create, the proposed action is unlawful, and that where a statute confers authority on an agency to create specific exemptions, broader authority to create other types of exemptions cannot be inferred. (Earthjustice, No. 179 at pp. 1–3)

NEMA stated that the proposed circadian-friendly integrated LED lamp exemption could lead to standards being set at the State level, resulting in a patchwork of product regulations. NEMA recommended that DOE finalize a rule that creates no exemptions and sets minimum ELs for all GSLs, regardless of product claims. NEMA recommended that DOE work with stakeholders to develop better, more useful definitions, and to set minimum ELs for energy conservation standards that will allow the market to develop and mature. (NEMA, No. 183 at p. 4).

Based on the comment received, DOE does not have sufficient information to establish a separate product class for circadian-friendly integrated LED lamps. (See 42 U.S.C. 6295(q)) Therefore, DOE is not exempting circadian-friendly integrated LED lamps from the GSL definition in this final rule. As a result, these lamps will be subject to the standards for GSLs.

With regards to the specific definition of circadian-friendly lamps, CLASP, NYSERDA, and the CEC commented that DOE's proposed definition of circadian-friendly integrated LED lamps is too broad and recommended that DOE include more specific requirements. (CEC, No. 176 at p. 3; NYSERDA, No. 166 at pp. 2–3; CLASP, No. 177 at pp. 3–4) Specifically, NYSERDA stated that the proposed definition called only for a ''decrease'' in blue light without providing more strict specific guidance (*i.e.,* ''decreasing by 90 percent'') or requiring removal of blue light. NYSERDA commented that the definition could be met by minimal design modifications targeting blue wavelengths, with the result that inefficient LED lamps in popular form factors could continue to be available without producing positive health outcomes. (NYSERDA, No. 166 at pp. 2–3) CLASP also recommended that DOE not include language like ''one setting that decreases or removes standard spectrum radiation'' and rather specify that such lamps should only—and always—operate in this modified mode. CLASP offered the example of DOE subjecting ''modified-spectrum'' GSLs which had a neodymium coating on the glass to an adjusted efficacy level because of the modified-spectrum feature. (CLASP, No. 177 at pp. 3–4) NYSERDA also stated that the other criteria in DOE's proposed definition (*i.e.,* marketing, replacement wattage, and packaging) could also be easily adjusted to meet the definition through minimal manufacturer changes. (NYSERDA, No. 166 at pp. 2–3) EEI stated that it was unclear how efficiency connected to DOE's proposed criteria that circadian-friendly integrated LED lamps be sold in packages of two lamps or less. Regarding the criteria that the lamp be designed and marketed as an equivalent replacement for a 40 W or 60 W incandescent lamp, EEI stated that there could be replacements for other wattage equivalents such as 100 W incandescent or 72 W halogen. (EEI, Public Meeting Transcript, No. 27 at pp. 19–20)

DOE believes at this time that circadian friendly integrated LED lamps do not possess unique attributes compared to other GSLs. There is no consensus on specific lamp attributes that meaningfully impact the human circadian cycle. The human circadian system's response curves are not yet fully understood and the proper dosing of light to achieve circadian effects has not been standardized. Therefore, DOE finds that an accurate definition of a circadian-friendly integrated LED lamp is not possible and the claim that these lamps provide unique utility is not accurate at this time. Accordingly, DOE is declining to adopt a definition of circadian-friendly integrated LED lamp at this time, which is consistent with comments on the proposed rule. As noted above, DOE is not exempting circadian-friendly integrated LED lamps from the GSL definition in this final rule and as a result, these lamps will be subject to the standards for GSLs.

3. Scope of Standards

In the January 2023 NOPR, DOE stated that it was not assessing standards for general service organic light-emitting diode (''OLED'') lamps, a type of GSL, in this rulemaking. 88 FR 1638, 1653. Due to the lack of commercially available GSLs that use OLED technology, in the January 2023 NOPR DOE determined that it is unclear whether the efficacy of these products can be increased. DOE tentatively determined that standards for these lamps would not be technologically feasible and did not evaluate them in the January 2023 NOPR. DOE did not receive any comments on this proposal. In this final rule, DOE continues to not evaluate standards for general service OLED lamps for the reasons stated previously.

DOE received comments that it should create separate product classes and thereby standards for each of the following lamp types: (1) lamps that change the lamp's correlated color temperature (''CCT''); (2) lamps that change the lamp to be a colored lamp; (3) lamps that are capable of operating

in standby mode and have at least one additional feature that does not control light output; and (4) lamps that are non-integrated and capable of operating in standby mode. In this rulemaking, DOE did not analyze amended standards for these lamp categories because DOE lacks sufficient information about the performance of these lamps given the rapidly evolving market. DOE has carefully reviewed the lamp categories and determined that because the markets for these lamps are rapidly developing, DOE is unable to make a clear and accurate determination regarding the consumer utility, how various technology options would affect the efficiency, and the maximum technologically feasible efficiency of these lamps, which prevents DOE from determining whether a specific standard for these lamps would be economically justified at this time. Accordingly, DOE did not consider standards for these lamps in this rulemaking. DOE may evaluate amended standards for these lamps in a future rulemaking. DOE notes that these lamps are still subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd). For a full discussion of these comments and DOE's responses, *see* section IV.B.2 of this document.

In the January 2023 NOPR, DOE proposed to exempt circadian-friendly integrated LED lamp (see section IV.A.2 of this document) from amended standards because these lamps offered a utility to consumers in the form of aiding in the human sleep-wake (*i.e.,* circadian) cycle and also these lamps did not have high efficacies. 88 FR 1638, 1652. DOE received several comments citing concerns regarding potential loopholes resulting from such an exemption from standards. ASAP *et al.,* CLASP, NYSERDA, and the CEC commented that DOE's proposal to exclude circadian-friendly integrated LED lamps from GSL regulation would risk creating a loophole and allow inefficient lamps on the market. (CEC, No. 176 at p. 3; NYSERDA, No. 166 at pp. 2–3; CLASP, No. 177 at pp. 3–4; ASAP *et al.,* No. 174 at pp. 1–2) NEMA stated that the circadian-friendly integrated lamp definition and exemption could provide manufacturers an opportunity to evade regulations. (NEMA, No. 183 at p. 4) DOE also received comments on the utility of circadian-friendly integrated LED lamps. NYSERDA commented that these lamps provide general illumination and found no clear evidence of a utility that justified exempting the lamps. (NYSERDA, No. 166 at p. 2) NEMA stated that the human circadian system's response curves are not yet fully understood and the proper dosing of light to achieve circadian effects has not been standardized. NEMA noted that IES RP–46 Recommended Practice: Supporting the Physiological and Behavioral Effects of Lighting in Interior Daytime Environments is still in development. NEMA commented some spectrally tunable lamps are marketed with ''circadian features'' entrainment but there are reasons to dismiss such claims because the ability to affect circadian entrainment is not a product attribute but a matter of proper lighting product application (*i.e.,* attention to timing, intensity, spectrum and duration of the applied light). Further NEMA commented that the two circadian-friendly integrated LED lamps cited in the January 2023 NOPR could be applied in such a way as to not produce the claimed circadian effects and offer a limited representation of the circadian entrainment potential as they only decrease or remove blue light to promote better sleep while other products can be programmed to provide more or less blue light by time of day. (NEMA, No. 183 at pp. 3–4)

DOE also received comments addressing DOE's observed lower efficacy of the circadian-friendly integrated LED lamps and suggestions to establish appropriate standards for these lamps instead of exempting them from standards. ASAP *et al.* commented that DOE's proposal to exempt circadian-friendly integrated LED lamps because it had observed an efficacy range of 47.8 lm/W to 85.7 lm/W suggested DOE assumed that the lower efficacy is representative of this technology. ASAP *et al.* stated that this may not be the case, as many common integrated omnidirectional short lamps on the market today have efficacies of 80–90 lm/W, which is similar to those of some of the circadian-friendly lamps identified by DOE. (ASAP *et al.,* No. 174 at pp. 1–2) CLASP and ASAP *et al.* commented that circadian-friendly lamps are based on the same design principles as other LED lamps (*e.g.,* improved drivers and LED chips) and therefore can be made more efficient in the same way. CLASP and ASAP *et al.* commented that, rather than exempting the lamps, DOE should determine the technologically justified efficacy adjustment for these lamps. (ASAP *et al.,* No. 174 at pp. 1–2; CLASP, No. 177 at pp. 3–4)

Similarly, NYSERDA, the CEC, and the CA IOUs recommended that DOE consider establishing a separate product class targeting circadian-friendly products at a level slightly lower than currently proposed for most product classes of GSLs. (NYSERDA, No. 166 at pp. 2–3; CA IOUs, No. 167 at p. 3; CEC, No. 176 at p. 3–4) NYSERDA commented that such a product class should include a clear definition and serve a specific health utility. (NYSERDA, No. 166 at pp. 2–3) The CEC also stated that the definition should include specific and objective features, such as color shifting, that can provide a basis for determining the additional power required to efficiently provide one or more specific circadian benefits. (CEC, No. 176 at p. 3–4) NYSERDA and the CEC stated that the product class approach based on a well-defined lamp type would achieve DOE's intent to preserve the circadian-friendly integrated LED lamps while limiting a loophole that would result in inefficient LED lamps on the market. (NYSERDA, No. 166 at pp. 2–3; CEC, No. 176 at p. 3–4) The CA IOUs commented that circadian-friendly integrated LED lamps are in early stages of development and there is no industry-wide definition of ''circadian-friendly'' lighting. The CA IOUs recommended that circadian-friendly integrated LED lamps be defined as proposed in the January 2023 NOPR but be subjected to a reasonable minimum luminous efficacy requirement. Additionally, the CA IOUs recommended that DOE require manufacturers to report shipments of circadian-friendly integrated LED lamps and issue public reports on shipment growth. The CA IOUs added that DOE could then make informed adjustments to the definition and standards as necessary for circadian-friendly integrated LED lamps in a future GSL rulemaking. (CA IOUs, No. 167 at p. 3)

Based on the comments received, there is no clear consensus on specific lamp attributes that meaningfully impact the human circadian cycle. The human circadian system's response curves are not yet fully understood and the proper dosing of light to achieve circadian effects has not been standardized. Further, as pointed out by the commenters, there are circadian-friendly integrated LED lamps with comparable efficacies to other GSLs. As a result, DOE does not have sufficient information to establish a separate product class for circadian-friendly integrated LED lamps. (See 42 U.S.C. 6295(q)) And as Earthjustice noted, DOE agrees that the proposed GSL exemption for circadian-friendly LED lamps would mean that these lamps would no longer be subject to the 45 lm/W backstop standard level or any standard, an action EPCA's anti-backsliding provision explicitly forbids. Consistent with these and the above comments, DOE is including circadian-friendly

integrated LED lamps within the scope of amended standards. DOE notes, however, that it could decide not to amend existing standards for circadian-friendly integrated LED lamps in a future rulemaking if so warranted by a product class designation.

Relatedly, while all GSLs are subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd), not all GSLs are subject to the amended standards adopted in this final rule, though DOE may consider amended standards for them in a future rulemaking. In this rulemaking, DOE is analyzing and adopting amended standards for CFLs and general service LED lamps that have a lumen output within the range of 310–3,300 lumens; have an input voltage of 12 volts or 24 volts, at or between 100 to 130 volts, at or between 220 to 240 volts, or of 277 volts for integrated lamps, or are able to operate at any voltage for non-integrated lamps; and do not fall into any exclusion from the GSL definition at 10 CFR 430.2. In this rulemaking as specified in § 430.32(dd)(1)(iv)(C), DOE is not analyzing and adopting amended standards for general service organic LED lamps and any GSL that:

(1) Is a non-integrated lamp that is capable of operating in standby mode and is sold in packages of two lamps or less;

(2) Is designed and marketed as a lamp that has at least one setting that allows the user to change the lamp's CCT and has no setting in which the lamp meets the definition of a colored lamp (as defined in 10 CFR 430.2); and is sold in packages of two lamps or less;

(3) Is designed and marketed as a lamp that has at least one setting in which the lamp meets the definition of a colored lamp (as defined in 10 CFR 430.2) and at least one other setting in which it does not meet the definition of colored lamp (as defined in 10 CFR 430.2) and is sold in packages of two lamps or less; or

(4) Is designed and marketed as a lamp that has one or more component(s) offering a completely different functionality (*e.g.,* a speaker, a camera, an air purifier, etc.) where each component is integrated into the lamp but does not affect the light output of the lamp (*e.g.,* does not turn the light on/off, dim the light, change the color of the light, etc.), is capable of operating in standby mode, and is sold in packages of two lamps or less. Lamps that would not meet these criteria and therefore would not be exempt from standards would be lamps that have integrated motion sensors that affect light output, lamps with internal battery backup used for light output, and lamps designed and marketed as dusk to dawn lamps.

Please note that DOE is not exempting circadian-friendly integrated LED lamps from the GSL definition or the scope of standards in this final rule. As a result, these lamps will be subject to the standards for GSLs.

4. Scope of Metrics

As stated in section II.A, this rulemaking is being conducted pursuant to 42 U.S.C. 6295(i)(6)(B) and (m). Under 42 U.S.C. 6295(i)(6)(B)(i)(I), DOE is required to determine whether standards in effect for GSILs should be amended to reflect lumen ranges with more stringent maximum wattage than the standards specified in paragraph (1)(A) (*i.e.,* standards enacted by section 321(a)(3)(A)(ii) of EISA [26]). The scope of this analysis is not limited to incandescent lamp technologies and thus encompasses all GSLs. In the January 2023 NOPR, DOE explained that the May 2022 Backstop Final Rule codified the statutory backstop requirement in 42 U.S.C. 6295(i)(6)(A)(v) prohibiting sales of GSLs that do not meet a 45 lm/W efficacy standard. Because incandescent and halogen GSLs would not be able to meet the 45 lm/W requirement, they are not considered in the analysis for this rulemaking. In the January 2023 NOPR, DOE discussed its decision to use minimum lumens per watt as the metric for measuring lamp efficiency for GSLs rather than maximum wattage of a lamp. 88 FR 1638, 1653. DOE did not receive comments on this decision. In this final rule, DOE continues to use minimum lumens per watt as the metric for measuring lamp efficiency for GSLs.

In the January 2023 NOPR, DOE also discussed proposed updates to existing metrics and the proposed addition of new metrics for GSLs. These included updating the existing lumen maintenance at 1,000 hours and at 40 percent of lifetime, rapid cycle stress test, lifetime requirements, and adding a power factor and start time requirement for MBCFLs. DOE also proposed adding a power factor requirement for integrated LED lamps. Finally, DOE proposed codifying color rendering index (''CRI'') requirements for lamps that are intended for a general service or general illumination application (whether incandescent or not); have a medium screw base or any other screw base not defined in ANSI C81.61–2006 [27]; are capable of being operated at a voltage at least partially within the range of 110 to 130 volts; and are manufactured or imported after December 31, 2011 as specified in section 321(a) of EISA. 88 FR 1638, 1653. The following sections discuss the comments received on these proposals.

a. Lifetime

NYSERDA commented that it supports DOE's proposed increase to a 10,000-hour lifetime for MBCFLs and recommended DOE consider adding a 10,000-hour-minimum requirement for LED lamps to ensure consumer needs are met. (NYSERDA, No. 166 at p. 3)

DOE only has authority to amend the lifetime requirement for MBCFLs, not LED lamps. The Energy Policy Act of 2005 (''EPAct 2005'') amended EPCA by establishing energy conservation standards for MBCFLs, which were codified by DOE in an October 2005 final rule. 70 FR 60413. Performance requirements were specified for five metrics: (1) minimum initial efficacy; (2) lumen maintenance at 1,000 hours; (3) lumen maintenance at 40 percent of lifetime; (4) rapid cycle stress; and (5) lamp life. (42 U.S.C. 6295(bb)(1)) In addition to revising the existing requirements for MBCFLs, DOE has the authority to establish requirements for additional metrics including CRI, power factor, operating frequency, and maximum allowable start time based on the requirements prescribed by the August 9, 2001 ENERGY STAR® Program Requirements for CFLs Version 2.0, or establish other requirements after considering energy savings, cost effectiveness, and consumer satisfaction. (42 U.S.C. 6295(bb)(2)–(3)) Based on this authority, in the January 2023 NOPR, DOE proposed to update the existing lifetime requirement for MBCFLs. The only metric that DOE proposed for LED lamps was a minimum power factor for integrated LED lamps. DOE finds that it has the authority to set this metric because power factor impacts energy use. A low power factor product is inefficient and

[26] This provision was to be codified as an amendment to 42 U.S.C. 6295(i)(1)(A). But because of an apparent conflict with section 322(b) of EISA, which purported to ''strik[e] paragraph (1)'' of section 6295(i) and replace it with a new paragraph (1), neither this provision nor other provisions of section 321(a)(3)(A)(ii) of EISA that were to be codified in 42 U.S.C. 6295(i)(1) were ever codified in the U.S. Code. *Compare* EISA, section 321(a)(3)(A)(ii), *with* 42 U.S.C. 6295(i)(1). It appears, however, that Congress's intention in section 322(b) of EISA was to replace the existing paragraph (1), not paragraph (1) as amended in section 321(a)(3). Indeed, there is no reason to believe that Congress intended to strike these new standards for GSILs. DOE has thus issued regulations implementing these uncodified provisions. *See, e.g.,* 10 CFR 430.32(x) (implementing standards for GSILs, as set forth in section 321(a)(3)(A)(ii) of EISA).

[27] American National Standards, ''for electrical lamp bases—Specifications for Bases (Caps) for Electric Lamps,'' approved August 25, 2006.

requires an increase in an electric utility's generation and transmission capacity. (*See* further details on the power factor requirement for integrated LED lamps in section IV.A.4.c of this document.)

b. Color Rendering Index (''CRI'')

NYSERDA stated its support for the inclusion of a minimum of 80 CRI for non-modified-spectrum GSLs, noting that an 80 CRI or above has been demonstrated to ensure sufficient visual acuity for general illumination situations. (NYSERDA, No. 166 at p. 3) EEI stated that while a CRI of 80 was adequate, a higher CRI is always better and a CRI of 90 would be preferable, if possible. (EEI, Public Meeting Transcript, No. 27 at pp. 24–26) NEMA stated its support for DOE's proposal to codify a minimum CRI of 80 but requested the requirement apply to all GSLs within the scope of the rulemaking rather than only to those with medium screw bases or any other screw base not defined in ANSI C81.61–2006, as specified in the January 2023 NOPR. NEMA stated that the proposed CRI requirement excludes many lamps in the scope of this regulation that are already normalized at a minimum CRI of 80 due to consumer preference and therefore their inclusion in the requirement would pose no regulatory burden for manufacturers. Further, NEMA stated its concern that as an offset to the new efficacy and performance requirements, the removal of a consistent regulated threshold will incentivize market introduction of lower CRI products. Additionally, NEMA stated that to its knowledge, there are no modified-spectrum incandescent lamps in the U.S. market today and recommended that all mentions of ''modified spectrum'' be excluded from the final rule. In the event that regulatory requirements for this product category must be maintained, NEMA recommended that all requirements for modified spectrum lamps be made identical to those of the non-modified spectrum lamps. (NEMA, No. 183 at p. 5)

These CRI requirements are from section 321(a) of EISA, which amended 42 U.S.C. 6295(i)(1). But because of an apparent conflict with section 322(b) of EISA, which purported to strike paragraph (1) of 42 U.S.C. 6295(i) and replace it with a new paragraph (1), neither this provision nor other provisions of section 321(a)(3)(A)(ii) of EISA that were to be codified in 42 U.S.C. 6295(i)(1) were ever codified in the U.S. Code. It has been DOE's position that Congress's intention in section 322(b) of EISA was to replace the existing paragraph (1), not the newly amended paragraph (1). There is no reason to believe that Congress intended to amend 42 U.S.C. 6295(i) to include requirements for CRI only to delete those the requirements in the same Act. *See* 88 FR 1638, 1653. In the January 2023 NOPR, DOE proposed to codify the CRI requirements in section 321(a) of EISA and mistakenly included a 2028 compliance date for CRI requirements. 88 FR 1638, 1654, 1719. However, section 321(a)(3)(A)(ii) of EISA and 42 U.S.C. 6295(i)(1) specify that these CRI requirements apply to lamps manufactured or imported after December 31, 2011. Because DOE lacks the legal authority to change the compliance date of CRI requirements established in EISA, DOE is declining to codify the CRI requirements in this rulemaking and will, instead, conduct a separate rulemaking to codify these requirements.

c. Power Factor

In the January 2023 NOPR, DOE proposed a minimum power factor requirement of 0.5 for MBCFLs and 0.7 for integrated LED lamps. 88 FR 1638, 1654. The CEC stated its support for DOE's proposal to include a minimum power factor for MBCFLs and integrated LED lamps. The CEC stated that as the number of LED lamps increases, harmonic waves sent over the power grid can cause issues, requiring expensive equipment to correct such issues and if uncorrected, harmonic waves will reduce the quality of power delivered to all electrical loads, including lamps, and the grid will experience avoidable losses. (CEC, No. 176 at pp. 4–5) NYSERDA stated its support for a power factor requirement of 0.7 for integrated LED lamps as established by ENERGY STAR. (NYSERDA, No. 166 at p. 3)

Hawaii State Energy Office (''HSEO'') stated that it supported a minimum power factor of 0.9 with certain exemptions for specialty lamps. HSEO further stated that regarding lamps of less than 5 W, given the efficacy of CFLs and LED lamps, 0.7 would be an appropriate minimum power factor. (HSEO, Public Meeting Transcript, No. 27 at p. 36) EEI also stated that both CFLs and LED lamps should have power factors over 0.9 as low power factors are not good for the grid and there are commercial customers that face financial penalties if their power factors go below 0.9. (EEI, Public Meeting Transcript, No. 27 at pp. 24–26)

NEMA recommended that DOE specify minimum power factors by wattage rather than setting a minimum power factor for all integrated LED lamps. NEMA stated that DOE should adopt the power factor requirements set forth in ANSI C82.77–10 without modification. Specifically, in its comment NEMA provides a table from ANSI C82.77–10 with the following power factor requirements: no minimum power factor for lamps less than or equal to 5 W, a minimum power factor of 0.57 for lamps 5 W to 25 W inclusive, and a minimum power factor of 0.86 for lamps greater than 25W. (*Note:* The table also specifies requirements for the minimum displacement factor, but it is not clear from NEMA's statements whether it is recommending DOE should require this additional requirement.) NEMA also noted that ENERGY STAR requirements are similarly less strict for low power lamps—*i.e.,* no minimum power factor for lamps less than or equal to 5 W, a minimum power factor of 0.6 for lamps greater than 5W to less than or equal to 10 W, and a minimum power factor of 0.7 for lamps greater than 10W. (NEMA, No. 183 at pp. 4–5, 40–41)

NEMA provided several reasons for using the wattage-tiered approach to power factor requirements specified in ANSI C82.77–10. NEMA stated that these requirements align with the International Electrotechnical Commission (''IEC'') standard and Global Lighting Association recommendations. NEMA stated that any reduction of imaginary current (which causes electrical losses in the equipment of the power company) from the proposed increase in power factor will be minimal compared to that due to the proposed increases in efficacy. NEMA stated that a single higher power factor requirement for products of all wattages will increase the amount of electronics in lamps and thereby the size of the lamps, especially posing a problem for small, low power lamps, and increasing the manufacturing burden to achieve the regulated efficacies. NEMA also stated that additional electronics required to achieve the higher power factor causes a small, unavoidable decrease in efficacy. Further, NEMA stated that there is a correlation between low power lamps and low power factor. (NEMA, No. 183 at pp. 4–5)

Regarding data available for determining an appropriate power factor requirement, Signify and Westinghouse stated that databases from sources such as ENERGY STAR contain a limited number of products that are not always representative of the entire market and DOE should be cautious of using them to develop requirements that apply to all lamps on the market. (Signify, Public Meeting Transcript, No. 27 at p. 29;

Westinghouse, Public Meeting Transcript, No. 27 at pp. 30–31)

In the January 2023 NOPR and in this final rule, DOE considered ENERGY STAR Lamps Specification V2.1 requirements,[28] industry standards, and characteristics of lamps in the current market when selecting power factor requirements for MBCFL and integrated LED lamps. 88 FR 1638, 1654. The assessment of lamps in the current market was based on the lamps database developed for the NOPR analysis and this final rule analysis (*see* section IV.D of this document). This lamps database is a comprehensive accounting of lamps on the market as it includes data from manufacturer catalogs, DOE's compliance certification database, retailer websites, and the ENERGY STAR Certified Light Bulbs database. Hence, DOE considered power factor requirements based on data that is representative of all lamps on the market.

Passive and active technologies that can correct power factors in lamps are commercially available and the circuitry used in power factor correction is made to be very efficient, while consuming small amounts of power. DOE reviewed the current U.S. market via its lamps database used in this analysis (*see* section IV.D of this document) and found that about 98 percent of integrated LED lamps have power factors of 0.7 or greater. DOE also found numerous low-wattage LED lamps from 2 to 5 W, on the market, that are within the covered lumen range of GSLs, have a power factor of 0.7 or greater, and meet the max tech levels for integrated LED lamps. Hence, DOE finds that a power factor requirement of 0.7 for integrated LED lamps is achievable for lamps across all wattages and does not prevent these lamps from meeting or exceeding the max-tech levels across the full lumen range. Therefore, in this final rule, DOE is adopting the power factor requirements as proposed in the January 2023 NOPR for MBCFLs and integrated LED lamps.

d. Summary of Metrics

Table IV.1 summarizes the non-efficacy metrics being adopted in this rulemaking (efficacy metrics are discussed in the engineering analysis; *see* section IV.D of this document). For MBCFLs, performance requirements were specified for five metrics: (1) minimum initial efficacy; (2) lumen maintenance at 1,000 hours; (3) lumen maintenance at 40 percent of lifetime; (4) rapid cycle stress; and (5) lamp life. (42 U.S.C. 6295(bb)(1)) In addition to revising the existing requirements for MBCFLs, DOE has the authority to establish requirements for additional metrics including CRI, power factor, operating frequency, and maximum allowable start time based on the requirements prescribed by the August 9, 2001 ENERGY STAR® Program Requirements for CFLs Version 2.0, or establish other requirements after considering energy savings, cost effectiveness, and consumer satisfaction. (42 U.S.C. 6295(bb)(2)–(3)) DOE is also establishing a minimum power factor for integrated LED lamps. DOE finds that it has the authority to set this metric because power factor impacts energy use. (42 U.S.C. 6295(bb)(3)(B)) A low power factor product is inefficient and requires an increase in an electric utility's generation and transmission capacity. DOE has determined that these new metrics for MBCFLs and integrated LED lamps will provide consumers with increased energy savings and/or consumer satisfaction for those products capable of achieving the adopted standard levels. DOE has existing test procedures for the metrics being proposed. (*See* sections III.C and IV.A.5 of this document for more information on test procedures for GSLs.) Further, DOE has concluded that the new metrics being adopted in this rule will not result in substantial testing burden, as many manufacturers already test their products according to these metrics.

[28] ENERGY STAR Lamps Specification V2.1, ENERGY STAR Program Requirements for Lamps (Light Bulbs), January 2, 2017. Available at: *www.energystar.gov/sites/default/files/ENERGY%20STAR%20Lamps%20V2.1%20Final%20Specification.pdf.*

Table IV.1 Non-Efficacy Metrics for Certain GSLs

Lamp Type	Metric	Minimum Standard Considered
MBCFLs	Lumen maintenance at 1,000 hours	90 percent of initial lumen output at 1,000 hours
	Lumen maintenance at 40 percent of lifetime*	80 percent of initial lumen output at 40 percent of lifetime
	Rapid cycle stress	MBCFL with start time >100 ms: survive one cycle per hour of lifetime* or a maximum of 15,000 cycles. MBCFLs with a start time of ≤ 100 ms: survive one cycle per every two hours of lifetime*.
	Lifetime*	10,000 hours
	Power factor	0.5
	CRI	80
	Start time	The time needed for a MBCFL to remain continuously illuminated must be within: (1) one second of application of electrical power for lamp with standby mode power (2) 750 milliseconds of application of electrical power for lamp without standby mode power.
Integrated LED Lamps	Power factor	0.7
* Lifetime refers to lifetime of a CFLs as defined in 10 CFR 430.2.		

5. Test Procedure

As noted in section III.C of this document, GSILs and certain IRLs, CFLs, and LED lamps are GSLs. DOE's test procedures for GSILs and IRLs are set forth at 10 CFR part 430, subpart B, appendix R. DOE's test procedure for CFLs is set forth at 10 CFR part 430, subpart B, appendix W. DOE's test procedure for integrated LED lamps is set forth at 10 CFR part 430, subpart B, appendix BB. DOE's test procedure for GSLs that are not GSILs, IRLs, CFLs, or integrated LED lamps is set forth at 10 CFR part 430, subpart B, appendix DD.

DOE received comments on some of DOE's test procedures applicable to GSLs. NEMA stated that section 3.1.4 in appendix BB and section 3.5 in appendix DD specifies testing be done at the ''maximum input power'' and for a color-tunable (multi-primary) lamp this will typically occur when all LED packages within are driven at 100-percent output. NEMA stated that when all primary color sources (*e.g.,* R, G, B, and W) are at full output, the chromaticity coordinates of the whole lamp may not be on or even close to the blackbody locus, about which white light chromaticities are standardized. Further, NEMA stated that depending on the exact parameters of the LED packages within, the chromaticity coordinates for this operating condition may not be in the range for which the color-rendering index, as defined in International Commission on Illumination 13.3, is a valid metric. NEMA stated that at the maximum input power condition, the lamp may not be operating as a GSL, but as a colored lamp. NEMA further commented that section 5.1 of the ENERGY STAR lamps V2.1 specification states that testing is to be done at the most consumptive white light setting covered by the specification. NEMA stated that this approach guarantees a tested lamp will operate in the GSL region with a chromaticity defined by ANSI C78.377 and accepted as ''white'' light. NEMA stated that DOE should amend its test procedures to require testing for color-tunable lamps at the highest input power nominal white chromaticity as defined in ANSI C78.377. (NEMA, No. 183 at pp. 21–22)

NEMA further stated that lamps with four or more primary colors exhibit a wider gamut area and will be able to produce a consumer-selected chromaticity with many different settings of those primaries. NEMA commented that, for example, a lamp may have one mode to maximize light output and another to maximize color rendering, and that the input power is likely to differ among modes. NEMA recommended that where the same chromaticity can be achieved with multiple primary settings, DOE should allow the manufacturer to determine the test conditions and provide instruction for how to repeat the condition for the highest input power white light chromaticity as per ANSI C78.377. (NEMA, No. 183 at pp. 21–22)

DOE is exempting from standards adopted in this final rule lamps that allow consumers to change the lamp from a non-colored lamp to a colored lamp (as defined in 10 CFR 430.2), which is referred to in NEMA's comment as a color tunable lamp. DOE appreciates NEMA's comments on how the test procedure might be amended to better address these products and encourages NEMA to submit them during an active rulemaking to amend the test procedure for integrated LED lamps and other GSLs. DOE is not amending any test procedure in this final rule.

NEMA stated that section 3.4 of appendix DD states to operate non-integrated LED lamps at the

manufacturer declared input voltage and current, which only provides a partial description of the testing conditions and does not represent a repeatable test condition for Type A or Type C linear LED lamps (''TLEDs''). NEMA stated it is repeating the point made in the 2016 GSL test procedure rulemaking that frequency and waveform are important parameters that vary among LED lamps. NEMA stated that DOE should amend the test procedure to allow testing with a manufacturer-designated commercial ballast in alignment with ANSI C78.53, and DOE should accept ANSI C78.53 testing for compliance with this rule. NEMA stated that manufacturers would specify performance ratings, indicate a ballast factor associated with those ratings, and identify the compatible ballast type and model. (NEMA, No. 183 at p. 21)

In the January 2023 NOPR, DOE did not propose amendments to the GSL test procedures. DOE cannot amend a test procedure without allowing opportunity for comment on proposed changes. DOE notes that it received similar comments regarding testing non-integrated LED lamps in response to the test procedure rulemaking for GSLs that culminated in a final rule published on October 20, 2016 (''October 2016 TP Final Rule''). 81 FR 72493. In that final rule, DOE concluded that requiring manufacturers to specify input voltage and current and operate the lamp at full light output resulted in a repeatable test procedure that allows for performance to be more fairly compared. 81 FR 72493, 72496. DOE will consider the comments including new information regarding testing of non-integrated LED lamps provided in this rulemaking in a future test procedure rulemaking.

B. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly available information. The subjects addressed in the market and technology assessment for this rulemaking include (1) a determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of GSLs. The key findings of DOE's market assessment are summarized in the following sections. *See* chapter 3 of the final rule TSD for further discussion of the market and technology assessment.

1. Concerns Regarding LED Lamp Technology

DOE received 158 comments from private citizens.[29] The comments, along with those from Soft Lights and Friends of Merrymeeting Bay, focused on various concerns regarding LED lamp technology including health impacts, lamp attributes, application, consumer costs, and manufacturer impacts. In this rulemaking, LED lamp technology is considered as a means for improving the energy efficiency of GSLs (*see* section IV.C of this document) and will be needed to achieve the standards being adopted in this final rule (*see* section V.C of this document). DOE has reviewed the concerns expressed in comments from private citizens and continues to consider LED lamp technology as a means for improving energy efficiency of GSLs in this rulemaking. The sections below provide a general summary of the comments received from private citizens and DOE responses.

a. Health Impacts

DOE received comments from private citizens that LED lamps can lead to adverse health effects (*e.g.,* headaches, eye strain, sleep issues, seizures). Commenters stated that this was due to the blue light that LED lamps emit and their overall brightness, which are issues that do not occur with incandescent or halogen lamps. In the May 2022 Backstop Final Rule and May 2022 Definition Final Rule DOE also received comments on potential adverse health effects of LED lamps. In the May 2022 Backstop Rule, DOE responded to these comments, stating that DOE researched studies and other publications to ascertain any known impacts of LED lamps on human health and has not found any evidence concluding that LED lighting used for general lighting applications directly results in adverse health effects. 87 FR 27439, 27457. In the May 2022 Definition Final Rule, DOE also stated it had considered the comments. DOE further stated it had considered the potential for health benefits of emissions reductions from reducing energy use by the covered products. In that rule, DOE maintained that the final rule's definitional changes appropriately promote EPCA's goals for increasing the energy efficiency of covered products through the establishment and amendment of energy conservation standards and promoting conservation measures when feasible. 42 U.S.C. 6291 *et seq.,* as amended. 87 FR 27461, 27468. (*See* May 2022 Backstop Final Rule and May 2022 Definition Final Rule for full comments and responses.) Additionally, Soft Lights filed a petition requesting DOE withdraw the May 2022 Backstop Final Rule and May 2022 Definition Final Rule. Soft Lights' petition asserted that LED lamps do not provide uniform illumination, do not emit light that disperses following the inverse square law, and are not regulated with regards to comfort, health or safety by the U.S. Food and Drug Administration (''FDA''). DOE denied the petition stating that granting Soft Light's request would be inconsistent with statutory law. Further, DOE declined to comment on Soft Light's assertion that the FDA has failed to publish comfort, health, or safety regulations for LEDs, stating these arguments are not for consideration by DOE. DOE also stated it is not aware of any prohibition on the use of LED lighting that would have impacted its rulemakings. 88 FR 16869, 16870. DOE notes that the FDA has authority to regulate certain aspects of LED products as radiation-emitting devices and has issued performance standards for certain types of light-emitting products.[30] Currently, there are no FDA performance standard for LED products in part 1040. DOE is not currently aware or any prohibition on the use of LED lighting that would impact this rulemaking.

In this final rule, DOE maintains its responses in previous rulemakings and petition denials regarding potential adverse health impacts of LED lamps.

DOE also received comments that LED lamps have adverse health effects on animal and plant life. Commenters stated that LED lamps contain toxic waste, plastic waste, and substances that pollute the land and water. DOE has not found any information or data indicating LED lamps contain toxic waste. In reviewing general guidelines for disposing of LED lamps, DOE found that either there is no guidance, or the guidance is to recycle them as electronic products. Hence DOE finds that LED lamps are similar in terms of the waste

[29] Comments submitted in response to the January 2023 NOPR, including comments from private citizens can be found in the docket of DOE's rulemaking to develop energy conservation standards for GSLs at *www.regulations.gov/docket/EERE–2022–BT–STD–0022/comments.*

[30] *See,* the Federal Food, Drug and Cosmetic Act section 531 *et seq.;* 21 U.S.C. 360KK; and 21 CFR part 1040.

produced by any other electronic products. Given LED lamp lifetime, most LED lamps will last longer and therefore not need to be replaced as frequently as other lamp technologies, leading to less waste. Further, DOE's research found no sources indicating that LED lamps covered under the GSL definition have adverse impacts on animal or plant life.

Based on the previous assessments, DOE continues to consider LED lamp technology as a means for improving energy efficiency of GSLs in this rulemaking (*see* section IV.C of this document).

b. Lamp Attributes

DOE received comments that LED lamps are failing prematurely (*e.g.,* burning out or changing color) before their marketed lifetime (*e.g.,* failure at 6 months, at 10 percent of marketed lifetime). Commenters attributed this to overheating of components. DOE reviewed the latest industry articles, journals, and research reports on this topic. DOE's research indicates that premature LED lamp failure can be attributable to factors including poorly designed lamps, power surges, or incompatible fixtures, among others. However, DOE has not found data or reports indicating that premature LED lamp failure is a significant problem with lamps offered on the market.

Flicker in LED lamps was also cited as an issue by commenters. Commenters stated that this could be due to installing LED lamps on existing dimmers. DOE reviewed the latest industry articles, journals, and research reports on this topic. While flicker was an issue in the early stages of LED lamp technology development, DOE's research has indicated no evidence that it remains a prevalent issue with lamps currently on the market. Flicker in LED lamps can occur due to use with an incompatible dimmer switch. Not all incandescent/halogen dimmers (*i.e.,* phase-cut control dimmers) are incompatible with LED technology. NEMA's Solid State Lighting (''SSL'') 7A, which provides basic requirements for phase-cut dimming of LED light sources, includes a list of forward phase-cut dimmers and scenarios in which they can be compatible with LED technology (*e.g.,* up to 125 W LED load). Further, in response to the May 2022 Definition Final Rule, NEMA had estimated 520 million out of 665 million decorative lamps on mostly switch-controlled sockets have already been converted to LED technology. DOE finds that NEMA's comment indicates that almost 80 percent of decorative lamps on switch-controlled sockets have already been converted to LED technology without a significant negative market reaction. 87 FR 27461, 27468. Further, manufacturers such as Signify, Green Creative, and Waveform Lighting are developing LED lamps that are compatible with a wider range of dimmer switches.

DOE also received comments that LED lamps emit unnatural blueish light that is too bright for regular use making them an inadequate replacement for incandescent and halogen lamps which emit light that mimics natural sunlight more closely. However, LED lamps are sold in a variety of color temperatures including the traditional 2700 K warm white CCT typically found in incandescent lamps. DOE's review of the market, including offerings at major retailers, indicates that these LED lamps are widely available on the market.

DOE received comments that LED lamps should be labeled with their peak luminance and this metric should be regulated. Commenters stated that the correct metric for measuring LED visible radiation is luminance (candela per square meter). Commenters further stated that the metric of lumens per watts can eliminate innovation with ultraviolet (''UV'') and infrared (''IR'') wavelengths that are used for color rendering and health benefits. Regarding labeling, the Federal Trade Commission specifies labeling requirements for products including GSLs (*see* 16 CFR 305.5(c)). As noted in section IV.A.4, this rulemaking uses lumens per watt as the metric to measure efficiency of GSLs. Lumens do include the measure of candela as they are the luminous flux emitted within a unit solid angle (one steradian) by a point source having a uniform luminous intensity of one candela.[31] Additionally, lumens are the measure by which lamp manufacturers specify light output on lamp specification sheets.

DOE also received comments that the owner's manuals for garage door openers state that they are designed for incandescent lamps and LED lamps can cause interference with the remote door openers. DOE reviewed the websites of manufacturers of the garage door openers mentioned in these comments. The websites cite universal LED lamps that can be used with garage door openers and would not cause interference. Further, Lighting Supply, a distributor of lamps for garages, states on its website that interference is primarily an issue with LED lamps from unknown manufacturers as most known brands are certified by the Federal Communications Commission, which requires lamps to have shielding within them to mitigate any radio frequency interference.

Additionally, DOE received comments that the use of LEDs in vehicle lights makes these lights bright and strenuous to eyes, creating hazardous driving conditions. In the analysis for the January 2017 Definition Final Rules, DOE determined that certain voltages and/or base types are typical for specialty lighting applications and excluded them from the GSL definition. 82 FR 7267, 7306, 7310. Typical specialty lighting applications include lamps used in vehicles.

Finally, DOE received comments that LED streetlights are too bright and when they degrade, the lights turn purple, flash on and off, and eventually burn out after a couple of years. DOE also received comments that LED lamps contribute to light pollution in the night sky. In response to similar comments received, in the May 2022 Backstop Final Rule DOE noted that the GSL definition excludes lamps with lumens greater than 3,300 and stated that streetlamps and lighting for construction applications are generally 5,000 lumens or greater. 87 FR 27439, 27457. Further, DOE's research of street lighting products shows that most products are sold as complete fixtures rather than as individual lamps and, therefore, would not fall within the GSL definition. As such, the lamps relevant to these comments are generally not covered as GSLs and therefore, not within the scope of the rulemaking.

Based on the above assessments, DOE does not find that there are issues with the lamp attributes of GSL LED lamps and continues to consider LED lamp technology as a means for improving the energy efficiency of GSLs (*see* section IV.C of this document).

c. Application

DOE received comments that LED lamps are too large to replace incandescent lamps in preexisting fixtures. Some commenters provided specifics—*i.e.,* B10 shape, E12 base LED lamps are 4 to 4.8 inches in length and 1.4 to 1.6 inches in width whereas their incandescent counterparts measure 3.8 inches in length and 1.25 inches in width. DOE reviewed several major manufacturer catalog and retailer websites and compared the specifications of the incandescent and LED version of B10 shape, E12 base lamps and found that the difference in width ranges from 0 to 0.05 inches and the difference in length ranges is 0.0 to 0.1 inches. DOE finds that these

[31] Illuminating Engineering Society, ''Lumens.'' Available at *www.ies.org/definitions/lumen/.*

differences in width and length are not as large as cited by the commenters and therefore, would likely not affect the usability of these lamps within existing fixtures. Hence, DOE does not find the size of LED lamps to be prohibitive of being used in existing fixtures.

DOE also received comments that LED lamps are inaccurately marketed to be used in enclosed fixtures and the comments further stated that LED lamp components are more sensitive to overheating so they are prone to premature failure due to the increased heat inside enclosed fixtures. DOE reviewed the latest industry articles, journals, and research reports on this topic. DOE's research found no evidence that lamps specifically rated for use in an enclosed fixture are failing due to use in an enclosed fixture; nor has it found this to be a reported issue within the lighting industry.

DOE received comments that the CRI of LED lamps is worse than incandescent lamps and high-CRI and red-rendering (R9) LED lamps cannot meet the proposed standards and would eliminate innovation of better color rendering LED lamps. DOE's analysis ensures that a range of lamp characteristics such as lumens, CCT, and CRI are available at the highest levels of efficacy. This includes products with high CRIs (*i.e.,* 90 or above). (*See* section IV.D.1.d of this document for more details.)

For the concerns noted above by commentators DOE did a thorough assessment of products and reviewed the latest industry articles, journals, and research reports on these topics. DOE was unable to find data or evidence showing that these concerns are being cited as prevalent and/or significant issues in the lamp market. Based on the assessments above, DOE does not find that there are issues with the use and application of GSL LED lamps and therefore continues to consider LED lamp technology as a means for improving the energy efficiency of GSLs (*see* section IV.C of this document).

d. Consumer Costs and Manufacturer Impacts

DOE received comments that LED lamps are not as cost efficient compared to incandescent and halogen lamps. Commenters stated that incandescent lamps are 100-percent energy efficient and pay for themselves when the outside temperature is below room temperature by reducing the need for heat systems. Commenters also stated that due to the cost of the LED lamps as well as the cost of upgrading to an appropriate dimmer, the final costs end up being more than the projected savings. Commenters stated DOE's estimate that switching to LED lamps could save $3 billion per year equates to around $2 per month per household, which should not be considered significant. DOE also received comments that the best way to conserve energy is to use lights less often regardless of lamp technology. DOE notes that May 2022 Backstop Final Rule codified a 45 lm/W requirement that incandescent and halogen lamps are unable to meet. Therefore, incandescent and halogen lamps were not analyzed as options available to consumers during the analysis period for this final rule. DOE does not anticipate that consumers will need to upgrade their dimmer under a standard compared to the dimmers that would be used with CFLs and LED lamps available in the no-new-standards case. With respect to the significance of savings, DOE notes that most households own a significant number of GSLs (the 2015 U.S. Lighting Market Characterization report estimates an average of over 50 lamps per household [32]). The household-level savings will be significantly higher than the savings associated with a single purchase. For details on consumer cost savings from these standards being adopted in this final rule, *see* sections V.B.1 and V.B.3.b. of this document. DOE agrees that energy savings can be had from a reduction in operating hours but notes this is also the case under a standard, and DOE does not estimate a change in operating hours under a standard. (See section IV.H.1 of this document for discussion.)

2. Product Classes

When evaluating and establishing energy conservation standards, DOE may establish separate standards for a group of covered products (*i.e.,* establish a separate product class) if DOE determines that separate standards are justified based on the type of energy used, or if DOE determines that a product's capacity or other performance-related feature justifies a different standard. (42 U.S.C. 6295(q)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (*Id.*)

In the January 2023 NOPR, DOE proposed product class divisions based on lamp component location (*i.e.,* location of ballast/driver); capability of operating in standby mode; directionality (*i.e.,* omnidirectional versus directional); and lamp length (*i.e.,* 45 inches or longer [''long''] or less than 45 inches [''short'']) as product class setting factors. 88 FR 1638, 1656. In chapter 3 of the final rule TSD, DOE discusses factors it ultimately determined were not performance-related features that justify different standard levels; including lamp technology, lumen package, lamp cover, dimmability, base type, lamp spectrum, CRI, and CCT. *See* chapter 3 of the final rule TSD for further discussion.

DOE received several comments on product class setting factors including lamp cover, lamp length, tunability, and non-illumination features. These comments are discussed in the following sections.

a. Lamp Cover

In the January 2023 NOPR, DOE considered lamp cover as a performance-related feature that justified a different standard level but determined that it was not such a feature (*see* chapter 3 of the January 2023 NOPR TSD). NEMA stated that when visible, frosted lamps reduce glare, although they are slightly less efficient. While max-tech performance may be achievable with clear lamps, they represent only a portion of the GSL market. (NEMA, No. 183 at p. 20)

In the January 2023 NOPR, DOE considered the impact of a lamp cover (*e.g.,* added glass, silicone coating) over the main light source, which can reduce the lumen output of the lamp. The lamp cover adds a white finish to these lamps, and they are sometimes referred to as frosted lamps. By contrast, lamps without a cover are sometimes referred to as bare or clear. In some cases, covered lamps may offer utility to consumers as they more closely resemble traditional lighting technologies and are frequently utilized where a lamp is visible (*e.g.,* without a lamp shade). DOE examined the difference in efficacies of lamps that have a cover versus those that do not. DOE found that while a cover could generally decrease efficacy, it could also increase it, such as when a phosphor coating transforms light emitted from LEDs into visible light. DOE also determined that many LED lamps that have covers have high efficacies. GSLs without a cover (*i.e.,* clear, bare) are mainly in the Integrated Omnidirectional Short product class. This product class also has lamps with covers (*i.e.,* frosted lamps). DOE's analysis shows that both the frosted and

[32] Navigant Consulting, Inc. *2015 U.S. Lighting Market Characterization.* 2017. U.S. Department of Energy: Washington, DC Report No. DOE/EE–1719. (Last accessed August 10, 2023.) *www.energy.gov/eere/ssl/downloads/2015-us-lighting-market-characterization.*

clear lamps in this product class can meet the max-tech EL identified in the January 2023 GSL NOPR and in this analysis. Hence, for the reasons provided in the January 2023 NOPR and above, DOE is not creating a product class for covered versus bare products in this final rule.

b. Lamp Dimensions

In the January 2023 NOPR, DOE stated it observed that pin base LED lamp replacements with 2G11 bases and lengths close to 2 feet are less efficacious than 2-foot linear LED lamps. To further understand this observation on lamp length, DOE requested comments on, assuming all other attributes are the same, how the efficacy of pin base LED lamp replacements compares to that of linear LED lamps. 88 FR 1638, 1657. NEMA commented that DOE should avoid assuming that pin base LED retrofit lamps and linear LED retrofit lamps have similar luminous efficacy because they differ in shape, size, directionality, and operating environments. NEMA stated that pin base retrofit lamps and linear LED retrofit lamps differ in the following ways: (1) pin base LED lamps designed to replace legacy CFLs either do not have the same single straight tube shape or are designed to take advantage of LED package directionality to provide more directional illumination; (2) pin base LED lamps must fit within a much smaller, shorter, and narrower luminaire type and application than linear LED retrofit lamps and are designed to direct light output either horizontally or vertically, depending on the luminaire type and application; and (3) typically, the thermal environment differs greatly between these applications, resulting in different efficiency expectations. NEMA stated that only in limited cases when the lamps have the same shape and directionality of light output is the luminous efficacy of a pin base LED retrofit lamp and linear LED retrofit lamp directly comparable. (NEMA, No. 183 at p. 6)

In the January 2023 NOPR, DOE requested comment on the observed lower pin base LED lamps with 2G11 base and close to 2-feet length (typically used as replacements for pin base CFLs) having a lower efficacy than linear LED lamps 2 feet in length (88 FR 1638, 1657), as DOE expected them to achieve similar levels of efficacy due to similarity in length. DOE appreciates NEMA's comments, which help inform the differences between these two lamp configurations and potential impacts on efficacy. Because they are both less than 45 inches in length, DOE groups them in the same product class (*i.e.,* either the Integrated Omnidirectional Short product class or the Non-integrated Omnidirectional Short product class) (*see* table IV.2 for product class division summary). In the January 2023 NOPR and in this final rule, DOE did not observe that the difference in efficacy between these two lamp configurations is substantial enough to result in a loss of the consumer utility provided by each lamp. DOE's analysis indicates that both pin base LED lamps with a 2G11 base close to 2 feet in length and linear LED lamps that are 2 feet can meet the max-tech ELs considered for the Non-integrated Omnidirectional Short product class (*see* section IV.D.1.d of this document). Therefore, DOE does not find that adjustments to product class setting factors are necessary.

In the January 2023 NOPR, DOE observed that 4-foot T5 and 8-foot T8 linear LED lamps were not reaching the same efficacies as 4-foot T8 linear LED lamps. DOE tentatively concluded that this is not due to a technical constraint due to diameter but rather lack of product development of 4-foot T5 and 8-foot T8 linear LED lamps. DOE requested comments and data on the impact of diameter on efficacy for linear LED lamps. 88 FR 1638, 1656–1657.

Westinghouse stated that for linear fluorescent tubes a smaller diameter means higher efficacy, for LED lamps it is the inverse as a smaller diameter means less space for electronics and thermal management. (Westinghouse, Public Meeting Transcript, No. 27 at pp. 42–43) DOE appreciates Westinghouse's comments, which help inform the impact of diameter on linear LED lamps. Linear LED lamps of both T5 and T8 diameters are grouped in the Integrated Omnidirectional Long product class (*see* table IV.2 for product class division summary) and both can meet the max-tech ELs. Hence, adjustments to product class setting factors are not necessary.

c. Non-Integrated Standby Operation

NEMA commented that none of DOE's proposed product classes included LED smart and connected lamps that are also non-integrated. To account for these products, NEMA recommended the following product classes: (1) Non-integrated Omnidirectional short (with standby) capturing the low voltage LED retrofit lamps less than 45 inches in length, (2) Non-integrated Omnidirectional long (with standby) capturing lamps operating on non-building mains 45 inches or more in length, and (3) Non-integrated Directional (with standby) capturing LED lamps designed to replace legacy CFLs. NEMA specified that all of these lamps would require operating on a remote driver or legacy fluorescent or high-intensity discharge (''HID'') ballast. (NEMA, No. 183 at p. 6)

In the January 2023 NOPR, DOE proposed only standby mode operation as a product class setting factor for integrated lamps. At the time of the January 2023 NOPR analysis, DOE did not observe non-integrated GSLs with standby mode power consumption. 88 FR 1638, 1657, 1667. Based on a review of the market for this final rule analysis, DOE identified non-integrated LED lamps that have standby mode power operation capability allowing the lamp to have dimming controls. For example, DOE identified a linear LED lamp that is designed to operate on fluorescent lamp ballast (*i.e.,* Type B), to have additional circuitry contained within the lamp that interprets the signal from the ballast and changes the light output accordingly. Hence, because the standby mode operation of this lamp is not solely external to the lamp (*i.e.,* in the ballast or driver) but also part of the lamp itself, DOE considers it as having standby mode operation capability and therefore standby mode power consumption.

Because the market for these non-integrated LED lamps that have standby mode power operation capability is rapidly developing, DOE is unable to make a clear and accurate determination regarding the consumer utility, how various technology options would affect the efficiency, and maximum technologically feasible efficiency of these lamps, which prevents DOE from determining whether a specific standard for these lamps would be economically justified at this time. Accordingly, DOE did not consider amended standards for these lamps in this rulemaking. DOE may evaluate amended standards for these products in a future rulemaking. DOE notes that these lamps are still subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd). The criteria that non-integrated GSLs with standby mode power operation capability must meet to be exempt from amended standards adopted in this final rule is specified in section IV.A.3 of this document.

d. Tunability

NEMA and Lutron stated that DOE incorrectly assumed that all lamps capable of operating in standby mode are fundamentally the same as lamps without standby functionality but with the addition of wireless communication components. NEMA and Lutron stated that because of this assumption, DOE did not create product classes for tunable white lamps and color tunable lamps. (NEMA, No. 183 at p. 8; Lutron,

No. 182 at p. 2) NEMA stated that including these additional categories will allow for a thorough analysis of lamps capable of operating in standby mode by the next rulemaking in 2028—which may result in the need for separate categories, different efficacy curves, and amended test procedures—and will allow DOE to set efficacy levels without restricting innovation in the coming years. (NEMA, No. 183 at pp. 13–14) Lutron stated that the product classes and scaling approach for standby mode proposed in the January 2023 NOPR would limit innovation and potentially regulate out of the market many lamps capable of dynamic color tuning and dynamic spectral tuning. (Lutron, No. 182 at pp. 2–3)

NEMA and Lutron stated that for these lamps DOE should set separate product classes and adopt ELs proposed in the January 2023 NOPR as follows: (1) Tunable white integrated omnidirectional lamps capable of operating in standby mode subject to EL 6; (2) Tunable white integrated directional lamps capable of operating in standby mode subject to EL 4; (3) Full-color tunable integrated omnidirectional lamps capable of operating in standby mode subject to EL 4; and (4) Full-color tunable integrated directional lamps capable of operating in standby mode subject to EL 4. (NEMA, No. 183 at p. 8; Lutron, No. 182 at p. 3)

NEMA and Lutron defined ''tunable white'' as a feature allowing the end user to adjust the light output to create different colors of white light; in which tuning must be capable of altering the color appearance along the black body curve from two or more LED colors, where each LED color is inside one of those defined by ANSI-defined (ANSI C78.377) white correlated color temperature ranges (*i.e.,* between 2700 K and 6500 K) inside of the seven-step MacAdam ellipse or the ANSI quadrangles. NEMA and Lutron defined ''full color tunable'' as a feature allowing the end user to adjust the light output to create white or colored white; in which tuning must include white light that can alter the color appearance along the black body curve by dynamically tuning color from three of more colors of LEDs where at least one LED extends to colors beyond the ANSI-defined (ANSI C78.377) white correlated color temperature ranges (*i.e.,* between 2700 K and 6500 K) outside of the seven-step MacAdam ellipse or the ANSI quadrangles. (NEMA, No. 183 at p. 14; Lutron, No. 182 at p. 2)

Lutron and NEMA provided comments on the impact on efficacy due to the tunable features of these lamps. Lutron commented that tunable lamps are less efficacious than a single-chromaticity lamp [33] because tunable lamps require: (1) effective LED color mixing on a small light-emitting surface, which leads to higher LED current densities; (2) a control system to vary intensity of each LED color; and (3) optics to mix LED colors into the appropriate beam pattern. Lutron estimated a 10-percent efficacy loss independent from the power consumed in standby mode. (Lutron, No. 182 at p. 6)

Lutron stated it is possible for static white lamps to meet the proposed EL requirement by employing highly efficacious white LEDs in efficient configurations. Lutron stated, in contrast, tunable white lamps employ a second color LED close to the blackbody locus at a different CCT and color tunable lamps employ three or more colors of LEDs where at least one LED is far from the blackbody locus. Lutron stated that these additional color LEDs are less efficacious because the human eye is insensitive to light radiated from LEDs at colors far from green (555 nm), such as red (620 nm) or blue (470 nm). (Lutron, No. 182 at pp. 4–5, 6) NEMA provided the example that having the functionality of selecting ''warm white'' (*i.e.,* a setting corresponding to nominally 2700 K on the blackbody locus) may require both white LEDs and lower efficacy LEDs, such as red and blue, to achieve the precise color point. NEMA stated primary color LEDs are placed farther out in the color space, expanding the gamut area, which represents the number of colors, including shades of white, the lamp can produce. NEMA stated that the result is a loss in efficacy compared to a single chromaticity lamp containing only 2700 K LEDs and that this loss is in addition to the efficacy reduction caused by the lamp's standby power functionality. (NEMA, No. 183 at p. 10)

Lutron also stated that, compared to tunable white lamps, full-color-tunable lamps introduce at least one color far from the blackbody locus to achieve the desired utility, and because the human eye is less sensitive to wavelengths far from green, there is an impact on efficacy beyond the impacts described for white tunable lamps. As an example, Lutron stated that 1400 K or lower, which is a setting that may provide more consumer comfort, can't be achieved without a higher intensity of red LEDs. Lutron commented that greater control of color variation and accuracy, color quality, beam angle, and other aspects can require higher-end LEDs, more sophisticated designs, and innovative constructions that prevent the lamps from achieving high efficacy levels. (Lutron, No. 182 at p. 5–6)

Lutron and NEMA also provided comments on the utility of tunable lamps. Lutron and NEMA stated that tunable white lamps and color tunable lamps are a growing sector of the market. (Lutron, No. 182 at pp. 7–8; NEMA, No. 183 at p. 10) Lutron stated that tunable lamps offer capabilities such as dimming, scene selection, geo-fencing, event scheduling, programmability and demand response to further achieve energy savings. (Lutron, No. 182 at p. 7) Lutron and NEMA stated that sectors such as retail, hospitality, restaurants, bars, entertainment, museums, theme parks, and architectural use lighting with deep dimming, warm dimming, CCT control, and color saturation to create unique consumer experiences. (Lutron, No. 182 at p. 7; NEMA, No. 183 at p. 10)

Lutron cited DOE's web page on ''Understanding LED Color-Tunable Products'' as noting that offices using white light during work hours could shift to evening get-togethers with saturated mood-setting colors without using additional color lamps that are exempted from DOE standards and therefore may not be efficacious. (Lutron, No. 182 at pp. 6–7) Lutron stated that one of the key benefits of all color tunable lamps is the ability to control colors and match chromaticity and also manipulate light and color intensities to affect moods and create effects. Lutron commented that tunable white lamps offer users multiple similar benefits as color tunable lamps, such as simulating daylight or candlelight to set a mood without the use of additional lighting or to match existing light to provide light consistency in a space. Lutron also stated that the ability to change the intensity and color of white light has been incorporated into green building and healthy building standards, particularly the WELL standard, operated by the International WELL Building Institute. (Lutron, No. 182 at p. 7)

NEMA also raised concerns regarding the DOE test procedure and its applicability for color tunable GSLs. Specifically, NEMA stated that DOE's test procedure for GSLs requires testing at maximum input power at which setting a color tunable lamp may not be operating as a GSL, but as a colored lamp. NEMA further noted that a lamp may have one mode to maximize light output and another to maximize color

[33] Commenters use ''static'' white lamps and single chromaticity lamps interchangeably and DOE assumes these terms identify lamps that are non-tunable.

rendering, and that the input power is likely to differ among modes. (NEMA, No. 183 at pp. 21–22) (*See* further discussion of these comments in section IV.A.5 of this document).

Because the market for these tunable lamps is rapidly developing, DOE is unable to make a clear and accurate determination regarding the consumer utility, how various technology options would affect the efficiency, and maximum technologically feasible efficiency of these lamps, which prevents DOE from determining whether a specific standard for these lamps would be economically justified at this time. Accordingly, DOE did not consider amended standards for these lamps in this rulemaking. DOE may evaluate amended standards for these products in a future rulemaking. DOE notes that these lamps are still subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd). The criteria that tunable white GSLs and color tunable GSLs must meet to be exempt from amended standards adopted in this final rule is specified in section IV.A.3 of this document.

e. Non-Illumination Features

NEMA stated that there are multi-functional lighting products without wireless communication components that include power-consuming non-lighting features when the product is not generating light. NEMA gave examples of outdoor lamps with motion sensors for home security, outdoor dusk-to-dawn lamps with ambient light sensors, and indoor lamps with an internal battery backup to be used as a flashlight for use during a power outage. NEMA stated that the January 2023 NOPR did not accommodate these products and elimination of their security/safety features would be a mistake and impede further innovation and development for future generations of similar products. NEMA stated that for these lamps, DOE's approach of determining ELs for lamps with standby mode power by adding 0.5 W to ELs for similar non-standby mode lamps, assuming all else being equal, was not correct. NEMA stated that for these lamps DOE should set separate product classes and adopt ELs proposed in the January 2023 NOPR as follows: (1) Omnidirectional lamps capable of operating on standby mode, incorporating energy-consuming non-illumination feature(s) subject to EL 4 and (2) Directional lamps capable of operating on standby mode, incorporating energy-consuming non-illumination feature(s) subject to EL 4. (NEMA, No. 183 at pp. 13–14)

NEMA provided comments on the impact on efficacy due to the non-illumination features of these lamps. As an example, NEMA stated that a lamp with a speaker has unavoidably lower efficacy than lamps with no additional features. NEMA stated that a lamp with Bluetooth speaker functionality would be roughly 30 percent lower in efficacy compared to the equivalent light output single-chromaticity lamp without integrated speakers. NEMA stated that these lamps provide desirable features for consumers, who will often purchase and install several of the lamps in a room. (NEMA, No. 183 at pp. 11–12) Additionally, NEMA stated that unless a lamp offers a physical switch or an app-based method for disabling the power from non-illumination features, the only way to measure the lamp's luminous efficacy independent of the non-illumination features is to disassemble the product and identify the appropriate solder traces to cut. (NEMA, No. 183 at p. 12)

NEMA stated that many smart lamps offer additional functionality and added consumer benefit while providing energy-saving features such as dimming, scheduling, high end trim, and demand response via digital programming or manual setting of these features. NEMA stated the International Energy Agency (''IEA'') SSL Annex Task 7, notes a large market potential for internet-connected lighting systems in the residential sector, including illumination and non-illumination functionality such as: on/off control; changing CCT; dimming; motion detection; daylight sensing to trigger automated lighting changes; temperature and humidity sensing to control heating and air conditioning; Wi-Fi signal boosting; smoke detection; security systems including cameras; security-initiated lighting response; integrated audio; baby monitoring; and energy consumption monitoring. NEMA, however, disagreed with the assumption in the IEA report that smart lamp penetration is limited to the residential sector and cited applications in retail and hospitals. NEMA gave the example of the usefulness of circadian entrainment smart lamp features in nursing homes, congregate care, and independent living facilities, etc. (NEMA, No. 183 at pp. 9, 12–13)

The CA IOUs commented that DOE's proposal may inadvertently restrict the development of new types of lighting products that offer additional capabilities that consumers desire, such as light sensors, Wi-Fi or Bluetooth, speakers, cameras, or LAN links. The CA IOUs commented these additional features often require standby energy consumption that is higher than would be allowed in DOE's proposed standards and to not eliminate them recommended DOE consider different luminous efficacy requirements for GSLs with only lighting-related features and for combination GSLs with non-lighting-related features. (CA IOUs, No. 167 at p. 2)

Because the market for lamps with non-illumination features (*i.e.,* features that do not control light output) is rapidly developing, DOE is unable to make a clear and accurate determination regarding the consumer utility, how various technology options would affect the efficiency, and maximum technologically feasible efficiency of these lamps, which prevents DOE from determining whether a specific standard for these lamps would be economically justified. Accordingly, DOE did not consider amended standards for these lamps in this rulemaking. DOE may evaluate amended standards for these products in a future rulemaking. DOE notes that these lamps are still subject to the 45 lm/W sales prohibition at 10 CFR 430.32(dd) The criteria that GSLs with a non-illumination feature and standby mode power operation capability must meet to be exempt from amended standards adopted in this final rule is specified in section IV.A.3 of this document.

f. Product Class Summary

In summary, in this final rule analysis, DOE is considering the same product class setting factors as those considered in the January 2023 NOPR, as shown in table IV.2. To avoid any confusion as to what lamp types are included in these product classes and therefore subject to the amended standards being adopted in this final rule, DOE is adding two clarifications to the GSL standards table being codified in the CFR by this final rule. Firstly, for all Directional product classes, DOE is specifying in the GSL standards table in the CFR that a directional lamp is a lamp that meets the definition of reflector lamp as defined in 10 CFR 430.2. Secondly, for the Non-integrated Omnidirectional Short product class, DOE is specifying in the GSL standards table in the CFR that this product class comprises, but is not limited to, lamps that are pin base CFLs and pin base LED lamps designed and marketed as replacements of pin base CFLs.

Table IV.2 GSL Product Classes

Lamp component location	Directionality	Lamp length	Standby mode operation
Integrated	Omnidirectional	Short (<45 inches)	Non-Standby
			Standby
		Long (≥45 inches)	Non-Standby
	Directional	All Lengths	Non-Standby
			Standby
Non-Integrated	Omnidirectional	Short (<45 inches)	N/A
		Long (≥45 inches)	
	Directional	All Lengths	

3. Technology Options

In the technology assessment, DOE identifies technology options that are feasible means of improving lamp efficacy. This assessment provides the technical background and structure on which DOE bases its screening and engineering analyses. To develop a list of technology options, DOE reviewed manufacturer catalogs, recent trade publications and technical journals, and consulted with technical experts. In the January 2023 NOPR, DOE identified 21 technology options that would be expected to improve GSL efficacy, as measured by the applicable DOE test procedure. The technology options were differentiated by those that improve the efficacy of CFLs versus those that improve the efficacy of LED lamps. 88 FR 1638, 1657.

With regards to the technology option of improved secondary optics for LED lamp technology, NEMA stated it is important to note that frosted bulbs, while slightly reducing light output, mitigate glare in LED lamp designs and in doing so provide consumer-desired utility. (NEMA, No. 183 at p. 7) DOE reviewed the utility and efficacy of frosted lamps when evaluating lamp cover as a potential product class setting factor (*see* IV.B.2.a of this document for the detailed discussion). Additionally, NEMA requested that DOE adopt the standardized terminology from ANSI/IES LS–1–22 [34] to ensure clarity in rulemaking discussions. NEMA noted that the term ''LED chip,'' as used in the January 2023 NOPR, is a non-standardized term with ample room for interpretation. (NEMA, No. 183 at p. 7). DOE appreciates NEMA's comment. In chapter 3 of the January 2023 NOPR TSD DOE had specified that the LED die, along with its electrode contacts and any optional additional layers, is referred to as the ''LED chip.'' This description of the LED chip aligns with the definition of LED package [35] specified in ANSI/IES LS–1–22. For further clarity and consistency with industry definitions (*i.e.,* ANSI/IES LS–1–22), DOE has replaced references to ''LED chip'' with ''LED package'' in this final rule notice and TSD. Additionally, in review of the nomenclature used in the January 2023 NOPR and TSD to describe the technology option of reduced current density, DOE stated that the LED package is driven at lower currents. 88 FR 1638, 1657–1658 (*see* chapter 3 of January 2023 NOPR TSD). Because ANSI/IES LS–1–22 defines LED array or module [36] as an assembly of LED packages intended to be connected to the LED driver, DOE finds that it is more appropriate to phrase this technology option as the LED array or module being driven at lower currents.

In this final rule as in the January 2023 NOPR, DOE is considering the technology options as shown in table IV.3.

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[34] American National Standards Institute/Illuminating Engineering Society, ANSI/IES LS–1–22, ''Lighting Science: Nomenclature and Definitions for Illuminating Engineering.'' Approved Nov. 2, 2021.

[35] ANSI/IES LS–1–22 defines ''LED package'' as an assembly of one or more light emitting diode (LED) dies that includes wire bond or other type of electrical connections, possibly with an optical element and thermal, mechanical, and electrical interfaces. Power source and ANSI standardized base are not incorporated into the device. The device cannot be connected directly to the branch circuit. Available at *www.ies.org/definitions/led-package/.*

[36] ANSI/IES LS–1–22 defines ''LED array or module'' as an assembly of light emitting diode (LED) packages (components), or dies on a printed circuit board or substrate, possibly with optical elements and additional thermal, mechanical, and electrical interfaces that are intended to connect to the load side of an LED driver. Power source and ANSI standard base are not incorporated into the device. The device cannot be connected directly to the branch circuit. Available at *www.ies.org/definitions/led-array-or-module/.*

Table IV.3 GSL Technology Options

Lamp Type	Name of Technology Option	Description
CFL	Highly Emissive Electrode Coatings	Improved electrode coatings allow electrons to be more easily removed from electrodes, reducing lamp power and increasing overall efficacy.
	Higher Efficiency Lamp Fill Gas Composition	Fill gas compositions improve cathode thermionic emission or increase mobility of ions and electrons in the lamp plasma.
	Higher Efficiency Phosphors	Use of higher efficiency phosphors to increase the conversion of ultraviolet ("UV") light into visible light.
	Glass Coatings	Coatings on inside of bulb reflect UV radiation passing through the phosphor back onto the phosphor, allowing a greater portion of UV to be absorbed, and thereby emit more visible light.
	Multi-Photon Phosphors	Emitting more than one visible photon for each incident UV photon absorbed.
	Cold Spot Optimization	Improve cold spot design to maintain optimal temperature and improve light output.
	Improved Ballast Components	Use of higher-grade components to improve efficiency of integrated ballasts.
	Improved Ballast Circuit Design	Better circuit design to improve efficiency of integrated ballasts.
	Higher Efficiency Reflector Coatings	Alternative reflector coatings such as silver, with higher reflectivity to increase the amount of directed light.
	Change to LEDs	Replace CFL with LED technology.

Lamp Type	Name of Technology Option	Description
LED	Efficient Down Converters	New wavelength conversion materials, such as novel phosphor composition and quantum dots, have the potential for creating warm-white LEDs with improved spectral efficiency, high color quality, and improved thermal stability.
	Improved Package Architectures	Arrangements of color mixing and phosphor coating LEDs on the LED array that improve package efficacy.
	Improved Emitter Materials	The development of efficient red, green, or amber LED emitters that allow for optimization of spectral efficiency with high color quality over a range of CCT and which also exhibit color and efficiency stability with respect to operating temperature.
	Alternative Substrate Materials	Emerging alternative substrates that enable high-quality epitaxy for improved device quality and efficacy.
	Improved Thermal Interface Materials ("TIMs")	TIMs enable high efficiency thermal transfer to reduce efficacy loss from rises in junction temperature and optimize for long-term reliability of the device.
	Improved LED Device Architectures	Novel architectures for integrating LED package(s) into a lamp, such as surface mount device and chip-on-board that improve efficacy.
	Optimized Heat Sink Design	Heat sink design to improve thermal conductivity and heat dissipation from the LED package, thus reducing efficacy loss from rises in junction temperature.
	Active Thermal Management Systems	Devices such as internal fans and vibrating membranes to improve thermal dissipation from the LED package.
	Improved Primary Optics	Enhancements to the primary optics of the LED package, such as surface etching, novel encapsulant formulations, and flip chip design that improve light extraction from the LED package and reduce losses due to light absorption at interfaces.
	Improved Secondary Optics	Reduce or eliminate optical losses from the lamp housing, diffusion, beam shaping, and other secondary optics to increase efficacy using mechanisms such as reflective coatings and improved diffusive coatings.
	Improved Driver Design	Novel and intelligent circuit design to increase driver efficiency.
	Alternating Current ("AC") LEDs	LEDs that operate on AC voltage, eliminating the requirement for and efficiency losses from the driver.

Lamp Type	Name of Technology Option	Description
	Reduced Current Density	Driving LED array or module at lower currents while maintaining light output, and thereby reducing the efficiency losses associated with efficacy droop.

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C. Screening Analysis

DOE uses the following four screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have a significant adverse impact on the utility of the product to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

10 CFR part 430, subpart C, appendix A, sections 6(b)(3) and 7(b).

In sum, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections include comments from interested parties pertinent to the screening criteria, DOE's evaluation of each technology option against the screening analysis criteria, and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

1. Screened-Out Technologies

In the January 2023 NOPR, DOE proposed to screen out multi-photon phosphors for CFLs, and quantum dots and improved emitter materials for LED lamps based on the first criterion on technological feasibility. DOE did not find evidence that multi-photon phosphors, quantum dots, or improved emitter materials are being used in commercially available products or prototypes. DOE also proposed to screen out AC LEDs based on the second and third criteria: respectively, practicability to manufacture, install, and service and adverse impacts on product utility or product. The only commercially available AC LED lamps that DOE found were G-shapes between 330 and 360 lumens or candle shapes between 220 and 400 lumens. Therefore, it is unclear whether the technology could be made for a wide range of products on a commercial scale and in particular for those being considered in this document. 88 FR 1638, 1658.

NEMA stated that it agrees with DOE's proposal to screen out AC LEDs as well as quantum dots and improved emitter materials for LED lamps. (NEMA, No. 183 at p. 7)

In this final rule as in the January 2023 NOPR, for reasons stated above, DOE continues to screen out the technologies of multi-photon phosphors for CFLs and quantum dots, improved emitter materials, and AC LEDs for LED lamps.

2. Remaining Technologies

In the January 2023 NOPR, DOE considered active thermal management for LED lamp technology as a design option, among others. 88 FR 1638, 1658. NEMA commented that active thermal management is not typically required or beneficial for products included in the GSL definition and therefore should not be factored in when providing a deviation from the GSL requirements without standby power. NEMA stated that products outside the scope of the GSL definition, namely small size devices with a lumen output of greater than 3,300 lumens, can be dependent upon and benefit from active thermal management, but that this should not be taken into consideration for this rulemaking. NEMA added that manufacturers should not be constrained from utilizing their design freedom to add active thermal management to a product covered by the scope of this rule if the final product meets the requirements and includes the full impacts of the thermal management. (NEMA, No. 183 at pp. 7–8) DOE has not found evidence that the design option of active thermal management is limited to lamps with lumen outputs greater than 3,300 lumens. Additionally, DOE identifies all possible technology options and subsequently design options that manufacturers can utilize to increase the efficacy of their lamps. DOE is not specifying the design options manufacturers must or must not use to achieve higher efficacies for their lamps. Therefore, in this final rule, DOE continues to consider active thermal management as a valid design option.

Through a review of each technology, DOE concludes that all of the other identified technologies listed in section IV.B.3 of this document met all five screening criteria to be examined further as design options in DOE's final rule analysis. In summary, DOE did not screen out the following technology options:

CFL Design Options

- Highly Emissive Electrode Coatings
- Higher Efficiency Lamp Fill Gas Composition
- Higher Efficiency Phosphors
- Glass Coatings
- Cold Spot Optimization
- Improved Ballast Components
- Improved Ballast Circuit Design
- Higher Efficiency Reflector Coatings
- Change to LEDs

LED Design Options

- Efficient Down Converters (with the exception of quantum dot technologies)
- Improved Package Architectures
- Alternative Substrate Materials
- Improved Thermal Interface Materials

- Improved LED Device Architectures
- Optimized Heat Sink Design
- Active Thermal Management Systems
- Improved Primary Optics
- Improved Secondary Optics
- Improved Driver Design
- Reduced Current Density

DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially available products or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, *see* chapter 4 of the final rule TSD.

D. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of GSLs. There are two elements to consider in the engineering analysis: the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency products, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each product class, DOE estimates the baseline cost, as well as the incremental cost for the product at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing products (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to interpolate to define ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the ''max-tech'' level (particularly in cases where the ''max-tech'' level exceeds the maximum efficiency level currently available on the market).

In this rulemaking, DOE applied an efficiency-level approach. For GSLs, ELs are determined as lumens per watt which is also referred to as the lamp's efficacy (*see* section IV.A.4 of this document). DOE derives ELs in the engineering analysis and end-user prices in the cost analysis. DOE estimates the end-user price of GSLs directly because reverse-engineering a lamp is impractical as the lamps are not easily disassembled. By combining the results of the engineering analysis and the cost analysis, DOE derives typical inputs for use in the LCC and NIA. Section IV.D.2 of this document discusses the cost analysis (*see* chapter 5 of the final rule TSD for further details).

The engineering analysis is generally based on commercially available lamps that incorporate the design options identified in the technology assessment and screening analysis. *See* chapters 3 and 4 of the final rule TSD for further information on technology and design options. For the January 2023 NOPR engineering analysis, DOE developed a lamps database using data from manufacturer catalogs, ENERGY STAR Certified Light Bulbs database,[37] DOE's compliance certification database,[38] and retailer websites. DOE used performance data of lamps from these sources in the following general order of priority: DOE's compliance certification database, manufacturer catalog, ENERGY STAR database, and retailer websites. In addition, DOE reviewed applicable lamps in the CEC's Appliance Efficiency Database.[39] 88 FR 1638, 1659. For this final rule analysis, DOE updated this database in mid-2022 with the most recent data available from these data sources.

The methodology consists of the following steps: (1) selecting representative product classes, (2) selecting baseline lamps, (3) identifying more efficacious substitutes, and (4) developing efficiency levels by directly analyzing representative product classes and then scaling those efficiency levels to non-representative product classes. The details of the engineering analysis are discussed in chapter 5 of the final rule TSD.

a. Representative Product Classes

In the case where a covered product has multiple product classes, DOE identifies and selects certain product classes as ''representative'' and concentrates its analytical effort on those classes. DOE chooses product classes as representative primarily because of their high market volumes and/or unique characteristics. DOE then scales its analytical findings for those representative product classes to other product classes that are not directly analyzed.

In the January 2023 NOPR, DOE proposed to establish eight product classes: (1) Integrated Omnidirectional Short Standby Mode, (2) Integrated Omnidirectional Short Non-standby Mode, (3) Integrated Directional Standby Mode, (4) Integrated Directional Non-standby Mode, (5) Integrated Omnidirectional Long, (6) Non-integrated Omnidirectional Short, (7) Non-integrated Omnidirectional Long, and (8) Non-integrated Directional. Because of the distinctive difference in design, the Directional and Omnidirectional product classes cannot be scaled from each other and were directly analyzed. For the same reasons, Long (45 inches or longer) and Short (shorter than 45 inches) product classes as well as Integrated (all components within lamp) and Non-integrated (ballast/driver external to lamp) were directly analyzed. The exception was that DOE scaled the Non-integrated Omnidirectional Long product class from the Integrated Omnidirectional Long product class. DOE determined that lamps in both these product classes are same in shape and size, and tentatively concluded the internal versus external components would not preclude them from being scaled from or to one another. 88 FR 1638, 1659–1660.

DOE did not receive any comments on the product classes chosen to be representative. In this final rule, DOE continues to directly analyze (*i.e.,* consider as representative) the product

[37] The most recent ENERGY STAR Certified Light Bulbs database can be found at *www.energystar.gov/productfinder/product/certified-light-bulbs/results* (last accessed June 17, 2020).

[38] DOE's compliance certification database can be found at *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A** (last accessed June 17, 2020).

[39] The most recent CEC Appliance Efficiency Database can be found at *www.energy.ca.gov/appliances/* (last accessed June 17, 2020).

classes in the January 2023 NOPR and shown in grey shading in table IV.4. *See* details in chapter 5 of this final rule TSD.

Table IV.4 GSL Representative Product Classes

Lumen Package	Directionality	Lamp Length	Standby Mode Operation
Integrated	Omnidirectional	Short (< 45 inches)	Non-Standby
			Standby
		Long (≥ 45 inches)	Non-Standby
	Directional (reflector lamps)	All Lengths	Non-Standby
			Standby
Non-Integrated	Omnidirectional	Short (< 45 inches)	N/A
		Long (≥ 45 inches)	
	Directional (reflector lamps)	All Lengths	

b. Baseline Efficiency

For each product class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each product class represents the characteristics of a product typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

Because certain products within the scope of this rulemaking have existing standards, GSLs that fall within the same product class as these lamps must meet the existing standard in order to prevent backsliding of current standards in violation of EPCA. (*See* 42 U.S.C. 6295(o)(1)) Specifically, the Integrated Omnidirectional Short product class consists of MBCFLs for which there are existing DOE standards. The other product classes do not have existing DOE standards but are subject to the statutory backstop requirement of 45 lm/W. In the January 2023 NOPR, DOE selected baseline lamps that are the most common, least efficacious lamps that meet existing energy conservation standards. Specific lamp characteristics were used to characterize the most common lamps purchased by consumers (*e.g.,* wattage, CCT, CRI, and lumen output). 88 FR 1638, 1660–1661. Because incandescent and halogen lamps cannot meet the 45 lm/W backstop requirement for GSLs, DOE did not analyze these lamps at the baseline or at higher ELs in the January 2023 NOPR.

NEMA stated that its member companies have noted for years that DOE's analyses do not account for the ongoing importation of non-compliant outlawed lamps that NEMA members will not manufacture. NEMA commented that, by its estimation, there are hundreds of GSL manufacturers globally who do not follow DOE regulations and instead circumvent legal challenges by closing and reopening their businesses under a variety of names. NEMA stated that it would be much closer to agreeing with DOE's baseline lamp selections if the selections reflected the market impact of these illicit offerings. (NEMA, No. 183 at p. 8)

DOE does not find that the baseline lamp characteristics identified in the January 2023 NOPR are invalid. DOE's analyses for rulemakings assume compliance with current applicable standards. DOE's Office of Enforcement leads DOE's efforts to ensure manufacturers deliver products that meet energy conservation standards.[40] DOE also provides information on its website on how to report on any regulation violations (*see www.energy.gov/gc/report-appliance-regulation-violation*). DOE would welcome any information that NEMA may have on potentially non-compliant manufacturers.

In this final rule, DOE continues to analyze the baseline lamps identified in the January 2023 NOPR as shown in table IV.5. *See* chapter 5 of this final rule TSD for further details.

[40] DOE, ''Office of the Assistant General Counsel for Enforcement.'' Available at *www.energy.gov/gc/office-assistant-general-counsel-enforcement.*

Table IV.5 GSL Baseline Lamps

Representative Product Class	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	Lifetime	CCT	CRI
				W	*lm*	*lm/W*	*hr*	*K*	
Integrated Omnidirectional Short	Spiral	E26	CFL	15	900	60.0	10,000	2,700	82
Integrated Omnidirectional Long	Linear (T8, 4-foot)	Medium Bipin	LED	15	1,800	120.0	50,000	4,000	80
Integrated Directional	PAR38	E26	CFL	23	1,100	47.8	10,000	2,700	82
Non-Integrated Omnidirectional Short	G24q-3	Double Tube	CFL	26.0	1,700	65.4	10,000	4,100	82
Non-Integrated Directional	GU5.3	MR16	LED	8.0	500	62.5	25,000	2,700	80

c. More Efficacious Substitutes

In the January 2023 NOPR, DOE selected more-efficacious replacements for the baseline lamps considered within each representative product class. DOE considered only technologies that met all five criteria in the screening analysis. These selections were made such that the more efficacious substitute lamp saved energy and had light output within 10 percent of the baseline lamp's light output, when possible. DOE also sought to keep characteristics of substitute lamps, such as CCT, CRI, and lifetime, as similar as possible to the baseline lamps. DOE selected more efficacious substitutes with the same base type as the baseline lamp since replacing a lamp with a lamp of a different base type would potentially require a fixture or socket change and thus is considered an unlikely replacement. In identifying the more efficacious substitutes, DOE utilized the lamps database of commercially available GSLs it developed for this analysis (*see* section IV.D.1 of this document). 88 FR 1638, 1662. As noted, non-integrated lamps are operated on an external ballast or driver. Hence for the Non-integrated Omnidirectional Short product class, DOE compiled catalog data of non-integrated CFL ballasts in order to estimate the system power ratings and initial lumen outputs of the representative lamp-and-ballast systems in this class. A lamp-and-ballast system input power depends on the total lamp arc power operated by the ballast and the ballast's efficiency, or BLE. 88 FR 1638, 1664.

DOE received comments regarding the Non-integrated Omnidirectional Short product class. Westinghouse stated that the G24q base lamp identified for the Non-integrated Omnidirectional Short product class is likely not omnidirectional and therefore, may not be the best lamp to analyze. Westinghouse stated that LED lamps designed to replace pin base CFLs are not actually omnidirectional but directional lamps designed to be used in specific luminaires based on the direction the consumer desires light to flow, and therefore, possibly not the right lamp type to use. (Westinghouse, Public Meeting Transcript, No. 27 at p. 54)

In DOE's analysis of the LED replacements for pin base CFLs, DOE reviewed marketing information and lamp specification sheets and spoke to manufacturers' product support. Based on this review, it is clear that the more efficacious LED lamps identified for the Non-integrated Omnidirectional Short product class are designed and marketed to be replacements for pin base CFLs. These LED lamps have shapes and base types designed to fit in existing fixtures that employ pin base CFLs. Additionally, as noted in the January 2023 NOPR, DOE learned that because the LED lamp replacements for pin base CFLs identified are designed to emit light in one direction, they emit fewer lumens than their CFL counterparts which are designed to emit light in all directions (*i.e.,* omnidirectional). Therefore, in a fixture the 26 W CFL and its equivalent LED lamp emit similar lumen outputs, as some of the CFL omnidirectional light is lost within the fixture. 88 FR 1638, 1663. Hence, DOE groups pin base CFLs and their replacement pin base LED lamps in the Non-integrated Omnidirectional Short product class. To minimize any confusion, in the table that will codify in the CFR standards adopted in this final rule, DOE is specifying that the Non-integrated Omnidirectional Short product class includes pin base LED lamps designed and marketed to replace pin base CFLs (*see* section IV.B.2.f of this document).

In this final rule, DOE maintains the more efficacious substitutes selected in the January 2023 NOPR as shown in table IV.6 through table IV.10. (In these tables the A-value is a variable in the equation form (a curve) that specifies the minimum efficacy standard for GSLs. The A-value specifies the height of the equation form and thereby indicates the level of efficacy (see section IV.D.1.d of this document)). DOE also continues to use the methodology used in the January 2023 NOPR to calculate the lamp-and-ballast system input power of the more efficacious substitutes in Non-integrated Omnidirectional Short product class. *See* chapter 5 of this final rule TSD for further details.

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Table IV.6 Representative Lamp Units in the Integrated Omnidirectional Short Product Class

Product Class	EL	Lifetime	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	A-Value*	CCT	CRI
		Hr				*W*	*lm*	*lm/W*		*K*	
Integrated Omnidirectional Short	Baseline	10,000	Spiral	E26	CFL	15.0	900	60.0	-40.0	2700	82
	EL 1	10,000	Spiral	E26	CFL	14.0	900	64.3	-35.7	2700	82
	EL 2	10,000	Spiral	E26	CFL	13.0	900	69.2	-30.8	2700	83
	EL 3	15,000	A19	E26	LED	10.0	800	80.0	-18.5	2700	80
		25,000	A19	E26	LED	10.0	800	80.0	-18.5	2700	84
	EL 4	15,000	A19	E26	LED	9.0	800	88.9	-9.6	2700	80
		25,000	A19	E26	LED	9.0	800	88.9	-9.6	2700	80
	EL 5	15000	A19	E26	LED	8.0	800	100.0	1.5	2700	81
	EL 6	15000	A19	E26	LED	7.0	800	114.3	15.8	2700	82
	EL 7	15000	A19	E26	LED	6.5	810	124.6	25.9	2700	80

Table IV.7 Representative Lamp Units in the Integrated Omnidirectional Long Product Class

Product Class	EL	Lifetime	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	A-Value	CCT	CRI
		hr				*W*	*lm*	*lm/W*		*K*	
Integrated Omnidirectional Long	Baseline	50,000	T8 Linear	Medium Bipin	LED	15.0	1800	120.0	17.5	4000	80
	EL 1	50,000	T8 Linear	Medium Bipin	LED	14.0	1800	128.6	26.1	4000	82
	EL 2	50,000	T8 Linear	Medium Bipin	LED	12.5	1750	140.0	37.5	4000	83
	EL 3	50,000	T8 Linear	Medium Bipin	LED	12.0	1800	150.0	47.5	4000	82
	EL 4	50,000	T8 Linear	Medium Bipin	LED	11.5	1800	156.5	54.0	4000	82
	EL 5	50,000	T8 Linear	Medium Bipin	LED	10.5	1700	161.9	59.4	4000	82
	EL 6	50,000	T8 Linear	Medium Bipin	LED	9.2	1625	176.6	74.1	4000	83

Table IV.8 Representative Lamp Units in the Integrated Directional Product Class

Product Class	EL	Lifetime	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	A-Value	CCT	CRI
		hr				*W*	*lm*	*lm/W*		*K*	
Integrated Directional	Baseline	10,000	PAR38	E26	CFL	23.0	1100	47.8	94.7	2700	82
	EL 1	25,000	PAR38	E26	LED	17.0	1200	70.6	72.6	2700	80
	EL 2	25,000	PAR38	E26	LED	16.0	1200	75.0	68.2	2700	80
	EL 3	25,000	PAR38	E26	LED	15.0	1200	80.0	63.2	2700	83
	EL 4	25,000	PAR38	E26	LED	14.0	1200	85.7	57.5	2700	82
	EL 5	25,000	PAR38	E26	LED	12.5	1200	96.0	47.2	2700	83

Table IV.9 Representative Lamp Units in the Non-integrated Omnidirectional Short Product Class

Product Class	EL	Lifetime	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	A-Value	CCT	CRI
		hr				*W*	*lm*	*lm/W*		*K*	
Non-integrated Omnidirectional Short	Baseline	10,000	Double Tube	G24q-3	CFL	26.0	1700	65.4	155.3	4100	82
	EL 1	10,000	Double Tube	G24q-3	CFL	26.0	1800	69.2	151.8	4100	82
		16,000	Double Tube	G24q-3	CFL	21.0	1525	72.6	147.3	4100	82
	EL 2	50,000	PL	G24q	LED	12.0	1100	91.7	123.4	4000	80
	EL 3	50,000	PL	G24q	LED	9.0	1200	133.3	83.4	4000	80

Table IV.10 Representative Lamp Units in the Non-integrated Directional Product Class

Product Class	EL	Lifetime	Lamp Shape	Base Type	Lamp Type	Nominal Wattage	Initial Lumens	Rated Efficacy	A-Value	CCT	CRI
		hr				*W*	*lm*	*lm/W*		*K*	
Non-integrated Directional	Baseline	25,000	MR16	GU5.3	LED	8.0	500	62.5	73.9	2700	80
	EL 1	25,000	MR16	GU5.3	LED	7.0	500	71.4	65.0	2700	82
	EL 2	25,000	MR16	GU5.3	LED	6.5	500	76.9	59.5	2700	83
	EL 3	25,000	MR16	GU5.3	LED	6.0	500	83.3	53.1	2700	84

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d. Higher Efficiency Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given product.

In the January 2023 NOPR, using the more efficacious substitutes identified, DOE developed ELs for each representative product class based on the consideration of several factors, including: (1) the design options associated with the specific lamps being studied (*e.g.,* grades of phosphor for CFLs, improved package architecture for LED lamps); (2) the ability of lamps across the applicable lumen range to comply with the standard level of a given product class; and (3) the max-tech level. Additionally, in the January 2023 NOPR, using the lamps database of commercially available GSLs, DOE conducted regression analyses to identify the equation form that best fits the GSL data. DOE determined a sigmoid equation is the best fit equation form to capture the relationship between wattage and lumens across all ranges for GSLs. The equation determines the minimum efficacy based on the measured lumen output of the lamp. The A-value in the equations is a value that can be changed to move the equation curve up or down and thereby change the minimum required efficacy. 88 FR 1638, 1665. DOE did not receive comments on the equation form used to set ELs in the January 2023 NOPR. In this final rule, DOE is continuing to use the same equation form as it is shown in table IV.11.

Table IV.11 GSL Equations

Representative Product Class	Equation*
Integrated Omnidirectional Short	$Efficacy = \frac{123}{1.2 + e^{-0.005(Lumens-200)}} + A$
Integrated Omnidirectional Long	$Efficacy = \frac{123}{1.2 + e^{-0.005(Lumens-200)}} + A$
Integrated Directional	$Efficacy = \frac{73}{0.5 + e^{-0.0021(Lumens+1000)}} - A$
Non-integrated Omnidirectional Short	$Efficacy = \frac{122}{0.55 + e^{-0.003(Lumens+250)}} - A$
Non-integrated Directional	$Efficacy = \frac{67}{0.45 + e^{-0.00176(Lumens+1310)}} - A$

* *Efficacy* = minimum efficacy requirement, *Lumens* = measured lumen output, and *A* = an adjustment variable (the "A-value").

DOE received comments on higher efficiency levels considered in the January 2023 NOPR that are detailed in the following sections.

Max-Tech

ASAP *et al.* stated DOE should reevaluate max-tech ELs presented in the January 2023 NOPR because DOE's analysis was based on lamp models available in June 2020 and lamps with higher efficacies appear to be currently available. Specifically, ASAP *et al.* stated that ENERGY STAR listed a 5.9 W, 800 lumen integrated omnidirectional short lamp with an efficacy of 135.6 lm/W while DOE had presented the max-tech lamp at 124.6 lm/W for the same lamp type at the same lumens. ASAP *et al.* and NYSERDA stated that integrated omnidirectional short lamps available in Europe have efficacies as high as 200 lm/W. (ASAP *et al.,* No. 174 at p. 2; NYSERDA, No. 166 at pp. 1–2)

CLASP also expressed concern that the LED lamp data on which DOE based its analysis is from mid-2020 and therefore, does not reflect products on the market today. CLASP stated that as a result, DOE's proposal uses efficacy levels that are too low and prices for LED lamps that are too high. CLASP commented that LED products are continuing to improve by around 5 percent per annum as projected by DOE's own SSL R&D program, and therefore, using older lamps means ELs are about 15 percent too low. (CLASP, No. 177 at p. 1) NYSERDA commented that the proposed max-tech levels are significantly below the technical potential across LED products and, as shown by DOE's Solid State Lighting research efforts, LEDs have the potential to reach 200 lm/W or higher. (NYSERDA, No. 166 at pp. 1–2)

In the January 2023 NOPR, DOE developed a lamps database using data from manufacturer catalogs, ENERGY STAR Certified Light Bulbs database, DOE's compliance certification database, and retailer websites. In addition, DOE reviewed applicable lamps in the CEC's Appliance Efficiency Database. This data was collected in June 2020 (*see* footnoted citations in January 2023 NOPR). 88 FR 1638, 1659. For this final rule analysis, DOE updated the lamps database with data collected mid-2022. Using this updated data, DOE reviewed the max-tech levels and determined that no changes are necessary from what was proposed in the January 2023 NOPR.

Regarding the 5.9 W integrated omnidirectional short lamp at 135.6 lm/W cited by ASAP *et al.,* this lamp has a CRI in the 90s. As stated in section IV.D.1.b of this document, DOE's analysis ensures that the baseline lamp just meet standards and has characteristics similar to the most common lamps purchased by consumers in the respective product classes (*e.g.,* wattage, CCT, CRI, and lumen output). Because the baseline lamp for the Integrated Omnidirectional Short product class has a CRI in the 80s, DOE did not consider lamps with CRIs in the 90s as appropriate substitutes. Hence, DOE did not identify the 5.9 W lamp at 135.6 lm/W as a more efficacious substitute representative of an EL. (*See* table IV.5 and January 2023 NOPR (88 FR 1638, 1661)). Regarding projections of LED efficacy increases by DOE's SSL R&D, as noted in section IV.C of this document, design options used to establish ELs must meet five screen criteria, including practicability to manufacture, install, and service. Hence, DOE bases its analysis on lamps that use design options that are incorporated in commercially available products or working prototypes, and not projected efficacies.

NEMA stated the max-tech level proposed in the January 2023 NOPR for linear LED lamps should not be considered. NEMA stated that linear LED lamps are designed to provide the same illumination levels as fluorescent tubes but with lower lumens by utilizing internal luminaire optics to redirect light where it is needed while fluorescent tubes emit light in all directions. NEMA added that because LED tubes are intended to produce the same delivered lumen output to a target area, considering more efficacious substitute lamps that provide lower lumens may hinder manufacturers from producing lamps able to provide the appropriate amount of light to meet the max-tech performance standard of EL 7. (NEMA, No. 183 at p. 20)

The Integrated Omnidirectional Long product class consists of linear tubular LED lamps 45 inches or longer that are Type B or Type A/B (*i.e.,* have an internal driver and connect to the main line voltage). In the January 2023 NOPR for this product class, DOE identified a 15 W 4-foot T8 linear LED lamp with a medium bipin base, 1,800 lumens, lifetime of 50,000 hours, CRI of 80, and CCT of 4,000 K as the baseline lamp (*see* table IV.5). 88 FR 1638, 1661. In its engineering analysis, DOE identifies more efficacious substitutes that save energy, have light output within 10 percent of baseline lamp, and have characteristics similar to this baseline lamp. Lumen output is kept constant within the 10 percent tolerance to ensure consumer utility of more efficacious substitutes. Hence for the Integrated Omnidirectional Long product class lumen outputs of more efficacious substitutes at each EL including at the max-tech level were within 10 percent of the baseline lamp lumens (*see* table IV.7). 88 FR 1638, 1663. Further, as noted in section IV.D.1, in the January 2023 NOPR, and in this final rule, DOE used a database of commercially available lamps to identify baseline lamps and more efficacious substitutes. Hence, the max-tech level for this product class is based on commercially available linear LED lamps and therefore is technologically feasible.

Quality Metrics

The CEC acknowledged that DOE stated in the January 2023 NOPR that there is value in ensuring a range of lamp characteristics such as lumens, CRI, and CCT are available at max-tech levels. The CEC stated, however, that when evaluating technological feasibility of max-tech or minimum lumen-per-watt requirements DOE should, in addition to raising minimum efficacy levels, consider other lamp quality characteristics such as color fidelity, noise, flicker, and rated life. (CEC, No. 176 at pp. 2–3) The CEC commented that California has shown that high-efficacy, high-quality LEDs are both economically justified and technologically feasible, and DOE should establish minimum energy conservation standards that encourage innovation and provide consumers with the best options for general illumination. The CEC added that such standards will ensure a robust lamp market that saves consumers money, reduce the unnecessary consumption of energy, and address climate change by avoiding the release of unnecessary GHGs. (CEC, No. 176 at p. 5)

Further, the CEC stated its concern that not considering quality characteristics in the development of efficiency levels would result in a race to the bottom (*e.g.,* a driverless lamp that achieves a slightly higher lm/W by avoiding AC to DC-conversion at the cost of flickering). The CEC stated that inclusion of quality characteristics in DOE's analysis would ensure that lamps with higher quality emitters and drivers are not excluded from or disadvantaged in the U.S. market. Further, the CEC commented that DOE's consideration of quality characteristics would provide the opportunity for California to align its existing and future minimum efficiency levels for GSLs more closely with Federal levels. The CEC stated that it is not recommending the creation of a separate product class for high-quality lighting because a single standard that

recognizes quality as an essential element of max-tech would be preferable. The CEC stated that it does, however, see establishing a separate product class based on specific quality criteria as an alternative for balancing quality and energy performance concerns, as well as ensuring a compliance path for high-performing products without lowering energy efficiency standards for baseline products. (CEC, No. 176 at pp. 2–3)

Additionally, the CEC requested that DOE consider the lumen disadvantage of providing good color rendering, in particular of red light. The CEC stated that lumens factor in the eye's perception of brightness according to a particular wavelength resulting in a disincentive to use red light in the lamp's spectrum as 1 unit of green light is worth 10 units of red light at the same power. The CEC stated this creates a conflict between costs, consumer preferences, and the lm/W standard, and is particularly impactful for consumers that prefer light at 2700 K, which has more red light. (CEC, No. 176 at pp. 2–3)

In its comment the CEC names color fidelity, noise, flicker and rated life as parameters to consider when evaluating minimum efficiency levels. In this analysis, DOE takes into account lamp characteristics provided in manufacturer's lamp specification sheets. Parameters specific to noise and flicker are not typically provided as part of lamp specifications and therefore DOE was unable to consider them. DOE's analysis does not focus only on whether a lamp has a higher efficacy. As mentioned in the CEC's comment DOE confirms that a range of lamp characteristics such as lumens, lifetime, CCT, and CRI are available at the highest levels of ELs considered, including lamps that offer good color rendering such as lamps with CRI in the 90s and high lifetimes such as lamps with 50,000 hours.

Further as stated in sections IV.D.1.b and IV.D.1.d of this document, DOE identifies baseline lamps that have characteristics typical of the product class such as CCT, CRI, and lifetime, and selects more efficacious substitutes that have similar characteristics. Hence DOE ensures that characteristics common for lamps on the market are not sacrificed at higher ELs. A lamp able to both achieve a set of characteristics common in the market and a higher efficacy is indicative of a product that meets consumer preferences as well as energy efficiency. Hence, DOE finds that DOE's analysis accounts for quality of lamps.

Anti-Backsliding Provision

In the January 2023 NOPR, because the Integrated Omnidirectional Short product class consists of MBCFLs which have existing standards, DOE assessed whether the initial ELs are equal to or more stringent than the existing standards (*i.e.,* that backsliding would not occur if the proposed ELs were adopted) and ensured that the proposed ELs did not result in less stringent standards than existing ones in violation of EPCA's anti-backsliding provision. DOE determined that for products with lumens less than 424, the initial EL 1 equation would result in an efficacy requirement less than the 45 lm/W MBCFL standard. Similarly, for products with lumens less than 371, the initial EL 2 equation would result in an efficacy requirement less than the 45 lm/W MBCFL standard. Hence, DOE proposed at EL 1 and EL 2 products with respectively, lumens less than 424 and lumens less than 371 must meet a minimum efficacy requirement of 45 lm/W and for all other lumen ranges meet the minimum efficacy requirement based on the equation line of EL 1 or EL 2, as applicable. 88 FR 1638, 1655–1656. DOE did not propose lumen ranges at which the minimum efficacy requirement must be the 45 lm/W standard and not the equation line for any other product classes.

Westinghouse stated the proposed EL 1 and EL 2 for the Non-integrated Omnidirectional Short (no standby mode) product class may also require minimums to prevent falling below the current standard. Specifically, Westinghouse stated at 310 to about 400 lumens, products fall below 45 lm/W. (Westinghouse, Public Meeting Transcript, No. 27 at pp. 64–65)

In this final rule, DOE reviewed potential backsliding resulting from ELs under consideration for all product classes, as all product classes are subject to the 45 lm/W backstop requirement. Based on this analysis, for the Integrated Omnidirectional Short (not capable of operating on standby mode) product class, DOE identified an error in its calculation of the lumen range that would result in an efficacy requirement less than the 45 lm/W. DOE is correcting that error in this final rule. For the Integrated Omnidirectional Short product class (not capable of operating on standby mode) for products with lumens less than 425 (rather than 424 as specified in the January 2023 NOPR), the initial EL 1 equation would result in an efficacy requirement less than the 45 lm/W standard. Similarly, for products with lumens less than 372 (rather than 371 as specified in the January 2023 NOPR), the initial EL 2 equation would result in an efficacy requirement less than the 45 lm/W standard. Hence, at EL 1 and EL 2, products with, respectively, lumens less than 425 and lumens less than 372 must meet a minimum efficacy requirement of 45 lm/W. Regarding other lumen ranges, at EL 1, products with lumens equal to 425 and less than or equal to 3,300 meet the minimum efficacy requirement based on the equation line of EL 1; and at EL 2, products with lumens equal to 372 and less than or equal to 3,300 lumens meet the minimum efficacy requirement based on the equation line of EL 2.

Further, DOE determined that for the Non-Integrated Omnidirectional Short product class for products with lumens less than 637, the initial EL 1 equation would result in an efficacy requirement less than the 45 lm/W standard. Similarly, for products with lumens less than 332, the initial EL 2 equation, would result in an efficacy requirement less than the 45 lm/W standard. Therefore, at EL 1 and EL 2 products with respectively, lumens less than 637 and lumens less than 332 must meet a minimum efficacy requirement of 45 lm/W. Regarding other lumen ranges, at EL 1, products with lumens equal to 637 and less than or equal to 3300 meet the minimum efficacy requirement based on the equation line of EL 1; and at EL 2 products with lumens equal to 332 and less than or equal to 3,300 lumens meet the minimum efficacy requirement based on the equation line of EL 2.

e. Scaling of Non-Representative Product Classes

In this January 2023 NOPR, DOE scaled the Non-integrated Omnidirectional Long product class from the representative Integrated Omnidirectional Long product class because the lamps in these product classes are the same in shape and size, and therefore could be scaled from or to one another. Because the linear shapes are substantively more prevalent than the U-shape lamps, DOE compared efficacies of linear tubular LED lamp pairs that had the same manufacturer, initial lumen output, length, CCT, lifetime, CRI range in the 80s and differed only in being integrated (Type B [41]) or non-integrated (Type A). Based

[41] Type A lamps have an internal driver and connect to the existing fluorescent lamp ballast; (2) Type B lamps have an internal driver and connect to the main line voltage; and (3) Type C lamps connect to an external, remote driver. In this analysis, DOE considers Type A and Type C lamps as non-integrated lamps because they require an external component to operate, whereas Type B and Type A/B lamps are integrated lamps as they can be directly connected to the main line voltage.

on this analysis, DOE applied a 10.7 percent efficacy increase to the efficacy at each EL of the Integrated Omnidirectional Long product class to calculate the efficacies of ELs for the Non-integrated Omnidirectional Long product class. The scaled efficacies of the ELs were then used to calculate the corresponding A-values. 88 FR 1638, 1667. DOE received no comments on the scaling of the Non-integrated Omnidirectional Long product class. In this final rule, DOE continues to use the methodology and results of this approach.

In the January 2023 NOPR, DOE scaled standby product classes from similar non-standby product classes. Based on test data, DOE found that standby power consumption was 0.5 W or less for the vast majority of lamps available. Therefore, DOE assumed a typical wattage constant for standby mode power consumption of 0.5 W and added this wattage to the rated wattage of the non-standby mode representative units to calculate the expected efficacy of lamps with the addition of standby mode functionality. DOE then used the expected efficacy of the lamps with the addition of standby mode functionality at each efficiency level to calculate the corresponding A-value. DOE assumed the lumens for a lamp with the addition of standby mode functionality were the same as for the non-standby mode representative units. 88 FR 1638, 1667.

DOE received comments on its approach of scaling standby mode product classes. ASAP *et al.* stated that DOE should set a separate standard for standby mode rather than the proposed integrated efficacy metric that combines standby mode and active mode power. ASAP *et al.* stated that a seemingly small tradeoff between active and standby mode wattage would result in a large percent increase in annual energy consumed due to the significantly greater number of operating hours in standby mode compared to active mode. ASAP *et al.* commented that, given DOE's estimates that 50 percent of lamps will include standby power by the end of the analysis period, failing to incorporate standby power in a way that captures its contribution to total energy use could have significant implications for national energy consumption associated with GSLs. ASAP *et al.* stated that if DOE decides not to set a separate standby standard, it should use a standby value of 0.2 W in setting the efficacy levels for lamps with standby power. ASAP *et al.* stated that, in the January 2023 NOPR, DOE stated that it used 0.2 W in the calculation of lamp unit energy consumption for all lamps with standby power because California requires state-regulated LED lamps to have standby power less than 0.2 W and it is likely that manufacturers sell the same lamp model across the United States. ASAP *et al.* stated that, when determining the standards for products with standby power, DOE instead used 0.5 W as a conservative estimate of standby power. ASAP *et al.* further stated that, while it acknowledges DOE performed standby mode power testing, there are also nearly 2,400 models of GSLs in California's compliance database meeting the 0.2 W standby power minimum. (ASAP *et al.,* No. 174 at pp. 3–5) The CEC also recommended that DOE set a separate standard limiting standby mode power consumption to 0.2 W in alignment with California's standards, rather than a power that varies with a lamp's lumen output. The CEC provided the example that based on DOE's current proposal for integrated omnidirectional short lamps, the standby power is about 0.5 W for 800 lumen lamps and would be 1.9 W for 3,300 lumen lamps. It noted that over 700 connected lamp models certified to the CEC database meet the 0.2 W standby mode power consumption requirement. (CEC, No. 176 at p. 4)

In the January 2023 NOPR, DOE tentatively determined that an integrated metric for active mode and standby mode was the most appropriate approach for establishing ELs for standby mode product classes. Hence, in the January 2023 NOPR, for GSLs with standby mode functionality, the energy efficiency standards set an assumed power consumption attributable to standby mode. It is possible for a lamp with standby mode power consumption greater than the assumed value to comply with the applicable energy efficiency standard, but only if the decreased efficiency of standby mode was offset by an increased efficiency in active mode. This ability for manufacturers to trade off efficiency between active mode efficiency and standby mode efficiency is a function of integrating the efficiencies into a single standard and is consistent with EPCA. EPCA directs DOE to incorporate, if feasible, standby mode and active mode into a single standard. (42 U.S.C. 6295(gg)(3)(A)) The integration of efficacies of multiple modes into a single standard allows for this type of trade-off. The combined energy consumption of a GSL in active mode and standby mode must result in an efficiency that is equal to or less than the applicable standard. 88 FR 1639, 1667.

Because an integrated metric provides flexibility in lamp design and a balance of active mode and standby mode efficiency in a lamp, DOE continues to use this approach in this final rule for determining the ELs for standby mode product classes. Regarding the use of 0.2 W instead of 0.5 W, as stated in the January 2023 NOPR, DOE found that standby power consumption was 0.5 W or less for the vast majority of lamps available. 88 FR 1638, 1667. (*See* appendix 5A of the final rule TSD for more information on the test results.) The purpose of the energy use analysis is to estimate representative values of actual energy consumption. The significant number of lamps available that consume 0.2 W or less in standby power and the requirement that lamps with standby power sold in California (a significant fraction of the GSL market) consume less than 0.2 W continues to suggest that 0.2 W is a reasonable estimate of representative standby energy consumption (*see* section IV.E of this document for further details on the energy use analysis). In this final rule, DOE is continuing to take a conservative approach because this is still a developing market and using 0.5 W as it did in the January 2023 NOPR to scale the ELs for standby mode product classes from the ELs of similar non-standby mode power classes.

f. Summary of All Efficacy Levels

Table IV.12 displays the efficacy requirements for each level analyzed by product class. The non-standby and standby Integrated Omnidirectional Short and Non-Integrated Omnidirectional product classes EL 1 and EL 2 have different requirements for lower and higher lumens. This is to ensure that lamps in the Integrated Omnidirectional Short product classes already subject to an existing standard are not subject to a less stringent standard (*i.e.,* that backsliding in violation of 42 U.S.C. 6295(o)(1) is not occurring) (*see* section IV.D.1.d of this document for further information). The representative product classes are shown in grey, and all others are scaled product classes. (*Note:* In the January 2023 NOPR, for the Integrated Omnidirectional Long product class DOE had decided to lower the A-value of EL 6 (max tech level) from 74.1 to 71.7. 88 FR 1638, 1666. However, in table VI.15, ''Proposed Efficacy Levels of GSLs'' and table VII.30, ''Proposed Amended Energy Conservation Standards for GSLs'' in the January 2023 NOPR, the A-value appeared as 74.1 instead of 71.7. 88 FR 1638, 1668, 1708. This has been corrected in the table below and all relevant tables in this final rule.)

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Table IV.12 GSL Efficacy Levels

Representative Product Class	Efficacy Level	Efficacy
		lm/W
Integrated Omnidirectional Short (Not Capable of Operating in Standby Mode)	EL 1	45 (for lumens less than 425) $123/(1.2+e^{-0.005*(Lumens-200)})$ – 35.7 (for lumens 425-3,300)
	EL 2	45 (for lumens less than 372) $123/(1.2+e^{-0.005*(Lumens-200)})$ – 30.8 (for lumens 372-3,300)
	EL 3	$123/(1.2+e^{-0.005*(Lumens-200)})$ – 18.5
	EL 4	$123/(1.2+e^{-0.005*(Lumens-200)})$ – 9.6
	EL 5	$123/(1.2+e^{-0.005*(Lumens-200)})$ + 1.5
	EL 6	$123/(1.2+e^{-0.005*(Lumens-200)})$ + 15.8
	EL 7	$123/(1.2+e^{-0.005*(Lumens-200)})$ + 25.9
Integrated Omnidirectional Long (Not Capable of Operating in Standby Mode)	EL 1	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 26.1
	EL 2	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 37.5
	EL 3	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 47.5
	EL 4	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 54.0
	EL 5	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 59.4
	EL 6	$123/(1.2+e^{(-0.005*(Lumens-200))})$ + 71.7
Integrated Directional (Not Capable of Operating in Standby Mode)	EL 1	$73/(0.5+e^{(-0.0021*(Lumens+1000))})$ – 72.6
	EL 2	$73/(0.5+e^{(-0.0021*(Lumens+1000))})$ – 68.2
	EL 3	$73/(0.5+e^{(-0.0021*(Lumens+1000))})$ – 63.2
	EL 4	$73/(0.5+e^{(-0.0021*(Lumens+1000))})$ – 57.5
	EL 5	$73/(0.5+e^{(-0.0021*(Lumens+1000))})$ – 47.2
Non-integrated Omnidirectional Short (Not Capable of Operating in Standby Mode)	EL 1	45 (for lumens less than 637) $122/(0.55+e^{(-0.003*(Lumens+250))})$ – 151.8 (for lumens 637-3300)

	EL 2	45 (for lumens less than 332) $122/(0.55+e^{(-0.003*(Lumens+250))}) - 123.4$ (for lumens 332-3300)
	EL 3	$122/(0.55+e^{(-0.003*(Lumens+250))}) - 83.4$
Non-integrated Directional (Not Capable of Operating in Standby Mode)	EL 1	$67/(0.45+e^{(-0.00176*(Lumens+1310))}) - 65.0$
	EL 2	$67/(0.45+e^{(-0.00176*(Lumens+1310))}) - 59.5$
	EL 3	$67/(0.45+e^{(-0.00176*(Lumens+1310))}) - 53.1$
Integrated Omnidirectional Short (Capable of Operating in Standby Mode)	EL 1	45 (for lumens less than 452) $123/(1.2+e^{(-0.005*(Lumens-200))}) - 37.9$ (for lumens 452-3,300)
	EL 2	45 (for lumens less than 399) $123/(1.2+e^{(-0.005*(Lumens-200))}) - 33.3$ (for lumens 399-3,300)
	EL 3	$123/(1.2+e^{(-0.005*(Lumens-200))}) - 22.2$
	EL 4	$123/(1.2+e^{(-0.005*(Lumens-200))}) - 14.2$
	EL 5	$123/(1.2+e^{(-0.005*(Lumens-200))}) - 4.3$
	EL 6	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 8.2$
	EL 7	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 17.1$
Integrated Directional (Capable of Operating in Standby Mode)	EL 1	$73/(0.5+e^{(-0.0021*(Lumens+1000))}) - 74.6$
	EL 2	$73/(0.5+e^{(-0.0021*(Lumens+1000))}) - 70.5$
	EL 3	$73/(0.5+e^{(-0.0021*(Lumens+1000))}) - 65.8$
	EL 4	$73/(0.5+e^{(-0.0021*(Lumens+1000))}) - 60.4$
	EL 5	$73/(0.5+e^{(-0.0021*(Lumens+1000))}) - 50.9$
Non-integrated Omnidirectional Long (Not Capable of Operating in Standby Mode)	EL 1	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 39.8$
	EL 2	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 52.4$
	EL 3	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 63.5$
	EL 4	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 70.7$
	EL 5	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 76.6$
	EL 6	$123/(1.2+e^{(-0.005*(Lumens-200))}) + 93.0$

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2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated product, the availability and timeliness of purchasing the GSLs on the market. The cost approaches are summarized as follows physical teardowns:

Under this approach, DOE physically dismantles a commercially available product, component-by-component, to develop a detailed bill of materials for the product.

- *Catalog teardowns:* In lieu of physically deconstructing a product, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the product.
- *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

In the present case, DOE conducted the analysis using a price survey approach. Typically, DOE develops manufacturing selling prices (''MSPs'') for covered products and applies markups to create end-user prices to use as inputs to the LCC analysis and NIA. Because GSLs are difficult to reverse-engineer (*i.e.,* not easily disassembled), DOE directly derives end-user prices for the lamps covered in this rulemaking. The end-user price refers to the product price a consumer pays before tax and installation. Because non-integrated CFLs operate with a ballast in practice, DOE also developed prices for ballasts that operate those lamps.

In the January 2023 NOPR, DOE reviewed and used publicly available retail prices to develop end-user prices for GSLs. DOE observed a range of end-user prices paid for a lamp, depending on the distribution channel through which the lamp was purchased. DOE identified the following four main distribution channels: Small Consumer-Based Distributors (*i.e.,* internet

retailers); Large Consumer-Based Distributors: (*i.e.,* home centers, mass merchants, and hardware stores); Electrical Distributors; and State Procurement. For each distribution channel, DOE calculated an aggregate price for the representative lamp unit at each EL using the average prices for the representative lamp unit and similar lamp models. DOE ensured there was sufficient data to determine average prices and employed the interquartile range (IQR) calculation, a common statistical rule used to identify outliers in a dataset. When sufficient data were not available at a specific distribution channel to develop a representative unit price at an EL, DOE extrapolated pricing from lamps in the product class as similar as possible to the representative unit and with available pricing data. DOE employed price trends observed from the larger dataset of GSL prices as well as scaling factors. Because the lamps included in the calculation were equivalent to the representative lamp unit in terms of performance and utility (*i.e.,* had similar wattage, CCT, shape, base type, CRI), DOE considered the pricing of these lamps to be representative of the technology of the EL. DOE developed average end-user prices for the representative lamp units sold in each of the four main distribution channels analyzed. DOE then calculated an average weighted end-user price using estimated shipments through each distribution channel. For shipment weightings, DOE used one set of shipment percentages reflecting commercial products for the Non-integrated Omnidirectional Short, Non-integrated Directional, and Integrated Omnidirectional Long product classes and another set of shipment percentages reflecting residential products for the Integrated Omnidirectional Short and Integrated Directional product classes. DOE grouped the Integrated Omnidirectional Long product class in the commercial product categories as these are mainly linear tubular LED lamps used as replacements for linear fluorescents in commercial spaces. DOE also determined prices for CFL ballasts by comparing the blue book prices of CFL ballasts with comparable fluorescent lamp ballasts and developing a scaling factor to apply to the end-user prices of the fluorescent lamp ballasts developed for the final rule that was published on November 14, 2011. 76 FR 70548. 88 FR 1638, 1669.

NEMA stated that it could not comment on end-user pricing and referred DOE to individual manufacturer interviews. (NEMA, No. 183 at p. 1) The CA IOUs stated their interest in whether DOE accounted for the impact of mid and upstream energy efficiency program incentives on its retail prices. The CA IOUs stated that DOE's collected retail prices may reflect, depending on the geographic region and rebate program, significant rebates that are applied further up the distribution channel stream and not reflected in manufacturer costs. (CA IOUs, Public Meeting Transcript, No. 27 at pp. 74–75)

When collecting retail prices, DOE recorded the regular prices rather than any discounted or sale prices specified by the retailer. DOE made no adjustment to retail prices for rebate programs. Rebate programs can vary in terms of geography, rebate amount as well as to the extent they are utilized, among other things. Hence it is difficult for DOE to determine the impact of mid or upstream rebate programs on retail price, if any, that is consistently applicable at a national level. The cost analysis in this rulemaking employs a consistent methodology in developing the final consumer prices that are used in the LCC analysis and development of MPC and MSP. Further, EPA's ENERGY STAR Lighting Program has noted that in recent years utility programs have been declining in anticipation of Federal standards, which would result in a new baseline that would make it difficult for utilities to justify their rebates.[42]

Hence, in this final rule, DOE continues to use the methodology and results of the cost analysis as determined in the January 2023 NOPR. The end-user prices are detailed in chapter 5 of the final rule TSD. These end-user prices are used to determine an MSP using a distribution chain markup. DOE developed an average distribution chain markup by examining the annual Securities and Exchange Commission (''SEC'') 10–K reports filed by publicly traded retail stores that sell GSLs. *See* section IV.J.2.a of this document for further details.

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of GSLs at different efficiencies in representative U.S. single-family homes, multi-family residences, and commercial buildings, and to assess the energy savings potential of increased GSL efficacy. The energy use analysis estimates the range of energy use of GSLs in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of amended or new standards. To develop annual energy use estimates, DOE multiplied GSL input power by the number of hours of use (''HOU'') per year and a factor representing the impact of controls.

DOE analyzed energy use in the residential and commercial sectors separately but did not explicitly analyze GSLs installed in the industrial sector. This is because far fewer GSLs are installed in that sector compared to the commercial sector, and the average operating hours for GSLs in the two sectors were assumed to be approximately equal. In the energy use and subsequent analyses, DOE analyzed these sectors together (using data specific to the commercial sector) and refers to the combined sector as the commercial sector.

1. Operating Hours

a. Residential Sector

To determine the average HOU of Integrated Omnidirectional Short GSLs in the residential sector, DOE collected data from a number of sources. Consistent with the approach taken in the January 2023 NOPR, DOE used data from various regional field-metering studies of GSL operating hours conducted across the United States. (88 FR 1669–1670) DOE determined the regional variation in average HOU using average HOU data from the regional metering studies, which are listed in the energy use chapter (chapter 6 of the final rule TSD). Specifically, DOE determined the average HOU for each of the reportable domains (*i.e.,* state, or group of states) used in the EIA 2009 Residential Energy Consumption Survey (''RECS'').[43] For regions without HOU metered data, DOE used data from adjacent regions. DOE estimated the national weighted-average HOU of Integrated Omnidirectional Short GSLs in the residential sector to be 2.3 hours per day.

For lamps in the other GSL product classes, DOE estimated average HOU by scaling the average HOU from the Integrated Omnidirectional Short product class. Scaling factors were developed based on the distribution of room types that particular lamp types

[42] EPA ENERGY STAR Lighting Program, ''ENERGY STAR Lighting Sunset Proposal Memo.'' Available at: *www.energystar.gov/sites/default/files/asset/document/ENERGY%20STAR%20Lighting%20Sunset%20Proposal%20Memo.pdf* (last accessed Aug. 22, 2023).

[43] U.S. Department of Energy–Energy Information Administration. 2009 RECS Survey Data. Available at *www.eia.gov/consumption/residential/data/2009/*(last accessed Aug. 1, 2023).

(*e.g.,* reflector or linear) are typically installed in, and the associated HOU for those room types. Room-specific average HOU data came from NEEA's ''2014 Residential Building Stock Assessment Metering Study'' (''RBSAM'') [44] and room distribution data by lamp type came from a 2010 KEMA report.[45] *See* chapter 6 of this final rule TSD for more detail. DOE notes that its approach assumes that the ratio of average HOU for reflector or linear lamps to A-line lamps will be approximately the same across the United States, even if the average HOU varies by geographic location. DOE estimated the national weighted-average HOU of Integrated Directional and Non-integrated Directional GSLs to be 2.9 hours per day and Integrated Omnidirectional Long GSLs to be 2.1 hours per day in the residential sector.

DOE assumes that operating hours do not vary by light source technology. Although some metering studies observed higher hours of operation for CFL GSLs compared to all GSLs—such as NMR Group, Inc.'s ''Northeast Residential Lighting Hours-of-Use Study'' [46] and the ''Residential Lighting End-Use Consumption Study'' (''RLEUCS'') [47]—DOE assumes that the higher HOU found for CFL GSLs were based on those lamps disproportionately filling sockets with higher HOU at the time of the studies. This would not be the case during the analysis period, when CFL and LED GSLs are expected to fill all GSL sockets. DOE assumes that it is appropriate to apply the HOU estimate for all GSLs to CFLs and LEDs, as only CFLs and LEDs will be available during the analysis period, consistent with DOE's approach in the January 2023 NOPR. This assumption is equivalent to assuming no rebound in operating hours as a result of more efficacious technologies filling sockets currently filled by less efficacious technologies.

The operating hours of lamps in actual use are known to vary significantly based on the room type in which the lamp is located; therefore, DOE estimated this variability by developing HOU distributions for each room type using data from NEEA's 2014 RBSAM, a metering study of 101 single-family houses in the Northwest. DOE assumed that the shape of the HOU distribution for a particular room type would be the same across the U.S., even if the average HOU for that room type varied by geographic location. To determine the distribution of GSLs by room type, DOE used data from NEEA's 2016–2017 RBSAM for single-family homes,[48] which included GSL room-distribution data for more than 700 single-family homes throughout the Northwest.

In response to the January 2023 NOPR, NEMA agreed with the data and methodology DOE used to estimate residential HOU. (NEMA, No. 183 at p. 15)

b. Commercial Sector

For each commercial building type presented in the ''2015 U.S. Lighting Market Characterization'' (''LMC''), DOE determined average HOU based on the fraction of installed lamps utilizing each of the light source technologies typically used in GSLs and the HOU for each of these light source technologies for integrated omnidirectional short, integrated directional, non-integrated directional, and non-integrated omnidirectional GSLs.[49] For integrated omnidirectional long GSLs, DOE used the data from the 2015 LMC pertaining to linear fluorescent lamps. DOE estimated the national-average HOU for the commercial sector by mapping the LMC building types to the building types used in Commercial Buildings Energy Consumption Survey (''CBECS'') 2012,[50] and then weighting the building-specific HOU for GSLs by the relative floor space of each building type as reported in the 2015 LMC. The national weighted-average HOU for integrated omnidirectional short, integrated directional, non-integrated directional, and non-integrated omnidirectional GSLs in the commercial sector were estimated at 11.5 hours per day. The national weighted-average HOU for integrated omnidirectional long GSLs in the commercial sector were estimated at 8.1 hours per day.

To capture the variability in HOU for individual consumers in the commercial sector, DOE used data from NEEA's ''2019 Commercial Building Stock Assessment'' (''CBSA'').[51] Similar to the residential sector, DOE assumed that the shape of the HOU distribution from the CBSA was similar for the U.S. as a whole.

In response to the January 2023 NOPR, NEMA agreed with the data and methodology DOE used to estimate commercial HOU. (NEMA, No. 183 at p. 15)

2. Input Power

The input power used in the energy use analysis is the input power presented in the engineering analysis (section IV.D.1.c of this document) for the representative lamps considered in this rulemaking.

3. Lighting Controls

For GSLs that operate with controls, DOE assumed an average energy reduction of 30 percent, which is based on a meta-analysis of field measurements of energy savings from commercial lighting controls by Williams, *et al.*[52] Because field measurements of energy savings from controls in the residential sector are very limited, DOE assumed that controls would have the same impact as in the commercial sector.

In response to the January 2023 NOPR, NEMA commented that the results of the meta-analysis DOE relied on to estimate 30 percent energy savings are not accurate because LED technology was not in general use at that time. NEMA suggested—based on a DesignLights Consortium report [53]

[44] Ecotope Inc. *Residential Building Stock Assessment: Metering Study.* 2014. Northwest Energy Efficiency Alliance: Seattle, WA. Report No. E14–283. Available at *neea.org/resources/2011-rbsa-metering-study* (last accessed Aug. 10, 2023).

[45] KEMA, Inc. Final Evaluation Report: Upstream Lighting Program: Volume 2. 2010. California Public Utilities Commission, Energy Division: Sacramento, CA. Report No. CPU0015.02. *www.calmac.org/publications/FinalUpstreamLightingEvaluationReport_Vol2_CALMAC.pdf* (last accessed Aug. 10, 2023).

[46] NMR Group, Inc. and DNV GL. *Northeast Residential Lighting Hours-of-Use Study.* 2014. Connecticut Energy Efficiency Board, Cape Light Compact, Massachusetts Energy Efficiency Advisory Council, National Grid Massachusetts, National Grid Rhode Island, New York State Energy Research and Development Authority. Available at *app.box.com/s/o1f3bhbunib2av2wiblu/1/1995940511/17399081887/1* (last accessed Aug. 10, 2023).

[47] DNV KEMA Energy and Sustainability and Pacific Northwest National Laboratory. *Residential Lighting End-Use Consumption Study: Estimation Framework and Baseline Estimates.* 2012. U.S. Department of Energy: Washington, DC. Available at: *www1.eere.energy.gov/buildings/publications/pdfs/ssl/2012_residential-lighting-study.pdf* (last accessed Aug. 10, 2023).

[48] Northwest Energy Efficiency Alliance. ''Residential Building Stock Assessment II: Single-Family Homes Report: 2016–2017.'' 2019. Northwest Energy Efficiency Alliance. Available at: *neea.org/img/uploads/Residential-Building-Stock-Assessment-II-Single-Family-Homes-Report-2016-2017.pdf* (last accessed Aug. 10, 2023).

[49] Navigant Consulting, Inc. ''2015 U.S. Lighting Market Characterization.'' 2017. U.S. Department of Energy: Washington, DC. Report No. DOE/EE–1719. Available at: *Energy.gov/eere/ssl/downloads/2015-us-lighting-market-characterization* (last accessed Aug. 10, 2023).

[50] U.S. Department of Energy—Energy Information Administration. ''2012 Commercial Buildings Energy Consumption Survey (CBECS).'' 2012. Available at: *www.eia.gov/consumption/commercial/data/2012/* (last accessed Aug. 10, 2023).

[51] Cadmus Group. *Commercial Building Stock Assessment 4 (2019) Final Report.* 2020. Northwest Energy Efficiency Alliance: Seattle, WA. *neea.org/resources/cbsa-4-2019-final-report* (last accessed Aug. 10, 2023).

[52] Williams, A., B. Atkinson, K. Garbesi, E. Page, and F. Rubinstein. Lighting Controls in Commercial Buildings. LEUKOS. 2012. 8(3): pp. 161–180.

[53] Wen, Y.-J., E. Kehmeier, T. Kisch, A. Springfield, B. Luntz, and M. Frey. Energy Savings

showing average savings of 49 percent for networked lighting controls—that DOE use a range of 30–49 percent energy savings from controls. (NEMA, No. 183 at p. 15) DOE appreciates NEMA identifying this report; however, because the meta-analysis DOE has relied on incorporates a variety of control strategies, DOE believes the meta-analysis is likely more representative of potential savings than the results of a study looking only at networked lighting controls. DOE has thus continued to use 30 percent energy savings for controls in its reference scenario. However, due to the inherent uncertainty in estimating energy savings from controls, DOE also analyzed a scenario in which controls are assumed to result in a 49 percent reduction in energy use. The results of this analysis can be found in appendix 7B of the final rule TSD.

For this final rule, DOE assumed that the controls penetration of 9 percent reported in the 2015 LMC is representative of integrated omnidirectional short GSLs. DOE estimated different controls penetrations for integrated omnidirectional long and integrated and non-integrated directional GSLs. The 2015 LMC reports a controls penetration of 0 percent for linear fluorescent lamps in the residential sector; therefore, DOE assumed that no residential integrated omnidirectional long lamps are operated on controls. To estimate controls penetrations for integrated directional and non-integrated directional GSLs, DOE scaled the controls penetration for integrated omnidirectional short GSLs based on the distribution of room types that reflector lamps are typically installed in relative to A-type GSLs, and the controls penetration by room type from the 2010 KEMA report. Based on this analysis, DOE estimated the controls penetrations for integrated directional and non-integrated directional GSLs at 10 percent.

In response to the January 2023 NOPR, NEMA recommended that DOE use a controls penetration of 1 percent or 2 percent for integrated omnidirectional long lamps. NEMA also commented that DOE should not rely on the 2015 LMC to estimate controls penetration due to the 2015 LMC being outdated and also showing less controls penetration than the previous 2010 LMC report. NEMA estimated that approximately 20 percent of residential lamps are connected to lighting controls and provided multiple explanations for the increased controls penetration. (NEMA, No. 183 at pp. 15–17) DOE has continued to use the 2015 LMC to estimate controls penetration in this final rule because the 2015 LMC estimates are the best nationally representative estimates that DOE has for integrated omnidirectional long lamps, assuming a 2 percent controls penetration for those lamps (as opposed to 0 percent) would have very minor impacts on the energy use and LCC results. For the other lamp types, DOE agrees that there is more uncertainty with the estimated controls penetration. As a result, DOE has analyzed a scenario in which the controls penetration is assumed to be 20 percent for all product classes other than integrated omnidirectional long. The results of this analysis can be found in appendix 7B of the final rule TSD.

For this final rule, DOE maintains its assumption in the January 2023 NOPR that the fraction of CFLs and LED lamps on controls is the same. By maintaining the same controls fraction for both technologies derived from estimates for all GSLs, DOE's estimates of energy savings may be slightly conservative compared to a scenario where fewer CFLs are on dimmers. Additionally, DOE's shipments model projects that only 2.3 percent of residential shipments in the integrated omnidirectional short product class and 0.3 percent of residential shipments in the integrated directional product class will be CFLs by 2029, indicating that the control fraction for CFLs will not significantly impact the overall results of DOE's analysis.

In the reference scenario, DOE assumed the fraction of residential GSLs on external controls remain fixed throughout the analysis period at 9 percent for integrated omnidirectional short GSLs, 10 percent for integrated directional and non-integrated directional GSLs, and 0 percent for integrated omnidirectional long GSLs. The national impact analysis does, however, assume an increasing fraction of residential LED GSLs that operate with controls in the form of smart lamps, as discussed in section IV.H.1.a of this document.

DOE assumed that building codes would drive an increase in floor space utilizing controls in the commercial sector in this final rule, similar to its assumption in the January 2023 NOPR (*see* appendix 9C of this final rule TSD). By the assumed first full year of compliance (2029), DOE estimated 36 percent of commercial GSLs in all product classes will operate on controls. In response to the January 2023 NOPR, NEMA commented that an estimated 50 percent of commercial GSLs operate on controls. (NEMA, No. 183 at p. 17) Without data to corroborate a different value, DOE has continued to assume 36 percent of commercial GSLs operate on controls in its reference scenario because DOE believes the data sources it used and the analysis it conducted to estimate commercial controls penetration in the compliance year provide a nationally representative estimate. However, based on NEMA's input, DOE has analyzed a scenario in which 50 percent of commercial GSLs operate on controls. The results of this analysis can be found in appendix 7B of the final rule TSD.

Chapter 6 of the final rule TSD provides details on DOE's energy use analysis for GSLs.

F. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for GSLs. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For a GSL standard case (*i.e.,* case where a standard would be in place at a particular TSL), DOE measured the LCC savings resulting from the estimated efficacy distribution under the considered standard relative to the estimated efficacy distribution in the no-new-standards case. The efficacy distributions include market trends that can result in some lamps with efficacies

from Networked Lighting Control (NLC) Systems with and without LLLC. 2020. Energy Solutions: Oakland, CA. Available at: *www.designlights.org/resources/reports/report-energy-savings-from-networked-lighting-control-nlc-systems-with-and-without-lllc/* (last accessed Aug. 10, 2023).

that exceed the minimum efficacy associated with the standard under consideration. In contrast, the PBP only considers the average time required to recover any increased first cost associated with a purchase at a particular EL relative to the baseline product.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of potential residential consumers and commercial customers. Separate calculations were conducted for the residential and commercial sectors. DOE developed consumer samples based on the 2020 RECS [54] and the 2018 CBECS [55] for the residential and commercial sectors, respectively. For each consumer in the sample, DOE determined the energy consumption for the lamp purchased and the appropriate electricity price. By developing representative consumer samples, the analysis captured the variability in energy consumption and energy prices associated with the use of GSLs.

DOE added sales tax, which varied by state, and installation cost (for the commercial sector) to the cost of the product developed in the product price determination to determine the total installed cost. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, lamp lifetimes, and discount rates. DOE created distributions of values for lamp lifetimes, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and GSL consumer samples. The model calculated the LCC and PBP for a sample of 10,000 consumers per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency. DOE calculated the LCC and PBP for consumers of GSLs as if each were to purchase a new product in the expected first full year of required compliance with amended standards. As discussed in section II of this document, since compliance with the statutory backstop requirement for GSLs commenced on July 25, 2022, DOE would set a 6-year compliance date of July 25, 2028, for consistency with requirements in 42 U.S.C. 6295(m)(4)(B) and 42 U.S.C. 6295(i)(6)(B)(iii). Therefore, because the compliance date would be in the second half of 2028, for purposes of its analysis, DOE used 2029 as the first full year of compliance with any amended standards for GSLs.

Table IV.13 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 7 of the final rule TSD and its appendices.

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[54] U.S. Department of Energy—Energy Information Administration. *2020 Residential Energy Consumption Survey (RECS).* 2020. *www.eia.gov/consumption/residential/data/2020/.* Last accessed August 10, 2023.

[55] U.S. Department of Energy—Energy Information Administration. *2018 Commercial Buildings Energy Consumption Survey (CBECS).* 2021. Available at *www.eia.gov/consumption/commercial/data/2018/* (last accessed Aug. 10, 2023).

Table IV.13 Summary of Inputs and Methods for the LCC and PBP Analysis*

Inputs	Source/Method
Product Cost	Weighted-average end-user price determined in the product price determination. To project the price of the LED lamps in the first full year of compliance, DOE used a price-learning analysis.
Sales Tax	Derived 2029 population-weighted-average tax values for each state based on Census population projections and sales tax data from Sales Tax Clearinghouse.
Installation Costs	Used RSMeans and U.S. Bureau of Labor Statistics data to estimate an installation cost of $1.73 per installed GSL for the commercial sector.
Disposal Cost	Assumed 35 percent of commercial CFLs are disposed of at a cost of $0.70 per CFL. Assumptions based on industry expert feedback and a Massachusetts Department of Environmental Protection mercury lamp recycling rate report.
Annual Energy Use	Derived in the energy use analysis. Varies by geographic location and room type in the residential sector and by building type in the commercial sector.
Energy Prices	Based on 2022 average and marginal electricity price data from the Edison Electric Institute. Electricity prices vary by season and U.S. region.
Energy Price Trends	Based on *AEO2023* price forecasts.
Product Lifetime	A Weibull survival function is used to provide the survival probability as a function of GSL age, based on the GSL's rated lifetime and sector-specific HOU. On-time cycle length effects are included for residential CFLs.
Residual Value	Represents the value of surviving lamps at the end of the LCC analysis period. DOE discounts the residual value to the start of the analysis period and calculates it based on the remaining lamp's lifetime and price at the end of the LCC analysis period.
Discount Rates	Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances.
Efficacy Distribution	Estimated by the market-share module of shipments model. *See* chapter 8 of the final rule TSD for details.
First Full Year of Compliance	2029

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 7 of the final rule TSD.

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1. Product Cost

To calculate consumer product costs, DOE typically multiplies the manufacturer production costs (''MPCs'') developed in the engineering analysis by the markups along with sales taxes. For GSLs, the engineering analysis determined end-user prices for 2020 directly; therefore, for the LCC analysis, the only adjustment was to adjust the prices to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis [56] and add sales taxes, which were assigned to each household or building in the LCC sample based on its location.

DOE also used a price-learning analysis to account for changes in LED lamp prices that are expected to occur between the time for which DOE has data for lamp prices (2020) and the assumed first full year of compliance of the rulemaking (2029). For details on the price-learning analysis, *see* section IV.G.1.b of this document.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE assumed an installation cost of $1.73 per installed commercial GSL—based on an estimated lamp installation time of 5 minutes from RSMeans [57] and hourly wage data from the U.S. Bureau of Labor Statistics [58]—but zero installation cost for residential GSLs.

3. Annual Energy Consumption

For each sampled household or commercial building, DOE determined the energy consumption for a GSL at different efficiency levels using the

[56] *www.bea.gov/data/prices-inflation/gdp-price-deflator* (last accessed March 5, 2024).

[57] RSMeans. Facilities Maintenance & Repair Cost Data 2013. 2012. RSMeans: Kingston, MA.

[58] U.S. Department of Labor–Bureau of Labor Statistics. ''Occupational Employment and Wages, May 2021: 49–9071 Maintenance and Repair Workers, General.'' Available at: *www.bls.gov/oes/2021/may/oes499071.htm* (last accessed April 13, 2022).

approach described previously in section IV.E of this document.

4. Energy Prices

Because marginal electricity price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average electricity prices. DOE generally applies average electricity prices for the energy use of the product purchased in the no-new-standards case, and marginal electricity prices for the incremental change in energy use associated with the other efficiency levels considered.

In this final rule, consistent with the January 2023 NOPR, DOE used marginal electricity prices to estimate electricity costs for both the incremental change in energy use and the energy use in the no-new-standards case due to the calculated annual electricity cost for some regions and efficiency levels being negative when using average electricity prices for the energy use of the product purchased in the no-new-standards case. Negative costs can occur in instances where the marginal electricity cost for the region and the energy savings relative to the baseline for the given efficiency level are large enough that the incremental cost savings exceed the baseline cost.

DOE derived electricity prices in 2022 using data from the EEI Typical Bills and Average Rates reports. Based upon comprehensive, industry-wide surveys, this semi-annual report presents typical monthly electric bills and average kilowatt-hour costs to the customer as charged by investor-owned utilities. For the residential sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2018).[59] For the commercial sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2019).[60]

DOE's methodology allows electricity prices to vary by sector, region, and season. In the analysis, variability in electricity prices is chosen to be consistent with the way the consumer economic and energy use characteristics are defined in the LCC analysis. DOE assigned marginal prices to each household in the LCC sample based on its location. DOE also assigned marginal prices to each commercial building in the LCC sample based on its location and annual energy consumption. For a detailed discussion of the development of electricity prices, see chapter 7 of the Final Rule TSD.

To estimate energy prices in future years, DOE multiplied the 2022 energy prices by the projection of annual average price changes for each of the nine census divisions from the Reference case in the *Annual Energy Outlook 2023* (*AEO2023),* which has an end year of 2050.[61] To estimate price trends after 2050, DOE assumed that the regional prices would remain at the 2050 value.

DOE used the electricity price trends associated with the AEO Reference case, which is a business-as-usual estimate, given known market, demographic, and technological trends. DOE also included AEO High Economic Growth and AEO Low Economic Growth scenarios in the analysis. The high- and low-growth cases show the projected effects of alternative economic growth assumptions on energy prices, and the results can be found in appendix 9D of the final rule TSD.

5. Product Lifetime

In this final rule, DOE considered the GSL lifetime to be the service lifetime (*i.e.,* the age at which the lamp is retired from service). For the representative lamps in this analysis, DOE used the same lifetime methodology as in the January 2023 NOPR. This methodology uses Weibull survival models to calculate the probability of survival as a function of lamp age. In the analysis, DOE considered the lamp's rated lifetime (taken from the engineering analysis), sector- and product class-specific HOU distributions, typical renovation timelines, and effects of on-time cycle length, which DOE assumed only applied to residential CFL GSLs.

For a detailed discussion of the development of lamp lifetimes, see appendix 7C of the final rule TSD.

6. Residual Value

The residual value represents the remaining dollar value of surviving lamps at the end of the LCC analysis period (the lifetime of the shortest-lived GSL in each product class), discounted to the first full year of compliance. To account for the value of any lamps with remaining life to the consumer, the LCC model applies this residual value as a ''credit'' at the end of the LCC analysis period. Because DOE estimates that LED GSLs undergo price learning, the residual value of these lamps is calculated based on the lamp price at the end of the LCC analysis period.

7. Disposal Cost

Disposal cost is the cost a consumer pays to dispose of their retired GSLs. DOE assumed that 35 percent of CFLs are recycled (this fraction remains constant over the analysis period), and that the disposal cost is $0.70 per lamp for commercial consumers. Disposal costs were not applied to residential consumers. Because LED lamps do not contain mercury, DOE assumes no disposal costs for LED lamps in both the residential and commercial sectors.

8. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to residential and commercial consumers to estimate the present value of future operating cost savings. The subsections below provide information on the derivation of the discount rates by sector. *See* chapter 7 of the final rule TSD for further details on the development of discount rates.

a. Residential

DOE estimated a distribution of residential discount rates for GSLs based on the opportunity cost of consumer funds. DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[62] The LCC analysis estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this time scale into account. Given the long time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the

[59] Coughlin, K. and B. Beraki. 2018. Residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001169. *ees.lbl.gov/publications/residential-electricity-prices-review.*

[60] Coughlin, K. and B. Beraki. 2019. Non-residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001203. *ees.lbl.gov/publications/non-residential-electricity-prices.*

[61] EIA. *Annual Energy Outlook 2023.* Available at: *www.eia.gov/outlooks/aeo/* (last accessed Aug. 10, 2023).

[62] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's triennial Survey of Consumer Finances [63] (''SCF'') starting in 1995 and ending in 2019. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 4.2 percent.

b. Commercial

For commercial consumers, DOE used the cost of capital to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so the cost of capital is the weighted-average cost to the firm of equity and debt financing. This corporate finance approach is referred to as the weighted-average cost of capital. DOE used currently available economic data in developing commercial discount rates, with Damadoran Online being the primary data source.[64] The average discount rate across the commercial building types is 6.8 percent.

9. Efficacy Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular TSL, DOE's LCC analysis considered the projected distribution (market shares) of product efficacies under the no-new-standards case (*i.e.,* the case without amended or new energy conservation standards) and each of the standard cases (*i.e.,* the cases where a standard would be set at each TSL) in the assumed first full year of compliance.

To estimate the efficacy distribution of GSLs for 2029, DOE used a consumer-choice model based on consumer sensitivity to lamp price, lifetime, energy savings, and mercury content, as measured in a market study, as well as on consumer preferences for lighting technology as revealed in historical shipments data. DOE also included consumer sensitivity to dimmability in the market-share model for non-linear lamps to capture the better dimming performance of LED lamps relative to CFLs. Dimmability was excluded as a parameter in the market-share model for linear lamps because DOE assumed that this feature was equivalently available among lamp options in the consumer-choice model. Consumer-choice parameters were derived from consumer surveys of the residential sector. DOE was unable to obtain appropriate data to directly calibrate parameters for consumers in the commercial sector. Due to a lack of data to support an alternative set of parameters, DOE assumed the same parameters in the commercial sector. For further information on the derivation of the market efficacy distributions, *see* section IV.G of this document and chapter 8 of the final rule TSD.

The estimated market shares for the no-new-standards case and each standards case for GSLs are determined by the shipments analysis and are shown in table IV.14 through table IV.18. A description of each of the TSLs is located in section V.A of this document.

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[63] U.S. Board of Governors of the Federal Reserve System. Survey of Consumer Finances. 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019. *www.federalreserve.gov/econresdata/scf/scfindex.htm* (last accessed Aug. 10, 2023).

[64] Damodaran, A. Data Page: Historical Returns on Stocks, Bonds and Bills-United States. 2023. *pages.stern.nyu.edu/~adamodar/* (last accessed August 10, 2023).

Table IV.14 Integrated Omnidirectional Short GSL Market Efficacy Distribution by Trial Standard Level in 2029

Trial Standard Level	EL 0 (%)	EL 1 (%)	EL 2 (%)	EL 3* (%)	EL 4* (%)	EL 5 (%)	EL 6 (%)	EL 7 (%)	Total** (%)
Residential									
No-New-Standards	0.7	0.8	0.8	26.9	26.1	14.0	13.8	16.9	100.0
TSL 1	0.0	0.0	0.8	27.3	26.5	14.2	14.0	17.1	100.0
TSL 2	0.0	0.0	0.0	27.6	26.7	14.3	14.1	17.3	100.0
TSL 3	0.0	0.0	0.0	0.0	0.0	31.4	30.9	37.7	100.0
TSL 4	0.0	0.0	0.0	0.0	0.0	0.0	45.0	55.0	100.0
TSL 5	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0
TSL 6	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0
Commercial									
No-New-Standards	0.7	0.8	0.8	27.7	26.8	13.6	13.4	16.4	100.0
TSL 1	0.0	0.0	0.8	28.1	27.1	13.8	13.6	16.6	100.0
TSL 2	0.0	0.0	0.0	28.3	27.4	13.9	13.7	16.7	100.0
TSL 3	0.0	0.0	0.0	0.0	0.0	31.4	30.9	37.7	100.0
TSL 4	0.0	0.0	0.0	0.0	0.0	0.0	45.0	55.0	100.0
TSL 5	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0
TSL 6	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0

* This EL contains two representative lamp options.
** The total may not sum to 100 percent due to rounding.

Table IV.15 Integrated Directional GSL Market Efficacy Distribution by Trial Standard Level in 2029

Trial Standard Level	EL 0 (%)	EL 1 (%)	EL 2 (%)	EL 3 (%)	EL 4 (%)	EL 5 (%)	Total* (%)
Residential							
No-New-Standards	0.3	11.9	14.4	17.3	21.1	35.1	100.0
TSL 1	0.0	11.9	14.4	17.3	21.2	35.2	100.0
TSL 2	0.0	0.0	0.0	23.5	28.8	47.8	100.0
TSL 3 - 6	0.0	0.0	0.0	0.0	0.0	100.0	100.0
Commercial							
No-New-Standards	0.3	11.9	14.4	17.3	21.1	35.1	100.0
TSL 1	0.0	11.9	14.4	17.3	21.2	35.2	100.0
TSL 2	0.0	0.0	0.0	23.5	28.8	47.8	100.0
TSL 3 - 6	0.0	0.0	0.0	0.0	0.0	100.0	100.0

* The total may not sum to 100 percent due to rounding.

Table IV.16 Non-integrated Directional GSL Market Efficacy Distribution by Trial Standard Level in 2029

Trial Standard Level	EL 0 (%)	EL 1 (%)	EL 2 (%)	EL 3 (%)	Total* (%)
Residential					
No-New-Standards	26.3	24.7	22.7	26.3	100.0
TSL 1 - 4	0.0	33.5	30.8	35.7	100.0
TSL 5 - 6	0.0	0.0	0.0	100.0	100.0
Commercial					
No-New-Standards	26.3	24.7	22.7	26.3	100.0
TSL 1 - 4	0.0	33.5	30.8	35.7	100.0
TSL 5 - 6	0.0	0.0	0.0	100.0	100.0

* The total may not sum to 100 percent due to rounding.

Table IV.17 Non-integrated Omnidirectional GSL Market Efficacy Distribution by Trial Standard Level in 2029

Trial Standard Level	EL 0 (%)	EL 1* (%)	EL 2 (%)	EL 3 (%)	Total** (%)
Commercial					
No-New-Standards	2.9	2.5	40.7	53.9	100.0
TSL 1	0.0	2.6	41.9	55.5	100.0
TSL 2 - 6	0.0	0.0	0.0	100.0	100.0

* This EL contains two representative lamp options.

** The total may not sum to 100 percent due to rounding.

Table IV.18 Integrated Omnidirectional Long GSL Market Efficacy Distribution by Trial Standard Level in 2029

Trial Standard Level	EL 0 (%)	EL 1 (%)	EL 2 (%)	EL 3 (%)	EL 4 (%)	EL 5 (%)	EL 6 (%)	Total* (%)
Residential								
No-New-Standards	14.5	14.2	14.0	15.1	14.1	14.5	13.7	100.0
TSL 1	0.0	16.6	16.4	17.6	16.4	16.9	16.1	100.0
TSL 2	0.0	0.0	0.0	26.3	24.5	25.2	24.0	100.0
TSL 3 - 5	0.0	0.0	0.0	0.0	0.0	51.3	48.7	100.0
TSL 6	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0
Commercial								
No-New-Standards	14.5	14.2	14.0	15.1	14.1	14.5	13.7	100.0
TSL 1	0.0	16.6	16.4	17.6	16.4	16.9	16.1	100.0
TSL 2	0.0	0.0	0.0	26.3	24.5	25.2	24.0	100.0
TSL 3 - 5	0.0	0.0	0.0	0.0	0.0	51.3	48.7	100.0
TSL 6	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0

* The total may not sum to 100 percent due to rounding.

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10. LCC Savings Calculation

In the reference scenario, DOE calculated the LCC savings at each TSL based on the change in average LCC for each standards case compared to the no-new-standards case, considering the efficacy distribution of products derived by the shipments analysis. This approach allows consumers to choose products that are more efficient than the standard level and is intended to more accurately reflect the impact of a potential standard on consumers.

DOE used the consumer-choice model in the shipments analysis to determine the fraction of consumers that purchase each lamp option under a standard, but the model is unable to track the purchasing decision for individual consumers in the LCC sample. However, DOE must track any difference in purchasing decision for each consumer in the sample in order to determine the fraction of consumers who experience a net cost. Therefore, DOE assumed that the rank order of consumers, in terms of the efficacy of the product they purchase, is the same in the no-new-standards case as in the standards cases. In other words, DOE assumed that the consumers who purchased the most-efficacious products in the no-new-standards case would continue to do so in standards cases, and similarly, those consumers who purchased the least efficacious products in the no-new-standards case would continue to do so in standards cases. This assumption is only relevant in determining the fraction of consumers who experience a net cost in the LCC savings calculation and has no effect on the estimated national impact of a potential standard.

11. Payback Period Analysis

The payback period is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. DOE refers to this as a ''simple PBP'' because it does not consider changes over time in operating cost savings. The PBP calculation uses the same inputs as the LCC analysis when deriving first-year operating costs.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure and multiplying those savings by the average energy price projection for the year in which compliance with the amended standards would be required.

G. Shipments Analysis

DOE uses projections of annual product shipments to calculate the national impacts of potential amended or new energy conservation standards on energy use, NPV, and future manufacturer cash flows.[65] The shipments model takes an accounting approach, tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

1. Shipments Model

The shipments model projects shipments of GSLs over a thirty-year analysis period for the no-new-standards case and for all standards cases. Consistent with the May 2022 Backstop Final Rule, DOE developed a shipments model that implements the 45 lm/W minimum efficiency requirement for GSLs in 2022 in the no-new-standards case and all standards cases. Accurate modeling of GSL shipments also requires modeling, in the years prior to 2022, the demand and market shares of those lamps that are eliminated by the implementation of the 45 lm/W minimum efficiency requirement, as well as general service fluorescent lamps (''GSFLs''), because replacements of these lamps are a source of demand for in-scope products.

Separate shipments projections are calculated for the residential sector and for the commercial sector. The shipments model used to estimate GSL lamp shipments for this rulemaking has three main interacting elements: (1) a lamp demand module that estimates the demand for GSL lighting for each year of the analysis period; (2) a price-learning module that projects future prices based on historic price trends; and (3) a market-share module that assigns shipments to the available lamp options.

a. Lamp Demand Module

The lamp demand module first estimates the national demand for GSLs in each year. The demand calculation assumes that sector-specific lighting capacity (maximum lumen output of installed lamps) remains fixed per square foot of floor space over the analysis period, and total floor space changes over the analysis period according to the EIA's *AEO2023* projections of U.S. residential and commercial floor space.[66] For linear lamps, DOE assumed that there is no new demand from floorspace growth due to the increasing prevalence of integral LED luminaires in new commercial construction.

A lamp turnover calculation estimates demand for new lamps in each year based on the growth of floor space in each year, the expected demand for replacement lamps, and sector-specific assumptions about the distribution of per-lamp lumen output desired by consumers. The demand for replacements is computed based on the historical shipments of lamps and the probability of lamp failure as a function of age. DOE used rated lamp lifetimes (in hours) and expected usage patterns in order to derive these probability distributions (*see* section IV.F.5 of this document for further details on the derivation of lamp lifetime distributions).

The lamp demand module also accounts for the reduction in GSL demand due to the adoption of integral LED luminaires into lighting applications traditionally served by GSLs, both prior to and during the analysis period. For non-linear lamps in each year, an increasing portion of demand capped at 15 percent is assumed to be met by integral LED luminaires modeled as a Bass diffusion

[65] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[66] U.S. Department of Energy—Energy Information Administration. Annual Energy Outlook 2023 with projections to 2050. Washington, DC Report No. AEO2023. U.S. Department of Energy—Energy Information Administration. Annual Energy Outlook 2023 with projections to 2050. Washington, DC. Report No. AEO2023. Available at: *www.eia.gov/outlooks/aeo/* (last accessed Aug. 21, 2023).

curve [67] as in the January 2023 NOPR. For linear lamps, DOE assumes that 8.2 percent of stock is replaced each year with integrated LED fixtures in order to account for retrofits and renovations, and that demand comes from replacement of failures in the remaining stock. This annual rate of stock replacement is based on a projection of commercial lighting stock composition through 2050 produced for *AEO2023*.[68] Further details on the assumptions used to model these market transitions are presented in chapter 8 of the final rule TSD.

NEMA commented that it does not believe the current conversion rate of linear lamp stock to integrated fixtures is likely to be maintained in the long term. (NEMA, No. 183 at p. 18) In addition, NEMA commented that sustainability goals for new construction are likely to support the linear lamp market of the future. (NEMA, No. 183 at p. 18) DOE acknowledges that there is uncertainty in the rate at which integrated fixtures will replace linear lamps fixtures, as well as uncertainty in the persistence of demand for linear lamps in applications that were not explicitly analyzed. In order to account for the possibility that shipments remain higher than those projected in this Final Rule analysis, DOE modeled a scenario where a smaller percentage of stock is removed each year. This lower attrition rate is based on estimates made in DOE's 2019 Forecast of Solid-State Lighting in General Illumination Applications,[69] and results in a more gradual reduction in the size of the linear lamp market. The national impacts of this shipments scenario are presented in appendix 9D of the final rule TSD.

For this final rule, DOE assumed the implementation of a 45 lm/W minimum efficiency requirement for GSLs in 2022, consistent with the May 2022 Backstop Final Rule. DOE notes that CFL and LEDs make up 79 percent of A-line lamp sales in 2021 based on data collected from NEMA A-line lamp indices, indicating that the market has moved rapidly towards increasing production capacity for CFL and LED technologies.[70]

As in the January 2023 NOPR, for the integrated omnidirectional short product class, DOE developed separate shipments projections for A-line lamps and for non-A-line lamps (candelabra, intermediate and medium-screw base lamps including, B, BA, C, CA, F, G and T-shape lamps) to capture the different market drivers between the two types of lamps. Based on an analysis of online product offerings, DOE assumed that the prices of lamp options at each EL would be approximately the same for A-line and non-A-line integrated omnidirectional short lamps, but scaled the power consumption of non-A-line lamps to be representative of a 450 lumen lamp. Although modelled separately, results for A-line and non-A-line lamps are aggregated into the integrated omnidirectional short product class throughout this final rule analysis.

b. Price-Learning Module

The price-learning module estimates lamp prices in each year of the analysis period using a standard price-learning model,[71] which relates the price of a given technology to its cumulative production, as represented by total cumulative shipments. Cumulative shipments are determined for each GSL lighting technology under consideration in this analysis (CFL and LED) at the start of the analysis period and are augmented in each subsequent year of the analysis based on the shipments determined for the prior year. New prices for each lighting technology are calculated from the updated cumulative shipments according to the learning (or experience) curve for each technology. The current year's shipments, in turn, affect the subsequent year's prices. Because LED lamps are a relatively young technology, their cumulative shipments increase relatively rapidly and hence they undergo a substantial price decline during the shipments analysis period. For simplicity, shipments of integrated omnidirectional long lamps were not included in the cumulative shipments total used to determine the price learning rate for LED GSLs, as shipments of those lamps would not contribute significantly to the total cumulative LED shipments or the resulting LED GSL learning rate, but integrated omnidirectional long GSLs were assumed to experience the same rate of price decline as all LED GSLs. DOE assumed that CFLs and GSFLs undergo no price learning in the analysis period due to the long history of these lamps in the market.

c. Market-Share Module

The market-share module apportions the lamp shipments in each year among the different lamp options developed in the engineering analysis. DOE used a consumer-choice model based on consumer sensitivity to lamp price, lifetime, energy savings, and mercury content, as measured in a market study, as well as on consumer preferences for lighting technology as revealed in historical shipments data. DOE also included consumer sensitivity to dimmability in the market-share model for non-linear lamps to capture the better dimming performance of LED lamps relative to CFLs. Dimmability was excluded as a parameter in the market-share model for linear lamps because DOE assumed that this feature was equivalently available among lamp options in the consumer-choice model. GSFL substitute lamp options were included in the consumer-choice model for integrated omnidirectional long lamps, as such GSFLs can serve as substitutes for linear LED lamps. Specifically, the 4-foot T8 lamp options described in the 2023 GSFL Final Determination analysis (see 88 FR 9118–9136) were included as lamp options to more accurately estimate the impact of any potential standard on costs and energy use in the broader linear lamp market.

The market-share module assumes that, when replacing a lamp, consumers will choose among all of the available lamp options. Substitution matrices were developed to specify the product choices available to consumers. The available options depend on the case under consideration; in each of the standards cases corresponding to the different TSLs, only those lamp options at or above the particular standard level, and relevant alternative lamps, are considered to be available. The market-share module also incorporates a limit on the diffusion of LED technology into the market using the widely accepted

[67] Bass, FM. A New Product Growth Model for Consumer Durables. *Management Science.* 1969. 15(5): pp. 215–227. Bass, FM. A New Product Growth Model for Consumer Durables. *Management Science* 1969. 15(5): pp. 215–227.

[68] U.S. Department of Energy—Energy Information Administration. Annual Energy Outlook 2023 with Projections to 2050. Washington, DC. Report No. AEO2023. Available at: *www.eia.gov/outlooks/aeo/* (last accessed Aug. 21, 2023).

[69] Navigant Consulting, Inc. Energy Savings Forecast of Solid-State Lighting in General Illumination Applications. 2019. U.S. Department of Energy: Washington, DC. Report No. DOE/EERE 2001. Available at: *www.energy.gov/eere/ssl/downloads/2019-ssl-forecast-report* (last accessed March 15, 2023).

[70] National Electrical Manufacturers Association. Lamp Indices. Available at *www.nema.org/analytics/lamp-indices* (last accessed Aug. 24, 2023).

[71] Taylor, M. and S.K. Fujita. *Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique.* 2013. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–6195E. (Last accessed August 5, 2021) *eta.lbl.gov/publications/accounting-technological-change.* Taylor, M. and S.K. Fujita. *Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique.* 2013. Lawrence Berkeley National Laboratory: Berkeley, CA. Report No. LBNL–6195E. (Last accessed August 5, 2021) *eta.lbl.gov/publications/accounting-technological-change.* (last accessed Aug. 5, 2021).

Bass adoption model,[72] the parameters of which are based on data on the market penetration of LED lamps published by NEMA,[73] as discussed previously. In this way, the module assigns market shares to available lamp options, based on observations of consumer preferences. DOE also used a Bass adoption model to estimate the diffusion of LED lamp technologies into the non-integrated product class and assumes that non-integrated LED lamp options became available starting in 2015.

In response to the January 2023 NOPR, EEI commented that, as proposed, the efficacy requirement of 120 lm/W for most types of lighting would eliminate 98 percent of the highest-efficiency light bulbs currently available to consumers. (EEI, No. 181 at pp. 2–3) NYSERDA commented that findings from its December 2020 study of sales and shipments of GSLs in New York underscores the feasibility of the NOPR's updated standards as LEDs made up 73 percent of all GSLs sold in New York in 2020 and that rate continues to grow. (NYSERDA, No. 166 at p. 3) The CA IOUs cited CEC's MAEDbS, which lists 15,313 integrated, single-ended LED lamps with lighting outputs between 800 and 1100 lumens, all complying with the light quality criteria in California's Appliance Efficiency Regulations. The CA IOUs noted that 14 percent of these lamps claim an efficacy of 120 lm/W or higher and would likely meet DOE's proposed standard, and the CA IOUs commented they anticipate a larger share of marketable GSLs will exceed the efficacy requirements when the new standard becomes effective. (CA IOUs, No. 167 at p. 2).

For the shipments model, DOE included the impact of historically observed trends in LED efficacy based on the 2019 DOE Solid State Lighting report,[74] which projects that the average efficacy of the non-linear LED GSLs will likely exceed the efficacy of the most efficacious (max-tech) lamp options considered in the engineering analysis in future years. As detailed in section IV.F.9 of this document, DOE projects that in the no-new-standards case by 2029, the fraction of GSLs at or above max-tech is at least 13 precent for all product classes, and considerably higher for some. More information on the efficacy trend data can be found in chapter 8 of the final rule TSD. Additionally, DOE does not anticipate a decrease in manufacturing capacity of products that will be able to meet the proposed standard by the compliance date (*see* section V.B.2 of this document for details).

H. National Impact Analysis

The NIA assesses the national energy savings (''NES'') and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[75] (''Consumer'' in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of GSLs sold from 2029 through 2058.

DOE evaluates the impacts of new or amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard and, in the case of integrated omnidirectional long lamps, out-of-scope alternatives such as GSFLs.

DOE takes analytical results from the shipments model and calculates the energy savings and the national consumer costs and savings from each TSL. Analytical results and inputs to the model are presented in the form of a spreadsheet. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA uses typical values (as opposed to probability distributions) as inputs.

Table IV.19 summarizes the inputs and methods DOE used for the NIA analysis for the final rule. Discussion of these inputs and methods follows the table. *See* chapter 9 of the final rule TSD for further details.

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[72] Bass, F.M. A New Product Growth Model for Consumer Durables. *Management Science.* 1969. 15(5): pp. 215–227.Bass, F.M. A New Product Growth Model for Consumer Durables. *Management Science.* 1969. 15(5): pp. 215–227.

[73] National Electrical Manufacturers Association. Lamp Indices. Available at: *www.nema.org/analytics/lamp-indices* (last accessed Aug. 24, 2023).

[74] Navigant Consulting, Inc. Energy Savings Forecast of Solid-State Lighting in General Illumination Applications. 2019. U.S. Department of Energy: Washington, DC. Report No. DOE/EERE 2001. Available at *www.energy.gov/eere/ssl/downloads/2019-ssl-forecast-report* (last accessed Feb. 23, 2022).

[75] The NIA accounts for impacts in the 50 states and U.S. territories.

Table IV.19 Summary of Inputs and Methods for the National Impact Analysis

Inputs	Method
Shipments	Annual shipments for each lamp option from shipments model for the no-new standards case and each TSL analyzed
First Full Year of Compliance	2029
Efficiency Trends	Both No-New-Standards Case and Standards-case efficiency distributions are estimated by the market-share module of the shipments analysis.
Annual Energy Consumption per Unit	Calculated for each lamp option based on inputs from the Energy Use Analysis
Total Installed Cost per Unit	Uses lamp prices, and for the commercial sector only, installation costs from the LCC analysis. Incorporates projection of future product prices based on historical data.
Annual Energy Cost per Unit	Calculated for each lamp option using the energy use per unit, and electricity prices and trends
Energy Price Trends	*AEO2023* projections (to 2050) and held fixed to 2050 value thereafter.
Energy Site-to-Primary and FFC Conversion	A time-series conversion factor based on *AEO2023*
Discount Rate	3 and 7 percent.
Present Year	2024

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1. National Energy Savings

The national energy savings analysis involves a comparison of national energy consumption of the considered products between each potential standards case (''TSL'') and the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2023.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is sometimes associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. In the case of lighting, the rebound effect could be manifested in increased HOU or in increased lighting density (lamps per square foot). In the January 2023 NOPR, DOE assumed no rebound effect in both the residential and commercial sectors for consumers switching from CFLs to LED lamps or from less efficacious LED lamps to more efficacious LED lamps. This is due to the relatively small incremental increase in efficacy between CFLs and LED GSLs or less efficacious LED lamps and more efficacious LED lamps, as well as an examination of DOE's 2001, 2010, and 2015 U.S. LMC studies, which indicates that there has been a reduction in total lamp operating hours in the residential sector concomitant with increases in lighting efficiency. Consistent with the residential sector, DOE does not expect there to be any rebound effect associated with the commercial sector. Therefore, DOE assumed no rebound effect in all final rule scenarios for both the residential and commercial sectors.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [76] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 9B of the final rule TSD.

EEI commented that DOE's utilization of a fossil fuel equivalent marginal heat rate for electricity generated from

[76] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581 (2009), October 2009. Available at *www.eia.gov/forecasts/aeo/index.cfm* (last accessed April 21, 2022).

renewable sources is inconsistent with prior DOE recommendations for all appliance standards rulemakings. EEI commented that by assigning a fossil heat rate to renewable energy as if that energy has an emissions impact (when in fact no carbon emissions are associated with the electricity generated), DOE's analysis does not accurately capture the emissions profile of clean energy resources deployed by the sector at large scale. EEI commented that DOE should use a more appropriate methodology for this rulemaking to accurately capture the ongoing clean energy transition, such as the ''captured energy'' approach. Otherwise, EEI commented, DOE's use of fossil-fuel marginal heat rates results in at least a 3x overstatement of the amount of primary energy that would be saved if new efficiency standards for consumer light bulbs are promulgated. (EEI, No. 181 at pp. 2–3)

As previously mentioned, DOE converts electricity consumption and savings to primary energy using annual conversion factors derived from the AEO. Traditionally, EIA has used the fossil fuel equivalency approach to report noncombustible renewables' contribution to total primary energy. The fossil fuel equivalency approach applies an annualized weighted-average heat rate for fossil fuel power plants to the electricity generated (in kWh) from noncombustible renewables. EIA recognizes that using captured energy (the net energy available for direct consumption after transformation of a noncombustible renewable energy into electricity) or incident energy (the mechanical, radiation, or thermal energy that is measurable as the ''input'' to the device) are possible approaches for converting renewable electricity to a common measure of primary energy, but it continues to use the fossil fuel equivalency approach in the AEO and other reporting of energy statistics. DOE contends that it is important for it to maintain consistency with EIA in DOE's accounting of primary energy savings from energy efficiency standards. This method for calculating primary energy savings has no effect on the estimation of impacts of standards on emissions, which uses a different approach (*see* chapter 9 of the final rule TSD).

a. Smart Lamps

Integrated GSLs with standby functionality, henceforth referred to as smart lamps, were not explicitly analyzed in the shipments analysis for this final rule. To account for the additional standby energy consumption from smart lamps in the NIA, DOE assumed that smart lamps would make up an increasing fraction of Integrated Omnidirectional Short, Integrated Directional, Non-integrated Directional, and Non-integrated Omnidirectional lamps in the residential sector following a Bass adoption curve. DOE assumes for this final rule that smart lamp penetration is limited to the residential sector.

In response to the January 2023 NOPR, NEMA objected to DOE's assumption that integrated lamps with standby functionality are fundamentally similar to lamps without standby functionality but with the addition of wireless communication components and the associated consumption of power in standby mode. NEMA noted that the variety of features that lamps capable of operating on standby power may offer has greatly expanded in recent years and includes functionality such as dimming, scheduling, high end trim, and demand response. (NEMA, No. 183 at p. 9–10) DOE notes that the representative lamps without standby power consumption that were used as the basis for scaling are also capable of dimming. DOE is not aware of data indicating how scheduling, high end trim and demand response functionality impact the energy consumption of smart GSLs with these features, but assumed that smart GSLs offer similar fractional energy savings (30 percent) from controls as representative GSLs used with dimming controls.

NEMA commented on the growing popularity of smart LED lamps, noting that nearly 10 million households use smart speakers to control lighting, based on data from EIA and RECS. (NEMA, No. 183 at p. 10) However, NEMA commented that it could not predict the market share for smart lamps by the end of the analysis period, noting how much the lighting market has changed in the last 35 years. (NEMA, No. 183 at p. 18) For this final rule, DOE continued to assume that there was an increase in the fraction of LED lamps that are smart lamps over the shipments analysis period. In the absence of information to support an alternative projection, DOE continued to assume that the market penetration of smart lamps in the residential sector reached 50 percent by the end of the analysis period.

DOE assumed a standby power of 0.2 W per smart lamp in alignment with standby requirements in California Code of Regulations—Title 20, as it is assumed that manufacturers would typically sell the same smart lamp models in California as in the rest of the U.S.[77] DOE further assumed that the majority of smart lamps would be standalone and not require the need of a hub.

More details on the incorporation of smart lamps in DOE's analysis can be found in chapter 9 of the TSD.

b. Unit Energy Consumption Adjustment To Account for GSL Lumen Distribution for the Integrated Omnidirectional Short Product Class

The engineering analysis provides representative units within the lumen range of 750–1,049 lumens for the integrated omnidirectional short product class. For the NIA, DOE adjusted the energy use of the representative units for the integrated omnidirectional short product class to account for the full distribution of GSL lumen outputs (*i.e.,* 310–2,600 lumens).

Using the lumen range distribution for integrated omnidirectional short A-line lamps developed originally for the March 2016 NOPR and used in the January 2023 NOPR, DOE calculated unit energy consumption (''UEC'') scaling factors to apply to the energy use of the integrated omnidirectional short representative lamp options by taking the ratio of the stock-weighted wattage equivalence of the full GSL lumen distribution to the wattage equivalent of the representative lamp bin (750–1,049 lumens). DOE applied a UEC scaling factor of 1.15 for the residential sector and 1.21 for the commercial sector for integrated omnidirectional short A-line lamps.

c. Unit Energy Consumption Adjustment To Account for Type A Integrated Omnidirectional Long Lamps

The representative units in the engineering analysis for the integrated omnidirectional long product class represent Type B lamp options. To account for Type A lamps that were not explicitly modeled, DOE scaled the energy consumption values of Type B integrated omnidirectional long lamp options based on the relative energy consumption of equivalent Type A lamps. DOE assumed a 60/40 market share of Type B and Type A linear LED lamps, respectively, based on product offerings in the Design Lights Consortium database, which was held constant throughout the analysis period.

2. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total

[77] California Energy Commission. California Code of Regulations: Title 20—Public Utilities and Energy. May 2018.

annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.G.1.b of this document, DOE developed LED lamp prices using a price-learning module incorporated in the shipments analysis. By 2058, which is the end date of the forecast period, the average LED GSL price is projected to drop 33 percent relative to 2022 in the no-new-standards case. DOE's projection of product prices as described in chapter 8 of the final rule TSD.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price projections on the consumer NPV for the considered TSLs for GSLs. In addition to the default price trend, DOE considered two product price sensitivity cases: (1) a high price decline case based on a higher price learning rate and (2) a low price decline case based on a lower price learning rate. The derivation of these price trends and the results of these sensitivity cases are described in appendix 9D of the final rule TSD.

The operating cost savings are primarily energy cost savings, which are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO2023,* which has an end year of 2050. For years after 2050, DOE maintained the 2050 electricity price. As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO2023* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 9D of the final rule TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this final rule, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[78] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

I. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this final rule, DOE analyzed the impacts of the considered standard levels on two subgroups: (1) low-income households and (2) small businesses. The residential low-income household analysis used a subset of the RECS 2020 sample composed of households that are at or below the poverty line. DOE analyzed only the low-income households that are responsible for paying their electricity bill in this analysis. RECS 2020 indicates that approximately 15% of low-income renters are not responsible for paying their electricity bills. Such consumers may incur a net cost (depending on if they purchase their own GSLs or not). DOE notes that this is only relevant for the integrated omnidirectional short GSL product class, as low-income households that purchase integrated directional GSLs would still experience a net benefit even if they are not responsible for paying their electricity bill and low-income households are assumed not to purchase lamps in other GSL product classes, which are uncommon in the residential sector.

The analysis of commercial small businesses uses the CBECS 2018 sample (as in the full-sample LCC analysis) but applies discount rates specific to small businesses. DOE used the analytical framework and inputs described in section IV.F of this document.

Chapter 10 in the final rule TSD describes the consumer subgroup analysis.

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of new and amended energy conservation standards on manufacturers of GSLs and to estimate the potential impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how new and amended energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (''GRIM''), an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more-stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases (*i.e.,* TSLs). To capture the uncertainty relating to manufacturer pricing strategies following new and amended standards, the GRIM estimates a range of possible impacts under different manufacturer markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics

[78] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* Available at *www.whitehouse.gov/omb/information-for-agencies/circulars* (last accessed March 22, 2024). DOE used the prior version of Circular A–4 (September 17, 2003) in accordance with the effective date of the November 9, 2023 version.

and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 11 of the final rule TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new and amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash-flow analysis that incorporates manufacturer costs, manufacturer markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from new and amended energy conservation standards. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2024 (the base year of the analysis) and continuing to 2058. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of GSLs, DOE used a real discount rate of 6.1 percent, which was derived from industry financials.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of new and amended energy conservation standards on GSL manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, and information gathered from industry stakeholders during previous rulemaking public comments. The GRIM results are presented in section V.B.2 of this document. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 11 of the final rule TSD.

a. Manufacturer Production Costs

Manufacturing more efficient products is typically more expensive than manufacturing baseline products due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry. Typically, DOE develops MPCs for the covered products using reverse-engineering. These costs are used as an input to the LCC analysis and NIA. However, because lamps are difficult to reverse-engineer, DOE directly derived end-user prices and then used those prices in conjunction with average distribution chain markups and manufacturer markups to calculate the MPCs of GSLs.

To determine MPCs of GSLs from the end-user prices, DOE divided the end-user price by the average distribution chain markup and then again by the average manufacturer markup of the representative GSLs at each EL. In the January 2023 NOPR, DOE used the SEC 10-Ks of publicly traded GSL manufacturers to estimate the manufacturer markup of 1.55 for all GSLs in this rulemaking. DOE used the SEC 10-Ks of the major publicly traded lighting retailers to estimate the distribution chain markup of 1.52 for all GSLs. DOE asked for comment on the use of these values and NEMA stated that it cannot comment on the average distribution chain markup and referred DOE to individual manufacturer interviews for this information. (NEMA, No. 183 at p. 19) The estimated manufacturer markup and the estimated average distribution chain markup values that were used in the January 2023 SNOPR were based on information provided during manufacturer interviews. Therefore, DOE continues to use the same values in this final rule analysis that were used in the January 2023 NOPR.

For a complete description of end-user prices, see the cost analysis in section IV.D.2 of this document.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, DOE developed a consumer-choice-based model to estimate shipments of GSLs. The model projects consumer purchases (and hence shipments) based on sector-specific consumer sensitivities to first cost, energy savings, lamp lifetime, and lamp mercury content. The shipments analysis projects shipments from 2024 (the base year) to 2058 (the end year of the analysis period). *See* chapter 8 of the final rule TSD for additional details.

c. Product and Capital Conversion Costs

New and amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and product designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with new and amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

In the January 2023 NOPR, DOE conducted a bottom-up analysis to calculate the product conversion costs for GSL manufacturers for each product class at each EL. To conduct this bottom-up analysis, DOE used manufacturer input from manufacturer interviews regarding the average amount of engineering time to design a new product or remodel an existing model. DOE then estimated the number of GSL models that would need to be re-modeled or introduced into the market for each product class at each EL using DOE's database of existing GSL models and the distribution of shipments from the shipments analysis (*see* section IV.G of this document).

DOE assumed GSL manufacturers would not re-model non-compliant CFL models into compliant CFL models, even if it is possible for the remodeled CFLs to meet the analyzed energy conservation standards. Additionally, DOE assumed that GSL manufacturers would not need to introduce any new LED lamp models due to CFL models not being able to meet the analyzed energy conservation standards.[79] However, DOE assumed that all non-compliant LED lamp models would be remodeled to meet the analyzed energy conservation standards.

Based on feedback in manufacturer interviews, DOE assumed that most LED lamp models would be remodeled between the estimated publication of this rulemaking's final rule and the estimated date by which energy conservation standards are required, even in the absence of DOE energy conservation standards for GSLs.

[79] Based on the Shipment Analysis, LED lamp sales exceed 95 percent of the total GSL sales for every analyzed product class by 2029 (the first full year of compliance). DOE assumed there are replacement LED lamps for all CFL models.

Additionally, DOE estimated that remodeling a non-compliant LED lamp model that would already be scheduled to be remodeled into a compliant one would require an additional month of engineering time per LED lamp model.[80]

DOE assumed that capital conversion costs would only be necessary if GSL manufacturers would need to increase the production volume of LED lamps in the standards case compared to the no-new-standards case and if existing LED lamp production capacity did not already exist to meet this additional market demand for LED lamps. Based on the shipments analysis, the volume of LED lamp sales in the years leading up to 2029 exceeds the volume of LED lamp sales in 2029 (the first full year of compliance) for every product class at all TSLs. Therefore, DOE assumed no capital conversion costs as GSL manufacturers would not need to make any additional investments in production equipment to maintain, or reduce, their LED lamp production volumes from the previous year.

DOE asked for comment on the methodology used to calculate product and capital conversion costs for GSLs in January 2023 NOPR. DOE did not receive any comments on this methodology. Therefore, DOE continued to use this methodology for this final rule analyses. DOE updated all engineering labor costs from 2021 dollars that were used in the January 2023 NOPR to 2022 dollars for this final rule analysis.

In general, DOE assumes all conversion-related investments occur between the publication of this final rule and the year by which manufacturers must comply with the new and amended standards. The conversion cost figures used in the GRIM can be found in section V.B.2.a of this document. For additional information on the estimated capital and product conversion costs, *see* chapter 11 of the final rule TSD.

d. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied non-production cost markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) a preservation of gross margin scenario; and (2) a preservation of operating profit scenario. These scenarios lead to different markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform ''gross margin percentage'' across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. DOE continued to use a manufacturer markup of 1.55 for all GSLs, which corresponds to a gross margin of 35.5 percent, and the same manufacturer markup that was used in the January 2023 NOPR. This manufacturer markup scenario represents the upper bound to industry profitability under new and amended energy conservation standards and is the manufacturer markup scenario that is used in all consumer analyses (*e.g.,* LCC, NIA).

Under the preservation of operating profit scenario, DOE modeled a situation in which manufacturers are not able to increase per-unit operating profit in proportion to increases in manufacturer production costs. Under this scenario, as the MPCs increase, manufacturers reduce their margins (on a percentage basis) to a level that maintains the no-new-standards case operating profit (in absolute dollars). The implicit assumption behind this scenario is that the industry can only maintain its operating profit in absolute dollars after compliance with new and amended standards. Therefore, operating profit in percentage terms is reduced between the no-new-standards case and the analyzed standards cases. DOE adjusted the margins in the GRIM at each TSL to yield approximately the same earnings before interest and taxes in the standards cases in the year after the first full year of compliance of the new and amended standards as in the no-new-standards case. This scenario represents the lower bound to industry profitability under new and amended energy conservation standards.

A comparison of industry financial impacts under the two markup scenarios is presented in section V.B.2.a of this document.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions in emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of CO_2, NO_X, SO_2, and Hg uses emissions intended to represent the marginal impacts of the change in electricity consumption associated with amended or new standards. The methodology is based on results published for the AEO, including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 12A in the final rule TSD. The analysis presented in this final rule uses projections from *AEO2023.* Power sector emissions of CH_4 and N_2O from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the Environmental Protection Agency (''EPA'').[81]

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive'' emissions (direct leakage to the atmosphere) of CH_4 and CO_2, are estimated based on the methodology described in chapter 12 of the final rule TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

[80] Based on feedback from manufacturers, DOE estimates that most LED lamp models are remodeled approximately every 2 to 3 years and it takes manufacturers approximately 6 months of engineering time to remodel one LED lamp model. DOE is therefore estimating that it would take manufacturers approximately 7 months (one additional month) to remodel a non-compliant LED lamp model into a compliant LED lamp model, due to the extra efficacy and any other requirement induced by DOE's standards.

[81] Available at: *www.epa.gov/sites/production/files/2021–04/documents/emission-factors_apr2021.pdf* (last accessed July 12, 2021).

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the AEO, which incorporates the projected impacts of existing air quality regulations on emissions. *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the emissions control programs discussed in the following paragraphs the emissions control programs discussed in the following paragraphs, and the Inflation Reduction Act.[82]

SO_2 emissions from affected electric generating units (''EGUs'') are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (''DC''). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these States to reduce certain emissions, including annual SO_2 emissions, and went into effect as of January 1, 2015.[83] The *AEO2023* incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, for states subject to SO_2 emissions limits under CSAPR, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by another regulated EGU.

However, beginning in 2016, SO_2 emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants.[84] 77 FR 9304 (Feb. 16, 2012). The final rule establishes power plant emission standards for mercury, acid gases, and non-mercury metallic toxic pollutants. Because of the emissions reductions under the MATS, it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation will generally reduce SO_2 emissions. DOE estimated SO_2 emissions reduction using emissions factors based on *AEO2023.*

CSAPR also established limits on NO_X emissions for numerous States in the eastern half of the United States. Energy conservation standards would have little effect on NO_X emissions in those States covered by CSAPR emissions limits if excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other EGUs. In such case, NO_X emissions would remain near the limit even if electricity generation goes down. Depending on the configuration of the power sector in the different regions and the need for allowances, however, NO_X emissions might not remain at the limit in the case of lower electricity demand. That would mean that standards might reduce NO_X emissions in covered States. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce NO_X emissions in States covered by CSAPR. Standards would be expected to reduce NO_X emissions in the States not covered by CSAPR. DOE used *AEO2023* data to derive NO_X emissions factors for the group of States not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2023,* which incorporates the MATS.

L. Monetizing Emissions Impacts

As part of the development of this final rule, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this final rule.

To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of CO_2, CH_4, and N_2O by using a measure of the SC of each pollutant (*e.g.,* SC–CO_2). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive orders, and DOE would reach the same conclusion presented in this rulemaking in the absence of the social cost of greenhouse gases. That is, the social costs of greenhouse gases, whether measured using the February 2021 interim estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases or by another means, did not affect the rule ultimately adopted by DOE.

DOE estimated the global social benefits of CO_2, CH_4, and N_2O reductions using SC–GHG values that were based on the interim values presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim*

[82] For further information, see the Assumptions to *AEO2023* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at: *www.eia.gov/outlooks/aeo/assumptions/* (last accessed August 21, 2023).

[83] CSAPR requires states to address annual emissions of SO_2 and NO_X, precursors to the formation of fine particulate matter (''$PM_{2.5}$'') pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain states to address the ozone season (May-September) emissions of NO_X, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five states in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule), and EPA issued the CSAPR Update for the 2008 ozone NAAQS. 81 FR 74504 (Oct. 26, 2016).

[84] In order to continue operating, coal power plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions.

Estimates under Executive Order 13990, published in February 2021 by the IWG (''February 2021 SC–GHG TSD''). The SC–GHG is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, the SC–GHG includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHG therefore, reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHG is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2, N_2O and CH4 emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG until revised estimates have been developed reflecting the latest, peer-reviewed science. DOE continues to evaluate recent developments in the scientific literature, including the updated SC–GHG estimates published by the EPA in December 2023 within their rulemaking on oil and natural gas sector sources.[85] For this rulemaking, DOE used these updated SC–GHG values to conduct a sensitivity analysis of the value of GHG emissions reductions associated with alternative standards for GSLs (see section IV.L.1.c of this document).

The SC–GHG estimates presented here were developed over many years, using peer-reviewed methodologies, transparent process, the best science available at the time of that process, and with input from the public. Specifically, in 2009, the IWG, that included the DOE and other executive branch agencies and offices was established to ensure that agencies were using the best available science and to promote consistency in the social cost of carbon ($SC–CO_2$) values used across agencies. The IWG published $SC–CO_2$ estimates in 2010 that were developed from an ensemble of three widely cited integrated assessment models (IAMs) that estimate global climate damages using highly aggregated representations of climate processes and the global economy combined into a single modeling framework. The three IAMs were run using a common set of input assumptions in each model for future population, economic, and CO_2 emissions growth, as well as equilibrium climate sensitivity—a measure of the globally averaged temperature response to increased atmospheric CO_2 concentrations. These estimates were updated in 2013 based on new versions of each IAM. In August 2016 the IWG published estimates of the social cost of methane ($SC–CH_4$) and nitrous oxide ($SC–N_2O$) using methodologies that are consistent with the methodology underlying the $SC–CO_2$ estimates. The modeling approach that extends the IWG $SC–CO_2$ methodology to non-CO_2 GHGs has undergone multiple stages of peer review. The $SC–CH_4$ and $SC–N_2O$ estimates were developed by Marten *et al.*[86] and underwent a standard double-blind peer review process prior to journal publication. In 2015, as part of the response to public comments received to a 2013 solicitation for comments on the $SC–CO_2$ estimates, the IWG announced a National Academies of Sciences, Engineering, and Medicine review of the $SC–CO_2$ estimates to offer advice on how to approach future updates to ensure that the estimates continue to reflect the best available science and methodologies. In January 2017, the National Academies released their final report, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide, and recommended specific criteria for future updates to the $SC–CO_2$ estimates, a modeling framework to satisfy the specified criteria, and both near-term updates and longer-term research needs pertaining to various components of the estimation process.[87] Shortly thereafter, in March 2017, President Trump issued Executive Order 13783, which disbanded the IWG, withdrew the previous TSDs, and directed agencies to ensure $SC–CO_2$ estimates used in regulatory analyses are consistent with the guidance contained in OMB's Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, section 5(c)). Benefit-cost analyses following E.O. 13783 used SC–GHG estimates that attempted to focus on the U.S.-specific share of climate change damages as estimated by the models and were calculated using two discount rates recommended by Circular A–4, 3 percent and 7 percent. All other methodological decisions and model versions used in SC–GHG calculations remained the same as those used by the IWG in 2010 and 2013, respectively.

On January 20, 2021, President Biden issued Executive Order 13990, which re-established the IWG and directed it to ensure that the U.S. Government's estimates of the social cost of carbon and other greenhouse gases reflect the best available science and the recommendations in the National Academies 2017 report. The IWG was tasked with first reviewing the SC–GHG estimates currently used in Federal analyses and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including by taking global damages into account. The interim SC–GHG estimates published in February 2021 are used here to estimate the climate benefits for this rulemaking. The E.O. instructs the IWG to undertake a fuller update of the SC–GHG estimates that takes into consideration the advice in the National Academies 2017 report and other recent scientific literature. The February 2021 SC–GHG TSD provides a complete discussion of the IWG's initial review conducted under E.O.13990. In particular, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways.

First, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to fully capture many climate impacts that affect the welfare of U.S. citizens and residents, and those impacts are better reflected by global measures of the SC–GHG. Examples of omitted effects from the E.O. 13783 estimates include direct effects on U.S. citizens, assets, and investments located abroad, supply chains, U.S. military assets and interests abroad, and tourism, and spillover pathways such as economic and political destabilization and global migration that can lead to adverse impacts on U.S. national security, public health, and humanitarian concerns. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation

[85] U.S. EPA. (2023). Supplementary Material for the Regulatory Impact Analysis for the Final Rulemaking, ''Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review'': EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances. Washington, DC: U.S. EPA. *www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/epas-final-rule-oil-and-natural-gas.*

[86] Marten, A.L., E.A. Kopits, C.W. Griffiths, S.C. Newbold, and A. Wolverton. Incremental CH_4 and N_2O mitigation benefits consistent with the US Government's $SC–CO_2$ estimates. *Climate Policy.* 2015. 15(2): pp. 272–298.

[87] National Academies of Sciences, Engineering, and Medicine. Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide. 2017. The National Academies Press: Washington, DC. Available at *nap.nationalacademies.org/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of.*

activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents. A wide range of scientific and economic experts have emphasized the issue of reciprocity as support for considering global damages of GHG emissions. If the United States does not consider impacts on other countries, it is difficult to convince other countries to consider the impacts of their emissions on the United States. The only way to achieve an efficient allocation of resources for emissions reduction on a global basis—and so benefit the U.S. and its citizens—is for all countries to base their policies on global estimates of damages. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and, therefore, in this final rule DOE centers attention on a global measure of SC–GHG. This approach is the same as that taken in DOE regulatory analyses from 2012 through 2016. A robust estimate of climate damages that accrue only to U.S. citizens and residents does not currently exist in the literature. As explained in the February 2021 SC–GHG TSD, existing estimates are both incomplete and an underestimate of total damages that accrue to the citizens and residents of the U.S. because they do not fully capture the regional interactions and spillovers previously discussed, nor do they include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. As noted in the February 2021 SC–GHG TSD, the IWG will continue to review developments in the literature, including more robust methodologies for estimating a U.S.-specific SC–GHG value, and explore ways to better inform the public of the full range of carbon impacts. As a member of the IWG, DOE will continue to follow developments in the literature pertaining to this issue.

Second, the IWG found that the use of the social rate of return on capital (estimated to be 7 percent under OMB's 2003 Circular A–4 guidance) to discount the future benefits of reducing GHG emissions inappropriately underestimates the impacts of climate change for the purposes of estimating the SC–GHG. Consistent with the findings of the National Academies and the economic literature, the IWG continued to conclude that the consumption rate of interest is the theoretically appropriate discount rate in an intergenerational context,[88] and recommended that discount rate uncertainty and relevant aspects of intergenerational ethical considerations be accounted for in selecting future discount rates.

Furthermore, the damage estimates developed for use in the SC–GHG are estimated in consumption-equivalent terms, and so an application of OMB Circular A–4's guidance for regulatory analysis would then use the consumption discount rate to calculate the SC–GHG. DOE agrees with this assessment and will continue to follow developments in the literature pertaining to this issue. DOE also notes that while OMB's 2003 Circular A–4 recommends using 3% and 7% discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and consumption benefits . . . at a lower rate than for intragenerational analysis.'' In the 2015 Response to Comments on the Social Cost of Carbon for Regulatory Impact Analysis, OMB, DOE, and the other IWG members recognized that ''Circular A–4 is a living document'' and ''the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A–4 itself.'' Thus, DOE concludes that a 7% discount rate is not appropriate to apply to value the social cost of greenhouse gases in the analysis presented in this analysis.

To calculate the present and annualized values of climate benefits, DOE uses the same discount rate as the rate used to discount the value of damages from future GHG emissions, for internal consistency. That approach to discounting follows the same approach that the February 2021 SC–GHG TSD recommends ''to ensure internal consistency—*i.e.,* future damages from climate change using the SC–GHG at 2.5 percent should be discounted to the base year of the analysis using the same 2.5 percent rate.'' DOE has also consulted the National Academies' 2017 recommendations on how SC–GHG estimates can ''be combined in RIAs with other cost and benefits estimates that may use different discount rates.'' The National Academies reviewed several options, including ''presenting all discount rate combinations of other costs and benefits with [SC–GHG] estimates.''

As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with the above assessment and will continue to follow developments in the literature pertaining to this issue. While the IWG works to assess how best to incorporate the latest, peer reviewed science to develop an updated set of SC–GHG estimates, it set the interim estimates to be the most recent estimates developed by the IWG prior to the group being disbanded in 2017. The estimates rely on the same models and harmonized inputs and are calculated using a range of discount rates. As explained in the February 2021 SC–GHG TSD, the IWG has recommended that agencies revert to the same set of four values drawn from the SC–GHG distributions based on three discount rates as were used in regulatory analyses between 2010 and 2016 and were subject to public comment. For each discount rate, the IWG combined the distributions across models and socioeconomic emissions scenarios (applying equal weight to each) and then selected a set of four values recommended for use in benefit-cost analyses: an average value resulting from the model runs for each of three discount rates (2.5 percent, 3 percent, and 5 percent), plus a fourth value, selected as the 95th percentile of estimates based on a 3 percent discount rate. The fourth value was included to provide information on potentially higher-than-expected economic impacts

[88] Interagency Working Group on Social Cost of Carbon. Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866. 2010. United States Government. Available at *www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Carbon. Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. 2013. Available at *www.federalregister.gov/documents/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis-Under Executive Order 12866. August 2016. Available at *www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf* (last accessed Jan. 18, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. Available at: *www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf* (last accessed January 18, 2022).

from climate change. As explained in the February 2021 SC–GHG TSD, and DOE agrees, this update reflects the immediate need to have an operational SC–GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process. Those estimates were subject to public comment in the context of dozens of proposed rulemakings as well as in a dedicated public comment period in 2013.

IPI commented that even though the proposed rule's costs would exceed its benefits without considering climate effects, DOE appropriately applies the social cost estimates developed by the Interagency Working Group on the Social Cost of Greenhouse Gases to its analysis of climate benefits. IPI commented that DOE should consider applying sensitivity analysis using EPA's draft climate-damage estimates released in November 2022, as EPA's work faithfully implements the roadmap laid out in 2017 by the National Academies of Sciences and applies recent advances in the science and economics on the costs of climate change. (IPI, No. 175 at pp. 1–3)

DOE typically does not conduct analyses using draft inputs that are still under review. DOE notes that because the EPA's draft estimates are considerably higher than the IWG's interim SC–GHG values applied for this final rule, an analysis that used the draft values would result in significantly greater climate-related benefits. However, such results would not affect DOE's decision in this final rule.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[89] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the integrated assessment models, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–CO_2 estimates. However, as discussed in the February 2021 SC–GHG TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this final rule likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

DOE's derivations of the SC–CO_2, SC–N_2O, and SC–CH_4 values used for this NOPR are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section V.B.6 of this document.

a. Social Cost of Carbon

The SC–CO_2 values used for this final rule were based on the values developed for the IWG's February 2021 TSD, which are shown in table IV.20 in five-year increments from 2020 to 2050. The set of annual values that DOE used, which was adapted from estimates published by EPA,[90] is presented in appendix 13A of the final rule TSD. These estimates are based on methods, assumptions, and parameters identical to the estimates published by the IWG (which were based on EPA modeling), and include values for 2051 to 2070. DOE expects additional climate benefits to accrue for products still operating after 2070, but a lack of available SC–CO_2 estimates for emissions years beyond 2070 prevents DOE from monetizing these potential benefits in this analysis.

Table IV.20. Annual SC-CO_2 Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton CO_2)

Year	Discount Rate and Statistic			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
2020	14	51	76	152
2025	17	56	83	169
2030	19	62	89	187
2035	22	67	96	206
2040	25	73	103	225
2045	28	79	110	242
2050	32	85	116	260

[89] Interagency Working Group on Social Cost of Greenhouse Gases. 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at *www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/.*

[90] See EPA, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, Washington, DC, December 2021. Available at *nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf* (last accessed Feb. 21, 2023).

NYSERDA commented that the assumption used by DOE in the NOPR regarding SC–CO_2 based on current Federal guidance is significantly lower than that established by the New York Department of Environmental Conservation, and DOE may be underestimating the climate benefits from this proposed standard. (NYSERDA, No. 166 at p. 3)

The IWG is preparing new SC–GHG values that reflect the current state of science related to climate change and its impacts. Until such values have been finalized, DOE continues to use the interim values in the February 2021 TSD. DOE agrees that the climate benefits from the proposed standard may be underestimated in the NOPR, but such underestimation has no bearing on DOE's decision in the NOPR or in this final rule.

DOE multiplied the CO_2 emissions reduction estimated for each year by the SC–CO_2 value for that year in each of the four cases. DOE adjusted the values to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–CO_2 values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–CH_4 and SC–N_2O values used for this final rule were based on the values developed for the February 2021 SC–GHG TSD. Table IV.21 shows the updated sets of SC–CH_4 and SC–N_2O estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in Appendix 13–A of the final rule TSD. To capture the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–CH_4 and SC–N_2O values, as recommended by the IWG. DOE derived values after 2050 using the approach described above for the SC–CO_2.

Table IV.21. Annual SC-CH_4 and SC-N_2O Values from 2021 Interagency Update, 2020–2050 (2020$ per Metric Ton)

Year	SC-CH_4				SC-N_2O			
	Discount Rate and Statistic				Discount Rate and Statistic			
	5%	3%	2.5%	3%	5%	3%	2.5 %	3%
	Average	Average	Average	95th percentile	Average	Average	Average	95th percentile
2020	670	1500	2000	3900	5800	18000	27000	48000
2025	800	1700	2200	4500	6800	21000	30000	54000
2030	940	2000	2500	5200	7800	23000	33000	60000
2035	1100	2200	2800	6000	9000	25000	36000	67000
2040	1300	2500	3100	6700	10000	28000	39000	74000
2045	1500	2800	3500	7500	12000	30000	42000	81000
2050	1700	3100	3800	8200	13000	33000	45000	88000

DOE multiplied the CH_4 and N_2O emissions reduction estimated for each year by the SC–CH_4 and SC–N_2O estimates for that year in each of the cases. DOE adjusted the values to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–CH_4 and SC–N_2O estimates in each case.

c. Sensitivity Analysis Using EPA's New SC–GHG Estimates

In the regulatory impact analysis of EPA's December 2023 Final Rulemaking, ''Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,'' EPA estimated climate benefits using a new set of Social Cost of Greenhouse Gas (SC–GHG) estimates. These estimates incorporate recent research addressing recommendations of the National Academies (2017), responses to public comments on an earlier sensitivity analysis using draft SC–GHG estimates, and comments from a 2023 external peer review of the accompanying technical report.[91]

The full set of annual values is presented in appendix 13C of the direct final rule TSD. Although DOE continues

[91] For further information about the methodology used to develop these values, public comments, and information pertaining to the peer review, see *https://www.epa.gov/environmental-economics/scghg.*

to review EPA's estimates, for this rulemaking, DOE used these new SC–GHG values to conduct a sensitivity analysis of the value of GHG emissions reductions associated with alternative standards for GSLs. This sensitivity analysis provides an expanded range of potential climate benefits associated with amended standards. The final year of EPA's new estimates is 2080; therefore, DOE did not monetize the climate benefits of GHG emissions reductions occurring after 2080.

The results of the sensitivity analysis are presented in appendix 13C of the final rule TSD. The overall climate benefits are larger when using EPA's higher SC–GHG estimates, compared to the climate benefits using the more conservative IWG SC–GHG estimates. However, DOE's conclusion that the standards are economically justified remains the same regardless of which SC–GHG estimates are used.

2. Monetization of Other Emissions Impacts

For the final rule, DOE estimated the monetized value of NO_X and SO_2 emissions reductions from electricity generation using benefit per ton estimates for that sector from EPA's Benefits Mapping and Analysis Program.[92] DOE used EPA's values for $PM_{2.5}$-related benefits associated with NO_X and SO_2 and for ozone-related benefits associated with NO_X for 2025 and 2030, and 2040, calculated with discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 period; for years beyond 2040, the values are held constant. DOE combined the EPA regional benefit-per-ton estimates with regional information on electricity consumption and emissions from *AEO2023* to define weighted-average national values for NO_X and SO_2 (see appendix 13B of the final rule TSD).

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

M. Utility Impact Analysis

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO2023.* NEMS produces the AEO Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption, and emissions in the *AEO2023* Reference case and various side cases. Details of the methodology are provided in the appendices to chapter 14 of the final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity, and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

N. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting a standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (''BLS''). BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[93] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[94] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2029), where these uncertainties are reduced. For more

[92] U.S. Environmental Protection Agency. ''Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors.'' Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-directly-emitted-pm25-pm25-precursors-and-ozone-precursors.*

[93] See U.S. Department of Commerce—Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (''RIMS II'').* 1997. U.S. Government Printing Office: Washington, DC. Available at *www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed July 1, 2021).

[94] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User's Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

details on the employment impact analysis, see chapter 15 of the final rule TSD.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for GSLs. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for GSLs, and the standards levels that DOE is adopting in this final rule. Additional details regarding DOE's analyses are contained in the final rule TSD supporting this document.

A. Trial Standard Levels

In general, DOE typically evaluates potential new or amended standards for products and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the product classes, to the extent that there are such interactions, and price elasticity of consumer purchasing decisions that may change when different standard levels are set.

In the analysis conducted for this final rule, DOE analyzed the benefits and burdens of six TSLs for GSLs. DOE developed TSLs that combine efficiency levels for each analyzed product class. These TSLs were developed by combining specific efficiency levels for each of the GSL product classes analyzed by DOE. TSL 1 represents a modest increase in efficiency, with CFL technology retained as an option for product classes that include fluorescent lamps, including the Integrated Omnidirectional Short and Non-integrated Omnidirectional product classes. TSL 2 represents a moderate standard level that can only be met by LED options for all product classes. TSL 3 increases the stringency for the Integrated Omnidirectional Short, Integrated Omnidirectional Long and Integrated Directional product classes, and represents a significant increase in NES compared to TSLs 1 and 2. TSL 4 increases the standard level for the Integrated Omnidirectional Short product class, as well as the expected NES. TSL 5 represents the maximum NPV. TSL 6 represents max-tech. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the final rule TSD.

Table V.1 presents the TSLs and the corresponding efficiency levels that DOE has identified for potential amended energy conservation standards for GSLs.

Table V.1 Trial Standard Levels for General Service Lamps

TSL	Representative Product Class				
	Integrated Omnidirectional Short	Integrated Omnidirectional Long	Integrated Directional	Non-Integrated Omnidirectional	Non-Integrated Directional
1	EL 2	EL 1	EL 1	EL 1	EL 1
2	EL 3	EL 3	EL 3	EL 3	EL 1
3	EL 5	EL 5	EL 5	EL 3	EL 1
4	EL 6	EL 5	EL 5	EL 3	EL 1
5	EL 7	EL 5	EL 5	EL 3	EL 3
6	EL 7	EL 6	EL 5	EL 3	EL 3

DOE constructed the TSLs for this final rule to include ELs representative of ELs with similar characteristics (*i.e.,* using similar technologies and/or efficiencies, and having roughly comparable equipment availability) or representing significant increases in efficiency and energy savings. The use of representative ELs provided for greater distinction between the TSLs. While representative ELs were included in the TSLs, DOE considered all efficiency levels as part of its analysis.[95]

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on GSL consumers by looking at the effects that potential amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs), and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 7 of the final rule TSD provides detailed information on the LCC and PBP analyses.

Table V.2 through table V.11 show the LCC and PBP results for the TSLs considered for each product class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured based on the changes in the efficacy distribution under a standard relative to the efficacy distribution in the no-new-standards case in the first full year of compliance (*see* section IV.F.9 of this document). Because some consumers purchase products with higher efficiency than the minimum allowed under a standard in the no-new-standards case, the average savings can differ from the difference between the average LCC of the baseline product and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with efficiency at or above a given TSL are not affected. Consumers for whom the

[95] Efficiency levels that were analyzed for this final rule are discussed in section 0 of this document. Results by efficiency level are presented in TSD chapter 8.

LCC increases at a given TSL experience a net cost.

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Table V.2 Average LCC and PBP Results for Integrated Omnidirectional Short GSLs

Lamp Option	EL	Average Costs 2022$					Simple Payback years	Average Lifetime years
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost*	Residual Value	LCC		
Residential								
0	0	3.57	3.99	7.11	0.00	10.69	--	6.9
1	1	3.73	3.72	6.64	0.00	10.37	0.6	6.9
2	2	3.89	3.45	6.16	0.00	10.05	0.6	6.9
3	3	3.14	2.66	4.74	1.41	6.47	0.0	11.8
4	3	4.28	2.66	4.74	2.24	6.78	0.5	13.4
5	4	3.86	2.39	4.27	1.73	6.39	0.2	11.8
6	4	5.24	2.39	4.27	2.74	6.76	1.0	13.4
7	5	4.56	2.13	3.79	2.05	6.31	0.5	11.8
8	6	5.26	1.86	3.32	2.36	6.22	0.8	11.8
9	7	5.62	1.73	3.08	2.52	6.18	0.9	11.8
Commercial								
0	0	5.31	6.10	12.23	0.00	17.74	--	2.7
1	1	5.46	5.69	11.42	0.00	17.08	0.4	2.7
2	2	5.62	5.29	10.60	0.00	16.42	0.4	2.7
3	3	4.87	4.07	8.16	0.94	12.09	0.0	4.1
4	3	6.01	4.07	8.16	2.29	11.88	0.3	6.6
5	4	5.59	3.66	7.34	1.16	11.77	0.1	4.1
6	4	6.97	3.66	7.34	2.80	11.51	0.7	6.6
7	5	6.29	3.25	6.52	1.37	11.44	0.3	4.1
8	6	6.99	2.85	5.71	1.58	11.12	0.5	4.1
9	7	7.35	2.64	5.30	1.69	10.96	0.6	4.1

Note: The results for each lamp option represent the average value if all purchasers use products at that lamp option. The PBP is measured relative to the baseline (EL 0) product; therefore, the PBP is not defined for EL 0.

* Calculated over the LCC analysis period, which is the lifetime of the EL 0 lamp.

Table V.3 Average LCC Savings Relative to the No-New-Standards Case for Integrated Omnidirectional Short GSLs

TSL	EL	Average LCC Savings* 2022$	Percent of Consumers that Experience Net Cost
Residential Sector			
1	2	1.75	0.8%
2	3	2.48	1.2%
3	5	0.49	21.6%
4	6	0.53	23.2%
5 - 6	7	0.55	24.0%
Commercial Sector			
1	2	2.27	0.4%
2	3	2.87	0.6%
3	5	0.71	12.0%
4	6	0.86	11.1%
5 - 6	7	0.94	10.8%

* The savings represent the average LCC for affected consumers.

Table V.4 Average LCC and PBP Results for Integrated Omnidirectional Long GSLs

Lamp Option	EL	Average Costs 2022$					Simple Payback years	Average Lifetime years
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost*	Residual Value	LCC		
Residential								
0	0	8.70	2.37	22.82	0.00	31.52	--	17.5
1	1	9.71	2.21	21.30	0.00	31.01	6.4	17.5
2	2	11.06	1.98	19.02	0.00	30.08	6.0	17.5
3	3	10.96	1.90	18.26	0.00	29.22	4.8	17.5
4	4	11.91	1.82	17.50	0.00	29.40	5.8	17.5
5	5	12.55	1.66	15.97	0.00	28.52	5.4	17.5
6	6	14.07	1.46	14.00	0.00	28.06	5.8	17.5
Commercial								
0	0	10.43	4.27	33.07	0.00	43.50	--	13.7
1	1	11.44	3.99	30.86	0.00	42.31	3.6	13.7
2	2	12.80	3.56	27.56	0.00	40.35	3.3	13.7
3	3	12.69	3.42	26.45	0.00	39.15	2.6	13.7
4	4	13.64	3.27	25.35	0.00	38.99	3.2	13.7
5	5	14.28	2.99	23.15	0.00	37.43	3.0	13.7
6	6	15.80	2.62	20.28	0.00	36.08	3.3	13.7

Note: The results for each lamp option represent the average value if all purchasers use products at that lamp option. The PBP is measured relative to the baseline (EL 0) product; therefore, the PBP is not defined for EL 0.

* Calculated over the LCC analysis period, which is the lifetime of the EL 0 lamp.

Table V.5 Average LCC Savings Relative to the No-New-Standards Case for Integrated Omnidirectional Long GSLs

TSL	EL	Average LCC Savings* 2022$	Percent of Consumers that Experience Net Cost
Residential Sector			
1	1	0.61	21.7%
2	3	1.07	39.4%
3 - 5	5	1.61	42.7%
6	6	1.88	44.2%
Commercial Sector			
1	1	1.27	3.8%
2	3	2.11	5.2%
3 - 5	5	3.36	2.6%
6	6	4.16	2.9%

* The savings represent the average LCC for affected consumers.

Table V.6 Average LCC and PBP Results for Integrated Directional GSLs

Lamp Option	EL	Average Costs 2022$					Simple Payback years	Average Lifetime years
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost*	Residual Value	LCC		
Residential								
0	0	18.93	6.38	12.06	0.00	30.98	--	7.2
1	1	12.43	4.72	8.91	6.28	15.06	0.0	13.5
2	2	11.51	4.44	8.39	5.82	14.08	0.0	13.5
3	3	10.62	4.16	7.86	5.37	13.11	0.0	13.5
4	4	9.60	3.89	7.34	4.85	12.09	0.0	13.5
5	5	7.85	3.47	6.55	3.97	10.43	0.0	13.5
Commercial								
0	0	20.66	9.27	18.92	0.00	39.79	--	2.8
1	1	14.16	6.85	13.98	6.63	21.52	0.0	6.7
2	2	13.24	6.45	13.16	6.14	20.27	0.0	6.7
3	3	12.35	6.04	12.34	5.66	19.03	0.0	6.7
4	4	11.33	5.64	11.51	5.12	17.73	0.0	6.7
5	5	9.58	5.04	10.28	4.19	15.68	0.0	6.7

Note: The results for each lamp option represent the average value if all purchasers use products at that lamp option. The PBP is measured relative to the baseline (EL 0) product; therefore, the PBP is not defined for EL 0.

* Calculated over the LCC analysis period, which is the lifetime of the EL 0 lamp.

Table V.7 Average LCC Savings Relative to the No-New-Standards Case for Integrated Directional GSLs

TSL	EL	Average LCC Savings* 2022$	Percent of Consumers that Experience Net Cost
Residential Sector			
1	1	9.88	0.0%
2	3	1.66	0.0%
3 - 6	5	3.17	0.0%
Commercial Sector			
1	1	9.75	0.0%
2	3	2.02	0.0%
3 - 6	5	3.89	0.0%

* The savings represent the average LCC for affected consumers.

Table V.8 Average LCC and PBP Results for Non-integrated Omnidirectional GSLs

Lamp Option	EL	Average Costs 2022$					Simple Payback years	Average Lifetime years
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost*	Residual Value	LCC		
Commercial								
0	0	7.67	10.33	21.44	0.00	29.32	--	2.9
1	1	10.73	10.33	21.44	0.00	32.38	Never	2.9
2	1	22.70	8.35	17.32	7.20	33.01	7.6	4.6
3	2	22.94	4.77	9.90	14.50	18.33	2.7	11.8
4	3	23.89	3.58	7.42	15.15	16.15	2.4	11.8

Note: The results for each lamp option represent the average value if all purchasers use products at that lamp option. The PBP is measured relative to the baseline (EL 0) product; therefore, the PBP is not defined for EL 0.

* Calculated over the LCC analysis period, which is the lifetime of the EL 0 lamp.

** A reported PBP of "Never" indicates that the increased purchase cost will never be recouped by operating cost savings.

Table V.9 Average LCC Savings Relative to the No-New-Standards Case for Non-integrated Omnidirectional GSLs

TSL	EL	Average LCC Savings* 2022$	Percent of Consumers that Experience Net Cost
Residential Sector			
1	1	4.80	10.4%
2 - 6	3	6.67	0.1%

* The savings represent the average LCC for affected consumers.

Table V.10 Average LCC and PBP Results for Non-integrated Directional GSLs

Lamp Option	EL	Average Costs 2022$					Simple Payback years	Average Lifetime years
		Installed Cost	First Year's Operating Cost	Lifetime Operating Cost*	Residual Value	LCC		
Residential								
0	0	9.35	2.24	13.01	0.00	22.36	--	13.5
1	1	10.31	1.96	11.38	0.00	21.70	3.4	13.5
2	2	11.15	1.82	10.57	0.00	21.72	4.3	13.5
3	3	11.95	1.68	9.76	0.00	21.71	4.6	13.5
Commercial								
0	0	11.09	3.25	14.47	0.00	25.56	--	6.7
1	1	12.04	2.85	12.66	0.00	24.71	2.4	6.7
2	2	12.89	2.64	11.76	0.00	24.65	3.0	6.7
3	3	13.69	2.44	10.86	0.00	24.54	3.2	6.7

Note: The results for each lamp option represent the average value if all purchasers use products at that lamp option. The PBP is measured relative to the baseline (EL 0) product; therefore, the PBP is not defined for EL 0.

* Calculated over the LCC analysis period, which is the lifetime of the EL 0 lamp.

Table V.11 Average LCC Savings Relative to the No-New-Standards Case for Non-integrated Directional GSLs

TSL	EL	Average LCC Savings* 2022$	Percent of Consumers that Experience Net Cost
Residential Sector			
1 - 4	1	0.36	23.6%
5 - 6	3	0.27	37.0%
Commercial Sector			
1 - 4	1	0.45	13.8%
5 - 6	3	0.45	26.4%

* The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on low-income households and small businesses. Table V.12 and table V.13 compare the average LCC savings and PBP at each efficiency level for the consumer subgroups with similar metrics for the entire consumer sample for GSLs. In most cases, the average LCC savings and PBP for low-income households and small businesses at the considered efficiency levels are not substantially different from the average for all consumers. Chapter 10 of the final rule TSD presents the complete LCC and PBP results for the subgroups.

Table V.12 Comparison of LCC Savings for Consumer Subgroups and All Consumers

TSL	Average LCC Savings* 2022$			
	Residential		Commercial	
	Low-Income Households	All Households	Small Businesses	All Businesses
Integrated Omnidirectional Short				
1	1.85	1.75	2.18	2.27
2	2.52	2.48	2.76	2.87
3	0.51	0.49	0.65	0.71
4	0.55	0.53	0.79	0.86
5 - 6	0.57	0.55	0.86	0.94
Integrated Omnidirectional Long				
1	N/A**	0.61	1.02	1.27
2		1.07	1.70	2.11
3 - 5		1.61	2.68	3.36
6		1.88	3.27	4.16
Integrated Directional				
1	6.78	9.88	9.57	9.75
2	1.56	1.66	2.01	2.02
3 - 6	3.02	3.17	3.86	3.89
Non-integrated Omnidirectional				
1	N/A		4.33	4.80
2 - 6			6.21	6.67
Non-integrated Directional				
1 - 4	0.31	0.36	0.35	0.45
5 - 6	0.21	0.27	0.29	0.45

* The savings represent the average LCC for affected consumers.

** Approximately 95% of Integrated Omnidirectional Long GSLs are shipped to the commercial sector. Moreover, for those low-income consumers who are renters (a subset of the residential consumer subgroup), DOE anticipates that the landlord, rather than the tenant, would typically purchase the lamps because Integrated Omnidirectional Long GSLs are not typical screw-in bulbs. For these reasons, DOE provides results for this product class ("PC") only for the commercial sector.

Table V.13 Comparison of PBP for Consumer Subgroups and All Consumers

Lamp Option	Simple Payback Period* years			
	Residential		Commercial	
	Low-Income Households	All Households	Small Businesses	All Businesses
Integrated Omnidirectional Short				
1	0.6	0.6	0.4	0.4
2	0.6	0.6	0.4	0.4
3	0.0	0.0	0.0	0.0
4	0.5	0.5	0.4	0.3
5	0.2	0.2	0.1	0.1
6	1.0	1.0	0.7	0.7
7	0.5	0.5	0.4	0.3
8	0.8	0.8	0.5	0.5
9	0.9	0.9	0.6	0.6
Integrated Omnidirectional Long				
1	N/A**	6.4	3.6	3.6
2		6.0	3.4	3.3
3		4.8	2.7	2.6
4		5.8	3.3	3.2
5		5.4	3.0	3.0
6		5.8	3.3	3.3
Integrated Directional				
1	0.0	0.0	0.0	0.0
2	0.0	0.0	0.0	0.0
3	0.0	0.0	0.0	0.0
4	0.0	0.0	0.0	0.0
5	0.0	0.0	0.0	0.0
Non-integrated Omnidirectional				
1	N/A		Never	Never
2			7.7	7.6
3			2.8	2.7
4			2.4	2.4
Non-integrated Directional				
1	3.5	3.4	2.4	2.4
2	4.4	4.3	3.0	3.0
3	4.8	4.6	3.2	3.2

* A reported PBP of "Never" indicates that the increased purchase cost will never be recouped by operating cost savings.

** Approximately 95% of Integrated Omnidirectional Long GSLs are shipped to the commercial sector. Moreover, for those low-income consumers who are renters (a subset of the residential consumer subgroup), DOE anticipates that the landlord, rather than the tenant, would typically purchase the lamps because Integrated Omnidirectional Long GSLs are not typical screw-in bulbs. For these reasons, DOE provides results for this PC only for the commercial sector.

c. Rebuttable Presumption Payback

As discussed in section IV.F.11 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and as required by EPCA, based the energy use calculation on the DOE test procedures for GSLs. In contrast, the PBPs presented in section V.B.1.a of this document were calculated using

distributions that reflect the range of energy use in the field.

Table V.14 presents the rebuttable-presumption payback periods for the considered TSLs for GSLs. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

Table V.14 Rebuttable-Presumption Payback Periods

Lamp Option	Rebuttable PBP* years				
	Integrated Omnidirectional Short	Integrated Omnidirectional Long	Integrated Directional	Non-Integrated Omnidirectional	Non-Integrated Directional
Residential					
1	0.6	6.4	0.0		3.3
2	0.6	6.0	0.0		4.2
3	0.0	4.8	0.0		4.5
4	0.5	5.8	0.0		
5	0.2	5.4	0.0		
6	1.0	5.8			
7	0.5				
8	0.8				
9	0.9				
Commercial					
1	0.3	3.2	0.0	Never	2.1
2	0.3	3.0	0.0	6.8	2.6
3	0.0	2.4	0.0	2.5	2.9
4	0.3	2.9	0.0	2.2	
5	0.1	2.7	0.0		
6	0.6	2.9			
7	0.3				
8	0.5				
9	0.5				

* A reported PBP of "Never" indicates that the increased purchase cost will never be recouped by operating cost savings.

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new and amended energy conservation standards on manufacturers of GSLs. The next section describes the expected impacts on manufacturers at each considered TSL. Chapter 11 of the final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from a standard. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential new and amended energy conservation standards on manufacturers of GSLs, as well as the conversion costs that DOE estimates manufacturers of GSLs would incur at each TSL. To evaluate the range

of cash flow impacts on the GSL industry, DOE modeled two manufacturer markup scenarios using different assumptions that correspond to the range of anticipated market responses to new and amended energy conservation standards: (1) the preservation of gross margin scenario and (2) the preservation of operating profit scenario, as previously described in section IV.J.2.d of this document.

Each of the modeled scenarios results in a unique set of cash flows and corresponding industry values at each TSL for GSL manufacturers. In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and each standards case (*i.e.,* TSLs) resulting from the sum of discounted cash flows from 2024 through 2058. To provide perspective on the short-run cash flow impact, DOE includes in the discussion of results a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before new and amended standards are required.

DOE presents the range in INPV for GSL manufacturers in table V.15 and table V.16. DOE presents the impacts to industry cash flows and the conversion costs in table V.17.

Table V.15 Industry Net Present Value for General Service Lamps - Preservation of Gross Margin Scenario

	Units	No-New-Standards Case	Trial Standard Level*					
			1	2	3	4	5	6
INPV	*2022$ millions*	2,108	2,053	1,941	1,946	1,955	1,951	1,950
Change in INPV	*2022$ millions*	-	(54)	(166)	(159)	(149)	(154)	(155)
	%	-	(2.6)	(7.9)	(7.5)	(7.1)	(7.3)	(7.3)

* Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.

Table V.16 Industry Net Present Value for General Service Lamps - Preservation of Operating Profit Scenario

	Units	No-New-Standards Case	Trial Standard Level*					
			1	2	3	4	5	6
INPV	*2022$ millions*	2,108	2,047	1,947	1,904	1,886	1,789	1,783
Change in INPV	*2022$ millions*	-	(60)	(159)	(200)	(219)	(316)	(322)
	%	-	(2.8)	(7.6)	(9.5)	(10.4)	(15.0)	(15.3)

* Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.

Table V.17 Cash Flow Analysis for General Service Lamp Manufacturers

	Units	No-New-Standards Case	Trial Standard Level*					
			1	2	3	4	5	6
Free Cash Flow (2028)	*2022$ millions*	119	88	37	(16)	(33)	(47)	(49)
Change in Free Cash Flow (2028)	*2022$ millions*	-	(31)	(83)	(135)	(152)	(166)	(168)
	%	-	(26)	(69)	(113)	(127)	(140)	(141)
Product Conversion Costs	*2022$ millions*	-	87	233	356	394	426	430

* Numbers in parentheses indicate a negative number. Some numbers may not sum exactly due to rounding.

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At TSL 6, DOE estimates the change in INPV will range from −$322 million to −$155 million, which represents a change in INPV of −15.3 percent to −7.3 percent, respectively. At TSL 6, industry free cash flow decreases to −$49 million, which represents a decrease of approximately 141 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 6 sets the efficacy level at EL 7 for the Integrated Omnidirectional Short product class, which is max-tech; at EL 6 for the Integrated Omnidirectional Long product class, which is max-tech; at EL 5 for the Integrated Directional product class, which is max-tech; and at EL 3 for the Non-Integrated Omnidirectional Short and Non-Integrated Directional product classes, which is max-tech for those product classes. DOE estimates that

approximately 17 percent of the Integrated Omnidirectional Short product class shipments; approximately 14 percent of the Integrated Omnidirectional Long product class shipments; approximately 35 percent of the Integrated Directional product class shipments; approximately 54 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 26 percent of the Non-Integrated Directional product class shipments will meet the ELs required at TSL 6 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 6. At TSL 6, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $430 million in product conversion costs as most LED lamps may need to be re-modeled to meet ELs required at TSL 6. DOE does not estimate any conversion costs for CFL models as GSL manufacturers are expected to discontinue all CFLs for any standard level beyond TSL 1.

At TSL 6, the shipment weighted-average MPC increases moderately by approximately 12.9 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this increase in MPC causes an increase in manufacturer free cash flow. However, the $430 million in conversion costs estimated at TSL 6, ultimately results in a moderately negative change in INPV at TSL 6 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the moderate increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup of 1.53 (compared to the 1.55 manufacturer markup used in the no-new-standards case). This slightly lower average manufacturer markup and the $430 million in conversion costs result in a moderately negative change in INPV at TSL 6 under the preservation of operating profit scenario.

At TSL 5, DOE estimates the change in INPV will range from −$316 million to −$154 million, which represents a change in INPV of −15.0 percent to −7.3 percent, respectively. At TSL 5, industry free cash flow decreases to −$47 million, which represents a decrease of approximately 140 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 5 sets the efficacy level at EL 7 for the Integrated Omnidirectional Short product class, which is max-tech; at EL 5 for the Integrated Omnidirectional Long product class; at EL 5 for the Integrated Directional product class, which is max-tech; and at EL 3 for the Non-Integrated Omnidirectional Short and Non-Integrated Directional product classes, which is max-tech for those product classes. DOE estimates that approximately 17 percent of the Integrated Omnidirectional Short product class shipments; approximately 28 percent of the Integrated Omnidirectional Long product class shipments; approximately 35 percent of the Integrated Directional product class shipments; approximately 54 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 26 percent of the Non-Integrated Directional product class shipments will meet or exceed the ELs required at TSL 5 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 5. At TSL 5, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $426 million in product conversion costs as most LED lamps may need to be re-modeled to meet ELs required at TSL 5. DOE does not estimate any conversion costs for CFL models as GSL manufacturers are expected to discontinue all CFLs for any standard level beyond TSL 1.

At TSL 5, the shipment weighted-average MPC increases moderately by approximately 12.8 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this increase in MPC causes an increase in manufacturer free cash flow. However, the $429 million in conversion costs estimated at TSL 5, ultimately results in a moderately negative change in INPV at TSL 5 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the moderate increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup of 1.53 (compared to the 1.55 manufacturer markup used in the no-new-standards case). This slightly lower average manufacturer markup and the $429 million in conversion costs result in a moderately negative change in INPV at TSL 5 under the preservation of operating profit scenario.

At TSL 4, DOE estimates the change in INPV will range from −$219 million to −$149 million, which represents a change in INPV of −10.4 percent to −7.1 percent, respectively. At TSL 4, industry free cash flow decreases to −$33 million, which represents a decrease of approximately 127 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 4 sets the efficacy level at EL 6 for the Integrated Omnidirectional Short product class; at EL 5 for the Integrated Omnidirectional Long product class; at EL 5 for the Integrated Directional product class, which is max-tech; at EL 3 for the Non-Integrated Omnidirectional Short product class, which is max-tech; and at EL 1 for the Non-Integrated Directional product class. DOE estimates that approximately 31 percent of the Integrated Omnidirectional Short product class shipments; approximately 28 percent of the Integrated Omnidirectional Long product class shipments; approximately 35 percent of the Integrated Directional product class shipments; approximately 54 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 74 percent of the Non-Integrated Directional product class shipments will meet or exceed the ELs required at TSL 4 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 4. At TSL 4, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $394 million in product conversion costs as many LED lamps may need to be re-modeled to meet ELs required at TSL 4. DOE does not estimate any conversion costs for CFL models as GSL manufacturers are expected to discontinue all CFLs for any standard level beyond TSL 1.

At TSL 4, the shipment weighted-average MPC increases moderately by approximately 10.4 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this increase in MPC causes an increase

in manufacturer free cash flow. However, the $394 million in conversion costs estimated at TSL 4, ultimately results in a moderately negative change in INPV at TSL 4 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the moderate increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup of 1.54 (compared to the 1.55 manufacturer markup used in the no-new-standards case). This slightly lower average manufacturer markup and the $394 million in conversion costs result in a moderately negative change in INPV at TSL 4 under the preservation of operating profit scenario.

At TSL 3, DOE estimates the change in INPV will range from −$200 million to −$159 million, which represents a change in INPV of −9.5 percent to −7.5 percent, respectively. At TSL 3, industry free cash flow decreases to −$16 million, which represents a decrease of approximately 113 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 3 sets the efficacy level at EL 5 for the Integrated Omnidirectional Short product class; at EL 5 for the Integrated Omnidirectional Long product class; at EL 5 for the Integrated Directional product class, which is max-tech; at EL 3 for the Non-Integrated Omnidirectional Short product class, which is max-tech; and at EL 1 for the Non-Integrated Directional product class. DOE estimates that approximately 45 percent of the Integrated Omnidirectional Short product class shipments; approximately 28 percent of the Integrated Omnidirectional Long product class shipments; approximately 35 percent of the Integrated Directional product class shipments; approximately 54 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 74 percent of the Non-Integrated Directional product class shipments will meet or exceed the ELs required at TSL 3 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 3. At TSL 3, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $356 million in product conversion costs as many LED lamps may need to be re-modeled to meet ELs required at TSL 3. DOE does not estimate any conversion costs for CFL models as GSL manufacturers are expected to discontinue all CFLs for any standard level beyond TSL 1.

At TSL 3, the shipment weighted-average MPC increases by approximately 6.7 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this increase in MPC causes an increase in manufacturer free cash flow. However, the $356 million in conversion costs estimated at TSL 3, ultimately results in a moderately negative change in INPV at TSL 3 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup. This slightly lower average manufacturer markup and the $356 million in conversion costs result in a moderately negative change in INPV at TSL 3 under the preservation of operating profit scenario.

At TSL 2, DOE estimates the change in INPV will range from −$166 million to −$159 million, which represents a change in INPV of −7.9 percent to −7.6 percent, respectively. At TSL 2, industry free cash flow decreases to $37 million, which represents a decrease of approximately 69 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 2 sets the efficacy level at EL 3 for the Integrated Omnidirectional Short product class; at EL 3 for the Integrated Omnidirectional Long product class; at EL 3 for the Integrated Directional product class; at EL 3 for the Non-Integrated Omnidirectional Short product class, which is max-tech; and at EL 1 for the Non-Integrated Directional product class. DOE estimates that approximately 98 percent of the Integrated Omnidirectional Short product class shipments; approximately 57 percent of the Integrated Omnidirectional Long product class shipments; approximately 73 percent of the Integrated Directional product class shipments; approximately 54 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 74 percent of the Non-Integrated Directional product class shipments will meet or exceed the ELs required at TSL 2 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 2. At TSL 2, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $233 million in product conversion costs as some LED lamps may need to be re-modeled to meet ELs required at TSL 2. DOE does not estimate any conversion costs for CFL models as GSL manufacturers are expected to discontinue all CFLs for any standard level beyond TSL 1.

At TSL 2, the shipment weighted-average MPC slightly increases by approximately 0.2 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this slight increase in MPC causes a marginal increase in manufacturer free cash flow. However, the $233 million in conversion costs estimated at TSL 2, ultimately results in a moderately negative change in INPV at TSL 2 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the slight increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup. This slightly lower average manufacturer markup and the $233 million in conversion costs result in a moderately negative change in INPV at TSL 2 under the preservation of operating profit scenario.

At TSL 1, DOE estimates the change in INPV will range from −$60 million to −$54 million, which represents a change in INPV of −2.8 percent to −2.6 percent, respectively. At TSL 1, industry free cash flow decreases to $88 million, which represents a decrease of approximately 26 percent, compared to the no-new-standards case value of $119 million in 2028, the year before the first full year of compliance.

TSL 1 sets the efficacy level at EL 2 for the Integrated Omnidirectional Short product class; at EL 1 for the Integrated Omnidirectional Long product class; at EL 1 for the Integrated Directional product class; at EL 1 for the Non-Integrated Omnidirectional Short product class; and at EL 1 for the Non-Integrated Directional product class. DOE estimates that approximately 99 percent of the Integrated Omnidirectional Short product class shipments; approximately 86 percent of the Integrated Omnidirectional Long product class shipments; approximately 99 percent of the Integrated Directional

product class shipments; approximately 97 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 74 percent of the Non-Integrated Directional product class shipments will meet or exceed the ELs required at TSL 1 in 2029, the first full year of compliance of new and amended standards.

DOE does not expect manufacturers to incur any capital conversion costs at TSL 1. At TSL 1, additional LED lamp production capacity is not expected to be needed to meet the expected volume of LED lamp shipments, as GSL manufacturers are expected to produce more LED lamps for every product class in the years leading up to 2029 than in 2029, the first full year of compliance of new and amended standards. DOE estimates approximately $87 million in product conversion costs. Most, but not all, LED lamps would meet the ELs required at TSL 1, and therefore would not need to be re-modeled.

At TSL 1, the shipment weighted-average MPC slightly increases by approximately 0.9 percent relative to the no-new-standards case MPC. In the preservation of gross margin scenario, this slight increase in MPC causes a marginal increase in manufacturer free cash flow. However, the $87 million in conversion costs estimated at TSL 1, ultimately results in a slightly negative change in INPV at TSL 1 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the slight increase in the shipment weighted-average MPC results in a slightly lower average manufacturer markup. This slightly lower average manufacturer markup and the $87 million in conversion costs result in a slightly negative change in INPV at TSL 1 under the preservation of operating profit scenario.

b. Direct Impacts on Employment

Based on previous manufacturer interviews and public comments from GSL rulemaking documents previously published, DOE determined that there are no GSL manufacturers that manufacture CFLs in the United States, as all CFLs sold in the United States are manufactured abroad. Some of these CFL manufacturing facilities are owned by the GSL manufacturer and others outsource their CFL production to original equipment manufacturers located primarily in Asia. However, several GSL manufacturers that sell CFLs in the United States have domestic employees responsible for the R&D, marketing, sales, and distribution of CFLs.

In the January 2023 NOPR, DOE estimated that in the no-new-standards case there could be approximately 30 domestic employees dedicated to the non-production aspects of CFLs in 2029, the first full year of compliance for GSL standards. DOE estimates GSL manufacturers selling CFLs in the U.S. could reduce or eliminate up to 30 domestic non-production employees if CFLs are not able to meet the adopted new and amended standards. DOE predicts that CFLs would not be able to meet energy conservation standards set at TSL 2 or higher.

While most LED lamp manufacturing is done abroad, there is a limited number of LED lamps and LED lamp components covered by this rulemaking that are manufactured domestically. EEI recalled that domestic light bulb factories shut down due to Federal action around 2010–2011, and that with other products, manufacturers have moved production overseas to lower costs. EEI inquired whether the employment analysis accounted for the percentage of GSLs manufactured in the United States versus overseas. (EEI, Public Meeting Transcript, No. 27 at p. 119–121)

Additionally, DOE received comments from private citizens [96] that stated heavy regulation of lamps has forced many American-based factories to shut down, removing a number of jobs for American manufacturers. Commenters stated that DOE should be trying to keep these manufacturers in the United States instead of relying on subpar products from overseas.

DOE estimated that over 90 percent of GSLs sold in the United States are manufactured abroad. The previous lamp factory shutdowns referenced by the interested parties were specifically caused by changes in lighting technologies being manufactured. All GSL manufacturing that occurs domestically that is covered by this rulemaking uses LED technology. DOE assumes that all GSL manufacturers manufacturing LED lamps in the U.S. would continue to manufacture LED lamps in the U.S. after compliance with standards and therefore would not reduce or eliminate any domestic production or non-production employees involved in manufacturing or selling of LED lamps.

DOE did not estimate a potential increase in domestic production employment due to energy conservation standards, as existing domestic LED lamp manufacturing represents a small portion of LED lamp manufacturing overall and would not necessarily increase as LED lamp sales increase. Therefore, DOE estimates that GSL manufacturers could reduce or eliminate up to 30 domestic non-production employees (that are associated with the non-production of CFLs) for all TSLs higher than TSL 2 (*i.e.,* at TSLs 3–6).

c. Impacts on Manufacturing Capacity

Based on the final rule shipments analysis, the quantity of LED lamps sold for all product classes reaches approximately 566 million in 2024 and then declines to approximately 400 million by 2029, the first full year of compliance for GSL standards, in the no-new-standards case. This represents a decrease of approximately 30 percent from 2024 to 2029. Based on the final rule shipments analysis, while all TSLs project an increase in number of LED lamps sold in 2029 (in the standards cases) compared to the no-new standards case, the number of LED lamps sold in 2029 (for all TSLs), is smaller than the number of LED lamps sold in the years leading up to 2029. Therefore, DOE assumed that GSL manufacturers would be able to maintain their 2028 LED lamp production capacity in 2029 and manufactures would be able to meet the LED lamp production capacity for all TSLs in 2029.

DOE does not anticipate that manufacturing the same, or slightly fewer, quantity of LED lamps that are more efficacious would impact the production capacity for LED manufacturers.

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop an industry cash-flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche manufacturers, and manufacturers exhibiting a cost structure substantially different from the industry average could be affected disproportionately. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics. Consequently, DOE identified small business manufacturers as a subgroup for a separate impact analysis.

For the small business subgroup analysis, DOE applied the small business size standards published by the Small Business Administration (''SBA'') to determine whether a

[96] Comments submitted in response to the January 2023 NOPR, including comments from private citizens can be found in the docket of DOE's rulemaking to develop energy conservation standards for GSLs at *www.regulations.gov/docket/EERE-2022-BT-STD-0022/comments.*

company is considered a small business. The size standards are codified at 13 CFR part 121. To be categorized as a small business under North American Industry Classification System (''NAICS'') code 335139, ''electric lamp bulb and other lighting equipment manufacturing'' a GSL manufacturer and its affiliates may employ a maximum of 1,250 employees. The 1,250-employee threshold includes all employees in a business's parent company and any other subsidiaries. DOE identified more than 300 GSL manufacturers that qualify as small businesses.

The small business subgroup analysis is discussed in more detail in section VI.B and in chapter 11 of the final rule TSD.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

DOE evaluates product-specific regulations that will take effect approximately 3 years before or after the first full year of compliance (*i.e.,* 2029) of the new and amended energy conservation standards for GSLs. This information is presented in table V.18.

Table V.18 Compliance Dates and Expected Conversion Expenses of Federal Energy Conservation Standards Affecting General Service Lamp Manufacturers

Federal Energy Conservation Standard	Number of Mfrs.*	Number of Manufacturers Affected from this Rule**	Approx. Standards Year	Industry Conversion Costs (millions)	Industry Conversion Costs / Product Revenue***
Ceiling Fans 88 FR 40932 (Jun. 22, 2023)†	91	2	2028	107.2 (2022$)	1.9%

* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.

** This column presents the number of manufacturers producing GSLs that are also listed as manufacturers in the listed energy conservation standard contributing to cumulative regulatory burden.

*** This column presents industry conversion costs as a percentage of product revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of the final rule to the compliance year of the energy conservation standard. The conversion period typically ranges from 3 to 5 years, depending on the rulemaking.

† Indicates a NOPR publication. Values may change on publication of a final rule.

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential amended standards for GSLs, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the first full year of anticipated compliance with amended standards (2029–2058). Table V.19 presents DOE's projections of the national energy savings for each TSL considered for GSLs. The savings were calculated using the approach described in section IV.H of this document.

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Table V.19 Cumulative National Energy Savings for GSLs; 30 Years of Shipments (2029-2058)

	Product Class	Trial Standard Level					
		1	2	3	4	5	6
		quads					
Primary Energy Savings	Integrated Omnidirectional Short	0.098	0.140	2.405	2.944	3.206	3.206
	Integrated Omnidirectional Long	0.051	0.113	0.184	0.184	0.184	0.201
	Integrated Directional	0.004	0.235	0.493	0.493	0.493	0.493
	Non-integrated Omnidirectional	0.000	0.002	0.002	0.002	0.002	0.002
	Non-integrated Directional	0.010	0.010	0.010	0.010	0.020	0.020
	Total	0.162	0.500	3.092	3.632	3.905	3.921
FFC Energy Savings	Integrated Omnidirectional Short	0.100	0.144	2.470	3.024	3.293	3.293
	Integrated Omnidirectional Long	0.052	0.116	0.189	0.189	0.189	0.206
	Integrated Directional	0.004	0.241	0.506	0.506	0.506	0.506
	Non-integrated Omnidirectional	0.000	0.002	0.002	0.002	0.002	0.002
	Non-integrated Directional	0.010	0.010	0.010	0.010	0.021	0.021
	Total	0.167	0.513	3.176	3.730	4.010	4.027

OMB Circular A–4 [97] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[98] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to GSLs. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's

[97] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *obamawhitehouse.archives.gov/omb/circulars_a004_a-4* (last accessed Aug. 21, 2023).

[98] EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. (42 U.S.C. 6295(m)). While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in table V.20. The impacts are counted over the lifetime of GSLs purchased during the period 2029–2037.

Table V.20 Cumulative National Energy Savings for GSLs; 9 Years of Shipments (2029-2037)

	Product Class	Trial Standard Level					
		1	2	3	4	5	6
		quads					
Primary Energy Savings	Integrated Omnidirectional Short	0.029	0.041	0.768	0.948	1.044	1.044
	Integrated Omnidirectional Long	0.025	0.055	0.085	0.085	0.085	0.083
	Integrated Directional	0.001	0.063	0.141	0.141	0.141	0.141
	Non-integrated Omnidirectional	0.000	0.002	0.002	0.002	0.002	0.002
	Non-integrated Directional	0.004	0.004	0.004	0.004	0.008	0.008
	Total	0.059	0.165	1.000	1.180	1.280	1.278
FFC Energy Savings	Integrated Omnidirectional Short	0.029	0.042	0.789	0.974	1.073	1.073
	Integrated Omnidirectional Long	0.026	0.057	0.087	0.087	0.087	0.085
	Integrated Directional	0.001	0.065	0.145	0.145	0.145	0.145
	Non-integrated Omnidirectional	0.000	0.002	0.002	0.002	0.002	0.002
	Non-integrated Directional	0.004	0.004	0.004	0.004	0.008	0.008
	Total	0.060	0.170	1.027	1.212	1.315	1.313

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for GSLs. In accordance with OMB's guidelines on regulatory analysis,[99] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.21 shows the consumer NPV results with impacts counted over the lifetime of products purchased during the period 2029–2058.

[99] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *obamawhitehouse.archives.gov/omb/circulars_a004_a-4* (last accessed March 25, 2022).

Table V.21 Cumulative Net Present Value of Consumer Benefits for GSLs; 30 Years of Shipments (2029-2058)

Discount Rate	Product Class	Trial Standard Level					
		1	2	3	4	5	6
		Billion 2022$					
3 percent	Integrated Omnidirectional Short	0.80	1.17	12.74	15.31	16.59	16.59
	Integrated Omnidirectional Long	0.19	0.38	0.53	0.53	0.53	0.39
	Integrated Directional	0.06	2.37	5.09	5.09	5.09	5.09
	Non-integrated Omnidirectional	0.00	0.01	0.01	0.01	0.01	0.01
	Non-integrated Directional	0.04	0.04	0.04	0.04	0.07	0.07
	Total	1.09	3.96	18.41	20.99	22.29	22.16
7 percent	Integrated Omnidirectional Short	0.35	0.51	4.71	5.61	6.07	6.07
	Integrated Omnidirectional Long	0.08	0.15	0.18	0.18	0.18	0.06
	Integrated Directional	0.03	1.04	2.28	2.28	2.28	2.28
	Non-integrated Omnidirectional	0.00	0.01	0.01	0.01	0.01	0.01
	Non-integrated Directional	0.01	0.01	0.01	0.01	0.02	0.02
	Total	0.47	1.73	7.20	8.10	8.57	8.45

The NPV results based on the aforementioned 9-year analytical period are presented in table V.22. The impacts are counted over the lifetime of products purchased during the period 2029–2037. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

Table V.22 Cumulative Net Present Value of Consumer Benefits for GSLs; 9 Years of Shipments (2029-2037)

Discount Rate	Product Class	Trial Standard Level					
		1	2	3	4	5	6
		Billion 2022$					
3 percent	Integrated Omnidirectional Short	0.28	0.40	5.36	6.44	7.02	7.02
	Integrated Omnidirectional Long	0.11	0.20	0.26	0.26	0.26	0.13
	Integrated Directional	0.02	0.84	1.91	1.91	1.91	1.91
	Non-integrated Omnidirectional	0.00	0.01	0.01	0.01	0.01	0.01
	Non-integrated Directional	0.02	0.02	0.02	0.02	0.03	0.03
	Total	0.42	1.48	7.55	8.63	9.22	9.10
7 percent	Integrated Omnidirectional Short	0.16	0.23	2.64	3.13	3.39	3.39
	Integrated Omnidirectional Long	0.05	0.10	0.10	0.10	0.10	-0.01
	Integrated Directional	0.01	0.50	1.13	1.13	1.13	1.13
	Non-integrated Omnidirectional	0.00	0.01	0.01	0.01	0.01	0.01
	Non-integrated Directional	0.01	0.01	0.01	0.01	0.01	0.01
	Total	0.23	0.84	3.88	4.37	4.64	4.54

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The previous results reflect the use of a default trend to estimate the change in price for GSLs over the analysis period (*see* sections IV.G and IV.H of this document). As part of the NIA, DOE also analyzed high and low benefits scenarios that use inputs from variants of the *AEO2023* Reference case. For the high benefits scenario, DOE uses the *AEO2023* High Economic Growth scenario, which has a higher energy price trend relative to the Reference case, as well as a lower price learning rate. The lower learning rate in this scenario slows the adoption of more efficacious lamp options in the no-new-standards case, increasing the available energy savings attributable to a standard. For the low benefits scenario, DOE uses the *AEO2023* Low Economic Growth scenario, which has a lower energy price trend relative to the Reference case, as well as a higher price learning rate. The higher learning rate in this scenario accelerates the adoption of more efficacious lamp options in the no-new-standards case (relative to the Reference scenario) decreasing the available energy savings attributable to a standard. NIA results based on these cases are presented in appendix 9D of the final rule TSD.

c. Indirect Impacts on Employment

DOE estimates that amended energy conservation standards for GSLs will reduce energy expenditures for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later

years of the analysis. Therefore, DOE generated results for near-term timeframes (2029–2032), where these uncertainties are reduced.

The results suggest that the adopted standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 15 of the final rule TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section IV.C.1.b of this document, DOE has concluded that the standards adopted in this final rule will not lessen the utility or performance of the GSLs under consideration in this rulemaking. Manufacturers of these products currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from new or amended standards. As discussed in section III.F.1.e of this document, EPCA directs the Attorney General of the United States (''Attorney General'') to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. To assist the Attorney General in making this determination, DOE provided the Department of Justice (''DOJ'') with copies of the NOPR and the TSD for review. In its assessment letter responding to DOE, DOJ concluded that the proposed energy conservation standards for GSLs are unlikely to have a significant adverse impact on competition. DOE is publishing the Attorney General's assessment at the end of this final rule.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 14 in the final rule TSD presents the estimated impacts on electricity generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from potential energy conservation standards for GSLs is additionally expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V.23 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K of this document. DOE reports annual emissions reductions for each TSL in chapter 12 of the final rule TSD.

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Table V.23 Cumulative Emissions Reduction for GSLs Shipped During the Period 2029-2058

	Trial Standard Level					
	1	2	3	4	5	6
Power Sector Emissions						
CO_2 (million metric tons)	2.71	8.21	50.18	58.99	63.48	63.68
SO_2 (thousand tons)	0.90	2.76	17.08	20.11	21.65	21.70
NO_X (thousand tons)	1.30	3.88	23.44	27.60	29.74	29.82
Hg (tons)	0.01	0.02	0.12	0.14	0.15	0.15
CH_4 (thousand tons)	0.20	0.61	3.77	4.44	4.78	4.79
N_2O (thousand tons)	0.03	0.09	0.52	0.62	0.66	0.67
Upstream Emissions						
CO_2 (million metric tons)	0.28	0.85	5.23	6.14	6.61	6.63
SO_2 (thousand tons)	0.02	0.05	0.31	0.36	0.39	0.39
NO_X (thousand tons)	4.31	13.23	81.57	95.81	103.03	103.43
Hg (tons)	0.00	0.00	0.00	0.00	0.00	0.00
CH_4 (thousand tons)	25.15	77.15	475.78	558.83	600.92	603.26
N_2O (thousand tons)	0.00	0.00	0.02	0.03	0.03	0.03
Total FFC Emissions						
CO_2 (million metric tons)	2.98	9.06	55.41	65.14	70.09	70.31
SO_2 (thousand tons)	0.92	2.81	17.39	20.47	22.05	22.09
NO_X (thousand tons)	5.61	17.11	105.01	123.42	132.77	133.25
Hg (tons)	0.01	0.02	0.12	0.14	0.15	0.15
CH_4 (thousand tons)	25.35	77.76	479.55	563.27	605.70	608.05
N_2O (thousand tons)	0.03	0.09	0.55	0.64	0.69	0.70

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As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 that DOE estimated for each of the considered TSLs for GSLs. Section IV.L.1.a of this document discusses the estimated SC–CO_2 values that DOE used. Table V.24 presents the value of CO_2 emissions reduction at each TSL for each of the SC–CO_2 cases. The time-series of annual values is presented for the selected TSL in chapter 14 of the final rule TSD.

Table V.24 Present Value of CO_2 Emissions Reduction for GSLs Shipped During the Period 2029-2058

TSL	SC-CO_2 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	Billion 2022$			
1	0.03	0.13	0.21	0.41
2	0.09	0.39	0.61	1.19
3	0.54	2.32	3.63	7.04
4	0.64	2.74	4.28	8.30
5	0.69	2.95	4.61	8.95
6	0.69	2.96	4.62	8.97

As discussed in section IV.L.1.b of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and N_2O that DOE estimated for each of the considered TSLs for GSLs. Table V.25 presents the value of the CH_4 emissions reduction at each TSL, and table V.26 presents the value of the N_2O emissions reduction at each TSL. The time-series of annual values is presented for the selected TSL in chapter 13 of the final rule TSD.

Table V.25 Present Value of Methane Emissions Reduction for GSLs Shipped During the Period 2029-2058

TSL	SC-CH_4 Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	Billion 2022$			
1	0.01	0.04	0.05	0.10
2	0.04	0.11	0.15	0.29
3	0.22	0.65	0.91	1.72
4	0.25	0.76	1.07	2.02
5	0.27	0.82	1.15	2.18
6	0.27	0.83	1.15	2.18

Table V.26 Present Value of Nitrous Oxide Emissions Reduction for GSLs Shipped During the Period 2029-2058

TSL	SC-N_2O Case			
	Discount Rate and Statistics			
	5%	3%	2.5%	3%
	Average	Average	Average	95th percentile
	Billion 2022$			
1	0.00	0.00	0.00	0.00
2	0.00	0.00	0.00	0.00
3	0.00	0.01	0.01	0.02
4	0.00	0.01	0.02	0.03
5	0.00	0.01	0.02	0.03
6	0.00	0.01	0.02	0.03

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as

well as other methodological assumptions and issues. DOE notes that the adopted standards would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the economic benefits associated with NO_X and SO_2 emissions reductions anticipated to result from the considered TSLs for GSLs. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V.27 presents the present value for NO_X emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and table V.28 presents similar results for SO_2 emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the selected TSL in chapter 13 of the final rule TSD.

Table V.27 Present Value of NO_X Emissions Reduction for GSLs Shipped During the Period 2029-2058

TSL	3% Discount Rate	7% Discount Rate
	million 2022$	
1	277.22	117.22
2	810.97	325.22
3	4,776.79	1,818.87
4	5,633.35	2,154.03
5	6,077.28	2,332.11
6	6,089.81	2,325.81

Table V.28 Present Value of SO_2 Emissions Reduction for GSLs Shipped During the Period 2029-2058

TSL	3% Discount Rate	7% Discount Rate
	million 2022$	
1	62.82	26.79
2	185.41	74.86
3	1,106.42	424.74
4	1,307.27	504.02
5	1,411.35	546.15
6	1,412.69	544.16

Not all the public health and environmental benefits from the reduction of greenhouse gases, NO_X, and SO_2 are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of direct PM and other co-pollutants may be significant. DOE has not included monetary benefits of the reduction of Hg emissions because the amount of reduction is very small.

DOE emphasizes that the emissions analysis, including the SC–GHG analysis, presented in this final rule and TSD was performed in support of the cost-benefit analyses required by Executive Order 12866, and is provided to inform the public of the impacts of emissions reductions resulting from each TSL considered.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V.29 presents the NPV values that result from adding the estimates of the economic benefits resulting from reduced GHG and NO_X and SO_2 emissions to the NPV of consumer benefits calculated for each TSL considered in this rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered GSLs, and are measured for the lifetime of products shipped during the period 2029–2058. The climate benefits associated with reduced GHG emissions resulting from the adopted standards are global benefits, and are also calculated based on the lifetime of GSLs shipped during the period 2029–2058.

Table V.29 Consumer NPV Combined with Present Value of Climate Benefits and Health Benefits

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Using 3% discount rate for Consumer NPV and Health Benefits (billion 2022$)						
5% Average SC-GHG case	1.47	5.09	25.05	28.82	30.75	30.63
3% Average SC-GHG case	1.60	5.46	27.27	31.44	33.56	33.45
2.5% Average SC-GHG case	1.69	5.72	28.85	33.29	35.56	35.45
3% 95th percentile SC-GHG case	1.93	6.44	33.07	38.28	40.94	40.84
Using 7% discount rate for Consumer NPV and Health Benefits (billion 2022$)						
5% Average SC-GHG case	0.66	2.26	10.20	11.65	12.41	12.28
3% Average SC-GHG case	0.79	2.63	12.42	14.27	15.23	15.11
2.5% Average SC-GHG case	0.88	2.89	13.99	16.12	17.23	17.11
3% 95th percentile SC-GHG case	1.12	3.61	18.22	21.11	22.61	22.50

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)).

For this final rule, DOE considered the impacts of amended standards for GSLs at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher-than-expected rate between current consumption and uncertain future energy cost savings.

Consumers value a variety of attributes in general service lamps. These attributes can factor into consumer purchasing decisions along with initial purchase and operating costs. For example, DOE analyzed consumer preferences for lifetime, presence of mercury, and dimmability in its modeling of consumer purchasing decisions for GSLs. Non-efficiency preferences such as consumer loyalty to a particular brand is not captured by DOE's model. DOE also does not explicitly model shape or color temperature as the former is typically a function of a fixture and DOE assumes the latter does not typically impact price or efficiency; though both could theoretically factor into consumer decisions. General considerations for consumer welfare and preferences, consumer choice decision modeling, and discrete choice estimation are areas DOE plans to explore further in a forthcoming rulemaking action related to the agency's updates to its overall analytic framework.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forego the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 8 of the final rule TSD. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[100]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer

[100] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034–6527.00354.*

purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[101] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for GSL Standards

Table V.30 and table V.31 summarize the quantitative impacts estimated for each TSL for GSLs. The national impacts are measured over the lifetime of GSLs purchased in the 30-year period that begins in the anticipated first full year of compliance with amended standards (2029–2058). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. DOE is presenting monetized benefits of GHG emissions reductions in accordance with the applicable Executive Orders and DOE would reach the same conclusion presented in this document in the absence of the social cost of greenhouse gases, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of this document.

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[101] Sanstad, A.H. *Notes on the Economics of Household Energy Consumption and Technology Choice*. 2010. Lawrence Berkeley National Laboratory. Available at *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed July 1, 2021).

Table V.30 Summary of Analytical Results for GSL TSLs: National Impacts

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Cumulative FFC National Energy Savings						
Quads	0.167	0.513	3.176	3.730	4.010	4.027
Cumulative FFC Emissions Reduction						
CO_2 (*million metric tons*)	2.98	9.06	55.41	65.14	70.09	70.31
CH_4 (*thousand tons*)	25.35	77.76	479.55	563.27	605.70	608.05
N_2O (*thousand tons*)	0.03	0.09	0.55	0.64	0.69	0.70
SO_2 (*thousand tons*)	0.92	2.81	17.39	20.47	22.05	22.09
NO_X (*thousand tons*)	5.61	17.11	105.01	123.42	132.77	133.25
Hg (*tons*)	0.01	0.02	0.12	0.14	0.15	0.15
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*)						
Consumer Operating Cost Savings	1.13	3.46	21.30	25.20	27.21	27.25
Climate Benefits*	0.17	0.50	2.98	3.51	3.78	3.79
Health Benefits**	0.34	1.00	5.88	6.94	7.49	7.50
Total Benefits†	1.64	4.95	30.16	35.65	38.49	38.54
Consumer Incremental Product Costs‡	0.04	-0.50	2.89	4.22	4.92	5.09
Consumer Net Benefits	1.09	3.96	18.41	20.99	22.29	22.16
Total Net Benefits	1.60	5.46	27.27	31.44	33.56	33.45
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*)						
Consumer Operating Cost Savings	0.52	1.49	8.79	10.45	11.33	11.30
Climate Benefits*	0.17	0.50	2.98	3.51	3.78	3.79
Health Benefits**	0.14	0.40	2.24	2.66	2.88	2.87
Total Benefits†	0.83	2.40	14.01	16.62	17.99	17.96
Consumer Incremental Product Costs‡	0.04	-0.23	1.60	2.35	2.76	2.85
Consumer Net Benefits	0.47	1.73	7.20	8.10	8.57	8.45
Total Net Benefits	0.79	2.63	12.42	14.27	15.23	15.11

Note: This table presents the costs and benefits associated with GSLs shipped during the period 2029−2058. These results include benefits to consumers which accrue after 2058 from the products shipped during the period 2029−2058.

* Climate benefits are calculated using four different estimates of the SC-CO_2, SC-CH_4 and SC-N_2O. Together, these represent the global SC-GHG. For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. *See* section IV.L of this document for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs as well as installation costs. Negative incremental cost increases reflect a lower total first cost under a particular standard for GSLs shipped in 2029-2058. Several factors contribute to this, including that certain lamp option at higher ELs are less expensive than certain lamp options at lower ELs that would be eliminated under a particular standard level, the relative decrease in price of LED lamp options compared to less efficient CFL options due to price learning, and the longer lifetime of LED lamp options resulting in fewer purchases over the analysis period.

Table V.31 Summary of Analytical Results for GSL TSLs: Manufacturer and Consumer Impacts

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Manufacturer Impacts						
Industry NPV (million 2022$) (No-new-standards case INPV = 2,108)	2,047 - 2,053	1,941 - 1,947	1,904 - 1,946	1,886 - 1,955	1,789 - 1,951	1,783 - 1,950
Industry NPV (% change)	(2.8) – (2.6)	(7.9) – (7.6)	(9.5) – (7.5)	(10.4) – (7.1)	(15.0) – (7.3)	(15.3) – (7.3)
Consumer Average LCC Savings (2022$)						
Integrated Omnidirectional Short	1.81	2.53	0.51	0.57	0.60	0.60
Integrated Omnidirectional Long	1.22	2.03	3.24	3.24	3.24	4.00
Integrated Directional	9.87	1.69	3.23	3.23	3.23	3.23
Non-Integrated Omnidirectional	4.80	6.67	6.67	6.67	6.67	6.67
Non-Integrated Directional	0.41	0.41	0.41	0.41	0.37	0.37
Shipment-Weighted Average*	2.78	2.36	1.13	1.18	1.20	1.24
Consumer Simple PBP (years)						
Integrated Omnidirectional Short	0.6	0.2	0.5	0.8	0.9	0.9
Integrated Omnidirectional Long	3.8	2.8	3.2	3.2	3.2	3.4
Integrated Directional	0.0	0.0	0.0	0.0	0.0	0.0
Non-Integrated Omnidirectional	7.6	2.4	2.4	2.4	2.4	2.4

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Non-Integrated Directional	2.8	2.8	2.8	2.8	3.8	3.8
Shipment-Weighted Average*	0.8	0.5	0.7	0.9	1.0	1.0
Percent of Consumers that Experience a Net Cost						
Integrated Omnidirectional Short	0.8%	1.1%	20.3%	21.7%	22.3%	22.3%
Integrated Omnidirectional Long	5.2%	7.8%	5.5%	5.5%	5.5%	5.7%
Integrated Directional	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Non-Integrated Omnidirectional	10.4%	0.1%	0.1%	0.1%	0.1%	0.1%
Non-Integrated Directional	18.0%	18.0%	18.0%	18.0%	31.0%	31.0%
Shipment-Weighted Average*	1.3%	1.8%	16.3%	17.3%	17.9%	18.0%

Parentheses indicate negative (-) values.
* Weighted by shares of each product class in total projected shipments in 2029.

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DOE first considered TSL 6, which represents the max-tech efficiency levels. TSL 6 would save an estimated 4.03 quads of energy, an amount DOE considers significant. Under TSL 6, the NPV of consumer benefit would be $8.45 billion using a discount rate of 7 percent, and $22.16 billion using a discount rate of 3 percent.

In the alternative analysis scenario discussed in section IV.G.1.a of this document wherein the market for linear lamps declines at a lower rate than in the reference scenario, energy savings at TSL 6 would be higher by 0.57 quads, while the total NPV of consumer benefit would increase by $0.55 billion using a discount rate of 7 percent, and $1.75 billion using a discount rate of 3 percent. See Appendix 9D of the final rule TSD for details.

The cumulative emissions reductions at TSL 6 are 70 Mt of CO_2, 22 thousand tons of SO_2, 133 thousand tons of NO_X, 0.15 tons of Hg, 608 thousand tons of CH_4, and 0.70 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 6 is $3.79 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 6 is $2.87 billion using a 7-percent discount rate and $7.50 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 6 is $15.11 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 6 is $33.45 billion.

At TSL 6 in the residential sector, the largest product classes are Integrated Omnidirectional Short GSLs, including traditional pear-shaped, candle-shaped, and globe-shaped GSLs, and Integrated Directional GSLs, including reflector lamps commonly used in recessed cans, which together account for 92 percent of annual shipments. The average LCC impact is a savings of $0.55 and $3.17 and a simple payback period of 0.9 years and 0.0 years, respectively, for those product classes. The fraction of purchases associated with a net LCC cost is 24.0 percent and 0.0 percent, respectively. In the commercial sector, the largest product classes are Integrated Omnidirectional Short GSLs and Integrated Omnidirectional Long GSLs, including tubular LED GSLs often referred to as TLEDs, which together account for 81 percent of annual shipments. The average LCC impact is a savings of $0.94 and $4.16 and a simple payback period of 0.6 years and 3.3 years, respectively, for those product classes. The fraction of purchases associated with a net LCC cost is 10.8 and 2.9 percent, respectively. Overall, 18.0 percent of GSL purchases are associated with a net cost and the average LCC savings are positive for all product classes.

At TSL 6, an estimated 23.9 percent of purchases of Integrated Omnidirectional Short GSLs and 0.0 percent of purchases of Integrated Directional GSLs by low-income households are associated with a net cost. While 23.9 percent of purchases of Integrated Omnidirectional Short GSLs by low-income households would be associated with a net cost, DOE notes that a third of those purchases have a net cost of no more than $0.25 and nearly 75 percent of those purchases have a net cost of no more than $1.00. Moreover, DOE notes that the typical low-income household has multiple Integrated Omnidirectional Short GSLs. Based on the average total number of lamps in a low-income household (23, based on RECS) and the average fraction of lamps in the residential sector that are Integrated Omnidirectional Short GSLs (78 percent, based on DOE's

shipments analysis), DOE estimates that low-income households would have approximately 19 Integrated Omnidirectional Short GSLs, on average. An analysis accounting for multiple lamp purchases would show that significantly fewer low-income consumers experience a net cost at the household level than on a per-purchase basis. For example, assuming low-income households purchase two lamps per year over a period of 7 years (corresponding to the average service life of the baseline Integrated Omnidirectional Short lamp), DOE estimates that only 9.0 percent of low-income households would experience a net cost and 91.0 percent would experience a net benefit.

At TSL 6, the projected change in INPV ranges from a decrease of $322 million to a decrease of $155 million, which corresponds to decreases of 15.3 percent and 7.3 percent, respectively. DOE estimates that approximately 83 percent of the Integrated Omnidirectional Short product class shipments; approximately 86 percent of the Integrated Omnidirectional Long product class shipments; approximately 65 percent of the Integrated Directional product class shipments; approximately 46 percent of the Non-Integrated Omnidirectional Short product class shipments; and approximately 74 percent of the Non-Integrated Directional product class shipments will not meet the ELs required at TSL 6 in 2029, the first full year of compliance of new and amended standards. DOE estimates that industry must invest $430 million to redesign these non-compliant models into compliant models in order to meet the ELs analyzed at TSL 6. DOE assumed that most, if not all, LED lamp models would be remodeled between the publication of this final rule and the compliance date, even in the absence of DOE energy conservation standards for GSLs. Therefore, GSL energy conservation standards set at TSL 6 would require GSL manufacturers to remodel their GSL models to a higher efficacy level during their regularly scheduled remodel cycle, due to energy conservation standards. GSL manufacturers would incur additional engineering costs to redesign their LED lamps to meet this higher efficacy requirement. DOE did not estimate that GSL manufacturers would incur any capital conversion costs as the volume of LED lamps manufactured in 2029 (the first full year of compliance) would be fewer than the volume of LED lamps manufactured in the previous year, 2028, even at TSL 6. Additionally, DOE did not estimate that manufacturing more efficacious LED lamps would require additional or different capital equipment or tooling.

After considering the analysis and weighing the benefits and burdens, the Secretary has concluded that at a standard set at TSL 6 for GSLs is economically justified. At this TSL, the average LCC savings for all product classes is positive. An estimated 18.0 percent of all GSL purchases are associated with a net cost. While 23.9 percent of purchases of Integrated Omnidirectional Short GSLs by low-income households would be associated with a net cost, a third of those purchases have a net cost of no more than $0.25 and nearly 75 percent of those purchases have a net cost of no more than $1.00. And significantly fewer low-income consumers experience a net cost at the household level after accounting for multiple lamp purchases. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers vastly outweigh the cost to manufacturers. At TSL 6, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent is over 26 times higher than the maximum estimated manufacturers' loss in INPV. The standard levels at TSL 6 are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $3.79 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $7.50 billion (using a 3-percent discount rate) or $2.87 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the amended energy conservation standards, DOE notes that the selected standard level represents the maximum improvement in energy efficiency for all product classes and is only $0.1 billion less than the maximum consumer NPV, represented by TSL 5, at both 3 and 7 percent discount rates. Additionally, compared to TSL 5, Integrated Omnidirectional Long purchases are 0.2 percent more likely to be associated with a net cost at TSL 6, but NES is an additional 0.02 quads in the reference scenario and an additional 0.2 quads in the scenario where the linear lamp market persists longer. Compared to TSL 4, Integrated Omnidirectional Short purchases at TSL 6 are approximately 1 percent more likely to be associated with a net cost, but NES is an additional 0.3 quads and NPV is an additional $1.2 billion at 3 percent discount rate and $0.3 billion at 7 percent discount rate. Compared to TSL 1 or 2, while 22 percent of Integrated Omnidirectional Short purchases at TSL 6 are associated with a net cost, compared to 1 percent at TSL 1 or 2, NES is more than 3 quads larger at TSL 6 and NPV is greater by more than $18 billion at 3 percent discount rate and more than $6 billion at 7 percent discount rate. These additional savings and benefits at TSL 6 are significant. DOE considers the impacts to be, as a whole, economically justified at TSL 6.

Although DOE considered proposed amended standard levels for GSLs by grouping the efficiency levels for each product class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. DOE notes that among all possible combinations of ELs, the proposed standard level represents the maximum NES and differs from the maximum consumer NPV by only $0.1 billion.

Therefore, based on the previous considerations, DOE adopts the energy conservation standards for GSLs at TSL 6. The amended energy conservation standards for GSLs, which are expressed as lm/W, are shown in table V.32.

Table V.32 Amended Energy Conservation Standards for GSLs

Product Class	Efficacy Equation (lm/W)
Integrated Omnidirectional Short GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 25.9$
Integrated Omnidirectional Short GSLs, With Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 17.1$
Integrated Directional GSLs, No Standby Power	$\text{Efficacy} = \frac{73}{0.5 + e^{-0.0021(\text{Lumens}+1000)}} - 47.2$
Integrated Directional GSLs, With Standby Power	$\text{Efficacy} = \frac{73}{0.5 + e^{-0.0021(\text{Lumens}+1000)}} - 50.9$
Integrated Omnidirectional Long GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 71.7$
Non-integrated Omnidirectional Long GSLs, No Standby Power	$\text{Efficacy} = \frac{123}{1.2 + e^{-0.005(\text{Lumens}-200)}} + 93.0$
Non-integrated Omnidirectional Short GSLs, No Standby Power	$\text{Efficacy} = \frac{122}{0.55 + e^{-0.003(\text{Lumens}+250)}} - 83.4$
Non-integrated Directional GSLs, No Standby Power	$\text{Efficacy} = \frac{67}{0.45 + e^{-0.00176(\text{Lumens}+1310)}} - 53.1$

2. Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits.

Table V.33 shows the annualized values for GSLs under TSL 6, expressed in 2022$. The results under the primary estimate are as follows:

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reductions, and the 3-percent discount rate case for GHG social costs, the estimated cost of the adopted standards for GSLs is $301.4 million per year in increased equipment installed costs, while the estimated annual benefits are $1,193.6 million from reduced equipment operating costs, $217.7 million in GHG reductions, and $303.2 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $1,413.1 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the adopted standards for GSLs is $292.2 million per year in increased equipment costs, while the estimated annual benefits are $1,564.6 million in reduced operating costs, $217.7 million from GHG reductions, and $430.8 million from reduced NO_X and SO_2 emissions. In this case, the net benefit amounts to $1,920.9 million per year.

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Table V.33 Annualized Benefits and Costs of Adopted Standards (TSL 6) for GSLs

	Million 2022$/year		
	Primary Estimate	**Low Net Benefits Estimate**	**High Net Benefits Estimate**
3% discount rate			
Consumer Operating Cost Savings	1,564.6	1,473.8	1,639.9
Climate Benefits*	217.7	213.0	220.6
Health Benefits**	430.8	421.6	436.3
Total Benefits†	2,213.1	2,108.4	2,296.8

	Million 2022$/year		
	Primary Estimate	Low Net Benefits Estimate	High Net Benefits Estimate
Consumer Incremental Product Costs‡	292.2	279.0	304.4
Net Benefits	1,920.9	1,829.5	1,992.4
Change in Producer Cashflow (INPV‡‡)	(22.5) – (10.8)	(22.5) – (10.8)	(22.5) – (10.8)
7% discount rate			
Consumer Operating Cost Savings	1,193.6	1,129.5	1,248.5
Climate Benefits* (3% discount rate)	217.7	213.0	220.6
Health Benefits**	303.2	297.4	306.7
Total Benefits†	1,714.5	1,639.9	1,775.8
Consumer Incremental Product Costs‡	301.4	288.9	312.8
Net Benefits	1,413.1	1,351.0	1,463.0
Change in Producer Cashflow (INPV‡‡)	(22.5) – (10.8)	(22.5) – (10.8)	(22.5) – (10.8)

Note: This table presents the costs and benefits associated with GSLs shipped during the period 2029−2058. These results include consumer, climate, and health benefits that accrue after 2058 from the products shipped during the period 2029−2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, LED lamp prices reflect a higher price learning rate in the Low Net Benefits Estimate, and a lower price learning rate in the High Net Benefits Estimate. See section V.B.3.b of this document for discussion. The methods used to derive projected price trends are explained in section IV.G.1.b of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC-GHG (*see* section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC-GHG at a 3-percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC-GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC-GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs as well as installation costs.

‡‡ Operating cost savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. *See* sections IV.F and IV.H of this document. DOE's national impact analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the product and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (*i.e.*, manufacturer impact analysis, or "MIA"). *See* section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 6.1 percent that is estimated in the MIA (*see* chapter 11 of the final rule TSD for a complete description of the industry weighted average cost

of capital). For GSLs, the annualized change in INPV ranges from -$22.5 million to -$10.8 million. DOE accounts for that range of likely impacts in analyzing whether a trial standard level is economically justified. *See* section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table; and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this final rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A-4 and E.O. 12866. If DOE were to include the change in INPV into the annualized net benefit calculation for this final rule, the net benefits would range from $1,898.4 million to $1,910.1 million at a 3-percent discount rate and would range from $1,390.6 million to $1,402.3 million at a 7-percent discount rate. Parentheses () indicate negative values.

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VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this final regulatory action constitutes a ''significant regulatory action'' within the scope of section 3(f)(1) of E.O. 12866, as amended by E.O. 14094. Accordingly, pursuant to section 6(a)(3)(C) of E.O. 12866, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the final regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the technical support document for this rulemaking.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') and a final regulatory flexibility analysis (''FRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*). DOE has prepared the following FRFA for the products that are the subject of this rulemaking.

For manufacturers of GSLs, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. (*See* 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support-table-size-standards.* Manufacturing of GSLs is classified under NAICS 335139, ''electric lamp bulb and other lighting equipment manufacturing.'' The SBA sets a threshold of 1,250 employees or fewer for an entity to be considered as a small business for this category.

1. Need for, and Objectives of, Rule

EPCA directs DOE to conduct two rulemaking cycles to evaluate energy conservation standards for GSLs. (42 U.S.C. 6295(i)(6)(A)–(B)) If DOE failed to complete the first rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv), or if a final rule from the first rulemaking cycle did not produce savings greater than or equal to the savings from a minimum efficacy standard of 45 lm/W, the statute provides a ''backstop'' under which DOE was required to prohibit sales of

GSLs that do not meet a minimum 45 lm/W standard. (42 U.S.C. 6295(i)(6)(A)(v)). As a result of DOE's failure to complete a rulemaking in accordance with the statutory criteria, DOE codified this backstop requirement in the May 2022 Backstop Final Rule. 87 FR 27439.

EPCA further directs DOE to initiate a second rulemaking cycle by January 1, 2020, to determine whether standards in effect for GSILs (which are a subset of GSLs) should be amended with more stringent maximum wattage requirements than EPCA specifies, and whether the exemptions for certain incandescent lamps should be maintained or discontinued. (42 U.S.C. 6295(i)(6)(B)(i)) As in the first rulemaking cycle, the scope of the second rulemaking is not limited to incandescent lamp technologies. (42 U.S.C. 6295(i)(6)(B)(ii)) DOE is publishing this final rule pursuant to this second cycle of rulemaking, as well as section (m) of 42 U.S.C. 6295.

2. Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis (''IRFA'')

DOE did not receive any substantive comments on the IRFA that was published in the January 2023 NOPR.

3. Description and Estimated Number of Small Entities Affected

For manufacturers of GSLs, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. The SBA sets a threshold of 1,250 employees or less for an entity to be considered as a small business for this category.

DOE created a database of GSLs covered by this rulemaking using publicly available information. DOE's research involved information from DOE's compliance certification database,[102] EPA's ENERGY STAR Certified Light Bulbs Database,[103] manufacturers' websites, and retailer websites. DOE found over 800 companies that sell GSLs covered in this rulemaking. Using information from D&B Hoovers, DOE screened out companies that have more than 1,250 employees, are completely foreign owned and operated, or do not manufacture GSLs in the United States. Based on the results of this analysis, DOE estimates there are approximately 261 small businesses that assemble GSLs covered by this rulemaking. Even though these small entities do not manufacture the main technological components that comprise the GSL and instead import the LEDs, LED packages, and LED drivers for inclusion in the GSLs, DOE is identifying them because they are doing some type of assembling in the United States. In the January 2023 NOPR, DOE included several small businesses that sell CFLs in the IRFA. However, as previously stated in section V.B.2.b of this document, there are no CFLs that are manufactured in the United States. The 21 companies identified in the January 2023 NOPR IRFA that sell CFLs do not manufacture any covered GSLs in the United States and therefore, do not meet the definition of a small business manufacturer. Based on DOE's updated analysis, DOE identified approximately 261 small businesses that assemble covered GSLs in the United States and do not manufacture the LEDs, LED packages, or LED drivers that are used in the LED lamps that they assemble. Instead, all of these small businesses purchase LEDs, LED packages, and LED drivers as components from component manufacturers abroad and then assemble these purchased components into the LED lamps that they sell.

4. Description of Reporting, Recordkeeping, and Other Compliance Requirements

For the 261 small businesses that assemble GSLs covered by this rulemaking, these small businesses will be required to remodel many of the LED lamps they assemble due to the adopted energy conservation standards. However, since the primary driver of efficacy is the LEDs, LED packages, and LED drivers, these GSL assemblers are believed to be minimally impacted by the adopted energy conservation standards. Small businesses assembling GSLs could be required to spend additional engineering time to integrate the more efficacious components that they purchase from component manufacturers to be able to meet the adopted energy conservation standards for any LED lamp models that do not meet the adopted energy conservation standards. DOE anticipates that most small businesses will be able to meet the adopted energy conservation standards by using more efficacious components such as LEDs, LED packages, and/or LED drivers in the LED lamp models that they assemble. DOE was not able to identify any small businesses that manufacturer their own LEDs, LED packages, or LED drivers that are used in the LED lamps that they assemble. Therefore, small businesses would most likely be able to meet the adopted energy conservation standards by purchasing more efficacious LEDs, LED packages, and/or LED drivers as a purchased part to their LED lamps. Additionally, the process of assembling LED lamps is not likely to require any additionally production equipment or tooling in the assembly process, or any significant changes to the assembly process when using more efficacious LEDs, LED packages, or LED drivers in their LED lamps.

The methodology DOE used to estimate product conversion costs for this final rule analysis is described in section IV.J.2.c of this document. At the adopted standards, TSL 6, DOE estimates that all manufacturers would incur approximately $430 million in product conversion costs. These estimated product conversion costs, at TSL 6, represent approximately 4.1 percent of annual revenue over the compliance period.[104] While small manufacturers are likely to have lower per-model sales volumes than larger manufacturers, DOE was not able to identify any small business that manufacturers the LEDs, LED packages, or LED drivers used in their LED lamps—which is the primary technology driving the conversion expenses. Therefore, small businesses that assemble GSLs would most likely spend less engineering resources compared to GSL manufacturers that do manufacture their own LEDs, LED packages and/or LED drivers. Additionally, GSL manufacturer revenue from LED lamps is estimated to be approximately $1,735 million in 2029, the first full year of compliance, at TSL 6 compared to $1,547 million in the no-new-standards case. This represents an increase of approximately 12 percent in annual revenue generated from the sales of LED lamps, since LED lamps will be the only technology capable of meeting the adopted standards. DOE conservatively estimates that small GSL manufacturers exclusively selling LED lamps would incur no more than 4.1 percent of their annual revenue over the compliance period to redesign non-compliant LED lamps into compliant LED lamps that will meet the adopted standards (*i.e.,* TSL 6).

[102] *www.regulations.doe.gov/certification-data.*

[103] ENERGY STAR Qualified Lamps Product List, *www.energystar.gov/productfinder/product/certified-light-bulbs/results* (last accessed May 2, 2022).

[104] The total estimated revenue between 2024, the final rule publication year, and 2028, the compliance year, is approximately, $10,465 million. $430 (million) ÷ $10,465 (million) = 4.1%.

5. Significant Alternatives Considered and Steps Taken To Minimize Significant Economic Impacts on Small Entities

The discussion in the previous section analyzes impacts on small businesses that would result from the adopted standards, represented by TSL 6. In reviewing alternatives to the adopted standards, DOE examined energy conservation standards set at lower efficiency levels. While TSL 1 through TSL 5 would reduce the impacts on small business manufacturers, it would come at the expense of a reduction in energy savings. TSL 1 achieves 96 percent lower energy savings compared to the energy savings at TSL 6. TSL 2 achieves 87 percent lower energy savings compared to the energy savings at TSL 6. TSL 3 achieves 21 percent lower energy savings compared to the energy savings at TSL 6. TSL 4 achieves 7 percent lower energy savings compared to the energy savings at TSL 6. TSL 5 achieves 0.4 percent lower energy savings compared to the energy savings at TSL 6.

Establishing standards at TSL 6 balances the benefits of the energy savings at TSL 6 with the potential burdens placed on GSL manufacturers, including small business manufacturers. Accordingly, DOE is not adopting one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 16 of the final rule TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act

Manufacturers of GSLs must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for GSLs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including GSLs. (*See* generally 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''), DOE has analyzed this proposed action rule in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by E.O. 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to

the extent permitted by law, this final rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

DOE has concluded that this final rule may require expenditures of $100 million or more in any one year by the private sector. Such expenditures may include (1) investment in research and development and in capital expenditures by GSLs manufacturers in the years between the final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency GSLs, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the final rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. This **SUPPLEMENTARY INFORMATION** section and the TSD for this final rule respond to those requirements.

Under section 205 of UMRA, DOE is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(i)(6)(A)–(B)), this final rule establishes amended energy conservation standards for GSLs that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 6295(o)(2)(A) and 6295(o)(3)(B). A full discussion of the alternatives considered by DOE is presented in chapter 16 of the TSD for this final rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth amended energy conservation standards for GSLs, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this final rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency

regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.[105] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve DOE's analyses. DOE is in the process of evaluating the resulting report.[106]

M. Description of Materials Incorporated by Reference

UL 1598C–2016 is an industry accepted test standard that provides requirements for LED downlight retrofit kits. To clarify the scope of the standards adopted in this final rule, DOE is updating the definition for ''LED Downlight Retrofit Kit'' to reference UL 1598C–2016 in the definition. UL 1598C–2016 is reasonably available on UL's website at *www.shopulstandards.com/Default.aspx.*

ANSI C78.79–2014 (R2020) (''ANSI C78.79–2020'') is referenced in the amendatory text of this document but has already been approved for the sections where it appears. No changes are being made to the IBR material.

[105] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at: *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed March 24, 2022).

[106] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.*

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that the Office of Information and Regulatory Affairs has determined that the rule meets the criteria set forth in 5 U.S.C. 804(2).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

Signing Authority

This document of the Department of Energy was signed on April 9, 2024, by Jeffrey M. Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 9, 2024.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.2 by:
■ a. Revising the definitions for ''General service incandescent lamp'' and ''General service lamp'';
■ b. Removing the definition ''LED Downlight Retrofit Kit'' and adding the definition ''LED downlight retrofit kit'' in its place;
■ c. Revising the definitions of ''Reflector lamp'', ''Showcase lamp'', and ''Specialty MR lamp''.

The revisions and addition read as follows:

§ 430.2 Definitions.

* * * * *

General service incandescent lamp means a standard incandescent or halogen type lamp that is intended for general service applications; has a medium screw base; has a lumen range of not less than 310 lumens and not more than 2,600 lumens or, in the case of a modified spectrum lamp, not less than 232 lumens and not more than 1,950 lumens; and is capable of being operated at a voltage range at least partially within 110 and 130 volts; however, this definition does not apply to the following incandescent lamps—

(1) An appliance lamp;
(2) A black light lamp;
(3) A bug lamp;
(4) A colored lamp;
(5) A G shape lamp with a diameter of 5 inches or more as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3);
(6) An infrared lamp;
(7) A left-hand thread lamp;
(8) A marine lamp;
(9) A marine signal service lamp;
(10) A mine service lamp;
(11) A plant light lamp;
(12) An R20 short lamp;
(13) A sign service lamp;
(14) A silver bowl lamp;
(15) A showcase lamp; and
(16) A traffic signal lamp.

General service lamp means a lamp that has an ANSI base; is able to operate at a voltage of 12 volts or 24 volts, at or between 100 to 130 volts, at or between 220 to 240 volts, or of 277 volts for integrated lamps (as set out in this definition), or is able to operate at any voltage for non-integrated lamps (as set out in this definition); has an initial lumen output of greater than or equal to 310 lumens (or 232 lumens for modified spectrum general service incandescent lamps) and less than or equal to 3,300 lumens; is not a light fixture; is not an LED downlight retrofit kit; and is used in general lighting applications. General service lamps include, but are not limited to, general service incandescent lamps, compact fluorescent lamps, general service light-emitting diode lamps, and general service organic light emitting diode lamps. General service lamps do not include:

(1) Appliance lamps;

(2) Black light lamps;
(3) Bug lamps;
(4) Colored lamps;
(5) G shape lamps with a diameter of 5 inches or more as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3);
(6) General service fluorescent lamps;
(7) High intensity discharge lamps;
(8) Infrared lamps;
(9) J, JC, JCD, JCS, JCV, JCX, JD, JS, and JT shape lamps that do not have Edison screw bases;
(10) Lamps that have a wedge base or prefocus base;
(11) Left-hand thread lamps;
(12) Marine lamps;
(13) Marine signal service lamps;
(14) Mine service lamps;
(15) MR shape lamps that have a first number symbol equal to 16 (diameter equal to 2 inches) as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3), operate at 12 volts, and have a lumen output greater than or equal to 800;
(16) Other fluorescent lamps;
(17) Plant light lamps;
(18) R20 short lamps;
(19) Reflector lamps (as set out in this definition) that have a first number symbol less than 16 (diameter less than 2 inches) as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3) and that do not have E26/E24, E26d, E26/50x39, E26/53x39, E29/28, E29/53x39, E39, E39d, EP39, or EX39 bases;
(20) S shape or G shape lamps that have a first number symbol less than or equal to 12.5 (diameter less than or equal to 1.5625 inches) as defined in ANSI C78.79–2014 (R2020) (incorporated by reference; see § 430.3);
(21) Sign service lamps;
(22) Silver bowl lamps;
(23) Showcase lamps;
(24) Specialty MR lamps;
(25) T shape lamps that have a first number symbol less than or equal to 8 (diameter less than or equal to 1 inch) as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3), nominal overall length less than 12 inches, and that are not compact fluorescent lamps (as set out in this definition);
(26) Traffic signal lamps.
* * * * *

LED downlight retrofit kit means a product designed and marketed to install into an existing downlight, replacing the existing light source and related electrical components, typically employing an ANSI standard lamp base, either integrated or connected to the downlight retrofit by wire leads, and is a retrofit kit classified or certified to UL 1598C–2016 (incorporated by reference; see § 430.3). LED downlight retrofit kit does not include integrated lamps or non-integrated lamps.
* * * * *

Reflector lamp means a lamp that has an R, PAR, BPAR, BR, ER, MR, or similar bulb shape as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3) and is used to provide directional light.
* * * * *

Showcase lamp means a lamp that has a T shape as specified in ANSI C78.79–2020 (incorporated by reference; see § 430.3), is designed and marketed as a showcase lamp, and has a maximum rated wattage of 75 watts.
* * * * *

Specialty MR lamp means a lamp that has an MR shape as defined in ANSI C78.79–2020 (incorporated by reference; see § 430.3), a diameter of less than or equal to 2.25 inches, a lifetime of less than or equal to 300 hours, and that is designed and marketed for a specialty application.
* * * * *

■ 3. Amend § 430.3 by adding paragraph (y)(4) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(y) * * *

(4) UL 1598C (''UL 1598C–2016''), *Standard for Safety for Light-Emitting Diode (LED) Retrofit Luminaire Conversion Kits,* First edition, dated January 16, 2014 (including revisions through November 17, 2016); IBR approved for § 430.2.

■ 4. Amend § 430.32 by:
■ a. Removing and reserving paragraph (u); and
■ b. Revising paragraphs (x) and (dd).

The revisions read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(x) *Intermediate base incandescent lamps and candelabra base incandescent lamps.* (1) Subject to the sales prohibition in paragraph (dd) of this section, each candelabra base incandescent lamp shall not exceed 60 rated watts.

(2) Subject to the sales prohibition in paragraph (dd) of this section, each intermediate base incandescent lamp shall not exceed 40 rated watts.
* * * * *

(dd) *General service lamps.* Beginning July 25, 2022, the sale of any general service lamp that does not meet a minimum efficacy standard of 45 lumens per watt is prohibited.

(1) Energy conservation standards for general service lamps:

(i) General service incandescent lamps manufactured after the dates specified in the following tables, except as described in paragraph (dd)(1)(ii) of this section, shall have a color rendering index greater than or equal to 80 and shall have a rated wattage no greater than, and a lifetime no less than the values shown in the table as follows:

GENERAL SERVICE INCANDESCENT LAMPS

Rated lumen ranges	Minimum lifetime * (hrs)	Maximum rate wattage	Compliance date
(A) 1490–2600	1,000	72	1/1/2012
(B) 1050–1489	1,000	53	1/1/2013
(C) 750–1049	1,000	43	1/1/2014
(D) 310–749	1,000	29	1/1/2014

* Use lifetime determined in accordance with § 429.66 of this chapter to determine compliance with this standard.

(ii) Modified spectrum general service incandescent lamps manufactured after the dates specified in the following table shall have a color rendering index greater than or equal to 75 and shall have a rated wattage no greater than, and a lifetime no less than the values shown in the table as follows:

MODIFIED SPECTRUM GENERAL SERVICE INCANDESCENT LAMPS

Rated lumen ranges	Minimum lifetime [1] (hrs)	Maximum rate wattage	Compliance date
(A) 1118–1950	1,000	72	1/1/2012
(B) 788–1117	1,000	53	1/1/2013
(C) 563–787	1,000	43	1/1/2014
(D) 232–562	1,000	29	1/1/2014

[1] Use lifetime determined in accordance with § 429.66 of this chapter to determine compliance with this standard.

(iii) A bare or covered (no reflector) medium base compact fluorescent lamp manufactured on or after January 1, 2006, must meet or exceed the following requirements:

Factor		Requirements
Configuration [1]	Labeled wattage (watts)	Minimum initial lamp efficacy (lumens per watt) must be at least:
(A) *Bare Lamp:*		
	(*1*) Labeled Wattage <15	45.0
	(*2*) Labeled Wattage ≥15	60.0
(B) *Covered Lamp (no reflector):*		
	(*1*) Labeled Wattage <15	40.0
	(*2*) 15≤ Labeled Wattage <19	48.0
	(*3*) 19≤ Labeled Wattage <25	50.0
	(*4*) Labeled Wattage ≥25	55.0

[1] Use labeled wattage to determine the appropriate efficacy requirements in this table; do not use measured wattage for this purpose.

(iv) Each general service lamp manufactured on or after July 25, 2028 must have:

(A) A power factor greater than or equal to 0.7 for integrated LED lamps (as defined in § 430.2) and 0.5 for medium base compact fluorescent lamps (as defined in § 430.2); and

(B) A lamp efficacy greater than or equal to the values shown in the table as follows:

Lamp type	Length	Standby mode operation [3]	Efficacy (lm/W)
(*1*) Integrated Omnidirectional.	Short (<45 inches)	No Standby Mode Operation.	$123/(1.2+e^{-0.005*(\text{Lumens } 200)})$ + 25.9
(*2*) Integrated Omnidirectional.	Long (≥45 inches)	No Standby Mode Operation.	$123/(1.2+e^{-0.005*(\text{Lumens } 200)})$ + 71.7
(*3*) [1] Integrated Directional	All Lengths	No Standby Mode Operation.	$73/(0.5+e^{-0.0021*(\text{Lumens}+1000)})$ − 47.2
(*4*) [2] Non-integrated Omnidirectional.	Short (<45 inches)	No Standby Mode Operation.	$122/(0.55+e^{-0.003*(\text{Lumens}+250)})$ − 83.4
(*5*) [1] Non-integrated Directional.	All Lengths	No Standby Mode Operation.	$67/(0.45+e^{-0.00176*(\text{Lumens}+1310)})$ − 53.1
(*6*) Integrated Omnidirectional.	Short (<45 inches)	Standby Mode Operation	$123/(1.2+e^{-0.005*(\text{Lumens } 200)})$ + 17.1
(*7*) [1] Integrated Directional	All Lengths	Standby Mode Operation	$73/(0.5+e^{-0.0021*(\text{Lumens}+1000)})$ − 50.9
(*8*) Non-integrated Omnidirectional.	Long (≥45 inches)	No Standby Mode Operation.	$123/(1.2+e^{-0.005*(\text{Lumens } 200)})$ + 93.0

[1] This lamp type comprises of directional lamps. A directional lamp is a lamp that meets the definition of reflector lamp as defined in § 430.2.
[2] This lamp type comprises of, but is not limited to, lamps that are pin base compact fluorescent lamps ("CFLs") and pin base light-emitting diode ("LED") lamps designed and marketed as replacements of pin base CFLs.
[3] Indicates whether or not lamps are capable of operating in standby mode operation.

(C) The standards described in paragraph (dd)(1)(iv) of this section do not apply to a general service lamp that:

(*1*) Is a general service organic light-emitting diode (OLED) lamps (as defined in § 430.2);

(*2*) Is a non-integrated lamp that is capable of operating in standby mode and is sold in packages of two lamps or less;

(*3*) Is designed and marketed as a lamp that has at least one setting that allows the user to change the lamp's correlated color temperature (CCT) and has no setting in which the lamp meets the definition of a colored lamp (as defined in § 430.2); and is sold in packages of two lamps or less;

(*4*) Is designed and marketed as a lamp that has at least one setting in which the lamp meets the definition of a colored lamp (as defined in § 430.2) and at least one other setting in which it does not meet the definition of colored lamp (as defined in § 430.2) and is sold in packages of two lamps or less; or

(*5*) Is designed and marketed as a lamp that has one or more component(s) offering a completely different functionality (*e.g.,* a speaker, a camera, an air purifier, etc.) where each component is integrated into the lamp but does not affect the light output of the lamp (*e.g.,* does not turn the light on/off, dim the light, change the color of the light, etc.), is capable of operating in standby mode, and is sold in packages of two lamps or less.

(2) Medium base CFLs (as defined in § 430.2) manufactured on or after the dates specified in the following table shall meet or exceed the following standards:

Metrics	Requirements for MBCFLs manufactured on or after January 1, 2006	Requirements for MBCFLs manufactured on or after July 25, 2028
(i) Lumen Maintenance at 1,000 Hours ..	≥90.0%	≥90.0%.
(ii) Lumen Maintenance at 40 Percent of Lifetime[1].	≥80.0%	≥80.0%.
(iii) Rapid Cycle Stress Test	At least 5 lamps must meet or exceed the minimum number of cycles. All MBCFLs: Cycle once per every two hours of lifetime [1].	At least 5 lamps must meet or exceed the minimum number of cycles. MBCFLs with start time >100 ms: Cycle once per hour of lifetime [1] or a maximum of 15,000 cycles. MBCFLs with a start time of ≤100 ms: Cycle once per every two hours of lifetime.[1]
(iv) Lifetime [1]	≥6,000 hours	≥10,000 hours.
(v) Start time	No requirement	The time needed for a MBCFL to remain continuously illuminated must be within: {1} one second of application of electrical power for lamp with standby mode power {2} 750 milliseconds of application of electrical power for lamp without standby mode power.

[1] Lifetime refers to lifetime of a compact fluorescent lamp as defined in § 430.2.

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

Appendix A—Letter From Department of Justice to the Department of Energy

U.S. Department of Justice
Antitrust Division
RFK Main Justice Building
950 Pennsylvania Avenue NW
Washington, DC 20530–0001

March 13, 2023

Ami Grace-Tardy
Assistant General Counsel for Legislation, Regulation and Energy Efficiency
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Dear Assistant General Counsel Grace-Tardy:

I am responding to your January 11, 2023 letter seeking the views of the Attorney General about the potential impact on competition of proposed energy conservation standards for general service lamps.

Your request was submitted under Section 325(o)(2)(B)(i)(V) of the Energy Policy and Conservation Act, as amended (ECPA), 42 U.S.C. 6295(o)(2)(B)(i)(V), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy conservation standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR 0.40(g). The Assistant Attorney General for the Antitrust Division has authorized me, as the Policy Director for the Antitrust Division, to provide the Antitrust Division's views regarding the potential impact on competition of proposed energy conservation standards on his behalf.

In conducting its analysis, the Antitrust Division examines whether a proposed standard may lessen competition, for example, by substantially limiting consumer choice or increasing industry concentration. A lessening of competition could result in higher prices to manufacturers and consumers.

We have studied in detail the Notice of Proposed Rulemaking (NOPR) regarding energy conservation standards for general service lamps, as well as the Technical Support Document (TSD) that accompanied it, both of which you transmitted to us under cover of your January 11 letter. We also attended via Webinar the February 1, 2023 Public Meeting held by the Department of Energy on the general service lamps NOPR and reviewed the related public comments.

The Division previously reviewed a related standard, contained in a Notice of Proposed Rulemaking published at 81 FR 14,528, on Mar. 17, 2016. Subsequently, the Division advised that it did not have evidentiary basis to conclude that that proposed standard for general service lamps was likely to adversely impact competition. The Division also advised that its conclusion was subject to significant uncertainty due to substantial marketplace changes that the standard would likely cause. Similarly, based on our review of the new standard, the Division does not have evidence that the new proposed standard for general service lamps are substantially likely to adversely impact competition.

Sincerely,

David G.B. Lawrence,

Policy Director.

[FR Doc. 2024–07831 Filed 4–18–24; 8:45 am]

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Part III

Department of Justice

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

Definition of ''Engaged in the Business'' as a Dealer in Firearms; Final Rule

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 2022R–17; AG Order No. 5920–2024]

RIN 1140–AA58

Definition of ''Engaged in the Business'' as a Dealer in Firearms

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

ACTION: Final rule.

SUMMARY: The Department of Justice (''Department'') is amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') regulations to implement the provisions of the Bipartisan Safer Communities Act that broaden the definition of when a person is considered ''engaged in the business'' (''EIB'') as a dealer in firearms other than a gunsmith or pawnbroker. This final rule incorporates the BSCA's definitions of ''predominantly earn a profit'' (''PEP'') and ''terrorism,'' and amends the regulatory definitions of ''principal objective of livelihood and profit'' and ''engaged in the business'' to ensure each conforms with the BSCA's statutory changes and can be relied upon by the public. The rule also clarifies what it means for a person to be ''engaged in the business'' of dealing in firearms and to have the intent to ''predominantly earn a profit'' from the sale or disposition of firearms. In addition, it clarifies the term ''dealer'' and defines the term ''responsible person.'' These clarifications and definitions assist persons in understanding when they are required to have a license to deal in firearms. Consistent with the Gun Control Act (''GCA'') and existing regulations, the rule also defines the term ''personal collection'' to clarify when persons are not ''engaged in the business'' because they make only occasional sales to enhance a personal collection or for a hobby, or if the firearms they sell are all or part of a personal collection. This rule further addresses the procedures that former licensees, and responsible persons acting on behalf of such licensees, must follow when they liquidate business inventory upon revocation or other termination of their license. Finally, the rule clarifies that a licensee transferring a firearm to another licensee must do so by following the verification and recordkeeping procedures in the regulations, rather than by using a Firearms Transaction Record, ATF Form 4473.

DATES: This rule is effective May 20, 2024.

FOR FURTHER INFORMATION CONTACT: Helen Koppe, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Washington DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This rulemaking finalizes the proposed rule implementing the provisions of the Bipartisan Safer Communities Act, Public Law 117–159, sec. 12002, 136 Stat. 1313, 1324 (2022) (''BSCA''), that amended the definition of ''engaged in the business'' in the GCA at 18 U.S.C. 921(a)(21)(C), as well as the Department's plan in response to Executive Order 14092 of March 14, 2023 (Reducing Gun Violence and Making Our Communities Safer), 88 FR 16527 (Mar. 17, 2023). Section 12002 of the BSCA broadened the definition of ''engaged in the business'' under 18 U.S.C. 921(a)(21)(C) by eliminating the requirement that a person's ''principal objective'' of purchasing and reselling firearms must include both ''livelihood and profit'' and replacing it with a requirement that the person must intend ''to predominantly earn a profit.'' The BSCA therefore removed the requirement to consider income for ''livelihood'' when determining that a person is ''engaged in the business'' of dealing in firearms at wholesale or retail. The definition of ''to predominantly earn a profit'' now focuses only on whether the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain. These regulations implement this statutory change and provide clarity to persons who remain unsure of whether they are engaged in the business as a dealer in firearms with the predominant intent of obtaining pecuniary gain. This rulemaking will result in more persons who are already engaged in the business of dealing in firearms becoming licensed and deter others from engaging in the business of dealing in firearms without a license. As more persons become licensed under this rule, those licensees will conduct more background checks to prevent prohibited persons from purchasing or receiving firearms, consistent with the longstanding requirements of the GCA for persons who are engaged in the business of dealing in firearms. Those additional licensees will also respond to trace requests when those firearms are later found at a crime scene. At the same time, neither the BSCA nor this rule purports to require every private sale of a firearm to be processed through a licensed dealer. Individuals may continue to engage in intrastate private sales without a license, provided that such individuals are not ''engaged in the business'' and the transactions are otherwise compliant with law.

This final rule accomplishes these important public safety goals of the GCA, as amended by the BSCA, in several ways. First, the rule finalizes an amendment to the regulatory definition of ''dealer'' to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying domestic or international activities are conducted.

Second, the rule finalizes an amendment to the regulatory definition of ''engaged in the business'' to define the terms ''purchase'' and ''sale'' as they apply to dealers to include any method of payment or medium of exchange for a firearm, including services or illicit forms of payment (*e.g.,* controlled substances). For further clarity, this final rule defines the term ''resale'' to mean ''selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person.'' This change aligns the regulatory text with the intent element in 18 U.S.C. 921(a)(21)(C) and makes clear that the term ''resale'' refers to the sale of a firearm, including a stolen firearm, any time after any prior sale has occurred.

Third, because performing services can also be a medium of exchange for firearms, the rule finalizes an amendment to existing regulations that codifies ATF's historical exclusion for auctioneers who provide only auction services on commission to assist in liquidating firearms at an ''estate-type'' auction.

Fourth, the rule clarifies who is required to be licensed as a wholesale or retail firearms dealer by finalizing a list of specific activities demonstrating when an unlicensed person's buying and reselling of firearms presumptively rises to the level of being ''engaged in the business'' as a dealer. It also finalizes a separate set of presumptions indicating when a person has the intent ''to predominantly earn a profit''

through the repetitive purchase and resale of firearms. The activities described in these presumptions are not an exclusive list of activities that may indicate that someone is ''engaged in the business'' or intends ''to predominantly earn a profit.'' These presumptions will provide clarification and guidance to persons who are potentially subject to the license requirement and will apply in administrative and civil proceedings. The presumptions will be used, for example, to help a fact finder determine in civil asset forfeiture proceedings whether seized firearms should be forfeited to the Government and in administrative licensing proceedings to determine whether to deny or revoke a Federal firearms license. These presumptions do not apply in any criminal proceedings but may be useful to judges in such proceedings when, for example, they decide how to instruct juries regarding permissible inferences.

At the same time, the final rule expressly recognizes that individuals who purchase firearms for the enhancement of a personal collection or a legitimate hobby are permitted by the GCA to occasionally buy and sell firearms for those purposes, or occasionally resell to a licensee or to a family member for lawful purposes, without the need to obtain a license. It also makes clear that persons may liquidate all or part of a personal collection, liquidate firearms that are inherited, or liquidate pursuant to a court order, without the need to obtain a license. Evidence of these activities may also be used to rebut the presumptions discussed above in a civil or administrative proceeding. Relatedly, the rule finalizes the proposed definition of the term ''personal collection'' (or ''personal collection of firearms'' or ''personal firearms collection'') to reflect common definitions of the terms ''collection'' and ''hobby.'' While firearms accumulated primarily for personal protection are not included in the definition of ''personal collection,'' the final rule makes clear that nothing in this rule shall be construed as precluding a person from lawfully acquiring a firearm for self-protection or other lawful personal use.

Finally, to help address the problem of licensees who improperly liquidate their business inventory of firearms without performing required background checks or maintaining required records after their license is terminated (*e.g.,* revocation, denial of renewal, expiration, or voluntary surrender), the rule finalizes the proposed regulations on discontinuing business. These regulations clarify the statutory requirements under 18 U.S.C. 923(c) regarding ''former licensee inventory''—a new term defined to mean those firearms that remain in the possession of a former licensee (or a ''responsible person'' of the former licensee, as also defined in the rule) at the time the license is terminated. The rule also finalizes an amendment to the regulations that makes clear that a licensee who transfers a firearm to another licensee is required to do so by following the licensee verification and recordkeeping procedures in the regulations, rather than by using a Firearms Transaction Record, ATF Form 4473 (''Form 4473'').

II. Background

Subsections in Section II

The Attorney General is responsible for enforcing the GCA. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA. *See* 18 U.S.C. 926(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA to the Director of ATF (''Director''), subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1), (c)(1); 28 CFR 0.130(a)(1)–(2); Treasury Department Order No. 221, sec. (1), (2)(d), 37 FR 11696, 11696–97 (June 10, 1972). Accordingly, the Department and ATF have promulgated regulations necessary to implement the GCA. *See* 27 CFR part 478.

The GCA, at 18 U.S.C. 922(a)(1)(A), makes it unlawful for any person, except a licensed dealer, to ''engage in the business'' of dealing in firearms.[1] The GCA further provides that no person shall engage in the business of dealing in firearms until the person has filed an application with ATF and received a license to do so. 18 U.S.C. 923(a). The required application must contain information necessary to determine eligibility for licensing and must include a photograph, fingerprints of the applicant, and a license fee for each place in which the applicant is to do business. 18 U.S.C. 923(a). The fee for dealers in firearms other than destructive devices is currently set by the GCA at $200 for the first three-year period and $90 for a renewal period of three years. 18 U.S.C. 923(a)(3)(B); 27 CFR 478.42(c)(2). Among other items, the Application for Federal Firearms License, ATF Form 7 (5310.12)/7CR (5310.16) (''Form 7''), requires the applicant to include a completed Federal Bureau of Investigation (''FBI'') Form FD–258 (''Fingerprint Card'') and a photograph for all responsible persons, including sole proprietors. *See* ATF Form 7, Instruction 6.

Significantly, under the GCA since 1998, once licensed, firearms dealers have been required to conduct background checks on prospective firearm recipients through the FBI's National Instant Criminal Background Check System (''NICS'') to prevent prohibited persons from receiving firearms. *See* 18 U.S.C. 922(t). They have also been required to maintain firearms transaction records for crime gun tracing purposes. *See* 18 U.S.C. 922(b)(5); 923(g)(1)(A). Persons who willfully engage in the business of dealing in firearms without a license are subject to a term of imprisonment of up to five years, a fine of up to $250,000, or both. 18 U.S.C. 922(a)(1)(A); 924(a)(1)(D); 3571(b)(3). Any firearms involved or used in any such willful violation may be subject to administrative or civil seizure and forfeiture. *See* 18 U.S.C. 924(d)(1). In addition, ATF may deny license applications submitted by persons who have willfully engaged in the business of dealing in firearms without a license, 18 U.S.C. 923(d)(1)(C), and ATF may revoke or deny renewal of a license if a licensee has aided and abetted others in willfully engaging in the business of dealing in firearms without a license, 18 U.S.C. 923(e)–(f).

A. Advance Notice of Proposed Rulemaking (1979)

The term ''dealer'' is defined by the GCA, 18 U.S.C. 921(a)(11)(A), and 27 CFR 478.11, and includes ''any person engaged in the business of selling firearms at wholesale or retail.'' However, as originally enacted, Congress did not define the term ''engaged in the business'' in the GCA.[2] Nor did ATF define the term ''engaged in the business'' in the original GCA implementing regulations.[3] ATF published an Advance Notice of Proposed Rulemaking (''ANPRM'') in

[1] Persons who engage in the business of manufacturing or importing firearms must also be licensed. 18 U.S.C. 922(a)(1)(A), 923(a). Once licensed, importers and manufacturers may also engage in the business of dealing, but only at their licensed premises and only in the same type of firearms their license authorizes them to import or manufacture. *See* 27 CFR 478.41(b).

[2] *See generally* Public Law 90–618, 82 Stat. 1213 (1968).

[3] 33 FR 18555 (Dec. 14, 1968).

the **Federal Register** in 1979 in an effort to ''develop a workable, commonly understood definition of ['engaged in the business'].'' *See* 44 FR 75186, 75186–87 (Dec. 19, 1979) (''1979 ANPRM''); 45 FR 20930 (Mar. 31, 1980) (extending the comment period for 30 more days). The ANPRM specifically referenced the lack of a common understanding of ''engaged in the business'' by the courts and requested comments from the public and industry on how the term should be defined and the feasibility and desirability of defining it. 1979 ANPRM at 75186–87.

ATF received 844 comments in response, of which approximately 551, or 65.3 percent, were in favor of ATF defining ''engaged in the business.'' [4] This included approximately 324 firearms dealers in favor of defining the term. However, at the time, ATF believed that none of the suggested definitions appeared ''to be broad enough to cover all possible circumstances and still be narrow enough to be of real benefit in any particular case.'' [5] One possible definition ATF considered would have established a threshold number of firearms sales per year to serve as a baseline for when a person would qualify as a dealer. The suggested threshold numbers ranged from ''more than one'' to ''more than 100'' per year. ATF did not adopt a numerical threshold because it would have potentially interfered with tracing firearms by persons who avoided obtaining a license (and therefore kept no records) by selling firearms under the minimum threshold.[6] Ultimately, ATF decided not to proceed further with rulemaking at that time. Congress also had not yet acted on then-proposed legislation—the McClure-Volkmer bill (discussed below)—which, among other provisions, would have defined ''engaged in the business.'' [7] For additional reasons why the Department has not adopted a minimum number of sales, see Section III.D of this preamble.

B. Firearms Owners' Protection Act of 1986

Approximately six years later, the McClure-Volkmer bill was enacted as part of the Firearms Owners' Protection Act (''FOPA''), Public Law 99–308, 100 Stat. 449 (1986). FOPA added a statutory definition of ''engaged in the business'' to the GCA. As applied to a person selling firearms at wholesale or retail, it defined the term ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C) as ''a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.'' [8] The term excluded ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.'' [9] FOPA further defined the term ''with the principal objective of livelihood and profit'' to mean ''that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.'' [10] Congress amended FOPA's definition of ''with the principal objective of livelihood and profit'' a few months later, clarifying that ''proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.'' [11]

The legislative history of FOPA reflects that the statutory definitions' purposes were to clarify that individuals who make only occasional firearms sales for a hobby to enhance their personal collection are not required to obtain a license and to benefit law enforcement ''by establishing clearer standards for investigative officers and assisting in the prosecution of persons truly intending to flout the law.'' [12] The legislative history also reveals that Congress did not intend to limit the licensing requirement only to persons for whom selling or disposing of firearms is a principal source of income or a principal business activity. The Committee Report stated that ''this provision would not remove the necessity for licensing from part-time businesses or individuals whose principal income comes from sources other than firearms, but whose main objective with regard to firearm transfers is profit, rather than hobby.'' [13] Thus, for example, ''[a] sporting goods or retail store which derived only a part of its income from firearm sales, but handled such sales for the 'principal objective of livelihood and profit,' would still require a license.'' [14]

Two years after its enactment, FOPA's definition of ''engaged in the business'' was incorporated into ATF's implementing regulations at 27 CFR 178.11 (now § 478.11) in defining the term ''Dealer in firearms other than a gunsmith or a pawnbroker.'' [15] At the same time, consistent with the statutory text and legislative history, ATF amended the regulatory definition of ''dealer'' to clarify that the term includes ''any person who engages in such business or occupation on a part-time basis.'' [16]

With respect to ''personal collections,'' FOPA included a provision, codified at 18 U.S.C. 923(c), that expressly authorized licensees to maintain and dispose of private firearms collections separately from their business operations. However, under FOPA, as amended, the ''personal collection'' provision was and remains subject to three limitations.

First, if a licensee records the disposition (*i.e.,* transfer) of any firearm from their business inventory into a personal collection, that firearm legally remains part of the licensee's business inventory until one year has elapsed after the transfer date. Should the licensee wish to sell or otherwise dispose of any such ''personal'' firearm during that one-year period, the licensee must re-transfer the applicable firearm back into the business inventory.[17] A subsequent transfer from the business inventory would then be subject to the recordkeeping and background check requirements of the GCA applicable to all other firearms in the business inventory. *See* 27 CFR 478.125(e); 478.102(a).

Second, if a licensee acquires a firearm for, or disposes of any firearm from, a personal collection for the purpose of willfully evading the restrictions placed upon licensees under the GCA, that firearm is deemed part of the business inventory. Thus, as explained in FOPA's legislative history, ''circuitous transfers are not exempt from otherwise applicable licensee requirements.'' [18]

[4] Memorandum for Assistant Director, Regulatory Enforcement, ATF, from Chief, Regulations and Procedures Division, ATF, *Re: Evaluation of Comments Received Concerning a Definition of the Phrase ''Engaged in the Business,'' Notice No. 331,* at 1–2 (June 9, 1980); *id.* at attach. 1.

[5] *Id.* at 2.

[6] *See id.*.

[7] *Id.* at 4.

[8] Public Law 99–308, sec. 101, 100 Stat. at 450.

[9] *Id.*

[10] *Id.*

[11] Public Law 99–360, sec. 1(b), 100 Stat. 766, 766 (1986).

[12] S. Rep. No. 98–583, at 8 (1984).

[13] *Id.* The Committee Report further explained that a statutory reference to pawnbrokers in the definition of ''engaged in the business'' was deleted because ''all pawnbrokers whose business includes the taking of any firearm as security for the repayment of money would automatically be a 'dealer.' '' *Id.* at 9.

[14] *Id.* at 8.

[15] 27 CFR 178.11 (1988).

[16] *Id.*

[17] 27 CFR 478.125a(a); *see also* S. Rep. No. 98–583, at 13.

[18] S. Rep. No. 98–583, at 13.

Third, even when a licensee has made a bona fide transfer of a firearm from their personal collection, section 923(c) requires the licensee to record the description of the firearm in a bound volume along with the name, place of residence, and date of birth of an individual transferee, or if a corporation or other business entity, the transferee's identity and principal and local places of business.[19] ATF incorporated these statutory provisions into its FOPA implementing regulations in 1988.[20]

As explained in the NPRM, courts interpreting the FOPA definition of ''engaged in the business'' found a number of factors relevant to assessing whether a person met that definition. 88 FR 61995. For example, in one leading case, the U.S. Court of Appeals for the Third Circuit listed the following nonexclusive factors for consideration to determine whether the defendant's principal objective was livelihood and profit (*i.e.,* economic): (1) quantity and frequency of the sales; (2) location of the sales; (3) conditions under which the sales occurred; (4) defendant's behavior before, during, and after the sales; (5) price charged for the weapons and the characteristics of the firearms sold; and (6) intent of the seller at the time of the sales. *United States* v. *Tyson,* 653 F.3d 192, 200–01 (3d Cir. 2011). In a separate case, the Third Circuit stated, ''[a]lthough the definition explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi,* it does not establish a specific quantity or frequency requirement. In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business. This inquiry is not limited to the number of weapons sold or the timing of the sales.'' *United States* v. *Palmieri,* 21 F.3d 1265, 1268 (3d Cir.), *vacated on other grounds,* 513 U.S. 957 (1994).[21]

C. Executive Action To Reduce Gun Violence (2016)

On January 4, 2016, President Obama announced several executive actions to reduce gun violence and to make communities across the United States safer. Those actions included two clarifications by ATF of ''principles'' relating to licensees, consistent with relevant court rulings: (1) that a person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted, and (2) that there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement.[22]

To provide this clarification, ATF published in 2016, and updated in 2023, a guidance document entitled *Do I Need a License to Buy and Sell Firearms?,* ATF Publication 5310.2.[23] The guidance assists unlicensed persons in understanding whether they will likely need to obtain a license as a dealer in firearms. Since its original publication in 2016, the guidance has explained that ''there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement.'' [24] ATF intends to further update the guidance once it issues this final rule.

D. Bipartisan Safer Communities Act (2022)

Over 35 years after FOPA's enactment, and 29 years after passage of the Brady Handgun Violence Protection Act of 1993 (Brady Act),[25] on June 25, 2022, President Biden signed into law the BSCA. Section 12002 of the BSCA broadened the definition of ''engaged in the business'' under 18 U.S.C. 921(a)(21)(C) by eliminating the requirement that a person's ''principal objective'' of purchasing and reselling firearms must include both ''livelihood and profit'' and replacing it with a requirement that the person must deal in firearms ''to predominantly earn a profit.'' The GCA now provides that, as applied to a wholesale or retail dealer in firearms, the term ''engaged in the business'' means ''a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' However, the BSCA definition did not alter the longstanding FOPA exclusions for ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.'' 18 U.S.C. 921(a)(21)(C).

These BSCA amendments were enacted after tragic mass shootings at a grocery store in Buffalo, New York; at an elementary school in Uvalde, Texas; and between Midland and Odessa, Texas.[26] In the third incident, the perpetrator had previously been adjudicated by a court as a mental defective and was prohibited from possessing firearms under 18 U.S.C. 922(g)(4).[27] After being denied a firearm from a licensed sporting goods store, he circumvented the NICS background check process by purchasing the AR–15 variant rifle he used in the shooting from an unlicensed individual without having to undergo a

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[19] *See* 18 U.S.C. 923(c).

[20] *See* 53 FR 10480 (Mar. 31, 1988); 27 CFR 178.125a (1988) (now § 478.125a). The existing regulations, 27 CFR 478.125(e) and 478.125a, which require dealers to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms, were upheld by the Fourth Circuit in *National Rifle Ass'n* v. *Brady,* 914 F.2d 475, 482–83 (4th Cir. 1990).

[21] *See also United States* v. *Brenner,* 481 F. App'x 124, 127 (5th Cir. 2012) (''Needless to say, in determining the character and intent of firearms transactions, the jury must examine all circumstances surrounding the transaction, without the aid of a 'bright-line rule.''' (quoting *Palmieri,* 21 F.3d at 1269)); *United States* v. *Bailey,* 123 F.3d 1381, 1392 (11th Cir. 1997) (''In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business.'' (quoting *Palmieri,* 21 F.3d at 1268)); *United States* v. *Nadirashvili,* 655 F.3d 114, 119 (2d Cir. 2011) (''[T]he government need not prove that dealing in firearms was the defendant's primary business. Nor is there a 'magic number' of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers.'' (quoting *United States* v. *Carter,* 801 F.2d 78, 81–82 (2d Cir. 1986))).

[22] *See* Press Release, The White House *FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer* (Jan. 4, 2016), *https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.*

[23] *See generally* ATF, *Do I Need a License to Buy and Sell Firearms?* (Jan. 2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf;* ATF, *Do I Need a License to Buy and Sell Firearms?* (Aug. 2023), *https://www.atf.gov/file/100871/download.*

[24] ATF, *Do I Need a License to Buy and Sell Firearms?* 5 (Jan. 2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.*

[25] Public Law 103–159, 107 Stat. 1536 (1993). The Brady Act created NICS, which became operational on November 30, 1998.

[26] *Buffalo Supermarket Shooting Gunman Kills 10 at Buffalo Supermarket in Racist Attack,* N.Y. Times (May 14, 2022), *https://www.nytimes.com/live/2022/05/14/nyregion/buffalo-shooting;* Mark Osborne et al., *At Least 19 Children, 2 Teachers Dead After Shooting at Texas Elementary School,* ABC News (May 25, 2022), *https://abcnews.go.com/US/texas-elementary-school-reports-active-shooter-campus/story?id=84940951;* Acacia Coronado & Alex Samuels, *Death Toll in Midland-Odessa Mass Shooting Climbs to Eight, Including the Shooter,* Texas Tribune (Aug. 31, 2019), *https://www.texastribune.org/2019/08/31/odessa-and-midland-shooting-30-victims-reports-say/.*

[27] Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR–15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), *https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms; Prison for Man Who Sold Texas Shooter Seth Ator AR–15 Used in Midland-Odessa Massacre,* CBS News (Jan. 7, 2021), *https://www.cbsnews.com/texas/news/prison-for-man-sold-texas-shooter-seth-ator-ar-15-midland-odessa-massacre/.*

background check.[28] The private seller later pled guilty to dealing in firearms without a license and to filing a false tax return due to his failure to report that major source of income.[29]

According to the Congressional Research Service (''CRS''), the BSCA's sponsors believed that ''there was confusion about the GCA's definition of 'engaged in the business,' as it pertained to individuals who bought and resold firearms repetitively for profit, but possibly not as the principal source of their livelihood.'' [30] CRS has explained that the sponsors ''maintain[ed] that [the BSCA's] changes clarify who should be licensed, eliminating a 'gray' area in the law, ensuring that one aspect of firearms commerce is more adequately regulated.'' [31]

As now defined by the BSCA, the term ''to predominantly earn a profit'' means that ''the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.'' 18 U.S.C. 921(a)(22). The statutory definition further provides that ''proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.'' *Id.* In the BSCA, Congress amended ''engaged in the business'' only with respect to dealers in firearms; it did not amend the various definitions of ''engaged in the business'' in 18 U.S.C. 921(a)(21) with respect to licensed gunsmiths, manufacturers, or importers.[32]

E. Executive Order 14092 (2023)

On March 14, 2023, President Biden issued Executive Order 14092, ''Reducing Gun Violence and Making Our Communities Safer.'' That order requires the Attorney General to submit a report to the President describing actions taken to implement the BSCA and to ''develop and implement a plan to: (i) clarify the definition of who is engaged in the business of dealing in firearms, and thus required to become Federal firearms licensees (FFLs), in order to increase compliance with the Federal background check requirement for firearm sales, including by considering a rulemaking, as appropriate and consistent with applicable law; [and] (ii) prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.'' [33]

III. Notice of Proposed Rulemaking

Subsections in Section III

A. Definition of ''Dealer''
B. Definition of ''Engaged in the Business''—''Purchase'' and ''Sale''
C. Definition of ''Engaged in the Business'' as Applied to Auctioneers
D. Presumptions That a Person is ''Engaged in the Business''
E. Definition of ''Personal Collection,'' ''Personal Collection of Firearms,'' and ''Personal Firearms Collection''
F. Definition of ''Responsible Person''
G. Definition of ''Predominantly Earn a Profit''
H. Disposition of Business Inventory After Termination of License
I. Transfer of Firearms Between FFLs and Form 4473

On September 8, 2023, the Department published in the **Federal Register** a notice of proposed rulemaking (''NPRM'') entitled ''Definition of 'Engaged in the Business' as a Dealer in Firearms,'' 88 FR 61993, proposing changes to various regulations in 27 CFR part 478. The comment period for the proposed rule concluded on December 7, 2023.

To implement the new statutory language in the BSCA, the NPRM proposed to amend paragraph (c) of the regulatory definition of ''engaged in the business,'' 27 CFR 478.11 (now paragraph (3) of § 478.11 and cross-referenced definition in § 478.13), pertaining to a ''dealer in firearms other than a gunsmith or pawnbroker,'' to conform with 18 U.S.C. 921(a)(21)(C) by removing the phrase ''with the principal objective of livelihood and profit'' and replacing it with the phrase ''to predominantly earn a profit.'' The rule also proposed to amend § 478.11 to conform with new 18 U.S.C. 921(a)(22) by adding the statutory definition of ''predominantly earn a profit'' as a new regulatory definition. Additionally, the rule proposed to move the regulatory definition of ''terrorism,'' which currently exists in the regulations under the definition of ''principal objective of livelihood and profit,'' to a new location. This is because the statutory definitions of ''to predominantly earn a profit'' (18 U.S.C. 921(a)(22)) and ''with the principal objective of livelihood and profit'' (18 U.S.C. 921(a)(23)) both provide that ''proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism'' and include identical definitions of ''terrorism.''

To further implement the BSCA's changes to the GCA, the rule proposed to clarify when a person is ''engaged in the business'' as a dealer in firearms at wholesale or retail by: (a) clarifying the definition of ''dealer''; (b) defining the terms ''purchase'' and ''sale'' as they apply to dealers; (c) clarifying when a person would not be engaged in the business of dealing in firearms as an auctioneer; (d) clarifying when a person is purchasing firearms for, and selling firearms from, a personal collection; (e) setting forth conduct that is presumed to constitute ''engaging in the business'' of dealing in firearms and presumed to demonstrate the intent to ''predominantly earn a profit'' from the sale or disposition of firearms, absent reliable evidence to the contrary; (f) adding a single definition for the terms ''personal collection,'' ''personal firearms collection,'' and ''personal collection of firearms''; (g) adding a definition for the term ''responsible person''; (h) clarifying that the intent to

[28] Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR–15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), *https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms.*

[29] *Id.*

[30] William J. Krouse, Cong. Rsch. Serv., IF12197, *Firearms Dealers ''Engaged in the Business''* 2 (2022), *https://crsreports.congress.gov/product/pdf/IF/IF12197.*

[31] *Id.; see also* 168 Cong. Rec. H5906 (daily ed. June 24, 2022) (statement of Rep. Jackson Lee) (''[O]ur bill would . . . further strengthen the background check process by clarifying who is engaged in the business of selling firearms and, as a result, is required to run background checks.''); 168 Cong. Rec. S3055 (daily ed. June 22, 2022) (statement of Sen. Murphy) (''We clarify in this bill the definition of a federally licensed gun dealer to make sure that everybody who should be licensed as a gun owner is. In one of the mass shootings in Texas, the individual who carried out the crime was mentally ill. He was a prohibited purchaser. He shouldn't have been able to buy a gun. He was actually denied a sale when he went to a bricks-and-mortar gun store, but he found a way around the background check system because he went online and found a seller there who would transfer a gun to him without a background check. It turned out that seller was, in fact, engaged in the business, but didn't believe the definition applied to him because the definition is admittedly confusing. So we simplified that definition and hope that will result—and I believe it will result—in more of these frequent online gun sellers registering, as they should, as federally licensed gun dealers which then requires them to perform background checks.''); Letter for Director, ATF, et al., from Sens. John Cornyn and Thom Tillis at 2–3 (Nov. 1, 2022) (''Cornyn/Tillis Letter'') (''The BSCA provides more clarity to the industry for when someone must obtain a federal firearms dealers license. In Midland and Odessa, Texas, for example, the shooter—who at the time was prohibited from possessing or owning a firearm under federal law—purchased a firearm from an unlicensed firearms dealer.''); Comments on the Rule from 17 U.S. Senators and 149 Representatives, p.4 (Nov. 30 and Dec. 1, 2023).

[32] The BSCA retained the existing term ''with the principal objective of livelihood and profit,'' which still applies to persons engaged in the business as manufacturers, gunsmiths, and importers. That definition became 18 U.S.C. 921(a)(23), and Congress renumbered other definitions in section 921 accordingly.

[33] *Reducing Gun Violence and Making Our Communities Safer,* E.O. 14092, secs. 2, 3(a)(i)–(ii), 88 FR 16527, 16527–28 (Mar. 14, 2023).

''predominantly earn a profit'' does not require the person to have received pecuniary gain, and that intent does not have to be shown when a person purchases or sells a firearm for criminal or terrorism purposes; (i) addressing how former licensees, and responsible persons acting on behalf of former licensees, must lawfully liquidate business inventory upon revocation or other termination of their license; and (j) clarifying that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of 27 CFR part 478, rather than using a Form 4473 when firearms are transferred to other licensees, including transfers by a licensed sole proprietor to that person's personal collection.

A. Definition of ''Dealer''

The NPRM noted that, in enacting the BSCA, Congress expanded the definition of ''engaged in the business'' ''as applied to a dealer in firearms,'' as noted above. 18 U.S.C. 921(a)(21)(C). Consistent with the text and purpose of the GCA, ATF regulations have long defined the term ''dealer'' to include persons engaged in the business of selling firearms at wholesale or retail, or as a gunsmith or pawnbroker, on a part-time basis. 27 CFR 478.11 (definition of ''dealer''). The NPRM explained that, due to the BSCA amendments, as well as continual confusion and non-compliance before and after the BSCA was passed, the Department has further considered what it means to be a ''dealer'' engaged in the firearms business in light of new technologies, mediums of exchange, and forums in which firearms are bought and sold with the predominant intent of obtaining pecuniary gain.

The NPRM further stated that, since 1968, advancements in manufacturing (*e.g.,* 3D printing) and distribution technology (*e.g.,* internet sales) and changes in the marketplace for firearms and related products (*e.g.,* large-scale gun shows) have changed the various ways individuals shop for firearms, and therefore have created a need for further clarity in the regulatory definition of ''dealer.'' [34] The proliferation of new communications technologies and e-commerce has made it simple for persons intending to make a profit to advertise and sell firearms to a large potential market at minimal cost and with minimal effort, using a variety of means, and often as a part-time activity. The proliferation of sales at larger-scale gun shows, flea markets, similar events, and online has also altered the marketplace since the GCA was enacted in 1968.

Therefore, in light of the BSCA's changes to the GCA and to provide additional guidance on what it means to be engaged in the business as a ''dealer'' within the diverse modern marketplace for firearms, the NPRM proposed to amend the regulatory definition of ''dealer'' in 27 CFR 478.11 to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities are conducted. This includes at any domestic or international public or private marketplace or premises. The proposed definition would provide nonexclusive examples of such existing marketplaces: a gun show [35] or event,[36] flea market,[37] auction house,[38] or gun range or club; at one's home; by mail order; [39] over the internet; [40] through the use of other electronic means (*e.g.,* an online broker,[41] online auction,[42] text messaging service,[43] social media

[34] *See* Cornyn/Tillis Letter at 3 (''Our legislation aims at preventing someone who is disqualified from owning or possessing a firearm from shopping around for an unlicensed firearm dealer.'').

[35] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 9 (July 2017), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-newsletter-july-2017/download* (gun show guidelines); ATF, *Important Notice to Dealers and Other Participants at This Gun Show,* ATF Information 5300.23A 1 (Sept. 2021) *https://www.atf.gov/firearms/docs/guide/important-notice-dealers-and-other-participants-gun-shows-atf-i-530023a/download* (licensees may only sell firearms at qualifying gun shows within the State in which their licensed business premises is located); Rev. Rul. 69–59 (IRS RRU), 1969–1 C.B. 360, 1969 WL 18703 (''[A] licensee may not sell firearms or ammunition at a gun show held on premises other than those covered by his license. He may, however, have a booth or table at such a gun show at which he displays his wares and takes orders for them, provided that the sale and delivery of the firearms or ammunition are to be lawfully effected from his licensed business premises only and his records properly reflect such transactions.'').

[36] *See, e.g.,* ATF, *How May a Licensee Participate in the Raffling of Firearms by an Unlicensed Organization?, https://www.atf.gov/firearms/qa/how-may-licensee-participate-raffling-firearms-unlicensed-organization* (last reviewed May 22, 2020); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 8–9 (June 2021), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download* (addressing conduct of business at firearm raffles); Letter for Pheasants Forever, from Acting Chief, Firearms Programs Division, ATF at 1–2 (July 9, 1999) (addressing nonprofit fundraising banquets); ATF, *FFL Newsletter* 4–5 (Feb. 1999), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-1999/download* (addressing dinner banquets).

[37] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 5–6 (June 2010), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-june-2010* (flea market guidelines); *see also United States* v. *Allman,* 119 F. App'x. 751, 754 (6th Cir. 2005) (''Illegal gun transactions at flea markets are not atypical.''); *United States* v. *Orum,* 106 F. App'x 972 (6th Cir. 2004) (defendant illegally displayed and sold firearms at flea markets and gun shows).

[38] *See Selling Firearms—Legally: A Q&A with the ATF,* Auctioneer, June 2010, at 22–27.

[39] *See, e.g., United States* v. *Buss,* 461 F. Supp. 1016 (W.D. Pa. 1978) (upholding jury verdict that defendant engaged in the business of dealing in firearms without a license through mail order sales).

[40] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 8 (June 2021), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download* (addressing internet sales of firearms); ATF Intelligence Assessment, *Firearms and internet Transactions* (Feb. 9, 2016); Mayors Against Illegal Guns, *Felon Seeks Firearm, No Strings Attached: How Dangerous People Evade Background Checks and Buy Illegal Guns Online* 14 (Sept. 2013), *https://www.nyc.gov/html/om/pdf/2013/felon_seeks_firearm.pdf;* Mayor Michael Bloomberg, City of New York, *Point, Click, Fire: An Investigation of Illegal Online Gun Sales* 2 (Dec. 2011); *United States* v. *Focia,* 869 F.3d 1269, 1274 (11th Cir. 2017) (affirming defendant's conviction for engaging in the business without a license by dealing firearms through the ''Dark Web'').

[41] A broker who actually purchases the firearms from the manufacturer, importer, or distributor, accepts payment for the firearms from the buyer, and has them shipped to the buyer from a licensee, must be licensed as a dealer because they are repetitively purchasing and reselling their firearms to predominantly earn a profit. Although individual dealers may sell firearms through online services sometimes called ''brokers,'' like a magazine or catalog company that only advertises firearms listed by known sellers and processes orders for them for direct shipment from the distributor to their buyers, these ''brokers'' are not themselves considered ''dealers.'' This is because these online ''brokers'' do not purchase the firearms for consideration, but only collect a commission or fee for providing contracted services to market and process the transaction for the seller. *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 3 (Sept. 2016), *https://www.atf.gov/firearms/docs/newsletter/ffl-newsletter-september-2016/download;* ATF, 2 *FFL Newsletter: Federal Firearms Licensee Information Service* 6–7 (Mar. 2013), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2013-volume-2/download; see also Fulkerson* v. *Lynch,* 261 F. Supp. 3d 779, 783–86, 788–89 (W.D. Ky. 2017) (denying summary judgment to applicant whose license was denied by ATF for previously willfully engaging in the business of dealing without a license as an online broker and granting summary judgement to the Government).

[42] *See, e.g.,* Press Release, DOJ, *Minnesota Man Indicted for Dealing Firearms Without a License* (Feb. 18, 2016), *https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license* (defendant dealt in firearms through websites such as *GunBroker.com*, an online auction website).

[43] *See, e.g.,* Press Release, DOJ, *Odenton, Maryland Man Exiled to 8 Years in Prison for Firearms Trafficking Conspiracy* (Apr. 27, 2017), *https://www.justice.gov/usao-md/pr/odenton-maryland-man-exiled-8-years-prison-firearms-trafficking-conspiracy* (defendant texted photos of firearms for sale to his customer and discussed prices).

raffle,[44] or website [45]); or at any other domestic or international public or private marketplace or premises. Many of these examples were referenced by courts, even before the BSCA expansion, as well as in ATF regulatory materials and common, publicly available sources. These examples in the NPRM were designed to clarify that firearms dealing requires a license in whatever place or through whatever medium the firearms are purchased and sold, including the internet and locations other than a traditional brick and mortar store.[46] However, regardless of the medium through or location at which a dealer buys and sells firearms, to obtain a license under the GCA, the dealer must still have a fixed premises in a State from which to conduct business subject to the license and comply with all applicable State and local laws regarding the conduct of such business.[47] 18 U.S.C. 922(b)(2); 923(d)(1)(E)–(F).

[44] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 9 (June 2021), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download* (''Social media gun raffles are gaining popularity on the internet. In most instances, the sponsor of the event is not a Federal firearms licensee, but will enlist the aid of a licensee to facilitate the transfer of the firearm to the raffle winner. Often, the sponsoring organization arranges to have the firearm shipped from a distributor to a licensed third party and never takes physical possession of the firearm. If the organization's practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must obtain a Federal firearms license.'').

[45] *See, e.g.,* Press Release, DOJ, *Snapchat Gun Dealer Convicted of Unlawfully Manufacturing and Selling Firearms* (Oct. 4, 2022), *https://www.justice.gov/usao-edca/pr/snapchat-gun-dealer-convicted-unlawfully-manufacturing-and-selling-firearms;* Press Release, DOJ, *Sebring Resident Sentenced to Prison for Unlawfully Dealing Firearms on Facebook* (Nov. 7, 2016), *https://www.justice.gov/usao-sdfl/pr/sebring-resident-sentenced-prison-unlawfully-dealing-firearms-facebook.*

[46] *See* Letter for Outside Counsel to National Association of Arms Shows, from Chief, Firearms and Explosives Division, ATF, *Re: Request for Advisory Opinion on Licensing for Certain Gun Show Sellers* at 1 (Feb. 17, 2017) (''Anyone who is engaged in the business of buying and selling firearms, regardless of the location(s) at which those transactions occur is required to have a Federal firearms license. ATF will issue a license to persons who intend to conduct their business primarily at gun shows, over the internet, or by mail order, so long as they otherwise meet the eligibility criteria established by law. This includes the requirement that they maintain a business premises at which ATF can inspect their records and inventory, and that otherwise complies with local zoning restrictions.''); Letter for Dan Coats, U.S. Senator, from Deputy Director, ATF, at 1–2 (Aug. 22, 1990) (an FFL cannot be issued at a table or booth at a temporary flea market); ATF Internal Memorandum #23264 (June 15, 1983) (same).

[47] *See Abramski* v. *United States,* 573 U.S. 169, 172 (2014) (''The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's 'business premises' by prohibiting, except in limited circumstances, the sale of a firearm 'to a person who does not appear in person' at that location.''); *National Rifle Ass'n,* 914 F. 2d at 480 (explaining that FOPA did not eliminate the requirement that a licensee have a business premises from which to conduct business ''which exists so that regulatory authorities will know where the inventory and records of a licensee can be found''); *Meester* v. *Bowers,* No. 12CV86, 2013 WL 3872946 (D. Neb. July 25, 2013) (upholding ATF's denial of license in part because the applicant failed to ''have 'premises from which he conducts business subject to license,''' in violation of 18 U.S.C. 923(d)(1)(E)).

The NPRM explained that, even though an applicant must have a business premises in a particular State to obtain a license, under the GCA, firearms purchases or sales requiring a license in the United States may involve conduct outside of the United States. Specifically, 18 U.S.C. 922(a)(1)(A) has long prohibited any person without a license from shipping, transporting, or receiving any firearm in foreign commerce while in the course of being engaged in the business of dealing in firearms,[48] and 18 U.S.C. 924(n) prohibits travelling from a foreign country to a State in furtherance of conduct that constitutes a violation of section 922(a)(1)(A).

The NPRM further noted that, as recently amended by the BSCA, the GCA now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. 18 U.S.C. 924(k)(2). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see* 18 U.S.C. 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for resale in another country are now engaging in conduct that is unlawful under the GCA. Consistent with the BSCA's new prohibition, 18 U.S.C. 924(k)(2), and the longstanding prohibition on ''ship[ping], transport[ing], or receiv[ing] any firearm in interstate or foreign commerce'' without a license, 18 U.S.C. 922(a)(1)(A), the rule proposed to clarify in the definition of ''dealer'' that purchases or sales of firearms as a wholesale or retail dealer may occur either domestically or internationally.

[48] *See, e.g., United States* v. *Baptiste,* 607 F. App'x 950, 953 (11th Cir. 2015) (upholding section 922(a)(1) conviction where firearms purchased in the United States were to be resold in Haiti); *United States* v. *Murphy,* 852 F.2d 1, 7–8 (1st Cir. 1988) (same with firearms to be resold in Ireland); *United States* v. *Hernandez,* 662 F.2d 289, 291 (5th Cir. 1981) (same with firearms to be resold in Mexico). *But see United States* v. *Mowad,* 641 F.2d 1067 (2d Cir. 1981) (reversing conviction for purchasing firearms for resale in Lebanon on the basis that there was no mention of exporting firearms in the GCA or any suggestion of congressional concern about firearm violence in other countries).

B. Definition of Engaged in the Business—''Purchase'' and ''Sale''

To further clarify the regulatory definition of a dealer ''engaged in the business'' with the predominant intent of earning a profit through the repetitive purchase and resale of firearms in 27 CFR 478.11, the NPRM also proposed to define, based on common dictionary definitions and relevant case law, the terms ''purchase'' and ''sale'' (and derivative terms thereof, such as ''purchases,'' ''purchasing,'' ''purchased,'' and ''sells,'' ''selling,'' or ''sold''). Specifically, the rule proposed to define ''purchase'' (and derivative terms thereof) as ''the act of obtaining a firearm in exchange for something of value,'' [49] and the term ''sale'' (and derivative terms thereof, including ''resale'') as ''the act of providing a firearm in exchange for something of value.'' [50] The term ''something of value'' was proposed to include money, credit, personal property (*e.g.,* another firearm [51] or ammunition [52]), a service,[53] a controlled substance,[54] or any other

[49] This definition is consistent with the common meaning of ''purchase,'' which is ''to obtain (as merchandise) by paying money or its equivalent.'' Webster's Third New International Dictionary 1844 (1971); *see also Purchase,* Black's Law Dictionary 1491 (11th ed. 2019) (''Webster's Third'') (''The acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.'').

[50] This definition is consistent with the common meaning of ''sale,'' which is ''a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).'' Webster's Third at 2003. The related term ''resale'' means ''the act of selling again.'' *Id.* at 1929.

[51] *See, e.g., United States* v. *Brenner,* 481 F. App'x, 125–26 (5th Cir. 2012) (defendant unlicensed dealer sold a stolen firearm traded to him for another firearm); *United States* v. *Gross,* 451 F.2d 1355, 1356, 1360 (7th Cir. 1971) (defendant ''had traded firearms [for other firearms] with the object of profit in mind'').

[52] *See, e.g., United States* v. *Huffman,* 518 F.2d 80, 81 (4th Cir. 1975) (defendant traded large quantities of ammunition in exchange for firearms).

[53] *See, e.g., United States* v. *57 Miscellaneous Firearms,* 422 F. Supp. 1066, 1070–71 (W.D. Mo. 1976) (defendant obtained the firearms he sold or offered for sale in exchange for carpentry work he performed).

[54] *See, e.g., United States* v. *Schaal,* 340 F.3d 196, 197 (4th Cir. 2003) (defendants traded many of their stolen firearms for drugs); *Johnson* v. *Johns,* No. 10–CV–904(SJF), 2013 WL 504446, at *1 (E.D.N.Y. Feb. 5, 2013) (on at least one occasion, petitioner, who was engaged in the unlicensed dealing in firearms

medium of exchange [55] or valuable consideration.[56]

Defining these terms to include any method of payment for a firearm would clarify that persons cannot avoid the licensing requirement by, for instance, bartering or providing or receiving services in exchange for firearms with the predominant intent to earn pecuniary gain even where no money is exchanged. It would also clarify that a person must have a license to engage in the business of dealing in firearms even when the medium of payment or consideration is unlawful, such as exchanging illicit drugs or performing illegal acts for firearms, and that it is a distinct crime to do so without a license.

C. Definition of Engaged in the Business as Applied to Auctioneers

Because the definitions of ''purchase'' and ''sale'' broadly include services provided in exchange for firearms, both as defined by common dictionaries and as proposed in the NPRM, the Department further proposed to make clear that certain persons who provide auctioneer services are not required to be licensed as dealers. ATF has long interpreted the statutory definition of ''engaged in the business'' as excluding auctioneers who provide only auction services on commission by assisting in liquidating firearms at an ''estate-type'' auction.[57] The new definition in the BSCA does not alter that interpretation. The Department proposed to incorporate this longstanding interpretation into the regulations while otherwise clarifying the regulatory definition of ''engaged in the business.''

As the NPRM explained, in this context, the auctioneer is generally providing services only as an agent of the owner or individual executor of an estate who is liquidating a personal collection. The firearms are within the estate's control and the sales are made on the estate's behalf. This limited exclusion from the definition of ''engaged in the business'' as a dealer is conditioned on the auctioneer not purchasing the firearms or taking them on consignment such that the auctioneer has the exclusive right and authority to sell the firearms at a location, time, and date to be selected by the auctioneer. If the auctioneer were to regularly engage in any of that conduct, the auctioneer would need to have a dealer's license because that person would be engaged in the business of purchasing and reselling firearms to earn a profit. An ''estate-type'' auction as described above differs from liquidating firearms by means of a ''consignment-type'' auction, in which the auctioneer is paid to accept firearms into a business inventory and then resells them in lots or over a period of time. In this ''consignment-type'' auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification.[58] Therefore, under ''consignment-type'' auctions, an auctioneer would need to be licensed.

D. Presumptions That a Person Is Engaged in the Business

The NPRM pointed out that the Department has observed through its enforcement efforts, regulatory functions, knowledge of existing case law, and subject-matter expertise that persons who are engaged in certain firearms purchase-and-sale activities are more likely than not to be ''engaged in the business'' of dealing in firearms at wholesale or retail. These activities have been observed through a variety of criminal, civil, and administrative enforcement actions and proceedings brought by the Department, including: (1) ATF inspections of prospective and existing wholesale and retail dealers of firearms who are, or intend to be, engaged in the business; [59] (2) criminal investigations and the resulting prosecutions (*i.e.,* cases) of persons who engaged in the business of dealing in firearms without a license; [60] (3) civil and administrative actions under 18 U.S.C. 924(d) to seize and forfeit firearms intended to be sold by persons engaged in the business without a license; [61] (4) ATF cease and desist letters issued to prevent section 922(a)(1)(A) violations; [62] and (5) ATF administrative proceedings under 18 U.S.C. 923 to deny licenses to persons who willfully engaged in the business of dealing in firearms without a license, or to revoke or deny renewal of existing licenses held by licensees who aided and abetted that misconduct.[63] In addition, numerous courts have identified certain activities or factors that are relevant to determining whether a person is ''engaged in the business''.[64] The rule, therefore, proposed to establish rebuttable presumptions in

through straw purchasers, compensated a straw purchaser with cocaine base).

[55] *See, e.g., Focia,* 869 F.3d at 1274 (defendant sold pistol online to undercover ATF agent for 15 bitcoins).

[56] The term ''medium of exchange'' generally means ''something commonly accepted in exchange for goods and services and recognized as representing a standard of value,'' Webster's Third at 1403, and ''valuable consideration'' is ''an equivalent or compensation having value that is given for something (as money, marriage, services) acquired or promised and that may consist either in some right, interest, profit, or benefit accruing to one party or some responsibility, forbearance, detriment, or loss exercised by or falling upon the other party,'' *id.* at 2530. *See, e.g., United States* v. *Berry,* 644 F.2d 1034, 1036 (5th Cir. 1981) (defendant sold firearms in exchange for large industrial batteries to operate his demolition business); *United States* v. *Reminga,* 493 F. Supp. 1351, 1357 (W.D. Mich. 1980) (defendant traded his car for three guns that he later sold or traded).

[57] *See* ATF, *Does an Auctioneer Who Is Involved in Firearms Sales Need a Dealer's License?, https://www.atf.gov/firearms/qa/does-auctioneer-who-involved-firearms-sales-need-dealer-license* (last reviewed July 10, 2020); ATF, *ATF Federal Firearms Regulations Reference Guide,* ATF Publication 5300.4, Q&A L1, at 207–08 (2014), *https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download;* ATF, *FFL Newsletter* 3 (May 2001), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-may-2001/download;* ATF Ruling 96–2, *Engaging in the Business of Dealing in Firearms (Auctioneers)* (Sept. 1996), *https://www.atf.gov/file/55456/download;* ATF, *FFL Newsletter* 7 (1990), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-1990-volume-1/download;* Letter for Editor, CarPac Publishing Company, from Acting Assistant Director (Regulatory Enforcement), ATF, at 1–2 (July 26, 1979).

[58] ATF Rul. 96–2 at 1.

[59] In Fiscal Year 2022, for example, ATF conducted 11,156 qualification inspections of new applicants for a license, and 6,979 compliance inspections of active licensees. *See* ATF, *Fact Sheet- Facts and Figures for Fiscal Year 2022* (Jan. 2023), *https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2022.*

[60] *See* footnotes 67 through 80 and 82 through 83, *infra.* The Department reviewed criminal cases from FY18 to FY23 that it investigated (closed), or is currently investigating (open/pending), involving violations of 18 U.S.C. 922(a)(1)(A) and 923(a).

[61] *See, e.g., United States* v. *Four Hundred Seventy Seven (477) Firearms,* 698 F. Supp. 2d 890, 890–91 (E.D. Mich. 2010) (civil forfeiture of firearms intended to be sold from an unlicensed gun store); *United States* v. *One Bushmaster, Model XM15–E2 Rifle,* No. 06–CV–156 (WDO), 2006 WL 3497899, at *1 (M.D. Ga. Dec. 5, 2006) (civil forfeiture of firearms intended to be sold by an unlicensed person who acquired an unusually large amount of firearms quickly for the purpose of selling or trading them); *United States* v. *Twenty Seven (27) Assorted Firearms,* No. SA–05–CA–407–XR, 2005 WL 2645010, at *1 (W.D. Tex. Oct. 13, 2005) (civil forfeiture of firearms intended to be sold at gun shows without a license).

[62] Over the years, ATF has issued numerous letters warning unlicensed persons not to continue to engage in the business of dealing in firearms without a license, also called ''cease and desist'' letters. *See, e.g., United States* v. *Kubowski,* 85 F. App'x 686, 687 (10th Cir. 2003) (defendant served cease and desist letter after selling five handguns and one rifle to undercover ATF agents).

[63] *See, e.g., In the Matter of Scott,* Application Nos. 9–93–019–01–PA–05780 and 05781 (Seattle Field Division, Apr. 3, 2018) (denied applicant for license to person who purchased and sold numerous handguns within one month); *In the Matter of SEL.L. Antiques,* Application No. 9–87–035–01–PA–00725 (Phoenix Field Division, July 14, 2006) (denied applicant who repetitively sold modern firearms from unlicensed storefront).

[64] *See* footnote 21, *supra,* and accompanying text. These cases—like the investigations, administrative actions, letters, and other examples cited in this paragraph—predate the BSCA's enactment but continue to be relevant to determining whether a person is ''engaged in the business'' because the BSCA expanded the definition of that term to cover additional conduct.

certain contexts to help unlicensed persons, industry operations personnel, and others determine when a person is likely ''engaged in the business'' requiring a dealer's license.[65]

These rebuttable presumptions would not shift the burden of persuasion in any proceeding from the Government. In addition, while the criteria set forth in the proposed rule may be useful to a court in a criminal proceeding—for example, to inform appropriate jury instructions regarding permissible inferences [66]—the proposed regulatory text made clear that the presumptions do not apply to criminal proceedings.

The Department considered, but did not propose in the NPRM, an alternative that would have set a minimum numerical threshold of firearms sold by a person within a certain period. That approach was not proposed for several reasons. First, while selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity, neither the courts nor the Department have recognized a set minimum number of firearms purchased or resold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is ''engaged in the business'' of dealing in firearms. Even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license. For example, even under the previous statutory definition, courts have upheld convictions for dealing without a license when few firearms, if any, were actually sold, when other factors were also present, such as the person representing to others a willingness and ability to repetitively purchase firearms for resale. *See, e.g., United States* v. *King,* 735 F.3d 1098, 1107 n.8 (9th Cir. 2013) (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that ''Section 922(a)(1)(A) does not require an actual sale of firearms'').[67] On the other hand, courts have stated that an isolated firearm transaction would not require a license when other factors were not present.[68] Second, in addition to the tracing concerns expressed by ATF in response to comments on the 1979 ANPRM, a person could structure their transactions to avoid a minimum threshold by spreading out their sales over time. Finally, the Department does not believe there is currently a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered ''engaged in the business.''

Rather than establishing a minimum threshold number of firearms purchased or sold, the NPRM proposed to clarify that, absent reliable evidence to the contrary, a person would be presumed to be engaged in the business of dealing in firearms when the person: (1) sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms; (2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time; (3) repetitively purchases for the purpose of resale, or sells or offers for sale firearms—(A) through straw or sham businesses, or individual straw purchasers or sellers; or (B) that cannot lawfully be purchased or possessed, including: (i) stolen firearms (18 U.S.C. 922(j)); (ii) firearms with the licensee's serial number removed, obliterated, or altered (18 U.S.C. 922(k); 26 U.S.C. 5861(i)); (iii) firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or (iv) machineguns or other weapons defined as firearms under 26 U.S.C. 5845(a) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d)); (4) repetitively sells or offers for sale firearms—(A) within 30 days after they were purchased; (B) that are new, or like

[65] The GCA and implementing regulations already incorporate rebuttable presumptions in other contexts. *See* 18 U.S.C. 922(b)(3) (A ''licensed manufacturer, importer or dealer shall be presumed, for purposes of [selling to out of state residents], in the absence of evidence to the contrary, to have had actual knowledge of the States laws and published ordinances of both States''); 27 CFR 478.96(c)(2) (same); *see also* 27 CFR 478.12(d) (''The modular subpart(s) identified in accordance with 478.92 with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be part of the frame or receiver of a weapon or device.''); 478.12(f)(1) (''Any such part [previously classified by the Director] that is identified with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be the frame or receiver of the weapon.''); 478.92(a)(1)(vi) (''firearms awaiting materials, parts, or equipment repair to be completed are presumed, absent reliable evidence to the contrary, to be in the manufacturing process'').

[66] Courts determine which jury instructions are appropriate in the criminal cases before them. While rebuttable presumptions may not be presented to a jury in a criminal case, jury instructions may include, for example, reasonable permissive inferences. *See Francis* v. *Franklin,* 471 U.S. 307, 314 (1985) (''A permissive inference suggests to the jury a possible conclusion to be drawn if the [Government] proves predicate facts, but does not require the jury to draw that conclusion.''); *County Court of Ulster County* v. *Allen,* 442 U.S. 140, 166–67 (1979) (upholding jury instruction that gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion); *Baghdad* v. *Att'y Gen. of the U.S.,* 50 F.4th 386, 390 (3d Cir. 2022) (''Unlike mandatory presumptions, permissive inferences . . . do not shift the burden of proof or require any outcome. They are just an 'evidentiary device . . . [that] allows—but *does not require*—the trier of fact to infer' that an element of a crime is met once basic facts have been proven beyond a reasonable doubt.''); *Patton* v. *Mullin,* 425 F.3d 788, 803–07 (10th Cir. 2005) (upholding jury instruction that created a permissive inference rather than a rebuttable presumption); *United States* v. *Warren,* 25 F.3d 890, 897 (9th Cir. 1994) (same); *United States* v. *Washington,* 819 F.2d 221, 225–26 (9th Cir. 1987) (same); *Lannon* v. *Hogan,* 719 F.2d 518, 520–25 (1st Cir. 1983) (same); *United States* v. *Gaines,* 690 F.2d 849 (11th Cir. 1982) (same); *cf., e.g., United States* v. *Antonoff,* 424 F. App'x 846, 848 (11th Cir. 2011) (recognizing the permissive inference of current drug use in ATF's definition of ''unlawful user'' in 27 CFR 478.11 as support for affirming the district court's finding that the defendant's drug use was ''contemporaneous and ongoing'' for sentencing purposes); *United States* v. *McCowan,* 469 F.3d 386, 392 (5th Cir. 2006) (upholding application of a sentencing enhancement based on the permissive inference of current drug use in 27 CFR 478.11); *United States* v. *Stanford,* No. 11–10211–01–EFM, 2012 WL 1313503 (D. Kan. Apr. 16, 2012) (holding that evidence of defendant's arrest was admissible by relying, in part, on the definition of ''unlawful user'' in 27 CFR 478.11).

[67] *See also* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?, https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf* (Jan. 2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf; Nadirashvili,* 655 F.3d at 120–21 (holding that, despite defendants' knowledge of only a single firearms transaction, there was sufficient evidence to prove they had aided and abetted unlawfully dealing in firearms without a license because they knew that their co-defendant ''held himself 'out generally as a source of firearms' and was ready to procure them for his customer''); *United States* v. *Kevin Shan,* 361 F. App'x 182, 183 (2d Cir. 2010) (holding that evidence that defendant sold two firearms within roughly a month and acknowledged he had a source of supply for other weapons was sufficient to affirm conviction for dealing firearms without a license); *United States* v. *Zheng Jian Shan,* 80 F. App'x 31 (9th Cir. 2003) (holding that evidence of sale of weapons in one transaction where the defendant was willing and able to find more weapons for resale was sufficient to affirm conviction); *Murphy,* 852 F.2d at 8 (''[T]his single transaction was sufficiently large in quantity, price and length of negotiation to constitute dealing in firearms.'').

[68] *United States* v. *Carter,* 203 F.3d 187, 191 (2d Cir. 2000) (''A conviction under 18 U.S.C. 922(a) ordinarily contemplates more than one isolated gun sale.''); *United States* v. *Swinton,* 521 F.2d 1255, 1259 (10th Cir. 1975) (''Swinton's sale [of one firearm] to Agent Knopp, standing alone, without more, would not have been sufficient to establish a violation of Section 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms. The unrebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns.'' (internal citation omitted)).

new in their original packaging; or (C) that are of the same or similar kind (*i.e.,* make/manufacturer, model, caliber/gauge, and action) and type (*i.e.,* the classification of a firearm as a rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm); (5) as a former licensee (or responsible person acting on behalf of the former licensee), sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal collection in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or (6) as a former licensee (or responsible person acting on behalf of a former licensee), sells or offers for sale firearms that were transferred to a personal collection of such former licensee or responsible person prior to the time the license was terminated, unless: (A) the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, of the United States Code; and (B) one year has passed from the date of transfer to the personal collection.

The proposed rule provided that any one circumstance or a combination of the circumstances set forth above would give rise to a rebuttable presumption that the person is engaged in the business of dealing in firearms and would need to be licensed under the GCA. The activities set forth in these proposed rebuttable presumptions would not be exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. Further, as previously noted, while the criteria may be useful to courts in criminal prosecutions when instructing juries regarding permissible inferences, the presumptions outlined above would not be applicable to such criminal cases.

At the same time, the Department recognized in the NPRM that certain transactions were not likely to be sufficient to support a presumption that a person is engaging in the business of dealing in firearms. For this reason, the proposed rule also included examples of when a person would not be presumed to be engaged in the business of dealing in firearms. Specifically, under the proposed rule, a person would not be presumed to be engaged in the business when the person transfers firearms only as bona fide gifts [69] or occasionally [70] sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby—unless their conduct also demonstrates a predominant intent to earn a profit.

The NPRM noted that the rebuttable presumptions are supported by the Department's investigative, regulatory, and enforcement experience,[71] as well as conduct that the courts have found to require a license even before the BSCA expanded the definition of ''engaged in the business.'' Moreover, these proposed presumptions are consistent with the case-by-case analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in firearms without a license. The Department observed in the NPRM that the fundamental purposes of the GCA would be severely undermined if persons were allowed to repetitively purchase and resell firearms to predominantly earn a profit without conducting background checks, keeping records, and otherwise complying with the license requirements of the GCA. The Department therefore proposed criteria for when a person is presumed to be ''engaged in the business'' to strike an appropriate balance that captures persons who should be licensed under the GCA, as amended, without limiting or regulating activity that is truly a hobby or enhancement of a personal collection.

The first proposed presumption—that a person would be presumed to be engaged in the business when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms—reflects that the definition of ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C) does not require that a firearm actually be sold by a person so long as the person is holding themself out as a dealer. This is because the relevant definition of ''engaged in the business,'' 18 U.S.C. 921(a)(21)(C), defines the phrase by reference to the intent ''to predominantly earn a profit through the repetitive purchase and resale of firearms'' even if those firearms are not actually repetitively purchased and resold.[72]

The second presumption proposed—that a person is engaged in the business when spending more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time—reflects that persons who spend more money or its equivalent on purchases of firearms for resale than their reported gross income are likely to be primarily earning their income from those sales, which is even stronger evidence of an intent to profit than merely supplementing one's income.[73] Alternatively, such persons may be using funds derived from criminal

[69] The Department interprets the term ''bona fide gift'' to mean a firearm given in good faith to another person without expecting any item, service, or anything of value in return. *See* Form 4473, at 4, Instructions to Question 21.a. (Actual Transferee/Buyer) (''A gift is not bona fide if another person offered or gave the person . . . money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm.''); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 2 (June 2021), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensee-ffl-newsletter-june-2021/download* (same).

[70] While the GCA does not define the term ''occasional,'' that term is commonly understood to mean ''of irregular occurrence; happening now and then, infrequent.'' *Occasional,* Collins English Dictionary, *https://www.collinsdictionary.com/us/dictionary/english/occasional* (last visited Apr. 4, 2024) (defining ''occasional'' in ''American English'').

[71] See the discussion at the beginning of Section III.D, ''Presumptions that a Person is 'Engaged in the Business.' ''

[72] *See United States* v. *Ochoa,* 726 F. App'x 651, 652 (9th Cir. 2018) (''[section] 922(a)(1)(A) reaches those who hold themselves out as sources of firearms.''); *United States* v. *Mulholland,* 702 F. App'x 7, 12 (2d Cir. 2017) (''The definition does not extend to a person who makes occasional sales for a personal collection or hobby, *id.,* and the government need only prove that a person was 'ready and able to procure [firearms] for the purpose of selling them from time to time.'' (quoting *Nadirashvili,* 655 F.3d at 199)); *King,* 735 F.3d at 1107 (defendant attempted to sell one of the 19 firearms he had ordered, and represented to the buyer that he was buying, selling, and trading in firearms and could procure any item in a gun publication at a cheaper price); *Shan,* 361 F. App'x at 183 (''[D]efendant sold two firearms within roughly one month and . . . Shan acknowledged on tape that he had a source of supply for other weapons.''); *Shan,* 80 F. App'x at 32 (''[T]he evidence leaves little doubt as to Shan's ability to seek and find weapons for resale''); *Carter,* 801 F.2d at 82 (''[T]he statute reaches 'those who hold themselves out as a source of firearms.' '' (quoting *United States* v. *Wilmoth,* 636 F.2d 123, 125 (5th Cir. 1981)).

[73] *See, e.g., Focia,* 869 F.3d at 1282 (''And finally, despite efforts to obtain Focia's tax returns and Social Security information, agents found no evidence that Focia enjoyed any source of income other than his firearms sales. This evidence overwhelmingly demonstrates that Focia's sales of firearms were no more a hobby than working at Burger King for a living could be described that way.''); *United States* v. *Valdes,* 681 F. App'x 874, 879 (11th Cir. 2017) (defendant who engaged in the business of dealing in firearms without a license did not report income on tax returns from firearms sales online and at gun shows); Press Release, DOJ, *Man Who Sold Midland/Odessa Shooter AR–15 Used in Massacre Sentenced for Unlicensed Firearms Dealing* (Jan. 7, 2021), *https://www.justice.gov/usao-ndtx/pr/man-who-sold-midlandodessa-shooter-ar-15-used-massacre-sentenced-unlicensed-firearms* (defendant convicted of filing a false tax return that concealed his income from firearms sales).

activities to purchase firearms, for example, including funds provided by a co-conspirator to repetitively purchase and resell the firearms without a license or for other criminal purposes, or funds that were laundered from past illicit firearms transactions. Such illicit and repetitive firearm purchase and sale activities do not require proof of profit for the Government to prove the requisite intent under 18 U.S.C. 921(a)(22), which states that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

The first presumption proposed within the third category listed above—that a person would be presumed to be engaged in the business when repetitively purchasing, reselling, or offering to sell firearms through straw or sham businesses or individual straw purchasers or sellers—reflects that persons who conceal their transactions by setting up straw or sham businesses or hiring ''middlemen'' to conduct transactions on their behalf are often engaged in the business of dealing in firearms without a license.[74]

The second presumption proposed under the third category—that a person would be presumed to be engaged in the business when repetitively purchasing, reselling, or offering to sell firearms that cannot lawfully be possessed—reflects that such firearms are actively sought by criminals and earn higher profits for the illicit dealer. The dealer is therefore taking on additional labor and risk with the intent of increasing profits. Such dealers will often buy and sell stolen firearms[75] and firearms with obliterated serial numbers[76] because such firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing.[77] They sometimes sell unregistered National Firearms Act (''NFA'') weapons[78] and unlawfully imported firearms because those firearms are more difficult to obtain, cannot be traced through the National Firearms Registration and Transfer Record, and may sell for a substantial profit.[79] Although these presumptions addressing repetitive straw purchase transactions and contraband firearms sales are intended to establish when persons are most likely to have the requisite intent to ''predominantly earn a profit'' under 18 U.S.C. 921(a)(21)(C), such cases are also supported by 18 U.S.C. 921(a)(22), which does not require the Government to prove an intent to profit where a person repetitively purchases and disposes of firearms for criminal purposes. These presumptions are also implicitly supported by 18 U.S.C. 923(c), which deems any firearm acquired or disposed of with the purpose of willfully evading the restrictions placed on licensed dealers under the GCA to be business inventory, not part of a personal collection. Indeed, concealing the identity of the seller or buyer of a firearm, or the identification of the firearm, undermines the requirements imposed on legitimate dealers to conduct background checks on actual purchasers (18 U.S.C. 922(t)) and maintain transaction records (18 U.S.C. 923(g)(1)–(2)) through which firearms involved in crime can be traced.

The first presumption proposed under the fourth category listed above—repetitive sales or offers for sale of firearms within 30 days from purchase—reflects that firearms for a personal collection are not likely to be repetitively sold within such a short period of time from purchase.[80] That

[74] *See Abramski,* 573 U.S. at 180 (''[C]onsider what happens in a typical straw purchase. A felon or other person who cannot buy or own a gun still wants to obtain one. (Or, alternatively, a person who could legally buy a firearm wants to conceal his purchase, maybe so he can use the gun for criminal purposes without fear that police officers will later trace it to him.''); *Bryan* v. *United* States, 524 U.S. 184, 189 (1998) (defendant used straw purchasers to buy pistols in Ohio for resale in New York); *Ochoa,* 726 F. App'x at 652 (''[W]hile the evidence demonstrated that Ochoa did not purchase and sell the firearms himself, it was sufficient to demonstrate that he had the princip[al] objective of making a profit through the repetitive purchase and sale of firearms, even if those purchases and sales were carried out by others.''); *United States* v. *Hosford,* 843 F.3d 161, 163 (4th Cir. 2016) (defendant purchased firearms through a straw purchaser who bought them at gun shows); *MEW Sporting Goods, LLC.* v. *Johansen,* 992 F. Supp. 2d 665, 674–75 (N.D.W.V. 2014), *aff'd,* 594 F. App'x 143 (4th Cir. 2015) (corporate entity disregarded where it was formed to circumvent firearms licensing requirement); *King,* 735 F.3d at 1106 (defendant felon could not ''immunize himself from prosecution'' for dealing without a license by ''hiding behind a corporate charter'' (quotation marks omitted)); *United States* v. *Fleischli,* 305 F.3d 643, 652 (7th Cir. 2002) (''In short, a convicted felon who could not have legitimately obtained a manufacturer's or dealer's license may not obtain access to machine guns by setting up a sham corporation.''); *National Lending Group, L.L.C.* v. *Mukasey,* No. CV 07–0024, 2008 WL 5329888, at *10–11 (D. Ariz. Dec. 19, 2008), *aff'd,* 365 F. App'x 747 (9th Cir. 2010) (straw ownership of corporate pawn shops); *United States* v. *Paye,* 129 F. App'x 567, 570 (11th Cir. 2005) (defendant paid straw purchaser to buy firearms for him to sell); *Casanova Guns, Inc.* v. *Connally,* 454 F.2d 1320, 1322 (7th Cir. 1972) (''[I]t is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provisions of a statute.''); *XVP Sports, LLC* v. *Bangs,* No. 2:11CV379, 2012 WL 4329258, at *5 (E.D. Va. Sept. 17, 2012) (''unity of interest'' existed between firearm companies controlled by the same person); *Virlow LLC* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives,* No. 1:06–CV–375, 2008 WL 835828, *3–7 (W.D. Mich. Mar. 28, 2008) (corporate form disregarded where a substantial purpose of the formation of the company was to circumvent the statute restricting issuance of firearms licenses to convicted felons); Press Release, DOJ, *Utah Business Owner Convicted of Dealing in Firearms Without a License and Filing False Tax Returns* (Sept. 23, 2016), *https://www.justice.gov/opa/pr/utah-business-owner-convicted-dealing-firearms-without-license-and-filing-false-tax-returns* (defendant illegally sold firearms under the auspices of a company owned by another Utah resident).

[75] *See, e.g., United States* v. *Fields,* 608 F. App'x 806, 809 (11th Cir. 2015); *United States* v. *Calcagni,* 441 F. App'x 916, 917 (3d Cir. 2011); *United States* v. *Simmons,* 485 F.3d 951, 953 (7th Cir. 2007); *United States* v. *Webber,* 255 F.3d 523, 524–25 (8th Cir. 2001); *Carter,* 801 F.2d at 83–84; *United States* v. *Perkins,* 633 F.2d 856, 857–58 (8th Cir. 1981); *United States* v. *Kelley,* No. 22C2780, 2023 WL 2525366, at *1 (N.D. Ill. 2023); *United States* v. *Logan,* 532 F. Supp. 3d 725, 726 (D. Minn. 2021); *United States* v. *Southern,* 32 F. Supp. 2d 933, 937 (E.D. Mich. 1998).

[76] *See, e.g., United States* v. *Ilarraza,* 963 F.3d 1, 6 (1st Cir. 2020); *Fields,* 608 F. App'x at 809; *United States* v. *Barrero,* 578 F. App'x 884, 886 (11th Cir. 2014); *Brenner,* 481 F. App'x at 126; *United States* v. *Teleguz,* 492 F.3d 80, 82 (1st Cir. 2007); *United States* v. *Bostic,* 371 F.3d 865, 869 (6th Cir. 2004); *United States* v. *Kitchen,* 87 F. App'x 244, 245 (3d Cir. 2004); *United States* v. *Ortiz,* 318 F.3d 1030, 1035 (11th Cir. 2003); *United States* v. *Rosa,* 123 F.3d 94, 96 (2d Cir. 1997); *United States* v. *Twitty,* 72 F.3d 228, 234 n.2 (1st Cir. 1995); *United States* v. *Collins,* 957 F.2d 72, 73 (2d Cir. 1992); *United States* v. *Hannah,* No. CRIM.A.05–86, 2005 WL 1532534, at *3 (E.D. Pa. 2005).

[77] *See Twitty,* 72 F.3d at 234 n.2 (defendant resold firearms with obliterated serial numbers, which were ''probably designed in part to increase the selling price of the weapons''); *Brenner,* 481 Fed. App'x at 126 (firearm traded to defendant was stolen); *Hannah,* 2005 WL 1532534, at *3 (holding that the defendant engaged in the business of dealing in firearms without a license in part because, on two occasions, ''the defendant informed the buyers to obliterate the serial numbers so he would not 'get in trouble' '').

[78] The National Firearms Act of 1934, 26 U.S.C. 5801 *et seq.,* regulates certain firearms, including short-barreled rifles and shotguns, machineguns, silencers, and destructive devices. NFA provisions still refer to the ''Secretary of the Treasury.'' *See generally* 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, this final rule refers to the Attorney General throughout.

[79] *See, e.g., United States* v. *Fridley,* 43 F. App'x 830, 831–32 (6th Cir. 2002) (defendant purchased and resold unregistered machineguns); *United States* v. *Idarecis,* 164 F.3d 620, 1998 WL 716568, at *1 (2d Cir. 1998) (unpublished table decision) (defendant converted rifles to machineguns and obliterated the serial numbers on the firearms he sold).

[80] *See, e.g.,* Press Release, DOJ, *Minnesota Man Indicted for Dealing Firearms Without a License* (Feb. 18, 2016), *https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license* (defendant sold firearms he purchased through online websites, and the average time he actually possessed a gun before offering it for sale was only nine days); Press Release, DOJ, *Ex-Pasadena Police Lieutenant Sentenced to One Year in Federal Prison for Unlicensed Selling of Firearms and Lying on ATF Form* (Feb. 25, 2019), *https://www.justice.gov/usao-cdca/pr/ex-pasadena-police-lieutenant-sentenced-one-year-federal-prison-unlicensed-selling* (defendant resold 79 firearms within six days after he purchased them); *United States* v. *D'Agostino,* No. 10–20449, 2011 WL

conduct is more consistent with treatment as business inventory.[81] Likewise, under the second and third presumptions proposed under this category, the Department has observed through its investigative and regulatory experience that persons who repetitively sell firearms in new condition or in like-new condition in their original packaging,[82] or firearms of the same or similar kind and type,[83] are not as likely to be repetitively selling such firearms from a personal collection. In contrast with sales from a personal collection, persons engaged in the business who are selling from a business inventory can earn the greatest profit by selling firearms in the best (*i.e.,* in a new) condition, or by selling the particular makes and models of firearms that their customers most want.

The presumption proposed under the fifth category listed above—that a former licensee, or responsible person acting on behalf of such former licensee, is engaged in the business when they sell or offer for sale firearms that were in business inventory upon license termination—recognizes that the licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a ''personal collection'' or otherwise as a personal firearm. Consistent with the GCA's plain language under section 921(a)(21)(C), this presumption recognizes that former licensees who thereafter intend to predominantly earn a profit from selling firearms that they had previously purchased for resale can still be ''engaging in the business'' after termination of their license. The GCA does not authorize former licensees to continue to be ''engaged in the business'' without a license even if the firearms were purchased while the person had a license.

The final presumption proposed—that a former licensee (or responsible person acting on behalf of the former licensee) is engaged in the business when they sell or offer for sale firearms that were transferred to the personal inventory of such former licensee or responsible person prior to the time the license was terminated, unless the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44 of title 18 and one year has passed since the transfer—is consistent with 18 U.S.C. 923(c) of the GCA, which deems firearms transferred from a licensee's business inventory to their personal collection or otherwise as a personal firearm as business inventory until one year after the transfer.[84] This provision indicates a congressional determination that one year is a sufficient period for a former licensee to wait before a firearm that is purchased for personal use can be considered part of a personal collection or otherwise as a personal firearm, as opposed to business inventory being resold for profit.

In the NPRM, the Department noted that these presumptions may be rebutted in an administrative or civil proceeding with reliable evidence demonstrating that a person is not ''engaged in the business'' of dealing in firearms.[85] If, for example, there is reliable evidence that an individual purchased a few collectible firearms from a licensed dealer where ''all sales are final'' and then resold those firearms back to the licensee within 30 days because the purchaser was not satisfied, the presumption that the unlicensed reseller is engaged in the business (arising from the evidence of repetitive sales or offers for sale of firearms within 30 days from purchase) may be rebutted.

219008, at *3 (E.D. Mich. Jan. 20, 2011) (some of the weapons defendant sold at gun shows were purchased ''a short time earlier''); *United States* v. *One Assortment of 89 Firearms,* 511 F. Supp. 133, 137 (D.S.C. 1980) (''That several sales of firearms occur in a reasonably short space of time is evidence of dealing in firearms.'').

[81] Further support for this 30-day presumption comes from the fact that, while many retailers do not allow firearm returns, some retailers and manufacturers do allow a 30-day period within which a customer who is dissatisfied with a firearm purchased for a personal collection or hobby can return or exchange the firearm. Dissatisfied personal collectors and hobbyists—persons not intending to engage in the business—are more likely to return new firearms rather than to incur the time, effort, and expense to resell them within that period of time. *See, e.g.,* Learn about the 30 Day Money Back Guarantee*: How to Return Your Firearm,* Walther Arms, *https://waltherarms.com/connect/guarantee#* (last visited Apr. 4, 2024); *Retail Policies,* Center Target Sports, *https://centertargetsports.com/retail-range/* (last visited Feb. 29, 2024) (''When you purchase any gun from Center Target Sports, we guarantee your satisfaction. Use your gun for up to 30 days and if for any reason you're not happy with your purchase, return it to us within 30 days and receive a store credit for the FULL purchase price.''); *Warranty & Return Policy,* Century Arms (Mar. 6, 2019), *https://www.centuryarms.com/media/wysiwyg/Warranty_and_Return_v02162021.pdf* (''Customer has 30 days to return surplus firearms, ammunition, parts, and accessories for repair/replacement if the firearm does not meet the advertised condition.''); *I Love You PEW 30 Day Firearm Guarantee,* Alphadog Firearms, *https://alphadogfirearms.com/i-love-you-pew/* (last visited Feb. 29, 2024) (''Original purchaser has 30 calendar days to return any new firearm purchased for store credit.''); *Return Exceptions Policy,* Big 5 Sporting Goods, *https://www.big5sportinggoods.com/static/big5/pdfs/Customer-Service-RETURN-EXCEPTIONS-POLICY-d.pdf* (last visited Feb. 29, 2024) (''Firearm purchases must be returned to the same store at which they were purchased. No refunds or exchanges unless returned in the original condition within thirty (30) days from the date of release.''); *Returns, Transfers & Consignments,* DFW Gun Range & Academy, *https://www.dfwgun.com/memberships/store-policies.html* (last visited Feb. 29, 2024) (30-day return policy); *Return Policy,* RifleGear, *https://www.riflegear.com/t-returns.aspx* (last visited Feb. 29, 2024) (30-day return policy); *Gun-Buyer Remorse Is a Thing of the Past,* Stoddard's Range and Guns, *https://stoddardsguns.com/stoddards-commitment/* (last visited Feb. 29, 2024) (30-day return policy); *Palmetto State Armory's Hassle-Free Return Policy,* AskHandle, *https://www.askhandle.com/blog/palmetto-state-armory-return-policy* (last visited Feb, 29, 2024) (30-day return policy); *Instructions for Returns/Repairs,* Rock River Arms, *https://www.rockriverarms.com/index.cfm?fuseaction=page.display&page_id=34* (last visited Feb. 29, 2024) (30-day return policy); ''*No Regrets*'' *Policy,* Granite State Indoor Range, *https://www.granitestaterange.com/our-pro-shop/* (last visited Apr. 4, 2024) (30-day return policy).

[82] *See, e.g., Carter,* 203 F.3d at 189 & n.1 (defendant admitted to willfully shipping and transporting 11 handguns in the course of engaging in the business of dealing in firearms without a license that were contained in their original boxes); *Brenner,* 481 F. App'x at 127 (defendant frequently referred to firearms as ''coming in'' and ''brand new''); *United States* v. *Van Buren,* 593 F.2d 125, 126 (9th Cir. 1979) (defendant's ''gun displays were atypical of those of a collector because he exhibited many new weapons, some in the manufacturers' boxes''); *United States* v. *Powell,* 513 F.2d 1249, 1250 (8th Cir. 1975) (defendant acquired and sold six ''new'' or ''like new'' shotguns over several months); *United States* v. *Posey,* 501 F.2d 998, 1002 (6th Cir. 1974) (defendant offered firearms for sale, some of them in their original boxes); *United States* v. *Day,* 476 F.2d 562, 564, 567 (6th Cir. 1973) (60 of the 96 guns to be sold by defendant were new handguns still in the manufacturer's original packages).

[83] *See, e.g.,* Press Release, DOJ, *FFL Sentenced for Selling Guns to Unlicensed Dealers* (May 27, 2022), *https://www.justice.gov/usao-ndtx/pr/ffl-sentenced-selling-guns-unlicensed-dealers* (defendant regularly sold large quantities of identical firearms to unlicensed associates who sold them without a license); *Shipley,* 546 F. App'x at 453 (defendant sold mass-produced firearms of similar make and model that were ''not likely to be part of a personal collection'').

[84] Even if one year has passed from the date of transfer, business inventory transferred to a personal collection or otherwise as a personal firearm of a former licensee (or responsible person acting on behalf of that licensee) prior to termination of the license cannot be treated as part of a personal collection or as a personal firearm if the licensee received or transferred those firearms with the intent to willfully evade the restrictions placed upon licensees by the GCA (*e.g.,* willful violations as cited in a notice of license revocation or denial of renewal). This is because, under section 923(c), any firearm acquired or disposed of with intent to willfully evade the restrictions placed upon licensees by the GCA is automatically business inventory. Therefore, because the firearms are statutorily deemed to be business inventory under either of these circumstances, a former licensee (or responsible person acting on behalf of such licensee) who sells such firearms is presumed to be engaged in the business, requiring a license.

[85] An example of an administrative proceeding where rebuttable evidence might be introduced would be where ATF denied a firearms license application, pursuant to 18 U.S.C. 923(d)(1)(C) and (f)(2), on the basis that the applicant was presumed under this rule to have willfully engaged in the business of dealing in firearms without a license. An example of a civil case would be an asset forfeiture proceeding, brought in a district court pursuant to 18 U.S.C. 924(d)(1), on the basis that the seized firearms were intended to be involved in willful conduct presumed to be engaging in the business without a license under this rule.

Similarly, the presumption that a person who repetitively resells firearms of the same make and model within one year of their purchase is ''engaged in the business'' could be rebutted based on evidence that the person is a collector who occasionally sells one specific kind and type of curio or relic firearm to buy another one in better condition to ''trade-up'' or enhance the seller's personal collection.[86] Another example in which evidence may rebut the presumption would be the occasional sale, loan, or trade of an almost-new firearm in its original packaging to a family member for lawful purposes, such as for their use in hunting, without the intent to earn a profit or to circumvent the requirements placed on licensees.[87]

E. Definition of ''Personal Collection,'' ''Personal Collection of Firearms,'' and ''Personal Firearms Collection''

The NPRM explained that the statutory definition of ''engaged in the business'' excludes ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.'' 18 U.S.C. 921(a)(21)(C). To clarify this definitional exclusion, the proposed rule would: (1) add a single definition for the terms ''personal collection,'' ''personal collection of firearms,'' and ''personal firearms collection''; (2) explain how those terms apply to licensees; and (3) make clear that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H, rather than using ATF Form 4473, when they acquire firearms from other licensees, including a sole proprietor who transfers a firearm to their personal collection or otherwise as a personal firearm in accordance with 27 CFR 478.125a.

Specifically, the NPRM proposed to define ''personal collection,'' ''personal collection of firearms,'' and ''personal firearms collection'' as ''personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (*e.g.,* noncommercial, recreational activities for personal enjoyment such as hunting, or skeet, target, or competition shooting).'' This reflects a common definition of the terms ''collection'' and ''hobby.'' [88] The phrase ''or for a hobby'' was adopted from 18 U.S.C. 921(a)(21)(C), which excludes from the definition of ''engaged in the business'' firearms acquired ''for'' a hobby. The NPRM also expressly excluded from the definition of ''personal collection'' ''any firearm purchased for resale or made with the predominant intent to earn a profit.'' 18 U.S.C. 921(a)(21)(C).

The NPRM further explained that, under the GCA, 18 U.S.C. 923(c), and its implementing regulations, 27 CFR 478.125(e) and 478.125a, a licensee who acquires firearms for a personal collection is subject to certain additional requirements before the firearms can become part of a ''personal collection.'' [89] Accordingly, the proposed rule further explained how that term would apply to firearms acquired by a licensee (*i.e.,* a person engaged in the business as a licensed manufacturer, licensed importer, or licensed dealer under the GCA), by defining ''personal collection,'' ''personal collection of firearms,'' or ''personal firearms collection,'' when applied to licensees, to include only firearms that were: (1) acquired or transferred without the intent to willfully evade the restrictions placed upon licensees by chapter 44, title 18, United States Code; [90] (2) recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale); [91] (3) recorded as a disposition from the licensee's business inventory to their personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e); (4) stored separately from, and not commingled with the business inventory, and appropriately identified as ''not for sale'' (*e.g.,* by attaching a tag), if on the business premises; [92] and (5) maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a.[93] These proposed parameters to define the term ''personal collection'' as applied to licensees reflect the statutory and regulatory requirements for personal collections in 18 U.S.C. 923(c) and 27

[86] *See Palmieri,* 21 F.3d at 1269 (''The fact finder must determine whether the transactions constitute hobby-related sales or engagement in the business of dealing from the nature of the sales and in light of their circumstances.'').

[87] *See, e.g., Clark* v. *Scouffas,* No. 99–C–4863, 2000 WL 91411, at *3 (N.D. Ill. Jan. 19, 2000) (license applicant was not a ''dealer'' who was ''engaged in the business'' as defined under section 921(a)(21)(C) where he only sold a total of three .38 Special pistols—two to himself, and one to his wife—without any intent to profit).

[88] *See* Webster's Third at 444, 1075, 1686 (defining the term ''personal'' to include ''of or relating to a particular person,'' ''collection'' to include ''an assembly of objects or specimens for the purposes of education, research, or interest'', and ''hobby'' as ''a specialized pursuit . . . that is outside one's regular occupation and that one finds particularly interesting and enjoys doing''); *Personal,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/personal* (last visited Mar. 1, 2024) (defining the term ''personal'' to include ''of, relating to, or affecting a particular person''); *Collection,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/collection* (last visited Mar. 1, 2024) (defining ''collection'' to include ''an accumulation of objects gathered for study, comparison, or exhibition or as a hobby''); *Hobby,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/hobby* (last visited Mar. 1, 2024) (defining ''hobby'' as a ''pursuit outside one's regular occupation engaged in especially for relaxation''); *see also Idarecis,* 164 F.3d 620, 1998 WL 716568, at *4 (''There is no case authority to suggest that there is a distinction between the definition of a collector and of a [personal] collection in the statute.'').

[89] The GCA, 18 U.S.C. 923(c), and its implementing regulations, also require that all firearms ''disposed of'' from a licensee's personal collection, including firearms acquired before the licensee became licensed, that are held for at least one year and that are sold or otherwise disposed of, must be recorded as a disposition in a personal bound book. *See* 18 U.S.C. 923(c); 27 CFR 478.125a(a)(4).

[90] *See* ATF, *May a Licensee Create a Personal Collection to Avoid the Recordkeeping and NICS Background Check Requirements of the GCA?, https://www.atf.gov/firearms/qa/may-licensee-create-personal-collection-avoid-recordkeeping-and-nics-background-check* (last reviewed July 15, 2020).

[91] *See* ATF, *Does a Licensee Have to Record Firearms Acquired Prior to Obtaining the License in Their Acquisition and Disposition Record?, https://www.atf.gov/firearms/qa/does-licensee-have-record-firearms-acquired-prior-obtaining-license-their-acquisition* (last reviewed July 15, 2020); ATF, *ATF Federal Firearms Regulations Reference Guide,* ATF P 5300.4, Q&A (F2) at 201 (2014) (''All firearms acquired after obtaining a firearms license must be recorded as an acquisition in the acquisition and disposition record as business inventory.''); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Feb. 2011), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-2011/download* (''There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity.''); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Mar. 2006), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2006/download* (''[E]ven if a dealer acquires a firearm from a licensee by completing an ATF Form 4473, the firearm must be entered in the transferee dealer's records as an acquisition.'').

[92] *See* ATF, *May a Licensee Store Personal Firearms at the Business Premises?, https://www.atf.gov/firearms/qa/may-licensee-store-personal-firearms-business-premises* (last reviewed July 15, 2020); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Feb. 2011), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-february-2011/download;* ATF Industry Circular 72–30, *Identification of Personal Firearms on Licensed Premises Not Offered for Sale* (Oct. 10, 1972).

[93] *See* ATF, *May a Licensee Maintain a Personal Collection of Firearms? How Can They Do So?, https://www.atf.gov/firearms/qa/may-licensee-maintain-personal-collection-firearms-how-can-they-do-so* (last reviewed July 15, 2020).

CFR 478.122(a), 478.123(a), 478.125(e), and 478.125a.[94] To implement these changes, the rule also proposed to make conforming changes by adding references in 27 CFR 478.125a to the provisions that relate to the acquisition and disposition recordkeeping requirements for importers and manufacturers.

F. Definition of ''Responsible Person''

The NPRM also proposed to add a regulatory definition of the term ''responsible person'' in 27 CFR 478.11, to mean ''[a]ny individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a sole proprietorship, corporation, company, partnership, or association, insofar as they pertain to firearms.'' This definition comes from 18 U.S.C. 923(d)(1)(B) and has long been reflected on the application for license (Form 7) and other ATF publications since enactment of a similar definition in the Safe Explosives Act in 2002.[95] This definition would exclude, for example, store clerks or cashiers who cannot make management or policy decisions with respect to firearms (*e.g.,* what company or store-wide policies and controls to adopt, which firearms are bought and sold by the business, and who is hired to buy and sell the firearms), even if their duties include buying or selling firearms for the business.

G. Definition of ''Predominantly Earn a Profit''

The NPRM also explained that the BSCA broadened the definition of ''engaged in the business'' as a dealer by substituting ''to predominantly earn a profit'' for ''with the principal objective of livelihood or profit.'' 18 U.S.C. 921(a)(21)(C). It also defined the term ''to predominantly earn a profit.'' 18 U.S.C. 921(a)(22). The NPRM proposed to incorporate those statutory changes, as discussed above.

The NPRM proposed to further implement the BSCA's amendments by: (1) clarifying that the ''proof of profit'' proviso—*i.e.,* the BSCA's provision that ''proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism''—also excludes intent to profit, thus making clear that it is not necessary for the Federal Government to prove that a person intended to make a profit if the person was dealing in firearms for criminal purposes or terrorism; (2) clarifying that a person may have the predominant intent to profit even if the person does not actually obtain pecuniary gain from selling or disposing of firearms; and (3) establishing a presumption in civil and administrative proceedings that certain conduct demonstrates the requisite intent to ''predominantly earn a profit,'' absent reliable evidence to the contrary.

These proposed regulatory amendments are consistent with the plain language of the GCA. Neither the pre-BSCA definition of ''with the principal objective of livelihood and profit'' nor the post-BSCA definition of ''to predominantly earn a profit'' requires the Government to prove that the defendant actually profited from firearms transactions. *See* 18 U.S.C. 921(a)(22), (a)(23) (referring to ''the intent underlying the sale or disposition of firearms''); *Focia,* 869 F.3d at 1282 (''The exact percentage of income obtained through the sales is not the test; rather, . . . the statute focuses on the defendant's motivation in engaging in the sales.'').[96]

ATF's experience also establishes that certain conduct related to the sale or disposition of firearms presumptively demonstrates a primary motivation to earn a profit. In addition to conducting criminal investigations of unlicensed firearms businesses under 18 U.S.C. 922(a)(1)(A), ATF has for many decades observed through qualification and compliance inspections how dealers who sell or dispose of firearms demonstrate a predominant intent to obtain pecuniary gain, as opposed to other intents, such as improving or liquidating a personal collection.

Based on this decades-long body of experience, the proposed rule provided that, absent reliable evidence to the contrary, a person would be presumed to have the intent to ''predominantly earn a profit'' when the person: (1) advertises, markets, or otherwise promotes a firearms business (*e.g.,* advertises or posts firearms for sale, including on any website; establishes a website for selling or offering for sale their firearms; makes available business cards; or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally; [97] (2) purchases, rents, or otherwise secures or sets aside permanent or temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case; [98] (3) makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales; [99] (4) purchases or otherwise secures merchant services as a business (*e.g.,* credit card transaction services, digital wallet for business) through

[94] The existing regulations, 27 CFR 478.125(e) and 478.125a—which require licensees to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms—were upheld by the Fourth Circuit in *National Rifle Ass'n,* 914 F.2d at 482–83.

[95] *See* 18 U.S.C. 841(s); *Application for Federal Firearms License,* ATF Form 7, Definition 3 (5300.12) (Oct. 2020); *Gilbert* v. *ATF,* 306 F. Supp. 3d 776, 781 (D. Md. 2018); *Gossard* v. *Fronczak,* 206 F. Supp. 3d 1053, 1064–65 (D. Md. 2016), *aff'd,* 701 F. App'x 266 (4th Cir. 2017); ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 6 (Sept. 2011), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-september-2011/download.*

[96] *See also Valdes,* 681 F. App'x at 877 (the government does not need to show that the defendant ''necessarily made a profit from dealing'' (quoting *Wilmoth,* 636 F.2d at 125)); *United States* v. *Mastro,* 570 F. Supp. 1388, 1391 (E.D. Pa. 1983) (''[T]he government need not show that defendant made or expected to make a profit.'' (citing cases)); *United States* v. *Shirling,* 572 F.2d 532, 534 (5th Cir. 1978) (''The statute is not aimed narrowly at those who profit from the sale of firearms, but rather broadly at those who hold themselves out as a source of firearms.''); *cf. King,* 735 F.3d at 1107 n.8 (section 922(a)(1)(A) does not require an actual sale of firearms).

[97] *See, e.g., United States* v. *Caldwell,* 790 F. App'x 797, 799 (7th Cir. 2019) (defendant placed 192 advertisements on a website devoted to gun sales); *Valdes,* 681 F. App'x at 878 (defendant handed out business card); *United States* v. *Pegg,* 542 F. App'x 328 (5th Cir. 2013) (defendant sometimes advertised firearms for sale in the local newspaper); *United States* v. *Crudgington,* 469 F. App'x 823, 824 (11th Cir. 2012) (defendant advertised firearms for sale in local papers, and tagged them with prices); *United States* v. *Dettra,* No. 99–3667, 2000 WL 1872046, at *2 (6th Cir. Dec. 15, 2000) (''Dettra's use of printed business cards and his acceptance of credit payment provide further reason to infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby.''); *United States* v. *Norman,* No. 4–10CR00059–JLH, 2011 WL 2678821, at *3 (E.D. Ark. 2011) (defendant placed advertisements in local newspaper and on a website).

[98] *See, e.g., United States* v. *Wilkening,* 485 F.2d 234, 235 (8th Cir. 1973) (defendant set up a glass display case and displayed for sale numerous ordinary long guns and handguns that were not curios or relics); *United States* v. *Jackson,* 352 F. Supp. 672, 676 (S.D. Ohio 1972), *aff'd,* 480 F.2d 927 (6th Cir. 1973) (defendant set up glass display case, displaying numerous long guns and handguns for sale that were not curios or relics); Press Release, DOJ, *Asheville Man Sentenced for Dealing Firearms Without a License* (Jan. 20, 2017), *https://www.justice.gov/usao-wdnc/pr/asheville-man-sentenced-dealing-firearms-without-license-0* (defendant sold firearms without a license from his military surplus store).

[99] *See, e.g., United States* v. *White,* 175 F. App'x 941, 942 (9th Cir. 2006) (''Appellant also created a list of all the firearms he remembers selling and the person to whom he sold the firearm.''); *Dettra,* 2000 WL 1872046, at *2 (''Dettra carefully recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner.''); *United States* v. *Angelini,* 607 F.2d 1305, 1307 (9th Cir. 1979) (defendant kept sales slips or invoices).

which the person makes or offers to make payments for firearms transactions; [100] (5) formally or informally purchases, hires, or otherwise secures business security services (*e.g.,* a central station-monitored security system registered to a business [101] or guards for security [102]) to protect business assets or transactions that include firearms; (6) formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions; [103] (7) secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or (8) purchases a business insurance policy, including any riders that cover firearms inventory.[104] Any of these firearms-business-related activities justifies a rebuttable presumption that the person has the requisite intent to predominantly earn a profit from reselling or disposing of firearms.

The NPRM noted that these rebuttable presumptions concerning an intent ''to predominantly earn a profit'' are independent of the set of presumptions described above regarding conduct that presumptively shows a person is ''engaged in the business.'' This second set of presumptions that addresses only intent ''to predominantly earn a profit'' would be used to independently establish the requisite intent to profit in a particular proceeding. As with the ''engaged in the business'' presumptions, the activities set forth in these intent presumptions would not be exhaustive of the conduct that may show that, or be considered in determining whether, a person actually has the requisite intent ''to predominantly earn a profit.'' There are many other fact patterns that would not fall within the specific conduct that presumptively requires a license under this rule but that reveal one or more preparatory steps that presumptively demonstrate an intent to predominantly earn a profit from firearms transactions. Again, none of these presumptions would apply to criminal prosecutions, but could be useful to courts in criminal cases, for example, to inform appropriate jury instructions regarding permissible inferences. These presumptions would be supported by the Department's investigative and regulatory efforts and experience as well as conduct that the courts have relied upon in determining whether a person was required to be licensed as a dealer in firearms even before the BSCA expanded the definition.

H. Disposition of Business Inventory After Termination of License

The NPRM next explained that one public safety issue that ATF has encountered over the years relates to former licensees who have liquidated their business inventory of firearms without performing background checks or maintaining required records after their license was revoked, denied renewal, or otherwise terminated (*e.g.,* license expiration or surrender of license). Some former licensees have transferred their business inventory of firearms to a ''personal collection'' and then sold them without performing background checks or recordkeeping.[105] Sometimes former licensees even continue to acquire more firearms for resale (''restocking'') after license termination. These activities have resulted in numerous firearms being sold without background checks by former licensees (including those whose licenses have been revoked or denied due to willful violations of the GCA) to potentially prohibited persons without any ability to trace those firearms if later used in crime.[106]

The NPRM proposed to revise the regulation's sections on discontinuing business, 27 CFR 478.57 and 478.78, to clarify how the prohibitions on engaging in the business of dealing in firearms without a license in 18 U.S.C 922(a)(1)(A) and 923(a) apply with respect to the sale of firearms that remain in the possession of a former licensee (or a responsible person of the former licensee) as business inventory at the time the license is terminated. Firearms that were in the business inventory of a former licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license) and that remain in the possession of the licensee (or a responsible person acting on behalf of the former licensee) are not part of a ''personal collection.'' While 18 U.S.C. 921(a)(21)(C) allows an unlicensed person to ''sell all or part of his personal collection'' without being considered ''engaged in the business,'' in this context, these firearms were purchased

[100] *See, e.g., King,* 735 F.3d at 1106–07 (defendant ''incorporated and funded a firearms business 'on behalf' of a friend whose American citizenship enabled business to obtain Federal firearms license'' and then ''misappropriated company's business account, using falsified documentation to set up credit accounts and order firearms from manufacturers and wholesalers''); *Dettra,* 2000 WL 1872046, at *2 (''Dettra's . . . acceptance of credit payment provide[s] further reason to infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby.'').

[101] Numerous jurisdictions require all persons with alarms or security systems designed to seek a police response to be registered with or obtain a permit from local police and pay the requisite fee. *See, e.g.,* Albemarle County (Virginia) Code sec. 12–102(A); Arlington County (Virginia) Code sec. 33–10(A); Cincinnati (Ohio) City Ord. Ch. 807–1–A4 (2); City of Coronado (California) Code sec. 40.42.050; Irvine (California) Code sec. 4–19–105; Kansas City (Missouri) Code sec. 50–333(a); Larimer County (Colorado) Security Alarm Ord. 09142010O001 sec. 3(A); Lincoln (Nebraska) Mun. Code sec. 5.56.030(a); Los Angeles (California) Mun. Code sec. 103.206(b); Loudoun County (Virginia) Code sec. 655.03(a); Mobile (Alabama) Code sec. 39–62(g)(1); Montgomery County (Maryland) Code sec. 3A–3; Prince William County (Virginia) Code sec. 2.5.25(a); Rio Rancho (New Mexico) Mun. Code sec. 97.04(A); Scottsdale (Arizona) Code sec. 3–10(a); Tempe (Arizona) Code sec. 22–76(a); Washington County (Oregon) Code sec. 8.12.040; West Palm Beach (Florida) Code sec. 46–32(a); Wilmington (Delaware) Code sec. 10–38(c); Woburn (Massachusetts) Code sec. 8–31. Due to the value of the inventory and assets they protect, for-profit businesses are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property.

[102] *See, e.g., United States* v. *De La Paz-Rentas,* 613 F.3d 18, 22–23 (1st Cir. 2010) (defendant was hired as bodyguard for protection in an unlawful firearms transaction).

[103] *See, e.g., United States* v. *Gray,* 470 F. App'x at 469 (defendant sold firearms through his sporting goods store, advertised his business using signs and flyers, and displayed guns for sale, some with tags).

[104] *See, e.g., United States* v. *Kish,* 424 F. App'x 398, 404 (6th Cir. 2011) (defendant could only have 200 firearms on display because of insurance policy limitations).

[105] *See, e.g.,* Annie Linskey, *Closed Store Is a Source of Guns,* Baltimore Sun (Apr. 15, 2008), *https://www.baltimoresun.com/news/bs-xpm-2008-04-15-0804150118-story.html* (after revocation of license, a dealer transferred around 700 guns to his ''personal collection'' and continued to sell them without recordkeeping). The problem of licensees liquidating their business inventory of firearms as firearms from their ''personal collections'' without background checks or recordkeeping has been referred to by some advocacy groups and Members of Congress as the ''fire-sale loophole.'' *See* Dan McCue, *Booker Bill Takes Aim at Gun Fire Sale Loophole,* The Well News (Sept. 9, 2022), *https://www.thewellnews.com/guns/booker-bill-takes-aim-at-gun-fire-sale-loophole/;* Shira Toeplitz, *Ackerman Proposes Gun-Control Bill to Close 'Firesale Loophole',* Politico: On Congress Blog (Jan. 12, 2011), *https://www.politico.com/blogs/on-congress/2011/01/ackerman-proposes-gun-control-bill-to-close-firesale-loophole-032289.*

[106] *See, e.g., Dettra,* 2000 WL 1872046, at *2 (defendant continued to deal in firearms after license revocation); Press Release, DOJ, *Gunsmoke Gun Shop Owner and Former Discovery Channel Star Indicted and Arrested for Conspiracy, Dealing in Firearms without a License and Tax Related Charges* (Feb. 11, 2016), *https://www.justice.gov/opa/pr/gunsmoke-gun-shop-owner-and-former-discovery-channel-star-indicted-and-arrested-conspiracy* (defendant continued to deal in firearms at a different address after he surrendered his FFL due to his violations of the Federal firearms laws and regulations); *Kish,* 424 F. App'x at 405 (defendant continued to sell firearms after revocation of license); *Gilbert* v. *Bangs,* 813 F. Supp. 2d 669, 672 (D. Md. 2011), *aff'd* 481 F. App'x 52 (4th Cir. 2012) (license denied to applicant who willfully engaged in the business after license revocation); ATF Letter to AUSA (Mar. 13, 1998) (advising that seized firearms offered for sale were not deemed to be part of a ''personal collection'' after surrender of license).

by the former licensee as business inventory and were not accumulated by that person for study, comparison, exhibition, or for a hobby. Accordingly, a former licensee who sells business inventory after their license is terminated could be unlawfully engaging in the business of dealing in firearms without a license.

Under the proposals to revise 27 CFR 478.57 (discontinuance of business) and 478.78 (operations by licensee after notice), once a license has been terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee would have 30 days, or such additional period designated by the Director for good cause, to either: (1) liquidate any remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with part 478 of the regulations; [107] or (2) transfer the remaining business inventory to the ''personal inventory of the former licensee'' (or a responsible person of the former licensee) provided the recipient is not prohibited by law from receiving or possessing firearms. The term ''personal inventory of the former licensee'' was proposed to clarify that such firearms are not part of a ''personal collection'' within the meaning of 18 U.S.C. 921(a)(21)(C). Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee (or responsible person of such licensee) who resells any such inventory, including business inventory transferred to ''personal inventory,'' would be subject to the same presumptions in 27 CFR 478.11 (definition of ''engaged in the business'' as a dealer other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale.

The 30-day period from license termination for a former licensee to transfer the firearms either to another licensee or to a personal collection parallels the period of time for record disposition after license termination in the GCA, 18 U.S.C. 923(g)(4), and is a reasonable period for that person to wind down operations after discontinuance of business without acquiring new firearms.[108] That period of liquidation was proposed to be extendable by the Director for good cause, such as to allow pawn redemptions if required by State, local, or Tribal law.

Also, the NPRM proposed to make clear in the definition of ''personal collection'' in 27 CFR 478.11 that firearms transferred by a former licensee to a personal collection prior to the license termination would not be considered part of a personal collection unless one year had passed from the date the firearm was transferred into the personal collection before the license was terminated. This proposal would give effect to 18 U.S.C. 923(c), which requires that all firearms acquired by a licensee be maintained as part of a personal collection for a period of at least one year before they lose their status as business inventory. Former licensees (or responsible persons) who sell business inventory within one year after transfer to a personal collection would be presumed to be engaging in the business of dealing in those firearms because the firearms are not yet considered part of a ''personal collection.'' *See* § 478.13(b)(5).

Moreover, under the proposed rule, a former licensee would not be permitted to continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'') without a license. Therefore, a former licensee (or responsible person) would be subject to the same presumptions in 27 CFR 478.11 (definition of ''engaged in the business'' as a dealer other than a gunsmith or pawnbroker) that apply to persons who sell firearms that were repetitively purchased with the predominant intent to earn a profit and any sales by such a person will be closely scrutinized by the Department on a case-by-case basis.

I. Transfer of Firearms Between FFLs and Form 4473

Finally, to ensure the traceability of all firearms acquired by licensees from other licensees, the NPRM proposed to make clear that licensees cannot satisfy their obligations under 18 U.S.C. 923(g)(1)(A) by completing a Form 4473 when selling or otherwise disposing of firearms to another licensed importer, licensed manufacturer, or licensed dealer, or disposing of a curio or relic to a licensed collector, including a sole proprietor licensee who transfers the firearm to their personal collection or otherwise as a personal firearm in accordance with 27 CFR 478.125a.[109] Form 4473 was not intended for use by licensees when transferring firearms to other licensees or by a sole proprietor transferring to their personal collection or otherwise as a personal firearm.

Pursuant to 18 U.S.C. 926(a)(1) and 27 CFR 478.94, 478.122(b), 478.123(b), and 478.125(e), when a licensee transfers a firearm to another licensee, the transferor must first verify the recipient's identity and license status by examining a certified copy of the recipient's license and recording the transfer as a disposition to that licensee in the bound book record. In turn, the recipient licensee would record the receipt as an acquisition in their bound book record. *See* 27 CFR part 478, subpart H. The NPRM explained that if a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record, asserting it is a ''personal firearm,'' then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime.

However, this clarification that FFLs may not satisfy their obligations by completing a Form 4473 to transfer firearms between themselves would not include dispositions by a licensed legal entity such as a corporation, company (to include a limited liability company), or partnership, to the personal collection of a responsible person of such an entity. This is because, when a responsible person acquires a firearm for their personal collection from the business entity holding the license, they are not acting on behalf of the licensee, even if the entity in which they are employed holds a Federal firearms license.[110] Such an entity, including a

[107] Consistent with its dictionary definition, the term ''liquidate'' in this context means to sell or otherwise dispose of a firearms inventory without acquiring additional firearms for the inventory (*i.e.,* ''restocking''). *See Liquidate,* Merriam-Webster, *https://www.merriam-webster.com/dictionary/liquidate* (last visited Mar. 4, 2024) (defining ''liquidate'' as ''to convert (assets) into cash''); *see also, e.g., Brenner,* 481 F. App'x at 127 (defendant former licensee was not liquidating a personal collection where all of the indictment-charged firearms were acquired after his license had not been renewed).

[108] *See also* 27 CFR 478.57 (requiring the owner of a discontinued or succeeded business to notify ATF of such discontinuance or succession within 30 days); 27 CFR 478.127 (requiring discontinued businesses to turn in records within 30 days).

[109] *See* ATF, *FFL Newsletter: Federal Firearms Licensee Information Service* 7 (Mar. 2006), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-march-2006/download* (''A dealer who purchases a firearm from another licensee should advise the transferor licensee of his or her licensed status so the transferor licensee's records may accurately reflect that this is a transaction between licensees. An ATF Form 4473 should not be completed for such a transaction, because this form is used only for a disposition to a nonlicensee.'').

[110] *See* ATF Ruling 2010–1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee* (May 20, 2010), *https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download* (permanently assigning a

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corporation, company, or partnership, would therefore have to use a Form 4473, NICS check, and disposition record entry when transferring a firearm to one of its individual officers (or partners, in the case of a partnership, or members, in the case of a limited liability company) for their personal use.[111]

IV. Analysis of Comments and Department Responses

Subsections in Section IV

A. Issues Raised in Support of the Rule
B. Issues Raised in Opposition to the Rule
C. Concerns With Specific Proposed Provisions
D. Concerns With the Economic Analysis

In response to the NPRM, ATF received nearly 388,000 comments. Of these, there were nearly 258,000 comments that expressed support for the proposed rule, or approximately two thirds of the total number of comments. Of these, over 252,000 (or approximately 98 percent) were submitted by individuals as form letters, *i.e.,* identical text that is often supplied by organizations or found online and recommended to be submitted to the agency as a comment.[112] There were nearly 99,000 comments opposed to the rule, or approximately 26 percent of the total number of comments, of which over 80,000 (or approximately 81 percent) were submitted as form letters.[113] The commenters' grounds for support and opposition, along with specific concerns and suggestions, are discussed below.

ATF also received some comments and recommendations on issues that are outside the scope of this rulemaking, such as comments asking ATF to implement provisions of the BSCA other than the definition of ''engaged in the business,'' [114] and comments not addressing issues presented in the proposed rule. Comments and recommendations that were outside the scope of this rulemaking, or received after the comment period deadline, are not addressed in this final rule.[115]

A. Issues Raised in Support of the Rule

As noted, nearly 258,000 commenters expressed support for the NPRM, including through form letters submitted as part of mass mail campaigns. The majority provided specific reasons why they supported the proposed rule. ATF received supporting comments from a wide variety of individuals and organizations, such as multiple city and State officials, including almost half of the States' attorneys general; Members of Congress; [116] teachers and teacher organizations; doctors, national medical organizations, and hospitals; victim advocate organizations; clergy and religious organizations; firearm owners; student and parent organizations; military veterans and active duty members; persons with law enforcement backgrounds; and various firearm control advocacy organizations, among many others. As discussed below, numerous commenters raised particular reasons they consider the rule necessary, as well as suggestions regarding the Department's proposed amendments to ATF regulations.

1. General Support for the Rule

Comments Received

Commenters supported the rule for a wide variety of reasons. The vast majority of supportive commenters expressed overall relief that this rule was forthcoming, were in support of the provisions as at least a beginning toward needed increases in public safety, and indicated that the rule was well designed. For example, one commenter stated, ''I wholeheartedly support the proposed amendments,'' while another added, ''I am thrilled that the ATF is taking action to tighten background checks.'' Another commenter said, ''[w]ow. What a well thought out and thorough set of rules . . . . I support the rules set out as written.'' A fourth commenter, an organization, said, ''[i]t is important to note that the various parts of the Proposed Rule are carefully integrated and work together to bring clarity, balance, and enforceability to the GCA's implementing regulations after BSCA amended the GCA—and we urge ATF to preserve each and every provision through to final publication.''

Those who commented about their public safety concerns added that this rule would help reduce gun violence, prevent prohibited persons from obtaining firearms, make communities safer, and save lives of both private citizens and police personnel, all of which they considered essential. The overall sentiment, as succinctly summed up in one of the form letters submitted by many thousands in support of the regulation, was, ''we must do what we can to stop gun violence.'' One commenter stated that moving beyond guidance to rulemaking is ''absolutely essential'' to ensure those selling firearms for profit are conducting background checks that are essential for public safety. One veteran and gun owner stated, ''I have great respect for the challenging but important role the [ATF] plays to ensure firearms are properly sold to and remain in the hands of owners who can both *legally and safely* own a firearm. Public Safety is paramount for me and will always supersede any perceived infringement on my Second Amendment Rights.'' Another commenter stated that numerous avenues must be taken to help protect Americans and emphasized that the number of mass shootings, suicides by gun, domestic violence deaths by firearms, and all the other shooting deaths ''are out of control, and appalling.'' Many other commenters also expressed their concern for public safety, for keeping prohibited persons from having firearms, and the resulting need for this rule, stating for example,

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firearm to a specific employee for personal use is considered a ''transfer'' that would trigger the recordkeeping and NICS background check requirements).

[111] *See* ATF, *Does an Officer or Employee of an Entity That Holds a Federal Firearms License, Such as a Corporation, Have to Undergo a NICS Check When Acquiring a Firearm for Their Own Personal Collection?, https://www.atf.gov/firearms/qa/does-officer-or-employee-entity-holds-federal-firearms-license-such-corporation-have* (last reviewed May 22, 2020); ATF, 2 *FFL Newsletter: Federal Firearms Licensee Information Service* 4 (Sept. 2013), *https://www.atf.gov/firearms/docs/newsletter/federal-firearms-licensees-newsletter-september-2013-volume-2/download.*

[112] There were four form letter campaigns in support of the rule and five form letter campaigns in opposition to the rule. Altogether, form letters totaled 332,000 comments, or about 86 percent. The vast majority of these form letter submissions included the name and city/state of the commenter. However, thousands also included personal stories, information, and concerns in addition to the form letter text. For example, at least one of these form letters had more than 1,000 variations (identified by a text analytics program and subsequent manual review) due to commenter additions and changes.

[113] In addition to the number of comments in support or in opposition to the rule, for about 1,000 comments, the commenters' positions could not be determined. Another nearly 30,000 comments were identified by a text analytics program as duplicate submissions, some in support and some in opposition to the rulemaking.

[114] The Department is incorporating other firearm provisions of the BSCA into ATF regulations through a separate rulemaking, a direct final rule entitled ''Bipartisan Safer Communities Act Conforming Regulations.''

[115] *See Thompson* v. *Clark,* 741 F.2d 401, 408 (D.C. Cir. 1984) (''[The Administrative Procedure Act] has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial.''); *cf. Home Box Off., Inc.* v. *FCC,* 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (''[O]nly comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency.'').

[116] ATF received two letters from Members of the United States House of Representatives in support of the rule, one dated December 1, 2023, with 149 signatories, and another dated December 7, 2023, with seven signatories. ATF received one letter in support from Members of the United States Senate, dated November 30, 2023, with 17 signatories.

''[a]lthough no single action will eliminate gun violence, this rule, which will have an especial impact on reducing gun access to those who are most interested in using it for ill, is essential to saving lives in our country.''

Many of the commenters believed that the proposed rule would increase public safety. One commenter stated, for example, that ''broadening the language [as Congress did in the statute] and strengthening this particular regulation will help to serve as a strong foundation for potential reforms in the future.'' Numerous other commenters stated that they considered the rule's provisions to be necessary, but only modest or starting steps toward much-needed public safety measures. For example, one commenter stated, ''[t]he standards in the proposed [rule] are such a modest beginning to the action needed to eliminate gun violence in our society.'' A further commenter added, ''if [the rule] could save even one life, wouldn't that be worth it? Please do not let another opportunity pass to do something to make our country safer!''

Military veteran groups in support of gun safety stressed that veterans' unique and valuable understanding of guns comes from the three basic pillars of military gun culture: (1) training, (2) safety, and (3) accountability—concepts they said are often lacking in civilian gun culture and laws. They added that this rule will keep guns out of the hands of dangerous individuals by ensuring that those prohibited by Federal law from purchasing firearms cannot use gun shows or internet sites to avoid our nation's background check laws—people who could be a danger not just to others, but to themselves. Additionally, these veteran groups pointed out that veterans are 2.3 times more likely to die by suicide, and 71 percent of veteran suicides are by gun (compared to about half of nonveteran suicides). Furthermore, they said, guns are 90 percent effective in causing a death by suicide, while all other lethal means combined are less than 5 percent effective. They concluded, ''[t]his rule will save veterans lives; but it must be done now.''

Healthcare and physicians' organizations called gun violence a public health epidemic and urged that ATF issue the rule because it would reduce or prevent firearm-related injuries and death. Several teacher organizations and religious organizations of different denominations expressed similar views, as did multiple parent and student-led organizations. One commenter stated, ''Gun violence is among our nation's most significant public health problems. Indeed, gun violence is the leading cause of death of children and teens. The impact of gun violence is not only death and injury, but also the long-term psychological toll that gun-related incidents inflict on those who survive shootings, as well as on the friends and family members of the injured, killed or impacted.'' They added that the proposed rule is vital and must be finalized. One commenter summarized, ''[t]his ruling can help to address the horrific epidemic of gun violence in this country.'' Another commenter agreed, observing that ''[g]un violence needs to be treated as the public health issue that it is. We owe our children a safe environment in schools as well as places of worship, stores and other public spaces.''

Department Response

The Department acknowledges the commenters' support and agrees that the final rule will increase public safety, as further explained below. *See* Section IV.A.6 and Department Response in Section IV.B.2 of this preamble.

2. Changes Are Consistent With Law

Comments Received

A number of commenters believed the proposed rule's approach was fair and consistent with current law. For example, one commenter stated that the ''proposed rule balances regulatory oversight and individual rights'' and ''ensures that responsible gun enthusiasts can engage in legal sales without unnecessary burdens while addressing concerns related to unlicensed firearms dealing.'' Several other commenters stated that promulgating this rule would not be forcing new law onto people and that the rule falls in line with the new gun laws that have already been established. As another commenter added, under the proposed rule, gun sellers will be no more exposed to criminal liability than they are currently for engaging in unlicensed business dealings; ''they will just have a much clearer sense of what conduct does and does not fall within that prohibition.''

Some commenters said the current process for acquiring firearms from licensed dealers is working, is not burdensome, and should be applied more broadly. For example, one gun owner commented that she could ''attest to how fast a background check can take after completing an online sale and then going to pick up the gun through a local dealer'' and that ''[n]o one is being inconvenienced by doing a [background] check.'' A sport trap shooter agreed, commenting that, ''I don't understand why there is something wrong with [this] process in the eyes of the [National Rifle Association] and others.'' Another commenter added that this rule still easily allows law-abiding people to obtain a gun if they go through the appropriate process. Some State attorneys general agreed, specifically mentioning that ATF's ''predominantly earn a profit'' presumptions are consistent with commercial, for-profit enterprises and are inconsistent with ''other intents, such as improving or liquidating a personal firearms collection,'' that Congress intended to exempt.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule is fully consistent with the GCA. The presumptions in the rule are based on the text and structure of the GCA as well as decades of post-FOPA case law interpreting the GCA. Additionally, the presumptions in the rule are consistent with the purpose of the GCA, as amended by the BSCA.

3. Changes Are Consistent With Statutory Authority

Comments Received

Other comments in support of the proposed rule emphasized that the proposed rule, which clarifies who must be licensed as a dealer and perform background checks, is fully within the Department's and ATF's statutory authority. Two sets of congressional commenters from both the House and Senate explained that ATF has interpreted the BSCA amendments to the GCA ''pursuant to the authority that Congress has long and consistently delegated to the Department of Justice and ATF to enforce our federal firearms laws—including the Gun Control Act of 1968 and now BSCA.'' The commenters added, ''[t]he proposed rule is appropriately based on investigative efforts and regulatory action that ATF has undertaken for decades and Congress' recognition that ATF can, and must, address the modern firearms marketplace, including the conditions under which guns are bought and sold. Claims that ATF has overstepped or even usurped Congress' legislative powers are inapposite. ATF has, time and again, implemented the laws that Congress has passed, including those related to licensing requirements and procedures, as well as background checks. ATF's proposed rule is no different.''

Another set of commenters (some State attorneys general) added, ''[t]he proposed rule is an exercise of ATF's inherent authority to amend its own regulations to implement the broadened definition of 'engaged in the business' promulgated by Congress in the BSCA. It is a function explicitly authorized by 18 U.S.C. 926(a), as clarifying a definition within the rule is a 'rule[ ] [or] regulation necessary to carry out the provisions' of the [GCA]. ATF's regulatory authority under the GCA plays a critical role in protecting the public from gun violence and has been repeatedly reaffirmed by federal courts in the decades since the GCA's passage.'' In support, the commenters cited cases in which courts have recognized ATF's expertise and authority to promulgate regulations.

Additional commenters noted that the proposed regulatory changes are fully within ATF's lawful authority and that the proposed rule is, as stated by one commenter, ''in fact necessary for ATF to be able to implement and enforce the new law that Congress has put on the books.'' Citing multiple ATF firearms regulations, this commenter also pointed out that ATF has for decades exercised its authority to promulgate and revise regulations implementing and enforcing the GCA, including by issuing and updating detailed regulatory definitions.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule is fully consistent with the Department's and ATF's statutory authority.

4. Enhances Public Safety by Expanding Background Checks

Comments Received

Many commenters opined that the proposed rule would improve public safety by expanding background checks for firearms purchasers. One commenter declared that, ''[a]s a US citizen, I would like to feel safer knowing at least the steps of background checks through the FBI database were done before a person could obtain a weapon.'' Another commented that the danger from unlicensed dealers is great because, according to several recent studies cited by the commenter: (1) over one million ads for firearms are posted each year that would not legally require the seller to conduct a background check for the purchase to be completed; (2) 80 percent of firearms purchased for criminal purposes come from sellers without a license; (3) firearms sold at gun shows are used disproportionately to commit crimes; and (4) 96 percent of inmates convicted of gun offenses were prohibited from having a firearm when they acquired one from an unlicensed seller. Another commenter summed up the current societal situation in their comment using information from a Centers for Disease Control and Prevention (''CDC'') database: ''[e]very day, an average of around 120 people in the United States are killed by gunfire and more than 200 are shot and wounded. Firearms are now the leading cause of death for American children and teens.''

Most supporters thought that the rule provided a fair approach that would increase safety. One commenter declared that the proposal ''is the very minimum our federal government can do to not only protect innocent victims from gun violence but also to protect law abiding gun owners from being tarred with the same brush as irresponsible gun owners.'' A self-described firearm owner commented, ''I whole heartedly support the rule to expand background checks'' because ''this will make our communities that much safer.''

Other commenters believed that the proposed rule was a step in the right direction. One commenter stated, ''[m]others everywhere are begging you to support background checks.'' They added that background checks certainly will not be the only solution to the multifaceted problem of gun violence, but said they are a step in ensuring people have the right accountability to keep guns away from those who mean to do harm. Another commenter said there is no downside to background checks that help prevent troubled and misguided persons from acquiring over-powered guns.

Many commenters expressed frustration with the current state of affairs and expressed support for expanding background checks and compliance with the law. One commenter stated that it should not be easier to buy a high-speed rifle than get a driver's license. Another commenter explained, ''I manage volunteer programs and people have to complete a background check before they can help a child learn to read or assist an older adult. We should require this same level of scrutiny for anyone looking to purchase a weapon.'' Another commenter stated, ''[g]uns are too serious to be privy to simple loopholes . . . . we can't just turn a blind eye to gaps in our legal system.'' Several other commenters expressed that there was never a valid policy reason for what the commenters called ''the gun-show loopholes.'' The commenters used this term to refer to a pre-BSCA interpretation of the definition of ''engaged in the business'' that many unlicensed dealers believe allows them to make unlicensed sales online and at gun shows. (See the Department Response at Section IV.C.16 of this preamble for explanation of the GCA provisions on this subject). The commenters stated that these ''loopholes'' are shameful, there is no downside to strict background checks, and people should do the right thing by requiring more background checks. Another commenter emphasized, ''[i]t really is beyond time that we consider the rights of non gun-toting citizens, too.''

Another commenter said that the regulation goes directly to the ''loopholes'' people have been trying to close for years, referring to guns offered for sale online or at gun shows. Similarly, a commenter said that, while background checks might be imperfect, they are certainly safer than not performing them. One commenter simply stated that background checks are excellent and that, ''[a]nyone who doesn't want one, should likely not be car[ry]ing a gun.'' Another commenter highlighted the public's opinion on the issue and referred to a recent Fox News poll showing that 87 percent of Americans support requiring criminal background checks on all gun buyers. A health research organization commented on the danger from not doing background checks, saying that experts estimate that nearly one in nine people who seek out firearms online would not pass a background check.

Most commenters cited safety concerns as a basis for their support of the BSCA's changes narrowing the background check gap, as implemented through the rule. One professional physicians' organization commented that private firearm sales conducted at gun shows or over the internet should be subject to the same background check requirements as firearm sales by federally licensed firearms dealers. They added that this would make children, their families, and their communities safer. Another commenter stated that reducing impulsive purchases and requiring time necessary to conduct background checks can save lives and spare family members grief.

One commenter provided a real-world example of what is currently happening without background checks for sales at gun shows, describing an experience they had at a recent gun show: ''[a]s he was filling out the paperwork someone approached him and told him [they] had the same gun [for sale] and a background check would not be

required [to buy it]—he could walk out with it that day.'' Another commenter stated, ''[h]onest, law abiding, gun owners are NOT afraid of accountability and pro-active requirements.''

Department Response

The Department acknowledges the commenters' support for the proposed rule. The GCA and these implementing regulations are designed to improve public safety by helping to prevent persons who are prohibited from possessing firearms under Federal law from acquiring firearms and allowing law enforcement officers to trace firearms involved in crime. By clarifying the circumstances in which persons are engaged in the business of dealing in firearms under the GCA and required to become a Federal firearms licensee, this regulation will result in more NICS background checks being run on prospective firearms purchasers. Not only will fewer prohibited persons obtain firearms from FFLs, but notifications that NICS denied a firearm transfer will be made by NICS to State, local, and Tribal law enforcement agencies within 24 hours to help them prevent gun crime.[117] In sum, the rule will help implement the provisions and goals of the GCA, as amended by the BSCA. At the same time, as explained more below, the rule does not require or implement universal background checks for private firearm sales between individuals. The rule affects only persons engaged in the business of dealing in firearms, including manufacturers and importers who deal in the firearms they manufacture or import.

5. Creates Universal Background Checks

Comments Received

Many commenters indicated a belief that the proposed rule created a universal background check requirement or expressed support for such a development. For example, one commenter stated, ''[b]ackground checks have been shown to stop some who should not have firearms from acquiring them,'' adding that, in ''order to make [background checks] more effective, they must be systematically and carefully applied nationwide.'' Likewise, another commenter said that instituting universal background checks ''is a no-brainer'' and should have been done long ago. Similarly, commenters said the current situation ''is madness'' and ''[u]niversal backgrounds checks are the very least and most obvious of interventions.'' Several other commenters stated that they fully support making background checks mandatory for gun buyers, that they support not just expanded background firearms checks, but indeed universal background checks, and that background checks should be required for all gun purchasers, every time, and similar variations. Many commenters expressed support for requiring background checks for all sales/transfers of firearms, including sales between private citizens.

Some commenters wanted to see a stronger, quicker approach to resolving the issue. One commenter said, ''[g]un laws as they stand are incredibly too relaxed and need to be amended,'' and ''I strongly feel that universal background checks are critical and need to be done now.'' Other commenters agreed that it is long overdue to pass universal background checks for gun ownership and they should be instituted now as the least that we should be doing. Likewise, a commenter requested that, hopefully, Congress would eventually move to a universal background check on all gun sales in the near future. Another commenter added that, since gun sales by legal dealers have required background checks for decades, these same requirements should apply to all gun sales.

A few commenters thought that implementing universal background checks was a minimally intrusive method of implementing change. For example, one commenter stated, ''[u]niversal background checks make sense. It doesn't take away a responsible gun owner's right but it provides a means to track those that should not own guns.''

A few commenters suggested additional actions that could be implemented. For example, one suggested regular checks at multi-year intervals in addition to universal background checks for all purchasers. Another commenter suggested adding mandatory waiting periods for every gun sale. And another suggested universal background checks for ammunition sales, as well.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the BSCA expands the definition of ''engaged in the business.'' As a result, the rule's implementation of that expansion will increase the number of background checks to prevent prohibited persons from obtaining firearms under the provisions of the GCA, as amended by the BSCA. However, the Department disagrees with commenters who believe this rule will result in ''universal background checks.'' The concept of ''universal background checks'' is not defined in Federal law, but is commonly understood to require persons to run background checks whenever a private, unlicensed person transfers a firearm to another, and some States have imposed this requirement.[118] Congress has not passed a law to require universal background checks, and this rule does not require unlicensed individuals who are not engaged in the business of manufacturing, importing, or dealing in firearms to run background checks for private firearm sales between individuals. Congress decided that only persons engaged in the business of manufacturing, importing, or dealing in firearms must obtain a license and run NICS background checks on firearm transferees. Nonetheless, by clarifying the meaning of ''engaged in the business,'' the rule will make clear that licensees must run NICS background checks when they transfer firearms at gun shows, over the internet, and by other means.

6. Enhances Public Safety by Allowing More Crime Guns To Be Traced

Comments Received

Several commenters believed that the current state of affairs, in which unlicensed dealers are selling firearms without making records, has a negative impact on crime gun tracing. One commenter opined that the rule can provide law enforcement with better tools to track and trace firearms used in crimes, aiding in their efforts to protect our communities. A law enforcement organization commented that the proposed rule would ''enable law enforcement to investigate guns recovered at crime scenes. With more gun sellers required to become licensed dealers, more information will be available to law enforcement aiding in completing the investigations. Law enforcement will be better equipped to identify and follow leads in criminal investigations and solve more crimes.'' Another commenter said, ''the absence of background checks means no sales records, hampering crime gun tracing.'' Finally, one group commented that aggregate firearm trace data can help identify patterns and trends that are valuable for understanding and combatting the trafficking of firearms into criminal hands, and more comprehensive transaction recordkeeping, like the rule will require,

[117] 18 U.S.C. 925B.

[118] Michael Martinez, *'Universal Background Check:' What Does It Mean?,* CNN (Jan. 28, 2013), *https://www.cnn.com/2013/01/14/us/universal-background-checks/index.html.*

would help increase the aggregate amount of information available for tracing.

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule will help Federal, State, local, and Tribal law enforcement solve crimes involving firearms through crime gun tracing. Under the GCA, ''dealers must store, and law enforcement officers may obtain, information about a gun buyer's identity. That information helps to fight serious crime. When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect.'' *Abramski,* 573 U.S. at 182 (internal citations omitted). As more persons become licensed, the transaction records maintained by those dealers will allow law enforcement to trace more firearms involved in crime [119] and to apprehend more violent offenders who misuse firearms.

7. Prevents Unlicensed Dealers From Exploiting Loopholes

Comments Received

Thousands of commenters in support of the rule expressed their desire to close gaps in the clarity of ''engaged in the business'' that, in their view, had been enabling people to deal in firearms without a license or prohibited persons to acquire firearms from unlicensed dealers. One set of commenters said that the rule ''will help close loopholes in our background check system that have, for decades, been exploited by bad actors like gun traffickers, straw purchasers, and other prohibited persons, including domestic abusers and convicted felons.'' Another commenter said, ''I can't think of any reasonable argument for continuing to allow loopholes that allow individuals to acquire guns outside the well-established, affordable, and reasonable process that applies to all other purchases.'' One of the form letters submitted by many commenters stated that, ''[a]nyone offering guns for sale online or at a gun show is presumed to be trying to make a profit and should therefore be licensed and run a background check on their customers.'' Other commenters simply stated that we need to be closing the loopholes in the system and do so once and for all.

Another commenter shared this example: ''[i]t was as easy as going to a flea market or pawn shop. Fifteen minutes or less and he had another gun for his collection.'' A third commenter observed that ''[g]uns sold without background checks in all cases are like the old days of the Wild West'' and that gun shows ''are a huge source for gun traffickers and people looking to avoid scrutiny.''

Some commenters were concerned that the current state of affairs is unjust. One commenter stated that they believe the proposed rule is necessary in fairness to the brick-and-mortar businesses and the up-front online retailers. Similarly, another commenter said that ''[c]losing loopholes so that commercial transactions that have previously evaded background checks [can no longer do so] is simply consistency; this is a very good idea, and I wholeheartedly support it.'' Additionally, a commenter thought that ''[t]here shouldn't be venues where background checks can be skirted. If a firearm changes hands, it benefits society to ensure that the hands accepting that firearm are going to handle it safely.''

Several commenters highlighted the fact that dealing as a licensee had integral advantages. For example, one commenter said the proposed rule expands the range of people required to have a license to sell a firearm, which makes neighborhoods safer because citizens know the firearms are being sold by a trusted merchant. Another commenter expressed that people should be happier to see firearms coming from a reputable source, rather than some ''flipper'' who might not have safety-checked the item. A dealer will stand behind an item and can be held accountable if there is an issue, they added.

Some commenters appreciated the Department's balanced approach. One commenter stated, ''[o]f course anyone selling firearms should be licensed & appropriately conducting background checks! Most responsible gun-owners agree on this point. Thank you for seeking to make our communities safer!'' One group commented that, by clarifying who is not considered to be ''engaged in the business,'' ATF has protected the ability of genuine hobbyists and collectors to transact firearms without fear of breaking the law. Another commenter added, ''I support this idea because this does not infringe on any rights, in my opinion, but rather stops back yard or home-based individuals from buying firearms then selling these items for a profit within a quick time frame.''

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will result in more persons who are engaged in the business of dealing in firearms, regardless of location, becoming licensed as required under the GCA, as amended by the BSCA. Once licensed, those persons will be required to abide by the recordkeeping and background check requirements of the GCA. The Department also agrees that promoting compliance with the licensing requirements of the GCA, as passed by Congress, is another benefit of the rule. As more persons dealing in firearms become licensed under this rule, there will be more fairness in the firearms marketplace. Licensed dealers are at a competitive disadvantage when, for example, similar firearms are being sold at a nearby table at a gun show by a seller who is engaged in the business of dealing in firearms but is not following the requirements that licensed dealers must follow. However, the Department disagrees with the comment that offering guns for sale online or at a gun show necessarily means the person must be licensed. This rule also recognizes that persons may, for example, occasionally offer firearms for sale to enhance or liquidate their personal collections even if a profit is sought from those sales.

8. Closes the Gun Show/Online Loophole

Comments Received

Several commenters voiced support for closing what they referred to as the ''gun show loophole,'' by which commenters meant a situation in which many sellers dealing in firearms offer them for sale at gun shows without becoming licensed or subjecting purchasers to background checks. For example, one commenter simply requested that the government please stop criminals from easily buying guns at gun shows without a background check. Another commenter expressed that Americans cannot allow individuals with violent histories to purchase a gun at a gun show or online without their background being investigated. A mother and gun owner added that she is relieved to hear that ATF is moving forward on closing the gun show loopholes. As a final example, one commenter stated that the ''only reason this loophole exists is to create a method for criminals & people with histories of violence to procure guns, there are no other reasons.''

Many supporters of the rule believed that it would resolve a long-standing inequity. As one commenter stated, ''[f]or decades, gun sellers have exploited loopholes in federal law that

[119] *See Definition of* ''*Frame or Receiver*'' *and Identification of Firearms,* 87 FR 24652, 24659 (Apr. 26, 2022).

let them sell guns online and at gun shows without conducting background checks. It's a recipe for disaster that worsens our country's gun violence crisis.'' Another commenter made the following comparison: ''[a]llowing unlicensed sellers to operate alongside licensed dealers at gun shows is akin to allowing some airline passengers to board without going through security—it's inconsistent and unsafe.'' Another commenter said that it shouldn't be as easy to purchase a gun online or at a gun show as it is to purchase a pair of shoes. Other commenters stated that our current reality is one in which firearms can be too easily acquired without background checks, notably through online platforms and at gun shows, and that the loophole that allows legal purchase of firearms at gun shows is a tragedy. A licensee commented with the following example from his 20 years of selling firearms: ''[t]here are 100s of guns sold at every gun show with no background check whatsoever. I see the same dealers at every show with tables full of guns selling to anyone with cash. I have had people who were denied in the NICS background check [I had conducted,] only to see them walk out with a gun. I beg of you to change the law to where EVERYONE at gun shows has to do background checks.''

Some commenters believed the rule presented a balanced approach. One commenter stated that closing the gun show loophole is a ''common-sense measure'' and doesn't infringe on the rights of responsible gun owners; rather, it ensures that background checks are conducted for all firearm purchases, regardless of where they take place. Additionally, a commenter said that the ''proposal laid out does not appear overly cumbersome for currently licensed dealers or citizens looking to liquidate guns from their personal collection'' and that ''[c]losing the 'gun show loophole' and requiring a record of firearms sold limits the possibility of nefarious characters obtaining weapons while increasing and promoting responsible gun ownership.'' Another commenter agreed, describing the rule as a modest, common-sense measure to close some of the huge loopholes that buyers and sellers use to get around our necessary and otherwise effective system of background checks.

Another commenter, while supporting this aspect of the rule, also recommended that ATF provide popular online marketplaces, such as Armslist and GunBroker, with materials and guidance once the rule is finalized to ensure their users understand their obligations to obtain Federal firearms licenses and conduct background checks before dealing in firearms.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that, as a result of this rule, there will be greater compliance with the law and more individuals who engage in the business of dealing in firearms at gun shows and online will become licensed under the GCA and therefore run background checks. ATF has updated its guidance in light of the BSCA and intends to further update the guidance to ensure that persons who operate at gun shows and online understand the relevant licensing obligations. *See* Section II.C of this preamble. The Department also notes that the term ''gun show loophole'' is a misnomer in that there is no statutory exemption under the GCA for unlicensed persons to engage in the business of dealing in firearms at a gun show, or at any other venue. As this rule clarifies, all persons who engage in the business of dealing in firearms must be licensed (and, once licensed, conduct background checks), regardless of location.

9. Reduces Firearms Trafficking

Comments Received

Some commenters thought the proposed rule could have a positive impact on reducing illegal firearms trafficking. One commenter said that firearm transfers must be regulated to prevent criminals from obtaining weapons and unscrupulous arms dealers from trafficking weapons that fuel violence here and in Mexico. Another commenter thought the rule would cause a reduction in trafficking because gun traffickers are ''masquerading as hobbyists or collectors.'' Other commenters stated that firearm rules or legislation may be very different between neighboring States, thus enabling trafficking. For example, one commenter, relying on a news story, stated that, ''[b]ecause Massachusetts has universal background checks and Maine does not, Maine is a top 'source state' for crime guns in Massachusetts'' and that ''[c]riminals come to Maine to get the guns in private sales that they cannot get in Massachusetts or in other states with universal background checks.'' Another commenter stated that creating additional regulations on how firearms are sold will reduce the number of firearms that are trafficked and that the rule will decrease the number of guns trafficked between State lines. Commenters who participated in one of the form letter campaigns stated that guns purchased in unlicensed sales often end up trafficked across State lines, recovered at crime scenes in major cities, and used against police officers, which contributes to the gun violence epidemic plaguing our country. Such commenters also added that guns sold without background checks—both online and at gun shows—are a huge source for gun traffickers and people trying to avoid such checks.

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will help reduce firearms trafficking. Many ATF criminal gun trafficking investigations reveal that guns used in crimes involve close-to-retail diversions of guns from legal firearms commerce into the hands of criminals, including straw purchases from FFLs, trafficking by FFLs, and illegal transfers by unlicensed sellers.[120] As more persons become licensed as a result of the BSCA's amendments to the meaning of ''engaged in the business,'' the multiple sales forms, out-of-business records, demand letter records, theft and loss reports, and trace responses provided to ATF by those dealers during criminal investigations will provide law enforcement with additional crucial crime gun intelligence. Law enforcement can use this information to better target limited resources to pursue illicit firearms traffickers nationally and internationally.[121]

10. Closes Liquidation Loophole for Former Licensees

Comments Received

Some commenters supported the proposed rule's clarification as to how the GCA applies to firearm sales and former dealers. For example, one commenter stated that dealers who have lost their licenses should never be allowed to sell guns again. Similarly, another commenter said that they support the rule because it ''goes a step beyond [previous liquidation provisions] and does not allow any dealers who had their licenses revoked to sell, trade, or distribute firearms to the public.''

[120] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 41 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.*

[121] *See* 18 U.S.C. 923(g)(3)–(7); ATF Form 3310.4 (Dec. 2021) (multiple handgun sales); ATF Form 3310.11 (Oct. 2020) (theft-loss report); ATF Form 3310.12 (Feb. 2024) (multiple sales of certain rifles).

Department Response

The Department acknowledges the commenters' support for the proposed rule and agrees that the rule will reduce the number of firearms in the business inventory of a former licensee that are sold improperly, *i.e.,* without background checks and associated recordkeeping. However, the Department is not adopting the suggestion to bar former dealers from ever selling guns again. Rather, former dealers are prohibited from engaging in the business of dealing in firearms, unless they once again become licensed.

11. Establishes Better Standards for Who Should Become Licensed

Comments Received

Several commenters appreciated the transparency established by the proposed rule. For example, one commenter stated, ''I strongly support this proposed regulation because it sets a clear, common-sense standard for when gun sellers must become licensed dealers and run background checks'' and builds on the BSCA passed by Congress. Multiple commenters and those associated with certain form letters said that they believe that anyone offering guns for sale online or at a gun show is trying to make a profit and should therefore be licensed, adding that they supported the rule's clarifying provisions. One group of parents whose children were victims of a mass shooting stated that they recognized that ''the intent of the proposed rule is not to be punitive.'' They added, ''[w]e support ATF maintaining an evaluation of the totality of the circumstances when determining if one is 'engaged in the business' rather than establishing a minimum standard of how many firearms bought or sold constitutes a licensure.'' Other commenters supported the clarifying provisions because they do more to ensure that sellers engaged in the business are treated alike. For example, one commenter stated that it ''simply makes no sense for some gun dealers/sellers to be exempt from the same standards that apply to licensed dealers.''

Department Response

The Department acknowledges commenters' support for the proposed rule and agrees that the rule will provide needed clarity to persons who are unsure whether they must become licensed under the GCA based on their firearms purchase and resale activities. Although this rule does not set forth a presumption that any person offering guns for sale online or at a gun show is engaged in the business, it does set forth several actions that give rise to a presumption that persons engaging in those activities, including online or at gun shows, are engaged in the business.

12. Consistent With Second Amendment Rights

Comments Received

Many supporters recognized that the proposal did not conflict with an individual's Second Amendment rights. One commenter stated that the rule is an important clarification in how gun laws are enforced in the United States, and it does not infringe upon the rights of citizens to ''keep and bear arms'' because ''[a]nyone wanting to transfer a firearm can still do so under this rule by using an existing federally-licensed firearms dealer.'' In another commenter's opinion, the ''right to bear arms is still alive and well even with reasonable rules set in place.'' Another commenter stated that gun advocates will argue that taking away these loopholes endangers their Second Amendment rights and that this is a false argument. This commenter added that, ''[a]ny American citizen who wants to purchase a firearm online for self-protection or hunting and who has a clean mental health and criminal record has nothing to fear from common sense restrictions to online gun sales.'' Other commenters stated that this rule will make all citizens of the United States safer without disrupting or infringing upon Second Amendment rights.

Many commenters thought that firearm ownership comes with certain responsibilities and that this rule helps ensure that those who are not able to be responsible are less able to get firearms. Several commenters stated that the rule would not limit Second Amendment rights but would increase safety. For example, one commenter stated that the proposed rule ''in no way infringes on our rights for gun ownership but instead makes it safer for all of us to own and purchase guns responsibly.'' Another commenter stated, ''[g]un ownership is a protected right but it is also a privilege reserved for those who can handle the responsibility.'' Other firearm owners commented that they are firm believers in their Second Amendment rights and feel strongly that those rights were conferred on individuals with responsible gun ownership in mind, and that they grew up being taught respect for guns.

Department Response

The Department agrees that this rule is fully consistent with the Second Amendment. This rule implements the provisions of the GCA, as amended by the BSCA, that require persons who are engaged in the business of dealing in firearms to be licensed. The Supreme Court has emphasized that its recent Second Amendment opinions ''should not be taken to cast doubt on laws imposing conditions and qualifications on the commercial sale of arms.'' *District of Columbia* v. *Heller,* 554 U.S. 570, 626–27 & n.26 (2008); *see also Bruen* v. *N.Y. State Rifle & Pistol Ass'n,* 597 U.S. 1, 80–81 (2022) (Kavanaugh, J., concurring, joined by Roberts, C.J.) (same). *See* Section IV.B.8.c of this preamble for more discussion on this topic.

B. Issues Raised in Opposition to the Rule

As noted, nearly 99,000 commenters expressed opposition to the NPRM, including through form letters submitted as part of mass mail campaigns. ATF received comments from a variety of interested parties, including FFL retailers and manufacturers; legal organizations that represent licensees; firearm sporting organizations; gun owner and gun collector organizations; more than half of States' attorneys general; Members of Congress; [122] firearm owners; active-duty military members and veterans; various firearm advocacy organizations; gun enthusiasts; and people with law enforcement backgrounds. As discussed below, numerous commenters raised various concerns about the Department's proposed amendments to ATF regulations. The topics included constitutional and statutory authority concerns, issues with the clarity and effect of the proposed definitions, presumptions, changes to procedures upon discontinuation of business, and concerns about the public safety goals of the Department in promulgating this rule.

1. Lack of Clarity

Comments Received

Many commenters opposed the rule on the grounds that it was vague or lacked clarity. Most of these commenters made statements to that effect without providing an explanation or examples. Some explained that they found the entire rule to be confusing, stating, ''[t]he language and grammar of

[122] ATF received two letters from Members of the United States House of Representatives in opposition to the rule, one dated October 12, 2023, with four signatories, and another received on December 7, 2023, with nine signatories. ATF received three letters in opposition from Members of the United States Senate, one dated September 21, 2023, with seven signatories, and two received December 7, 2023, one with two signatories and one with one signatory.

the entire preamble is intentionally misleading and confusing unless the reader is an attorney,'' ''the regulations are exceedingly confusing to me, and I consider myself to be a learned man,'' and ''this rule is so vague that people trying to be right will never know exactly what would make them need to be a dealer.''

Some commenters, however, were more specific. Some of these commenters gave examples of particular parts of the rule they found vague, for example: ''the proposed definitions are replete with the use of the term 'may' with respect to being engaged in the business as a dealer in firearms''; the rule ''leaves the interpretation of 'occasional' subjective in nature''; the word ''repetitively'' used in the fourth EIB presumption is ambiguous and could be interpreted as ''selling any number of firearms that is more than one''; ''it states 'even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license.' No examples are provided''; the rule ''creates confusion by attempting to clarify the term 'dealer' and how it applies to auctioneers''; and the presumption that a person is a dealer when that person '''sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrate a willingness and ability to purchase and sell additional firearms' is vague and would likely include even harmless banter between buyer and seller of a single firearm regarding additional purchases these individuals with to make some time in the future.'' One commenter argued that, ''[t]he apparent fines and jail time are draconian relative to the vagueness of the application of the proposed rule.'' At least one commenter asked that the Department qualify ''repetitively'' with a time limit so that a firearms owner who is likely to sell a firearm more than once in their lifetime or even over a five-year period would not be inadvertently captured under the presumptions. And, at least one commenter took the position that ''of course, repetition means more than once.''

Some other commenters focused on the impacts of the provisions they stated were vague. One commenter said it appears that the ''intent of this law is to force all sales through an FFL as you otherwise are never sure the sale is lawful.'' A couple of commenters mentioned that ''four times in the proposed rule the ATF provide[d] a list of 'rebuttable presumption[s]' or other factors and then conclude[d] by noting that the list is 'not exhaustive' '' and that the proposed rule is ''unlikely'' to cover selling one's gun to an immediate family member—but leaves open the possibility that ATF could change its mind. ''This makes compliance both difficult and inconsistent,'' one of these commenters added. ''When definitions are vague in this manner, it leaves far too much opportunity for unlawful or unjust 'interpretation' or inconsistent implementation and enforcement,'' they concluded. The commenter further explained that the proposed rule's lack of clarity ''places citizens who wish to abide by laws . . . in the unreasonable position of having their lawfulness in a gray area. In this way, an unelected official of ATF seems to have discretion to arrest persons, seize property, or take other 'enforcement actions' somewhat arbitrarily. Additionally, even if courts later overturn that ATF officer's decision, the hardship faced by the law[-]abiding citizens due to those circumstances (lost wages, attorney fees, reputational damage, emotional stress and trauma, etc.) are unreasonable.''

Other commenters were concerned about what they described as the ambiguity of the statutory definitions, which ATF proposed to include verbatim in the regulation. One commenter stated, ''[t]he new definitions, such as 'predominantly earn a profit' and 'terrorism,' may lead to differing interpretations and legal challenges.'' Another stated, ''[t]he proposed rule is riddled with ambiguous and imprecise terms such as 'predominantly earn a profit' and 'principal objective of livelihood and profit.' This lack of clarity is unacceptable and can lead to arbitrary enforcement and interpretation, jeopardizing the rights of law-abiding citizens.''

One commenter suggested that additional education will be necessary because the rule is hard to understand. ''While I appreciate the intention to assist individuals in understanding when they are required to have a license to deal in firearms, the proposed changes, as they currently stand, create more questions than answers. The need for comprehensive education and outreach efforts to inform the public about these changes is evident.''

Department Response

The Department disagrees that the rule is vague or lacks clarity. The rule implements the BSCA by setting forth specific conduct that is presumed to be ''engag[ing] in the business'' of dealing in firearms or acting with a predominant intent to earn a profit under the GCA. This rule provides persons who may be unclear how the statute applies to them with greater clarity as to what conduct implicates the statute, even though the rule does not purport to include every possible scenario. Many thousands of commenters stated that they believe this rulemaking provides much needed clarity to help ensure that persons who are prohibited from receiving or possessing firearms do not receive them.

The Department acknowledges commenters' concerns that the presumptions are not exhaustive of all of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms or has a predominant intent to earn a profit. However, there are numerous and various fact patterns that could fall within the statutory definition of being ''engaged in the business'' of dealing in firearms under 18 U.S.C. 921(a)(21)(C). This rule cannot possibly describe every potential scenario. It is important to note the presumptions are designed to improve clarity and consistency, though, as presumptions, they are not conclusive findings and may be rebutted. The conduct that presumptively falls within the definition of ''engaged in the business'' represents common fact patterns that the Department has seen during numerous criminal investigations, regulatory enforcement actions, and criminal prosecutions, and which the Federal courts have recognized as strong indicators of engaging in the business of dealing in firearms even prior to the BSCA's expanded definition. In other words, these presumptions represent situations that have been observed and tested repeatedly over decades as conduct that is indicative of whether a person is engaged in the business or has a predominant intent to earn pecuniary gain from the sale or disposition of firearms. The Department therefore disagrees that the rule, which provides additional clarification about what the statute requires, is vague or will result in inconsistent or unfair implementation and enforcement.

The Department also disagrees that the rule is confusing or overly complex. The Department acknowledges that the preamble to the proposed rule was long and included significant discussions and legal case citations in support of the Department's proposed regulatory changes. However, the rule changes the regulatory definition of what it means to be ''engaged in the business'' as a dealer in firearms to match the statutory definition as amended by the BSCA and provides additional detail to aid persons in understanding what conduct is likely to meet that definition. This includes addressing particular contexts, such as

auctioneers, and licensees who cease to be licensed. The rule does this by defining certain terms and describing specific, identifiable conduct in specific rebuttable presumptions. These definitions are based on statutory language, standard dictionary definitions, and Federal court opinions.

Based on concerns identified in the public comments, this final rule has further refined some definitions and presumptions to help collectors and hobbyists better understand when they are enhancing or liquidating a personal collection without the need for a license. For example, in response to one of the specific comments on the first EIB presumption, the Department has added a parenthetical after ''represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms'' to explain that it means ''(*i.e.,* to be a source of additional firearms for resale).'' This presumption, like the others, is based on ATF's criminal and regulatory enforcement experience and the case law cited in both the proposed rule and this final rule.

The Department does not agree with commenters that the rule's use of the term ''may'' in the regulatory definition of ''engaged in the business'' does not provide firearms sellers with sufficient clarity as to who is required to be licensed. While the presumptions in the rule are intended to provide clarity to persons who resell firearms, the Department cannot establish bright-line rules that address every conceivable scenario. For example, while the regulatory text states that ''[s]elling large numbers of firearms . . . may be highly indicative of business activity,'' that will not always be the case, depending on the circumstances. This is why the regulatory text uses the word ''may'' at times and expressly states that activities set forth in the rebuttable presumptions are not exhaustive of the evidence or conduct that may be considered in determining whether a person is engaged in the business of dealing in firearms or in determining the more limited question of whether a person has the intent to predominantly earn a profit through the repetitive purchase and resale of firearms.

The Department does not agree with commenters that the undefined terms in the rule are vague. In the absence of specific definitions, readers should use the ordinary meaning of these statutory terms and other words in the regulatory text. This includes the definition of the term ''occasional,'' which means ''infrequent,'' or ''of irregular occurrence,'' [123] and the term ''repetitively'' as it applies to a person engaged in the business as a dealer, which means that a person intends to or actually does purchase and resell firearms again. With regard to the comment that the term ''repetitive'' should be limited to a period of time, again, this term, like the term ''occasional,'' should be read consistently with its ordinary meaning.[124] Consistent with that ordinary meaning, a person is less likely to be understood as ''repetitively'' selling firearms if they do so twice over five years than if they do so several times over a short period. With regard to statutory terms, such as ''to predominantly earn a profit'' and ''terrorism,'' those definitions were added to the GCA by the BSCA. The Department is now adding them into ATF regulations so that the regulatory text conforms to the statute.

The Department disagrees that no examples were provided in the proposed rule to explain the statement, ''even a single firearm transaction or offer to engage in a transaction, when combined with other evidence, (*e.g.,* where a person represents to others a willingness to acquire more firearms for resale or offers more firearms for sale) may require a license.'' 88 FR 62021. That regulatory text itself included an example: ''(*e.g.,* where a person represents to others a willingness to acquire more firearms for resale or offers more firearms for sale).'' *Id.* This distinguishes a person engaged in the business of dealing in firearms from a person who makes only a single isolated firearm transaction without such other evidence, and who would not ordinarily require a license, as the case law demonstrates.[125] To further clarify this example, the Department has added the following clause to the regulatory text, ''whereas, a single isolated firearm transaction without such evidence would not require a license.'' § 478.13(b).

The Department disagrees that ATF's enforcement of the rule would be arbitrary. The rule clarifies the meaning of statutory terms and identifies common scenarios under which persons are presumptively engaged in the business, allowing for uniform application and understanding.

The Department also disagrees that the rule creates confusion as to how the term ''dealer'' applies to auctioneers. As described in Section III.C of this preamble, the proposed and final regulatory text explains that firearms dealing may occur anywhere, including by online auction, and establishes by regulation ATF's longstanding interpretations that distinguish between estate-type and consignment-type auctions.

The Department agrees with commenters that undertaking additional outreach efforts would be beneficial to further explain the amendments made to the GCA by the BSCA and how this rule implements those changes. The Department plans to do so. As one example, in response to the BSCA, ATF already updated its guidance entitled *Do I Need a License to Buy and Sell Firearms?* [126] and intends to further update the guidance to include additional details that conform with this final rule.

2. Does Not Enhance Public Safety

Comments Received

Other commenters opposed the rule on the grounds that it will not enhance public safety. The majority of comments on this topic argued that criminals are the people putting public safety at risk, and that they are not going to abide by the BSCA and the proposed regulation or purchase firearms through FFLs. As a result, they stated, the proposed rule will do nothing to affect public safety, while imposing a burden on law-abiding citizens. One commenter stated, ''[p]rivate firearm sales and transfers happen among law-abiding people and are not in any way part of the unreasonable public safety risk that gun prohibition advocates claim. Therefore, this rule does nothing to address the unlawful acts of the criminals that pose a true and actual threat to public safety.'' Another stated, ''there is very little public safety i[f] this rule is enacted. The criminal element in society simply will ignore it, and the lawful gun owners will be greatly affected with the burden of complying

[123] *See Occasional,* Collins English Dictionary, *https://www.collinsdictionary.com/us/dictionary/english/occasional* (last visited Feb. 29, 2024) (defining ''occasional'' in ''American English'').

[124] *See, e.g., Repetitive,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/repetitive* (last visited Apr. 1, 2024) (''containing repetition''); *Repetition,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/repetition* (last visited Apr. 1, 2024) (''the act or instance of repeating or being repeated'').

[125] *See* footnote 72; *cf.* S. Rep. No. 98–583, at 8 (1984) (The statute does ''not require that the sale or disposition of firearms be or be intended as, a principal source of income or a principal business activity. Nor does it apply to isolated sales, unless of course, such sales are part of a regular course of business with the principal objective of livelihood and profit.'').

[126] ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms*? (Aug. 2023), *https://www.atf.gov/file/100871/download.*

with the rule. Time and effort[ ] and money will have to be expended by gun owners for no appreciable benefit.'' A third commenter stated there is no evidence to support a correlation with public safety, asserting, ''[t]he proposed rule change lacks empirical evidence to substantiate its assumed benefit of improved public safety. Numerous studies, including those published in peer-reviewed journals [citing a journal article], have found that the correlation between gun control measures and reduction in gun violence is negligible. This suggests that the rule change is a reactive measure rather than a well-considered evidence-based policy.'' Another commenter said that, if ATF wants to do something to promote gun safety, it should be actively involved with industry experts to develop standards in education and safe ownership instead of issuing the rule.

Other commenters suggested that issuing the regulation will ''only serve to create a black market in firearms sales, while doing nothing to actually stop crime,'' asked ''how this helps with cartels and organized crime, when most of those people are already under a class that shouldn't have guns anyway (*i.e.* illegal),'' and argued that the rule ''will create criminals out of lawful gun owners, while dangerous criminals like drug dealers and gang members could not care less.'' They added that the rule will make the public less safe because law-abiding gun owners will face more hurdles while criminals will keep doing what they are doing. Another commenter stated that, ''[o]n the whole[,] gun owners are more law abiding[,] not less. We purposely avoid breaking any law that may affect our ability to own firearms, even laws we may not agree with. So this affects a population that is less likely to be a problem and does nothing to discourage the criminal population.''

Several commenters stated that criminals receive their firearms from sources other than FFLs. For example, one commenter said: ''Federal studies have repeatedly found that persons imprisoned for firearm crimes get their firearms mostly through theft, the black market, or family members or friends.'' They stated, ''less than one percent get guns at gun shows [citing a report].'' Another commenter said that a study conducted by ATF, which reportedly concludes that less than 1 percent of guns used in crimes were acquired by other means (*i.e.,* through private sales), indicates that this rule would not be effective in preventing criminals from obtaining firearms. And a couple of commenters stated that the source of danger comes from outside the country, asserting, for example, ''This rule will not make anyone safer. America has enemies across the globe. Who will do everything they can to attack us. When [our] border is wide open, America is significantly less safe because our border is open. Guns that will come from across the border will not be known to the ATF. Close the border to truly secure our nation.'' Another commenter said the rule will only encourage more back-alley deals and the proliferation of unsafe, hand-made, and 3D-printed firearms to evade the regulatory provisions.

Department Response

The Department disagrees that this rule will not enhance public safety or lacks empirical evidence to support it. In enacting the BSCA, Congress determined that there were persons who were engaged in the business of dealing in firearms at wholesale or retail who should have been licensed under existing law.[127] Congress therefore amended the GCA to clarify that those persons must be licensed. This rule implements that amendment to the GCA. The result will be that more persons who are engaged in the business of dealing in firearms will become licensed, run NICS background checks, and maintain transaction records through which firearms involved in crime can be traced. *See* Section VI.A.2 of this preamble. One empirical indication of support for this anticipated increase is that after the original publication of the guidance *Do I Need a License to Buy and Sell Firearms?,* ATF Publication 5310.2, in January 2016, there was a modest increase of approximately 567 license applications (based on Federal Firearms Licensing Center (''FFLC'') records). In addition, around 242,000 commenters stated that they believe this rulemaking will increase public safety and provided data on that point. Additional empirical evidence that public safety will be enhanced includes the following:

More Background Checks: As explained previously, the amended regulations will increase the number of background checks performed because more dealers will become licensed and run background checks on their customers. With additional background checks being run by licensed dealers, more prohibited persons will be denied firearms, consistent with the plain language and intent of the GCA, as amended by the Brady Act and the BSCA. Since the inception of NICS in 1998, the FBI has denied at least 2,172,372 transfers due to background checks, and in 2022 alone, it denied 131,865.[128] From among the transfers denied in 2022, 60,470 potential transferees were convicted of a crime punishable by imprisonment for a term exceeding one year;[129] 12,867 were under indictment or information for such a crime; 8,851 were fugitives from justice; and 10,756 had been convicted of a misdemeanor crime of domestic violence.[130]

These NICS denials prevented the receipt and possible misuse of a firearm by a prohibited person. Additionally, since the passage of the BSCA's provision on enhanced background checks for juveniles, 18 U.S.C. 922(t)(1)(C)(iii), the FBI has conducted more than 200,000 enhanced checks, resulting in at least 527 potentially dangerous juveniles being denied firearms as of the first week of January 2024.[131] And, as a result of the NICS Denial Notification Act, codified at 18 U.S.C. 925B, these denials will be reported within 24 hours directly to State, local, and Tribal law enforcement authorities, which can then take appropriate action. Because more persons will become licensed under the BSCA and this rule, more enhanced juvenile checks will be conducted and more denials will be reported to State, local, and Tribal law enforcement, resulting in fewer firearms being transferred to prohibited persons and faster investigation of denials and recovery of transferred firearms as appropriate.

More Crime Gun Traces: With more licensed dealers, law enforcement will have increased ability to trace firearms involved in crime through required records, including out-of-business records. Between 2017 and 2021, law enforcement agencies nationally and internationally submitted a total of 1,922,577 crime guns to ATF for tracing, with 460,024 submitted in 2021. During that period, the number of traces increased each year, resulting in a 36 percent rise over the five years from

[127] *See* footnotes 30 and 31, *supra.*

[128] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 14, *https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.*

[129] *See* 18 U.S.C. 921(a)(20) (defining ''crime punishable by imprisonment for a term exceeding one year'').

[130] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 32, *https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.*

[131] Press Release, DOJ, *Justice Department Marks More Than 500 Illegal Firearm Purchases Stopped by New Enhanced Background Checks* (Jan. 5, 2024), *https://www.justice.gov/opa/pr/justice-department-marks-more-500-illegal-firearm-purchases-stopped-new-enhanced-background.*

2017 to 2021.[132] ATF was able to determine the first retail purchaser in 77 percent of those requests, providing law enforcement with crucial leads and an increasing capability to solve gun crimes in their respective jurisdictions throughout the United States and abroad.[133]

In response to the comment alleging that few criminals (1 percent) acquire firearms at gun shows, the most recent ATF report on firearms commerce—the National Firearms Commerce and Trafficking Assessment, Volume Two, Part III—reveals that, between 2017 and 2021, 41,810 crime guns were traced to licensees at gun shows, reflecting a 19 percent increase during that time.[134] While the figure from 2021 represents only 3 percent of the total number of crime guns traced, ''this figure does not represent the total percentage of recovered crime guns that were sold at a gun show during the study period as private citizens and unlicensed dealers sell firearms at gun show venues.'' ATF has no ability to trace crime guns to the numerous unlicensed dealers at gun shows, and therefore, ''[n]ational data . . . [is] not available on unregulated firearms transfers at gun shows.'' [135] The low figure, therefore, does not suggest that few crime guns are sold at gun shows—to the contrary, it demonstrates law enforcement agencies' limited ability to trace crime guns that are purchased at those venues. As more unlicensed gun show dealers become licensed, law enforcement will be able to trace more firearms subsequently involved in crime that were sold at gun shows to help solve those crimes.

Better Crime Gun Intelligence: All licensed dealers are required to report multiple sales of handguns occurring within five consecutive business days, report thefts or losses of firearms from their inventory or collection, and respond to trace requests.[136] Certain dealers are required to report multiple sales of certain rifles to ATF occurring within five consecutive business days, and respond to demand letters with records that report transactions where there is a short ''time-to-crime.'' [137] From this information, ATF is able to provide law enforcement agencies throughout the United States with key crime gun intelligence showing firearm trafficking patterns.[138] In addition to crucial intelligence provided directly to law enforcement in their respective jurisdictions, comprehensive data gathered from licensee sources was used to compile the *National Firearms Commerce and Trafficking Assessment, Volume II,* regarding the criminal use of firearms that have been diverted from lawful commerce. This assessment allows law enforcement to better focus their limited resources on dangerous criminals and enhances policymakers' ability to create strategies to better stem the flow of crime guns to their jurisdictions.[139] For example, stolen firearms play an indirect role in trafficking and diversion to the underground firearm markets used by prohibited persons, juveniles, and other individuals seeking to buy firearms without going through a background check. From 2017 to 2021, licensees reported being the victims of 3,103 larcenies, 2,154 burglaries, and 138 robberies.[140] This data was further broken down over time by license type, business premises type, State, quantity of firearms stolen, weapon type, caliber, time-to-crime, time-to-recovery, recovery location, and age and gender of ultimate possessor.[141] This information will help reduce thefts from licensees and, therefore, reduce firearms trafficking.[142] ATF does not receive the same detailed information about thefts from non-licensee dealers who do not submit FFL Theft/Loss Reports (ATF Form 3310.11) to ATF, but ATF is aware that thefts from non-licensees constitute a significantly higher number of thefts and thus are a larger contributor to firearms trafficking.[143] Increasing the number of dealers who are licensed will help reduce firearms trafficking by providing more of this kind of detailed information as well.

The Department acknowledges that there are criminals who are currently engaged in the business of trafficking in firearms for profit who will not become licensed, notwithstanding the requirements in the GCA (as amended by the BSCA) and this rule. But the fact that some persons purposely violate Federal law is appropriately addressed through enforcement, and it is not a reason to refrain from providing further clarity to increase compliance among those dealing in firearms. The penalties for engaging in the business of dealing in firearms without a license have long been set forth in the GCA, and this rulemaking does not purport to change them. The illicit market in firearms already exists, and nothing in this rule furthers that market. By providing further clarity about who is required to become licensed, this rule will help law-abiding persons comply with the law and will also help ATF in its ability to enforce the law. It will reduce the number of persons who are currently engaged in certain purchases and sales of firearms without a license so that their activities do not perpetuate firearms trafficking.

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[132] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 1 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.*

[133] *Id.* at 2.

[134] *Id.* at 14.

[135] *Id.*

[136] 18 U.S.C. 923(g)(3), (6), (7).

[137] 18 U.S.C. 923(g)(3)(a); ATF, *National Tracing Center: Demand Letter Program, https://www.atf.gov/firearms/national-tracing-center* (last reviewed Feb. 26, 2024) (''Demand Letter 2 is issued to FFLs who had 25 or more firearms traced to them the previous calendar year with a 'time-to-crime' of three years or less.''); Report of Multiple Sale or Other Disposition of Certain Rifles, ATF Form 3310.12 (Feb. 2024), *https://www.atf.gov/firearms/docs/form/report-multiple-sale-or-other-disposition-certain-rifles-atf-form-331012/download;* Demand Letter 2 Program: Report of Firearms Transactions, ATF Form 5300.5 (Dec. 2021), *https://www.atf.gov/firearms/docs/form/report-firearms-transactions-atf-form-53005/download.*

[138] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part II: National Tracing Center Overview* 8–10 (Jan. 11, 2023), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-ii-ntc-overview/download.*

[139] Press Release, DOJ, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment: Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), *https://www.atf.gov/news/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and* (''The comprehensive—and unprecedented—compilation of data in this report is intended to provide strategic insight to law enforcement, policymakers, and researchers as they work to reduce and prevent gun violence.'').

[140] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part V: Firearm Thefts* 2 (Jan. 11, 2023), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download.*

[141] *Id.* at 5–12.

[142] Press Release, DOJ, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment: Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), *https://www.atf.gov/news/pr/justice-department-announces-publication-second-volume-national-firearms-commerce-and* (''The Department of Justice is committed to using cutting-edge crime gun intelligence to reduce violent crime, and this first of its kind data set on emerging threats, specifically the epidemic of stolen firearms and the proliferation of machinegun conversion devices, will have real-world impact in safeguarding our communities.'').

[143] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part V: Firearm Thefts* 2 (Jan. 11, 2023), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download* (''[F]irearm thefts from private citizens greatly outnumber firearms stolen from FFLs. As reflected in Figure BRL–01, firearms stolen from private citizens accounted for most stolen crime guns known to LEAs. From 2017 to 2021, there were 1,074,022 firearms reported stolen. About 3% (34,339) were stolen in FFL thefts, 1% (13,145) were stolen in interstate shipments, and almost 96% (1,026,538) were stolen in thefts from private citizens.'').

Moreover, as noted previously, prohibited persons continue to seek to purchase firearms through licensed dealers—there were over 130,000 attempts in 2022 alone. By helping sellers better understand when they must be licensed pursuant to the BSCA, and thus increasing the number of licensees, this rule will result in more prohibited persons being denied firearms at the point of sale before they can be used in a violent crime. And, to the extent criminals purchase firearms through licensed dealers, the firearms they use will be able to be traced through the dealers' transaction records when they are later found at a crime scene or otherwise linked to a violent crime. Unlicensed sellers are not required to run background checks or maintain transaction records through which crime guns can be traced. As to the proliferation of more hand-made and 3D-printed firearms, other rules address the licensing requirements for persons engaged in the business of manufacturing firearms.[144] Nonetheless, when dealers who become licensed under this rule accept hand-made, 3D-printed, and privately made firearms into inventory, they are already required to serialize and record such firearms for crime gun tracing purposes and run background checks on subsequent purchasers.[145]

3. Punishes Law-Abiding Citizens

Comments Received

Thousands of commenters stated that the proposed rule is an attack on the entire population of law-abiding firearm owners through unlawful infringement of their rights. To that end, many commenters claimed they will lose the ability to protect themselves and their families because they believe the proposed rule was designed to make it difficult for law-abiding Americans to acquire firearms.

Many commenters opined that they would be prevented—potentially criminally—from passing firearms to family, friends, or others when trading up, retiring from their gun collecting hobby, or otherwise wishing to purge firearms from their collections. Many commenters believed that a certain number of firearms sold, such as more than three per year, would make them a felon. One commenter was concerned with how the rule affects him as a WWII re-enactor when members seek to sell firearms to new members and stated that it would be difficult for this group to continue their hobby under the proposed rule without going through an FFL.

In that vein, many commenters stated that the proposed rule is threatening, puts law-abiding citizens in a burdensome defensive position of proving to an ''over-zealous'' Government that they are not required to be licensed as a firearms dealer, and could entrap them. Some opined that the goal of the proposed rule is to use complex and confusing language to criminalize the activities of countless average individuals who wish to sell or otherwise liquidate their firearms as they naturally gain in value over time, especially during periods of inflation. One commenter stated that ''[t]his proposal is a transparent attempt to strong-arm internet service providers, gun shows, technology platforms, and other facilitators to abandon any involvement in private gun sales with vague threats of 'administrative action' for non-compliance.'' Another commenter suggested that the proposed rule was intended to ''make every American gun owner live in fear of buying or selling a gun at any point in their lives.''

A few commenters raised concerns that, if they inadvertently deal in firearms without a license, and are therefore determined to be in violation of the rule by ATF, they would not be able to then become a legal dealer. ''One footnote in this proposed rule suggests the ATF might prevent a person from obtaining a license to even engage in future firearm transactions because they were presumed to have 'willfully engaged in the business of dealing in firearms without a license,' '' a commenter said. ''Therefore, the agency might warn that individual of their purportedly unlawful behavior,'' the commenter continued, and ''[s]uch an individual, wishing to complete a future firearm transaction without ATF harassment, might submit an application to obtain a license to deal in firearms. But ATF's footnote suggests the law-abiding individual might be denied the license simply because their previous conduct was presumptively unlawful,'' they concluded.

Department Response

The Department disagrees with the assertions that this rule is intended to or will make felons of law-abiding citizens when they wish to pass firearms to family or friends, or to sell all or a part of a personal collection of firearms. This rule effectuates the BSCA and helps protect innocent and law-abiding citizens from violent crime. This rule does not place additional restrictions on law-abiding citizens who occasionally acquire or sell personal firearms to enhance a personal collection or for a hobby. Instead, the rule provides clarity to persons on when they are engaged in the business as a dealer in firearms with the predominant intent to profit. It articulates what it means to be engaged in the business, as well as other relevant statutory terms, to identify those persons whose conduct requires that they obtain a license—as distinguished from persons who make occasional purchases and sales in private transactions not motivated predominantly by profit.

This rule does not prevent law-abiding persons from purchasing or possessing firearms, from selling inherited firearms, or from using their personal firearms for lawful purposes such as self-defense, historical re-enactments, or hunting. The rule includes a non-exhaustive list of conduct that does not support a presumption that a person is engaging in the business and that may also be used to rebut the presumptions. Additionally, this rule does not impose any new restrictions in the application process to become an FFL. Further, nothing in this rule imposes licensing requirements on internet service providers, gun show promotors, or technology platforms that are operating in conformity with applicable legal requirements. And finally, this rule does not inhibit law-abiding citizens from acquiring firearms. In fact, this rule will likely increase the number of licensed dealers available to sell firearms to consumers. Nonetheless, a small percentage of unlicensed persons who are engaged in the business under the BSCA amendments, and therefore must become licensed to continue dealing in firearms, might choose to leave the firearm sales market rather than become licensed, for a variety of reasons. *See* Sections IV.D.5 and VI.A of this preamble for further discussion of this potential outcome.

In this rule, despite several commenters advocating for a strict numerical threshold, the Department did not establish a numerical threshold for what would constitute being ''engaged in the business.'' Any number would be both overinclusive and underinclusive. It would be overinclusive in that a collector who does not sell firearms to predominantly earn a profit might sell a significant number of firearms to liquidate a personal collection (and thus cross the numerical threshold), even though the GCA provides that sales to liquidate a personal collection are not made to

[144] For more information on who must be licensed as a manufacturer, *see Definition of* ''*Frame or Receiver*'' *and Identification of Firearms,* 87 FR 24652 (Apr. 26, 2022).

[145] *See* 27 CFR 478.92(a)(2); 478.125(i).

predominantly earn a profit. *See* 18 U.S.C. 921(a)(22). And it would be underinclusive in that someone might devote time, attention, and labor to dealing in firearms with the intent to profit (and would thus qualify as being engaged in the business under the statute), but might not meet some hypothetical number of sales and thus elect not to get, or purposefully evade getting, a license. As stated above, the courts have indicated that a license may be required even when there is a single firearms transaction or offer to engage in a transaction where persons also hold themselves out as sources of additional weapons. *See* Section III.D of this preamble. At the same time, however, Congress specifically exempted from the definition of ''engaged in the business'' as a dealer in firearms ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms,'' 18 U.S.C. 921(a)(21)(C), so a person who makes multiple sales will not always be engaged in the business.

The Department disagrees with the commenters who said that persons who inadvertently deal without a license in violation of the rule would be ''caught in a trap'' of not being able to become a licensed dealer. Even if a person is presumed to be engaged in the business of dealing in firearms under one of the EIB presumptions in the rule, ATF would need to have evidence that the person ''willfully'' engaged in that business without a license to deny the application for license. *See* 18 U.S.C. 923(d)(1)(C). Consistent with the way the courts have long interpreted this term in this administrative firearms licensing context, the term ''willfully'' means that the license applicant ''knew of his legal obligation [to become licensed] and purposefully disregarded or was plainly indifferent to'' that requirement. *Article II Gun Shop, Inc.* v. *Gonzales,* 441 F.3d 492, 497 (7th Cir. 2006) (quoting *Stein's, Inc.* v. *Blumenthal,* 649 F.2d 463, 467 (7th Cir. 1980)).[146] So, only an applicant who purposefully disregarded or was plainly indifferent to the licensing requirement would be denied a license on those grounds.

The Department disagrees that WWII re-enactors will be unable to sell firearms to fellow hobbyists under this rule without going through a licensed dealer. While Federal law already generally prevents persons from selling firearms to a person in another State without going through a licensed dealer,[147] neither existing law nor this rule prevents persons residing in the same State from occasionally purchasing and reselling firearms to enhance their personal collections or for a hobby without going through a licensee. Nonetheless, to further address these concerns, the Department has amended the definition of ''personal collection'' in this rule to include, as an example, personal firearms that a person accumulates for ''historical re-enactment.''

4. Adverse Impact on Underserved and Minority Communities

Comments Received

Certain commenters opined that the proposed rule could somehow have an adverse effect on persons with limited economic means who would be forced to ''choose between living expenses and protecting themselves and love[d] ones.'' Comments included scenarios such as economically disadvantaged persons being unable to sell a personally owned firearm to make ends meet because of, for example, prohibitive costs and hurdles to becoming licensed; families needing to liquidate assets, including personally owned firearms, to care for loved ones, pay for food, rent, or other obligations; disadvantaged persons having to choose between selling a firearm at a loss or being prosecuted as an ''illegal gun dealer''; and low-income individuals being financially unable to acquire a firearm to provide protection for themselves or families as a result of the rule. One commenter stated that the requirement for individuals to rebut presumptions in administrative or civil proceedings poses a considerable financial burden, particularly for those with lower incomes, and specifically persons of color.

Several commenters expressed concern that the proposed rule would unfairly target minority communities. Some commenters opined that the proposed rule is classist and racist: ''only rich [White] people'' can afford to legally obtain guns because licensed firearms dealers are disproportionately distributed in white neighborhoods; minority populations experience disproportionately higher rates of arrest versus non-minority populations; and minority communities will have the greatest struggle to obtain a firearm for protection where self-defense needs may be most acute. Another commenter opined that Black and brown communities, LGBTQI+ people, and transgender people will be disproportionately affected by the final rule. Others suggested that the FFL licensing costs should be reduced by this rule, suggesting a $10 limited FFL license for a personal collector.

Department Response

The Department disagrees that this rule will prevent persons with limited income from lawfully acquiring or liquidating firearms. Specifically, under this rule, a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms occasionally as bona fide gifts, to obtain more valuable, desirable, or useful firearms for the person's personal collection; occasionally to a licensee or to a family member for lawful purposes; to liquidate all or part of a personal collection; to liquidate firearms they have inherited; or to liquidate firearms pursuant to a court order. *See* 27 CFR 478.13(e). With respect to the cost of a dealer license and the comment suggesting that ATF reduce the FFL licensing cost, this rule must effectuate the laws of Congress and that amount is set by 18 U.S.C. 923(a)(3)(B) ($200 for three years, and $90 renewal for three years). With respect to commenters' asserted limited access to licensed dealers in minority communities, neither the GCA nor this rule distinguishes between communities. All persons who engage in the business of dealing in firearms must be licensed at fixed business premises within a State, *see* 18 U.S.C. 923(d)(1)(E), and this rule implements the licensing requirements wherever that dealing may occur.

The Department further disagrees that this rule will disproportionately affect lower-income individuals or certain minority groups. This final rule implements the GCA, as amended by the BSCA, which regulates commerce in firearms. The GCA requires that all persons who meet the definition of engaged in the business of dealing in firearms must become licensed without regard to their socioeconomic status, where they live, or to which identity groups they belong. The GCA does not distinguish between minority groups and other groups, and its licensing provisions are not targeted at reducing

[146] *See also CEW Properties, Inc.* v. *ATF,* 979 F.3d 1271, 1273 (10th Cir. 2020); *Shawano Gun & Loan, LLC* v. *Hughes,* 650 F.3d 1070, 1077–78 (7th Cir. 2011) (quoting *Gonzales,* 441 F.3d at 497); *Armalite, Inc.* v. *Lambert,* 544 F.3d 644, 647–49 (6th Cir. 2008); *On Target Sporting Goods, Inc.* v. *Attorney General of U.S.,* 472 F.3d 572, 575 (8th Cir. 2007); *RSM, Inc.* v. *Herbert,* 466 F.3d 316, 321–22 (4th Cir. 2006); *Willingham Sports, Inc.* v. *ATF,* 415 F.3d 1274, 1277 (11th Cir. 2005); *Perri* v. *ATF,* 637 F.2d 1332, 1336 (9th Cir. 1981).

[147] *See* 18 U.S.C. 922(a)(5).

the number of locations where lower income residents can lawfully purchase firearms. And, according to several commenters, including a civil rights organization, minority communities are disproportionately hurt by gun violence, including hate crimes (often by prohibited persons who would not pass a background check), and this rule will help minority communities by reducing gun violence.

Under the GCA and this rule, a person who ''makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of the person's personal collection of firearms'' is not ''engaged in the business'' of dealing firearms. § 478.13(a). In addition, nothing in the GCA or this rule precludes a person from lawfully purchasing firearms for self-protection or other lawful personal use, or making isolated sales of such firearms without devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. A single or isolated sale of a firearm that generates pecuniary gain to help make ends meet, care for loved ones, or pay for food, rent or other obligations would not alone be sufficient to qualify as being engaged in the business; instead, there would need to be additional conduct indicative of firearms dealing within the meaning of the GCA. Similarly, persons who liquidate (without restocking) all or part of their personal collection are not considered to be engaged in the business and may use the proceeds for lawful purposes, including those mentioned above. However, a person could still be engaged in the business even when they are using proceeds to make ends meet, care for loved ones, or pay for food, rent, or other obligations if they were to engage in additional conduct that is indicative of firearms dealing within the meaning of the GCA.

5. More Important Priorities and Efficiencies

Comments Received

Many of the commenters opined that there are more important ways that ATF should address firearm violence and crime instead of promulgating the rule. Thousands of commenters suggested considering alternative solutions that address the root causes of gun violence, such as community-based violence prevention programs, mental health reform, or improved access to mental health services, including allocating money for such services. Others suggested implementing weapon safety courses in schools. Specifically, a commenter said, ''[a]ccording to the government's own statistics [citing to the CDC website], the majority of gun deaths are due to suicides. And the next highest category of deaths by firearms is inner city peer on peer murders of young men[.]'' If the Government wants to try to fix these sources of firearm-related deaths, the commenter added, it should look at the evidence and address the root causes.

Many commenters suggested increasing support for law enforcement agencies, such as funding and equipment, while many more suggested enforcing current laws, such as targeting stolen firearms or felons possessing firearms, instead of creating new laws and regulations. Others suggested targeting straw purchases, criminals who sell firearms to minors, unlawful internet sales such as Glock switches, and individuals who lie on the ATF Form 4473.

Some suggested focusing enforcement efforts based on geography, such as focusing on the southern border to address firearm, drug, and human trafficking whereas others suggested focusing on gangs or criminals known to operate in certain cities or other areas and creating gang task forces. Along those lines, some suggested enforcing existing Federal law against prohibited persons possessing firearms in communities where local officials downplay Federal prohibitions for political reasons. In addition to enforcing current laws, some suggested other measures, such as harsher prison sentences for violent criminals, eliminating ''no bail'' policies, constructing more prisons, and ending a ''revolving door'' justice system that they said fails to hold violent felons accountable.

Other commenters expressed concern about the firearm background check system. Some commenters suggested improving firearm background check response times for currently licensed FFLs before implementing a rule that would increase the number of licensees. Some suggested focusing on comprehensive background checks and closing legal loopholes that allow firearms to fall into the wrong hands.

Department Response

The Department acknowledges comments about treating mental health and drug addiction, securing schools and workplaces, improving records available to the NICS, properly funding law enforcement, and various other national policy issues, such as the root causes of gun violence, border control, gangs, drug and human trafficking, penal facilities and laws, and how State and local officials implement laws. The Department agrees that these are important issues; however, they are not addressed in the GCA or the BSCA's provisions relating to persons engaged in the business of dealing in firearms, and therefore are outside the scope of this rule.

To the extent that commenters raised issues within ATF's jurisdiction—such as by suggesting that ATF focus on firearms trafficking, felons possessing firearms, stolen firearms, targeting straw purchases, criminals who sell firearms to minors, unlawful internet sales of weapons such as Glock switches, and individuals who lie on ATF Form 4473—the Department agrees that these are, and should be, among the Department's most important concerns. At their core, they are all related to keeping firearms out of the hands of prohibited persons and others who may commit crimes with firearms. In addition to ATF's other enforcement efforts, the Department considers this rulemaking necessary to implement the GCA and address those concerns.[148] Clarifying who qualifies as a dealer in firearms and must be licensed will not only increase the number of FFLs, but also provide ATF with a better ability to: (1) curb prohibited sales to minors, felons, and others; (2) better identify and target those engaging in straw purchases and firearms trafficking (which can indirectly aid in capturing people who engage in drug and human trafficking); and (3) identify unlawful internet sales and false statements on ATF Forms 4473, among other benefits. These issues are precisely what this rule targets.

6. Concerns With Effect on ATF

Comments Received

A number of commenters expressed views that the proposed rule would cause such an increase in the number of dealer applicants and licensees that ATF would not have the resources to handle the corresponding increased workload. One commenter stated, ''Legal sales of firearms by individuals take place every day over trading websites and gun shows, creating thousands of transactions; estimates in the proposed rule indicate as many as 300,000 individuals would need to obtain an FFL which would overburden the ATF and result in long delays and high expense for the government, likely

[148] Although these other matters may fall within the scope of ATF's authority, ''an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.'' *Massachusetts* v. *E.P.A.,* 549 U.S. 497, 527 (2007).

much greater than the estimates.'' Another stated, ''[t]he true cost is likely to be far greater when factoring in the ATF's expanded responsibilities, increased workload, and the potential need for additional personnel and resources to manage the influx of license applications and compliance checks. This could result in unforeseen financial and logistical challenges for both the ATF and the individuals seeking licenses.'' Another commenter stated that the NPRM would increase the number of inspections ATF would have to conduct, including just for one or two firearms sold.

In addition to costs to ATF and potential licensees, another commenter suggested that the proposed rule raises concerns relating to the NICS. By exponentially increasing the number of transactions requiring background checks, the proposal risks overburdening the NICS, leading to delays or even erroneous outcomes, they said, adding, ''This rule would exacerbate existing problems, thereby undermining its effectiveness as a tool for ensuring public safety.''

Other commenters suggested that all this extra cost and work would provide little benefit because nearly all of these current exchange activities are innocent and legal, having no criminal intent, the ''mountains of applications [would be] for what will be temporary FFL licenses,'' and the increase would, ironically, ''hinder'' ATF's ability to solve crime. As one commenter stated, ''After all, licensed dealers can directly order firearms from distributors or manufacturers, and the more licensed dealers, the harder it is to ensure all those dealers are complying with all applicable laws and regulations (fixed number of agents available for compliance inspections, more license holders, lower rate of inspections per license holder).'' Although acknowledging that the licensing fee is set by statute, several of these commenters nonetheless suggested an increase in the fees to help ATF. The application fee for dealers in firearms is currently set by the GCA at $200 for the first three-year period, stated one of these commenters. They continued by comparing this to the amount people spend in State fees for hunting licenses, as well as the scope of ATF's work: ''In the area of firearms alone ATF not only assists thousands of law enforcement agencies nationally and internationally in firearm tracing but also further contributes to public safety through permitting and monitoring with follow up compliance checks of 11 different types of [FFLs]. Your agency needs additional staff and funding support. I recommend increasing the FFL application fee to $600 to help facilitate carrying out your public safety mission. If an out of state person went on an elk hunting trip to Oregon, Wyoming, Montana, or Colorado they would be paying over $700 just for the license/tags!'' (emphasis removed)

Department Response

In response to comments saying that ATF does not have resources necessary to process additional licenses and increasing workload, the Department acknowledges that the BSCA amended the GCA to broaden the scope of persons who are required to be licensed as dealers under the GCA. The Department anticipates that, soon after this final rule is published, there will be an initial influx of applicants, which will then level off as licenses are processed and issued. The Department will reallocate resources as necessary to handle the estimated initial increase in the number of license applicants and anticipates being able to do so without taking away from other enforcement priorities.

The Department acknowledges commenters' desire to increase dealer license fees; however, those fees are set by statute, not by regulation. *See* 18 U.S.C. 923(a)(3). As such, those comments are beyond the scope of this rule.

7. Concerns With the Comment Process

Comments Received

One commenter stated that ATF required all commenters to include their name and address to comment and added that this requirement violates the First Amendment, adding that courts have consistently held that restrictions on anonymous speech are subject to ''exacting scrutiny.'' They also stated that asking for commenter identity ''severely limit[s] both the degree and amount of public participation.'' The commenter further stated that this ''is predictably likely to chill the gun owning public from weighing in and exercising their right to participate.'' Finally, the commenter pointed out that many government agencies accept anonymous comments in identical circumstances and that the Administrative Procedure Act (''APA'') does not require agencies to authenticate comments. As a result, the commenter requested that ATF re-open the comment period. At least one commenter who submitted a comment later in the comment period expressed skepticism about the large number of comments already posted in favor of the rule and thought they could have been produced by automated bots. Further, at least two commenters were under the impression that ATF refused to accept boxes of petitions submitted by a firearms advocacy organization.

Department Response

The Department disagrees that ATF's request for self-identification in its instructions ''severely limit[ed] the degree and amount of public participation,'' or discouraged the public from commenting, as evidenced by the thousands of electronic comments that ATF received that were either submitted anonymously or under an obvious pseudonym. Moreover, among the tens of thousands of submitted comments opposing the rule were many comments in which commenters expressly declared that they would not comply with any regulation or simply made disparaging or profane statements about the proposed rule, DOJ, or ATF, which undermines the comment's suggestion that commenters who have a negative view of ATF were deterred from submitting comments. ATF accepted, posted, and considered the anonymous and pseudonymous comments and those with negative views.

The commenter's statement that restrictions on anonymous speech are subject to ''exacting scrutiny'' under the First Amendment is irrelevant here because ATF did not restrict anonymous speech. Rather, ATF required commenters to include their first and last name and contact information when submitting comments, and noted that ''ATF may not consider, or respond to, comments that do not meet these requirements.'' 88 FR 62019. Thus, individuals could submit anonymous comments at will, but ATF indicated that it might not respond. ATF is not constitutionally required to respond to all comments, as ''[n]othing in the First Amendment or in [the Supreme Court's] case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.'' *Minn. State Bd. for Cmty. Colleges* v. *Knight,* 465 U.S. 271, 285 (1984). Nonetheless, ATF did consider the submitted comments, anonymous or not, and is responding in this preamble to the issues raised, even though not to every individual comment.

The NPRM instructions under ''Public Participation,'' requiring that commenters include their first and last name and contact information (88 FR 62019), were for mail-in comments. ATF generally requires that persons provide such information on mailed comments in case of illegible handwriting in the

comment or in case the agency would like to follow up on a comment to gain further information or perspective from the commenter. In addition, ATF also generally requests such information on any comment submitted by electronic means or mail for the latter reason. Commenters are encouraged to include such information when submitting an electronic comment; however, the NPRM made clear that if commenters were submitting via the Federal eRulemaking portal, they should follow instructions on the portal. 88 FR 61993, 62019. On the Federal eRulemaking portal, the Department permits individuals to submit comments anonymously or even use aliases to mask their identity.

The significant majority of comments were submitted through the eRulemaking portal and were not required to include identifying information. As discussed above, thousands of commenters submitted electronic form letters opposing the rule, and those commenters, though they could have submitted anonymously, typically provided a name as part of those mass-mail campaigns. Accordingly, the Department disagrees that commenters opposing the rule were discouraged from participating and also disagrees with the suggestion that ATF should re-open the comment period.

Additionally, the developers of the Federal eRulemaking portal have in place measures to prevent comments from automated bots [149] and did not inform ATF that there were any system irregularities during the comment period.

And finally, the commenters who believed that ATF denied acceptance of boxes of petitions were mistaken. ATF received, accepted, scanned, posted, and considered the petitions from the firearms advocacy organization on behalf of their constituency, which were timely mailed before the close of the comment period in accordance with the NPRM instructions. Those petitions, which expressed objections to the proposed rule, totaled over 17,000 comments and were processed and considered.

[149] According to *regulations.gov*, the system employs reCAPTCHA ''to support the integrity of the rulemaking process and manage the role of software-generated comments.'' *See Frequently Asked Questions, Regulations.gov*, *https://www.regulations.gov/faq* (last visited Mar. 7, 2024).

8. Constitutional Concerns

a. Violates the Ex Post Facto Clause

Comments Received

A few commenters stated that the NPRM directly violates clause 3 of Article I, Section 9, of the United States Constitution, which prohibits ex post facto laws. These commenters' opposition comes from their belief that, once the final rule goes into effect, sales of firearms that are currently lawful will no longer be legal, and that the new prohibition would constitute an ex post facto law. The commenters who provided reasons for their assertion that this rule constitutes an ex post facto law primarily focused on their belief that the rule would be an ''infringement on firearms ownership and property rights'' and would create a backdoor firearms registry, that the rule is ''criminalizing and restricting transactions and expanding the scope of scrutiny'' of the ''engaged in the business'' as a dealer definition to ''those who the original law had not intended,'' and that the rule is an attempt to tax and punish Americans that have not committed a crime. One commenter stated that the EIB presumption that applies when a person repetitively sells firearms of the same or similar kind or type ''reads like a trap ready to spring on an unsuspecting collector who[se conduct] would previously be perfectly legal'' if, for example, they had exchanged a bolt-action Mosin-Nagant rifle in 7.62x54r for a Star Model B pistol in 0x18. According to the commenter, ''the concern here is taking an activity which was entirely acceptable prior to this rule, then moving the goalposts to make it illegal. It is concerning that this would appear to be an ex-post facto change.'' Another commenter asked whether it was legal ''to pass a law in 2022, then redefine what that law says?''

Department Response

The Department disagrees that the proposed rule violates the Ex Post Facto Clause. As an initial matter, the rule does not itself impose any new liability. Rather, the rule implements the BSCA, which amended the GCA, a statute passed by Congress. A law ''violates the Ex Post Facto Clause if it applies to events occurring before its enactment and alters the definition of criminal conduct or increases the punishment for a crime.'' *United States* v. *Pfeifer,* 371 F.3d 430, 436 (8th Cir. 2004) (citing *Lynce* v. *Mathis,* 519 U.S. 433, 441 (1997)). But a law does not violate the Ex Post Facto Clause just because it applies to conduct that ''began prior to, but continued after'' its effective date. *United States* v. *Brady,* 26 F.3d 282, 291 (2d Cir. 1994) (internal quotation marks omitted). For example, in the context of firearm possession, courts have consistently recognized that regulating the continued or future possession of a firearm that was acquired before the regulation took effect does not implicate the Ex Post Facto Clause because such a regulation does not criminalize past conduct. *See, e.g., United States* v. *Pfeifer,* 371 F.3d 430, 436–37 (8th Cir. 2004); *United States* v. *Mitchell,* 209 F.3d 319, 322–23 (4th Cir. 2000); *United States* v. *Brady,* 26 F.3d 282, 290–91 (2d Cir. 1994); *United States* v. *Gillies,* 851 F.2d 492, 495–96 (1st Cir. 1988); *United States* v. *D'Angelo,* 819 F.2d 1062, 1065–66 (11th Cir. 1987); *cf. Samuels* v. *McCurdy,* 267 U.S. 188, 193 (1925) (rejecting Ex Post Facto Clause challenge to statute that prohibited the post-enactment possession of intoxicating liquor, even when the liquor was lawfully acquired before the statute's enactment).

Here, the rule does not impose any civil or criminal penalties and nothing in this rule requires that the statute be applied in a manner that violates the Ex Post Facto Clause. Nor does this rule regulate ''firearm ownership'' in a vacuum—it addresses dealing in firearms. This rule describes the proper application of the terms Congress used in various provisions of the GCA, as modified by the BSCA, to define what constitutes being engaged in the business as a dealer—and, thus, when persons must obtain a dealer's license before selling firearms. As stated above, this rule does not impose liability independent of the pre-existing requirements of those statutes.

The Department disagrees that this rule ''redefine[s] what that law says.'' It simply explains and further clarifies the terms of the BSCA. The Department further disagrees that substantive rules that interpret an earlier statute—such as the 2022 changes the BSCA made to the GCA—through a congressional grant of legislative rulemaking authority are ex post facto laws merely because they interpret or clarify those laws. The proposed rule is exclusively prospective and does not penalize prior conduct; it is not an ex post facto law. *See Lynce,* 519 U.S. at 441. For these reasons, the Department disagrees with commenters' assertions that the rule violates the Ex Post Facto Clause.

b. Violates the First Amendment

Comments Received

A few commenters raised concerns that the proposed definitions violate the First Amendment. These commenters

stated that, ''One is not required by the Constitution to be vetted and permitted in order to claim protection under the First Amendment Right to Free Speech,'' which the commenters stated includes the right to ''procure and sell firearms as a citizen.'' In addition, at least one commenter stated that the ''promotion'' presumption under the definition of ''predominantly earn a profit'' violates the First Amendment by infringing on a private citizen's ability to promote their brand by conflating intent to sell with promotion of a brand. Another commenter stated that, when an agency can charge a crime against a person solely because they utter an offer to sell a firearm, ATF is enforcing thought crimes. The commenter added that this goes beyond existing law structures and does not meet the standard of calling ''Fire!'' in a theater.

Some commenters expressed First Amendment concerns specifically regarding the definition of terrorism included in the regulation. While some commenters voiced approval of including the definition of terrorism because they believe it allows the Government address potential threats effectively, other commenters objected, with some stating it is unnecessary and possibly infringes on freedom of speech and expression because the Government might inadvertently stifle protected political activism or dissent. They urged that the definition needs to be more precise to avoid unintended consequences and to ensure that legitimate firearms activities are not penalized.

Department Response

The Department disagrees with the commenters' First Amendment objections. As an initial matter, this rule does not regulate speech at all, nor is the right to ''procure and sell firearms as a citizen'' protected speech under the First Amendment. Although the Supreme Court has held that the First Amendment protects ''expressive conduct,'' it is not implicated by the enforcement of a regulation of general application not targeted at expressive activity. *Arcara* v. *Cloud Books, Inc.,* 478 U.S. 697, 702, 706–07 (1986). (First Amendment scrutiny ''has no relevance to a statute directed at . . . non-expressive activity,'' but applies ''where it was conduct with a significant expressive element that drew the legal remedy in the first place.''); *see also Wright* v. *City of St. Petersburg,* 833 F.3d 1291, 1298 (11th Cir. 2016) (''First Amendment scrutiny 'ha[d] no relevance to [a trespass ordinance] directed at imposing sanctions on nonexpressive activity' ''); *cf. Talk of the Town* v. *Dep't of Fin. & Bus. Servs. ex rel. Las Vegas,* 343 F.3d 1063, 1069 (9th Cir. 2003) (section of Las Vegas Code barring consumption of alcohol in places that lack valid liquor licenses ''in no way can be said to regulate conduct containing an element of protected expression''). Conduct may be expressive where ''[a]n intent to convey a particularized message [is] present, and . . . the likelihood [is] great that the message would be understood by those who viewed it.'' *Texas* v. *Johnson,* 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington,* 418 U.S. 405, 410–11 (1974)). This final rule does not regulate expressive conduct of any kind, and the commenters have not offered any valid reason to believe that selling firearms constitutes expressive conduct. As such, the First Amendment is not implicated by this rule.

Even if certain aspects of procuring and selling a firearm could be considered expressive conduct, ''a sufficiently important governmental interest in regulating the nonspeech element'' of conduct that also includes an expressive element ''can justify incidental limitations on First Amendment freedoms.'' *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968). Under an *O'Brien* analysis—

> a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Addressing these elements, first, ''the Government may constitutionally regulate the sale and possession of firearms.'' *Wilson* v. *Lynch,* 835 F.3d 1083, 1096 (9th Cir. 2016). Second, courts have repeatedly held that public safety and preventing crime are not only substantial, but compelling, governmental interests. *See, e.g., United States* v. *Salerno,* 481 U.S. 739, 750 (1987); *Mai* v. *United States,* 952 F.3d 1106, 1116 (9th Cir. 2020); *Worman* v. *Healey,* 922 F.3d 26, 39 (1st Cir. 2019); *Kolbe* v. *Hogan,* 849 F.3d 114, 139 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass'n* v. *Cuomo,* 804 F.3d 242, 261 (2d Cir. 2015); *Horsley* v. *Trame,* 808 F.3d 1126, 1132 (7th Cir. 2015). Third, ''the Government's efforts to reduce gun violence'' are not directed at any hypothetical expressive conduct and cannot be construed to be related to the suppression of free expression in any way. *Wilson,* 835 F.3d at 1096–97. Fourth, the regulation's definitions and rebuttable presumptions do not ban ownership, purchase, or sale of firearms, nor do they restrict purchases and sales for enhancement of personal firearms collections. The regulation merely clarifies that recurring sales or purchases for resale, with the predominant intent to earn a profit, constitute being engaged in the business as a dealer. It does not ban these sales; it just requires that dealers comply with existing statutory licensing requirements. Therefore, any burden is ''incidental'' and ''minimal.'' *Id.* Because the regulation ''satisfies each of the *O'Brien* conditions,'' it would ''survive[ ] intermediate scrutiny.'' *Id.* at 1097 (finding ATF's Open Letter to Federal Firearms Licensees, informing them that they would have cause to deny a firearm sale as violating 18 U.S.C. 922(d)(3) if a purported purchaser presented their medical marijuana registry card, did not violate the First Amendment even if having the card was considered expression). Thus, even if the *O'Brien* standard applies, the regulation does not violate the First Amendment.

Moreover, this rule does not establish that an individual will be charged with a crime ''solely'' because they ''utter'' an offer to sell a firearm. As noted above, the presumptions set forth in this rule do not apply to criminal proceedings. Further, the application of a rebuttable presumption based on a seller's speech does not restrict speech in any way—it means only that, in a proceeding to determine whether a seller of firearms is ''engaged in the business'' of dealing in firearms, the Department may be able to make an initial evidentiary showing based on the seller's speech, and the evidentiary burden then shifts to the seller. The Supreme Court has held that the First Amendment ''does not prohibit the evidentiary use of speech to establish'' a claim ''or to prove motive or intent.'' *Wisconsin* v. *Mitchell,* 508 U.S. 476, 489 (1993). Consistent with this principle, courts have rejected First Amendment challenges to rebuttable presumptions that are triggered by speech evidence. *See Cook* v. *Gates,* 528 F.3d 42, 63–64 (1st Cir. 2008); *cf. Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495–96 (1982) (rejecting claim that a village had unlawfully restricted speech through a drug paraphernalia licensing ordinance just because guidelines for enforcing the ordinance ''treat[ed] the proximity of drug-related literature as indicium that paraphernalia are 'marketed for use with illegal cannabis or drugs' ''). Ultimately, the subject of this final rule is a seller's conduct and not his speech, and the

rule does not impose any burdens on speech.

To the extent commenters are alleging this rule impermissibly inhibits commercial speech, it does no such thing. Repetitively or continuously advertising the sale of firearms can result in a person being presumed to be engaging in the business, but a presumption may be rebutted. At any rate, even if unrebutted, the implication of the presumption is simply that the person must have a license to deal in firearms—that person is not precluded from advertising the sale of firearms. Assuming the presumption does burden commercial speech, courts have routinely recognized that ''[t]he Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.'' *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York,* 447 U.S. 557, 562–63 (1980) (internal quotation marks omitted). If the content of the commercial speech is not illegal or misleading, the Government must first ''assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.''' *Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 624 (1995). As stated above, ''the Government may constitutionally regulate the sale and possession of firearms,'' *Wilson,* 835 F.3d at 1096, and public safety is a compelling governmental interest. Requiring those who are engaged in the business of dealing in firearms to be licensed—and thus to keep records and conduct background checks on potential purchasers to deny transfers to those who are prohibited from possessing firearms—materially advances public safety. Moreover, this requirement is narrowly drawn because it pertains to only those ''who devote[ ] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' *It does not apply to every sale.*

The Department also disagrees that the rule's definition of ''terrorism'' is unnecessary or infringes upon protected speech. The definition mirrors the statutory definition of ''terrorism'' that Congress enacted and codified in 18 U.S.C. 921(a)(22) and (a)(23), with only a minor addition at the beginning to state the definitions to which it applies. It is also necessary to explain the congressionally enacted proviso that proof of profit shall not be required when a person engages in the regular and repetitive purchase and disposition of firearms in support of terrorism. The definition does not constitute a governmental restriction on speech or expressive conduct, and so it does not violate the First Amendment.

Again, it bears emphasizing that this statutory definition of ''terrorism'' existed in the definition of ''principal objective of livelihood and profit'' before the BSCA was passed, and still remains there verbatim. The BSCA added that same definition to the new ''predominantly earn a profit'' definition. This rule merely moves that definition within the regulations to be a standalone definition so that it applies to both the term ''predominantly earn a profit'' and ''principal objective of livelihood and profit'' (in the sections governing importers, manufacturers, and gunsmiths)—consistent with the statute—without repeating it in two places, and makes a slight edit at the beginning to state that it applies to both definitions. This rule does not further interpret or define that term, and comments in that regard are beyond the scope of the rule.

c. Violates the Second Amendment

Comments Received

Of those who objected to the NPRM, a majority argued that any changes to the definitions, or creating new requirements and rebuttable presumptions, are inconsistent with the Second Amendment and are therefore unconstitutional. Commenters stated that the right to have—and thus purchase and sell—firearms dates back to the Founding and that requiring licenses for any aspect of firearm sales is an unconstitutional infringement of Second Amendment rights. Many commenters stated that the rule is ''reclassifying all sales (even private) to require a 'licensed dealer' (FFL) . . . thusly preventing law abiding United States citizens from obtaining firearms. If a citizen cannot obtain a firearm, a citizen cannot keep or bear a firearm violating the Second Amendment,'' and similar statements. Some of these commenters stated that the rule violates the Second Amendment by creating universal background checks, making it difficult and costly for citizens to sell personal firearms, and that it deprives people of the inherent right to dispose of, trade, or do what they wish with their own property.

Some stated they understand the importance of balancing public safety and regulation of illegal firearms activity with firearm ownership, but expressed concerns that the correct balance point has not been determined yet or that the proposed regulation might ''inadvertently classify individuals who engage in the lawful and occasional transfer of personal firearms to friends or family members as arms dealers,'' raising concerns about overreach and undue burden.

Several commenters tied these concerns to *District of Columbia* v. *Heller,* 554 U.S. 570 (2008), stating that expanding the definition of who is engaged in the business of dealing in firearms may criminalize law-abiding citizens engaging in their Second Amendment rights, which the commenters stated were ''unequivocally affirm[ed]'' by *Heller.* One commenter stated that the *Heller* decision ''emphasized that any restrictions placed on the Second Amendment must be closely tailored to avoid unnecessary infringement on individual rights. The proposed rule, by including casual sellers under the umbrella of those 'engaged in the business,' stretches this definition beyond its historical and legal boundaries. This is not a close tailoring of restrictions but an undue burden on average citizens who may occasionally sell firearms without falling under any standard commercial definition of a firearms dealer.''

Many other commenters stated that the regulation violates *New York State Rifle & Pistol Ass'n,* v. *Bruen,* 597 U.S. 1 (2022), because, the commenters argued, there is no analogous historical law from either the Founding era—when the Second Amendment was ratified—or the Reconstruction period—when the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment's protections and rendered them applicable to the States—that defined a ''dealer'' in firearms or required background checks, dealer licensing, recordkeeping, or gun registration. Others stated that the regulation violates *Bruen* because, they stated, *Bruen* precludes the Government from using means-end scrutiny to justify its firearms laws. Accordingly, the commenters argued, the proposed rule's use of public safety as a basis for purportedly banning firearms from average citizens renders it unconstitutional under *Bruen.* These commenters further argued the proposed rule is unconstitutional under *Bruen* because it serves no public interest.

A few other commenters directly stated that the BSCA, GCA, and NFA all violate the Second Amendment. Some added that the ATF regulation is misinterpreting the BSCA, which did not intend to change the definition of ''engaged in the business'' or any other definition, and the proposed rule is thus

an effort to work around the Second Amendment.

Department Response

The Department disagrees with commenters that the GCA, the BSCA amendments, or this rule implementing these statutes violate the Second Amendment. Those statutes and this final rule are consistent with the Supreme Court's Second Amendment decisions. In *Heller,* the Court emphasized that ''the right secured by the Second Amendment is not unlimited'' and ''nothing in our opinion should be taken to cast doubt'' on certain laws, including those ''imposing conditions and qualifications on the commercial sale of arms.'' 554 U.S. at 626–27. The Court repeated the same statement in *McDonald* v. *City of Chicago,* 561 U.S. 742, 786 (2010), and Justice Kavanaugh, joined by the Chief Justice, reiterated the point in his concurring opinion in *Bruen,* 597 U.S. at 81 (Kavanaugh, J.).

Those precedents confirm that this rule raises no constitutional concern under the Second Amendment. The rule addresses the commercial sale of firearms. This rule does not prevent individuals who are permitted to possess firearms under Federal law from possessing or acquiring firearms; individuals remain free to purchase firearms from an FFL or in a private sale from a non-licensee who is not engaged in the business of dealing in firearms. Nor does this rule require a dealer's license for all sales. By its terms, this rule applies only to those who ''devote[ ] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' 18 U.S.C. 921(a)(21)(C). And because this rule does not mandate a license for all sales, it does not mandate a background check for all sales. Likewise, this rule does not prevent those who own firearms from lawfully selling, acquiring, or keeping this property. This rule does not prevent law-abiding citizens from making occasional sales or purchases of firearms for the enhancement of a personal collection or for a hobby—it concerns only those ''engaged in the business'' of firearms dealing. Firearm owners would only need a license in the event that they are devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.

At least one circuit court has rejected a facial Second Amendment challenge to the licensing requirement in 18 U.S.C. 923(a) on the ground that it ''imposes a mere condition or qualification. Though framed as a prohibition against unlicensed firearm dealing, the law is in fact a requirement that those who engage in the [business of selling] firearms obtain a license.'' *United States* v. *Hosford,* 843 F.3d 161, 166 (4th Cir. 2016). The licensing requirement, which is implemented by this rule, is ''a crucial part of the federal firearm regulatory scheme.'' *Id.* at 168; *see also Focia,* 869 F.3d at 1286 (prohibiting transfers between unlicensed individuals in different states ''does not operate to completely prohibit [the defendant] or anyone else, for that matter, from selling or buying firearms''; instead, it ''merely'' imposes ''conditions and qualifications on the commercial sale of arms'' (internal quotation marks omitted)); *United States* v. *Nowka,* No. 11–CR–00474, 2012 WL 2862061, at *6 (N.D. Ala. May 10, 2012) (''[Plaintiff's] right to buy or sell a firearm is not abridged. It is regulated.''). This rule implements a definitional change that Congress made in the BSCA, which will expand the number of firearms sellers affected by the licensing requirement in 18 U.S.C. 923(a).

Additionally, the final rule is consistent with the Supreme Court's more recent decision in *Bruen.* That case clarified the standard for resolving Second Amendment claims ''[i]n keeping with *Heller,*'' 597 U.S. at 17, and the Court did not draw into question *Heller*'s explanation that regulations of commercial sales of firearms are presumptively lawful. *See id.* at 81 (Kavanaugh, J., concurring); *see also id.* at 79 (noting that the Second Amendment does not prohibit the imposition of objective ''licensing requirements'' commonly associated with firearms ownership); *id.* at 72 (Alito, J., concurring) (noting that nothing in that opinion decided anything about ''the requirements that must be met to buy a gun''). Under *Bruen,* to establish a Second Amendment violation, a challenger must first show that the final rule implicates ''the Second Amendment's plain text.'' *Id.* at 17 (majority opinion). Only if that threshold requirement is met is the Government then required to ''demonstrate that the [final rule] is consistent with this Nation's historical tradition of firearm regulation.'' *Id.* Here, the final rule does not implicate the Second Amendment's ''plain text,'' which addresses the right to ''keep and bear Arms'' and is silent as to the commercial sale of firearms. U.S. Const. amend. II. Both before and after *Bruen,* courts have agreed that the Second Amendment does not ''protect a proprietor's right to sell firearms.'' *Teixeira* v. *County of Alameda,* 873 F.3d 670, 690 (9th Cir. 2017); *see also United States* v. *Kazmende,* No. 22–CR–236, 2023 WL 3872209, at *5 (N.D. Ga. May 17, 2023) (rejecting a Second Amendment challenge to 18 U.S.C. 922(a)(1)'s prohibition on willfully engaging in the business of dealing in firearms without a license on the ground that the ''Second Amendment . . . simply does not cover the *commercial* dealing in firearms.''), *report and recommendation adopted,* 2023 WL 3867792 (N.D. Ga. June 7, 2023); *United States* v. *Flores,* 652 F. Supp. 3d. 796, 799–802 (S.D. Tex. 2023) (holding that ''commercial firearm dealing is not covered by the Second Amendment's plain text''); *United States* v. *King,* 646 F. Supp. 3d. 603, 607 (E.D. Pa. 2022) (holding that ''the Second Amendment does not protect the *commercial* dealing of firearms''); *United States* v. *Tilotta,* 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022) (concluding that the plain text of the Second Amendment does not cover the commercial sale and transfer of firearms).

Even if, contrary to law, the scope of the Second Amendment's protection extended to commercial dealing in firearms, there is a robust historical tradition supporting the Government's authority to require licenses and inspection of firearms sellers. Where a regulation implicates the Second Amendment, the Government may justify it ''by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation,'' including, for example, by pointing to ''a well-established and representative historical *analogue.*'' *Id.* at 24, 30. To be analogous, historical and modern firearms regulations need only be ''relevantly similar''; a ''historical *twin*'' is not required. *Id.* at 29–30. In fact, from colonial times, State and local governments have routinely exercised their authority to regulate the sale of firearms, through licensing, inspection, and similar requirements.

For instance, the third U.S. Congress made it unlawful for a limited period ''to export from the United States any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenades, gunpowder, sulpher, or saltpetre,'' Act of May 22, 1794, 1 Stat. 369, ch. 33, sec. 1 (''An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same''), demonstrating a clear understanding that the Constitution permitted regulation of firearms sellers.

Further, as the en banc Ninth Circuit recounted in detail, as early as the 1600s, ''colonial governments substantially controlled the firearms trade,'' including through ''restrictions on the commercial sale of firearms.'' *Teixeira,* 873 F.3d at 685 (further explaining, as examples, that ''Connecticut banned the sale of firearms by its residents outside the colony,'' and Virginia law made it unlawful for any individual to travel more than three miles from a plantation with ''arms or ammunition above and beyond what he would need for personal use'').

Measures regulating firearms sellers, similar to the inspection and licensing regime of today, have been commonplace throughout history. To take one example, in 1805, Massachusetts required that all musket and pistol barrels manufactured in the State and offered for sale be ''proved'' (inspected and marked by designated individuals) upon payment of a fee, to ensure their safe condition, and Maine enacted similar requirements in 1821.[150] Further, multiple States, such as Massachusetts (1651, 1809), Connecticut (1775), New Jersey (1776), and New Hampshire (1820), required licenses or inspection to export or sell gunpowder (akin to modern ammunition).[151] *See also United States* v. *El Libertad,*—F. Supp. 3d—,No. 22–CR–644, 2023 WL 4378863, at *7 (S.D.N.Y. July 7, 2023) (finding that historical laws showed ''expansive authority exercised by colonial and early state legislatures as well as early congresses over the transfer of firearms between individuals and across borders,'' including through ''licensing requirements [and] registration requirements''). Similar licensing and taxation requirements for the sale of gunpowder and certain arms were enacted through the antebellum and Reconstruction eras.[152]

That modern laws regarding the commercial sale of firearms may not be identical to laws from the Founding era is not dispositive. There are many reasons other than constitutional limitations that historical regulations are not a ''dead ringer'' for modern regulations. *Bruen,* 597 U.S. at 30. For example, during the Founding era, guns in America were ''produced laboriously, one at a time,'' Pamela Haag, *The Gunning of America* 9 (2016), and communities were ''close-knit,'' where ''[e]veryone knew everyone else,'' *Range* v. *Att'y Gen.,* 69 F.4th 96, 117 (3d Cir. 2023) (en banc) (Krause, J., dissenting) (quoting Stephanos Bibas, *The Machinery of Criminal Justice* 2 (2012)). That is substantially different from today, where guns may be mass-produced quickly and are widely available for purchase at ubiquitous retailers through modern technology and more plentiful and far-reaching channels of national and international commerce, where sellers are unlikely to know their customers. But from the Founding and before, the principle remains the same. The Government has been allowed to—and has enacted measures to—regulate the commercial sale of firearms to prevent their sale to persons the Government deemed dangerous. Thus, assuming for the sake of argument that the regulation implicates Second Amendment rights, it would pass muster under *Bruen.*

In response to commenters stating that the Department should not use the *Heller* two-step process, the Department acknowledges that *Bruen* abrogated the ''two-step'' framework of *Heller,* as ''one step too many,'' and rejected the application of means-end scrutiny at the second step. *Bruen,* 597 U.S. at 19. Although the Department believes this rule does promote public safety, the Department is not relying on this benefit in conducting the historical analysis required by *Bruen* (assuming again for the sake of argument that it applies).

Therefore, to the extent that commenters argued the rule or the underlying statute violates the Second Amendment, the Department disagrees for all of the reasons stated above.

d. Violates the Fourth or Fifth Amendment Right to Privacy

Comments Received

Several commenters claimed the proposed rule violates their right to privacy under the Fourth Amendment and the Fifth Amendment's Due Process Clause. These commenters believe that the proposed rule creates a de facto firearms registry by requiring that people who engage in recurring purchases and sales with the predominant intent to earn a profit must obtain a dealer's license. Other commenters stated that enforcement of the proposed rule would lead to a violation of their constitutional right to privacy by requiring them to be registered dealers subject to privacy-invading and warrantless inspections without breaking a law—even for a single firearms transaction. They raised particular concerns in this regard for those who operate from home. And other commenters asserted a Fourth Amendment violation in regard to their property if the Government knows what firearms or how many weapons each individual owns. One commenter focused on the rule's inclusion of electronic marketplaces as a violation of privacy, stating that including online brokers, auctions, text messaging services, and similar electronic means of transacting purchases and sales would cause people to ''forfeit their privacy to the ATF in these matters.''

Department Response

The Department disagrees that the rule violates the Fourth Amendment or any constitutional right to privacy. Under both the statute and the proposed and final rules, there are no recordkeeping or background check requirements for personal firearms that

[150] *See* 3 Laws of the Commonwealth of Massachusetts, from November 28, 1780, to February 28, 1807, at 259–61 (1807); 1 Laws of the State of Maine 546 (1830).

[151] *See* Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 126, Powder (1890) (1651 statute requiring license to export gunpowder); 2 General Laws of Massachusetts from the Adoption of the Constitution to February, 1822, at 198–200, ch. 52, An Act Providing for the Appointment of Inspectors, and Regulating the Manufactory of Gun-Powder, secs. 1, 8 (1823) (1809 statute providing for the appointment of an ''inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder,'' and imposing penalties for any sale or export of gunpowder ''before the same has been inspected and marked''); 15 The Public Records of the Colony of Connecticut, from May, 1775, to June, 1776, Inclusive 191, An Act for Encouraging the Manufactures of Salt Petre and Gun Powder (1890) (1775 Connecticut law establishing, among other things, that no gunpowder manufactured in the colony ''shall be exported out'' of the colony ''without [an applicable] licence''); Acts of the General Assembly of the State of New-Jersey, at a Session Begun at Princeton on the 27th Day of August 1776, and Continued by Adjournments 6, ch. 6, An Act for the Inspection of Gun-Powder, sec. 1 (1877) (No person shall offer any gunpowder for sale ''without being previously inspected and marked as is herein after directed.''); Laws of the State of New Hampshire; With the Constitutions of the United States and of the State Prefixed 276–78, An Act to Provide for the Appointment of Inspectors and Regulating the Manufactory of Gunpowder, secs. 1, 8 (1830) (authorizing ''inspector of gunpowder for every public powder magazine, and at every manufactory of gunpowder in this state'' and imposing penalties for any sale or disposition of gunpowder ''before the same has been inspected and marked'').

[152] The Revised Charter and Ordinances of the City of Chicago: To Which are Added the Constitutions of the United States and State of Illinois 123–24, ch. 16, Regulating the Keeping and Conveying Gun Powder and Gun Cotton, secs. 1, 6 (1851) (1851 city law barring the sale of gunpowder ''in any quantity'' without government permission, and barring ''retailer[s] of intoxicating liquors'' and ''intemperate person[s]'' from such permits); The Charter and Ordinances of the City of Saint Paul, to August 1st, 1863, Inclusive 166, Gunpowder, ch. 21, sec. 1 (1863) (similar 1858 city law requiring permission to sell gunpowder,); Acts of the General Assembly of Alabama: Passed at the Session of 1874–75, at 41, An Act to Establish Revenue Laws for the State of Alabama, Act No. 1, sec. 102(27) (1875) (imposed $25 license fee on dealers of pistols and certain knives); Acts of the General Assembly of Alabama, Passed at the Session of 1878–9, at 436–37, Act of Feb. 13, 1879, Act No. 314, sec. 14 (authorized town to ''license dealers in pistols, bowie-knives and dirk-knives'').

are occasionally bought and sold as part of enhancing a personal collection, such as for sporting purposes. As to the recordkeeping and background check requirements for the licensees engaged in the business of dealing in firearms, those records are not maintained in the custody of the government but are retained by the licensee until they discontinue their business. *See* 18 U.S.C. 923(g)(4); 27 CFR 478.129. Moreover, even when these records are in ATF's possession after the licensee discontinues their business, due to statutory and permanent appropriations restrictions, they are not searchable by a transferee's name or any personal identification code. *See* 18 U.S.C. 926(a);[153] Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112–55, 125 Stat. 552, 609–10 (2011) (''That, hereafter, no funds made available by this or any other Act may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code . . .''). This rule does not create or modify requirements with respect to retaining and searching records.

The Department also does not agree that this rule will violate a constitutional right to privacy with regard to commenters' property. This rule does not require individuals to provide any information with regard to their possession of firearms. It applies only to those engaged in the business of dealing in firearms. ''Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. 'An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home.''' *Minnesota* v. *Carter,* 525 U.S. 83, 90 (1998) (quoting *New York* v. *Burger,* 482 U.S. 691, 700 (1987)). Moreover, every applicant for a license is made aware of ATF's right of entry into their premises and examination of their records, *see* 27 CFR 478.23; thus there can be no reasonable expectation of privacy in the information contained in those records. *Cf. United States* v. *Marchant,* 55 F.3d 509, 516 (10th Cir. 1995) (finding no reasonable expectation of privacy in the information contained in ATF Form 4473 and further noting that ''Form 4473 did not advise Defendant that the information elicited was private, or that it would remain confidential''). Additionally, while the proposed rule in no way establishes a registry of firearms, and Congress has specifically prohibited such a registry, it is worth noting that the nearly century-old requirement for the actual registration of privately held firearms has never once been found to violate a Fourth Amendment right to privacy.

Some courts have recognized a privacy interest in avoiding disclosure of certain personal matters under the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Doe No. 1* v. *Putnam County,* 344 F. Supp. 3d 518, 540 (S.D.N.Y. 2018). Even under these court decisions, however, ''not all disclosures of private information will trigger constitutional protection.'' *Id.* (internal quotation marks omitted). In at least one circuit, the right to privacy in one's personal information under the Due Process Clauses is ''limited [to a] set of factual circumstances involving one's personal financial or medical information.'' *Id.* ''[T]he question is not whether individuals regard [particular] information about themselves as private, for they surely do, but whether the Constitution protects such information.'' *DM* v. *Louisa County Dep't of Human Services,* 194 F. Supp. 3d 504, 508–09 (W.D. Va. 2016) (internal quotation marks omitted) (finding no right to privacy with respect to the nature and location of an individual's counseling sessions). Basic information regarding firearms ownership or possession is of neither the medical nor financial variety, and no court has found this information to be constitutionally protected. *See Doe 1,* 344 F. Supp. 3d at 541 (''Disclosure of one's name, address, and status as a firearms license [holder] is not one of the 'very limited circumstances' in which'' a right to privacy exists).

e. Violates the Fifth Amendment—Unconstitutionally Vague

Comments Received

Some commenters objected to the rule on the ground that it is so vague that it violates the Due Process Clause of the Fifth Amendment. Most commenters merely stated that the rule violates the Fifth Amendment because it is unconstitutionally vague, without providing further details. Of those few commenters that elaborated their vagueness concern, the primary concern was that the rule does not define a threshold number of firearms that must be sold to qualify a person as a dealer in firearms, and that they felt this is unconstitutionally vague. A couple of other commenters stated that the rule was unconstitutionally vague and arbitrary in setting some of the rebuttable presumptions, and focused particularly on the presumption that a resale within 30 days after purchase could qualify a person as a dealer in firearms. These commenters believed that the time period included in this provision was arbitrary and so vague that routine actions that commonly arise in personal firearms contexts could trigger the presumption without people realizing it, thus entrapping people or exposing law-abiding citizens to a criminal prosecution. One commenter stated that ''[p]hrases like 'time, attention, and labor' or 'predominantly earn a profit' are nebulous and subject to interpretation,'' and stated that this vagueness conflicts with the principles established in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

One commenter argued that the proposed rule is unconstitutional, relying on *Johnson* v. *United States,* 576 U.S. 591 (2015), for the proposition that a criminal statute is unconstitutionally vague in violation of due process for either of two reasons: first, if ''it fails to give ordinary people fair notice'' of what is proscribed; and, second, if it is ''so standardless that it invites arbitrary enforcement.'' *Johnson,* 576 U.S. at 595. The commenter added that ''[o]ther case law expounding the 'void for vagueness' doctrine'' includes *Grayned.* According to the commenter, ''[u]nder *Grayned,* due process required that a law provide fair warning and provide 'persons of reasonable intelligence a reasonable opportunity to know what is prohibited so he may act accordingly.''' Another commenter cited to *Cargill* v. *Garland,* 57 F.4th 447, 469 (5th Cir.) (en banc), *cert. granted* 144 S. Ct. 374 (2023) (mem.), and stated, '''ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.''' Relying on *Cargill,* the commenter said, ''[a] statute is ambiguous if, after a court has 'availed [itself] of all traditional tools of statutory construction,' the court is left to 'guess at its definitive meaning' among several options. *Id.* (cleaned up).'' This commenter continued, ''In those circumstances involving ambiguous criminal statutes, the court is 'bound to apply the rule of lenity.' *Id.* at 471. So even if a court were to find that the statutory definition of 'engaged in the business' is ambiguous enough to allow

[153] ''No such rule or regulation prescribed after the date of the enactment of the Firearm Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation.''

for presumptions of guilt based on a single transaction, that is far from the most obvious reading of the statute, which interpretation would thus be resolved in favor of lenity.'' Some congressional commenters stated, ''The proposed rule raises serious vagueness concerns in light of the severe penalties. Will someone face a civil investigation for handing out business cards to sell his personal collection? What about if someone decides to sell a firearm in its original packaging?''

Department Response

The Department disagrees with commenters that this regulation, terms within it, or the rebuttable presumptions established by it are unconstitutionally vague. To begin, many of the comments are critical of the specific language Congress included in the statute (which is being added to the regulation). The Department cannot change the terms in the statute or their effect on sellers' legal rights and obligations. However, these comments illustrate the benefits of a rule that provides additional clarification to the public. The rule explains the Department's understanding of the statutory terms at issue and describes how those terms apply to particular circumstances, thus providing greater clarity to the public.

In any event, however, the terms employed in the statute and rule are not unconstitutionally vague. ''It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.'' *Grayned,* 408 U.S. at 108. A law is impermissibly vague if it ''fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages discriminatory enforcement.'' *FCC* v. *Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) (internal quotation marks omitted). However, ''[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'' *Grayned,* 408 U.S. at 110. The definitions in this rule use the terms with their ordinary meanings and in context, *see United States* v. *TRW Rifle,* 447 F.3d 686, 689, 690 (9th Cir. 2006), and are sufficiently clear to '''give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,''' *Village of Hoffman Estates,* 455 U.S. at 498 (quoting *Grayned,* 408 U.S. at 108). Absolute certainty is not required. *See Hosford,* 843 F.3d at 171 (explaining that laws ''necessarily have some ambiguity, as no standard can be distilled to a purely objective, completely predictable standard''); *Draper* v. *Healey,* 827 F.3d 1, 4 (1st Cir. 2016) ([I]f due process demanded [a] how-to guide, swaths of the United States Code, to say nothing of state statute books, would be vulnerable.''); *United States* v. *Lachman,* 387 F.3d 42, 56 (1st Cir. 2004) (''The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague.''); *Kolbe* v. *O'Malley,* 42 F. Supp. 3d 768, 800 (D. Md. 2014) (A ''statute is not impermissibly vague simply because it does not spell out every possible factual scenario with celestial precision.'' (internal quotation marks omitted)). The many objective examples and detailed explanations in the rule, all supported by a thorough administrative record, provide clarification and assist people in complying with the statute. This rule is therefore not unconstitutionally vague.

The Department further disagrees that this rule violates the rule of lenity. The rule of lenity does not apply whenever a law or rule may contain some ambiguity. ''The simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.'' *Muscarello* v. *United States,* 524 U.S. 125, 138 (1998). To invoke the rule of lenity, a court ''must conclude that there is a 'grievous ambiguity or uncertainty' in the statute.'' *Id.* at 138–39 (quoting *Staples* v. *United States,* 511 U.S. 600, 619 n.17 (1994)). A grievous ambiguity or uncertainty is present '''only if, after seizing everything from which aid can be derived, [a] [c]ourt 'can make no more than a guess as to what Congress intended.''' *Ocasio* v. *United States,* 578 U.S. 282, 297 n.8 (2016) (quoting *Muscarello,* 524 U.S. at 138–39). This rule does not require ''a guess'' as to what conduct satisfies being ''engaged in the business''; it adopts the plain, statutory or dictionary meaning of terms and provides rebuttable presumptions and examples for additional clarity.

The rule's rebuttable presumptions are also not unconstitutionally vague; indeed, such presumptions are common in the law. Courts frequently rely on them because they provide an approach that is particularized to certain circumstances. The presumptions in this rule are specific and tailored to particular situations. The fact that they may be overcome by rebuttal evidence does not render them vague. Although the presumptions do not address all circumstances in which a person might be engaged in the business, they do take into account common fact patterns that have been found to be appropriate indicators.

While a bright line numerical approach might provide greater clarity, the Department has rejected such an approach for the reasons identified in Section IV.B.3 of this preamble, as well as in the NPRM. The Department has also chosen to use presumptions in this rule rather than another approach,[154] because these presumptions are consistent with the analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in firearms without a license even under the pre-BSCA definition.

f. Violates the Fifth Amendment—Unconstitutional Taking

Comments Received

A few commenters opposed the rule as an unconstitutional taking under the Fifth Amendment. The primary concerns raised by these commenters were that, by requiring people who currently sell firearms without a license to acquire a license, the rule creates a backdoor registry, enabling the Government to identify what weapons, and how many, each person has, so that the Government can then enter private property without a warrant and seize them. One commenter spelled out the concern more fully, stating, ''Moreover, the rights to self-defense and to keep and bear arms are, in no small measure, property rights. The Fifth Amendment's Takings Clause provides additional protection to these rights. This clause ensures that private property cannot be taken for public use without just compensation. Arms, as personal property acquired lawfully, fall under this protection. Therefore, any regulation that effectively deprives an individual of their arms, or the utility thereof, intersects with property rights and demands rigorous scrutiny under the Takings Clause.''

Department Response

The Department disagrees that the proposed regulation constitutes a taking, and further disagrees that it results in a compensable taking. As an initial matter, no property is being taken. This rule does not require individuals who currently own firearms that they might sell or who might buy firearms in the future to surrender or destroy any personal property in order to engage in those activities. Further, even if they predominantly intend to earn a profit through repetitive purchases or resales, and thus must obtain a dealer license, they still do not have to surrender or

[154] For the reasons why the Department did not adopt a factor-based approach, see Section IV.C.3.

destroy any personal property to comply with this rule.

Furthermore, even where the application of Federal firearms laws results in the forfeiture of firearms, that is not a compensable taking. The Federal Circuit has recognized that, under Supreme Court precedent, there are certain exercises ''of the police power that ha[ve] repeatedly been treated as legitimate even in the absence of compensation to the owners of the . . . property.'' *Acadia Tech. Inc.* v. *United States,* 458 F.3d 1327, 1332–33 (Fed. Cir. 2006). As the Supreme Court articulated the doctrine, ''[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.'' *Mugler* v. *Kansas,* 123 U.S. 623, 668–69 (1887); *see Acadia Tech., Inc.,* 458 F.3d at 1333. The Federal Circuit and the Court of Federal Claims have also made clear that these principles apply with full force in analyzing the impact of firearms regulations. *See Mitchell Arms, Inc.* v. *United States,* 7 F.3d 212 (Fed. Cir. 1993); *Akins* v. *United States,* 82 Fed. Cl. 619 (2008).

Even if a takings analysis would be appropriate, a takings claim would likely be analyzed under *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 124 (1978), and the result would be the same. Under *Penn Central,* a court considers: (1) the character of the Government's actions, (2) the property holder's investment-backed expectations, and (3) the economic impact on the property holder. *Id.*

No taking exists under the *Penn Central* test. A restriction ''directed at the protection of public health and safety . . . is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions.'' *Rose Acre Farms, Inc.* v. *United States,* 559 F.3d 1260, 1281 (Fed. Cir. 2009). A plaintiff's ''reasonable investment-backed expectations are greatly reduced in a highly regulated field,'' *Branch* v. *United States,* 69 F.3d 1571, 1581 (Fed. Cir. 1995), such as the firearms industry. And as the Supreme Court has made clear, an owner of personal property ''ought to be aware of the possibility that new regulation might even render his property economically worthless.'' *See Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1027–28 (1992). At the same time, with respect to economic impact, the Court has observed that even when a regulation ''prevent[s] the most profitable use of [a person's] property,'' a ''reduction in the value of property is not necessarily equated with a taking.'' *Andrus* v. *Allard,* 444 U.S. 51, 67 (1979); *see also Jacob Ruppert, Inc.* v. *Caffey,* 251 U.S. 264, 303 (1920) (upholding a Federal law banning nonintoxicating alcoholic beverages on the ground that ''there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use''). Therefore, even under a takings analysis, this rule does not constitute a taking under the Fifth Amendment.

The Department disagrees that the proposed rule will enable ATF to create a national firearms registry that can be used to seize firearms. Since Fiscal Year 1979, Congress has prohibited ATF from using any Federal funds to create a national gun registry. Treasury, Postal Service, and General Government Appropriations Act, 1979, Public Law 95–429, 92 Stat. 1001, 1002 (1978). ATF complies with that statutory prohibition, and this proposed rule does not change either the prohibition or ATF's compliance. Nor does the rule permit ATF to create a backdoor national firearms registry, and it is not doing so. Any records that licensed dealers are legally required to keep remain with the dealer as long as the business continues, and information from those records is requested only if a particular firearm becomes part of a criminal investigation by a law enforcement entity. *See* 18 U.S.C. 923(g). ATF does not keep or receive records until the licensee ceases operations. And, although ATF may receive some records from discontinued businesses, they are not searchable by name or other personally identifiable information. This rule does not change that.

g. Violates the Fifth Amendment—Equal Protection Clause

Comments Received

A few commenters claimed that the proposed rule violates what they characterize as the Fifth Amendment's Equal Protection Clause by enabling uneven application of the law; uneven enforcement; seizing personal property; and creating a chilling effect on owners, buyers, and sellers of firearms.

Department Response

The Department disagrees that the proposed rule violates the equal protection component of the Fifth Amendment's Due Process Clause. Under certain circumstances, the equal protection component prohibits the Federal Government from treating similarly situated persons differently. *See Bolling* v. *Sharpe,* 347 U.S. 497, 498 (1954). However, like the Fourteenth Amendment Equal Protection Clause, the equal protection component of the Fifth Amendment ''must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.'' *Romer* v. *Evans,* 517 U.S. 620, 631 (1996). If a ''classification 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class,' [a court will] subject the classification to strict scrutiny. Otherwise, [courts] will uphold the classification if it is 'rationally related to a legitimate state interest.''' *Mance* v. *Sessions,* 896 F.3d 699, 711 (5th Cir. 2018) (footnote omitted) (quoting *Nat'l Rifle Ass'n* v. *ATF,* 700 F.3d 185, 211–12 (5th Cir. 2012)). There is no fundamental right to be engaged in the business of dealing in firearms or in selling firearms without a license. *See Kazmende,* 2023 WL 3872209, at *5. Nor are firearms dealers a ''suspect class,'' meaning a class that is ''saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'' *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976) (internal quotation marks omitted).

Rational basis review thus applies here. Rational basis review requires a ''rational relationship'' between the classification and ''some legitimate governmental purpose.'' *See Heller* v. *Doe,* 509 U.S. 312, 320 (1993). Under rational basis review, a classification ''is accorded a strong presumption of validity,'' *id.* at 319, and will be upheld if ''there is some rational basis for the statutory distinctions made . . . or [those distinctions] have some relevance to the purpose for which the classification is made.'' *Lewis* v. *United States,* 445 U.S. 55, 65 (1980) (internal quotation marks omitted) (rejecting an equal protection challenge to a ''firearm regulatory scheme'' that prohibits a felon from possessing a firearm).

There is clearly a rational basis for requiring those engaged in the business of dealing in firearms to be licensed according to the classifications and other requirements set forth in this rule. The ''principal purpose'' of the GCA is ''to curb crime by keeping firearms out of the hands of those not legally entitled to possess them.'' *Huddleston* v. *United States,* 415 U.S. 814, 824 (1974)

(internal quotation marks omitted). As a result, ''[c]ommerce in firearms is channeled through federally licensed importers, manufacturers, and dealers in an attempt to halt mail-order and interstate consumer traffic in these weapons.'' *Id.; see also United States* v. *Biswell,* 406 U.S. 311, 315 (1972) (''[C]lose scrutiny'' of ''interstate traffic in firearms'' is ''undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders''); *id.* at 315–16 (''Federal regulation'' of the traffic in firearms ''assures that weapons are distributed through regular channels and in a traceable manner''); *United States* v. *Hosford,* 82 F. Supp. 3d 660, 667 (D. Md. 2015) (prohibiting engaging in the business of firearms without a license ''ensures that significant commercial traffic in firearms will be conducted only by parties licensed by the federal government'' (internal quotation marks omitted)); *id.* (''Nor is the licensing requirement onerous.''). As discussed throughout this preamble, the regulatory changes in this final rule are essential to implementing Congress's changes to the GCA and furthering the Government's interest in having people who are engaged in the business of selling firearms be licensed as FFLs.

h. Violates the Fifth Amendment—Due Process Clause

Comments Received

A few commenters claimed that the proposed rule violates the Fifth Amendment's Due Process Clause and the concept of ''innocent until proven guilty'' by creating rebuttable presumptions. The Due Process Clause states, ''No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .'' U.S. Const. amend. V. Some of these commenters asserted that the presumptions reduce the scrutiny that would be required under the Due Process Clause before charging a person with a crime or removing their property, or cause a person to inadvertently commit a crime without knowing it would be seen that way under a presumption.

Others interpreted the presumptions as causing people to be presumed guilty, and then having to prove their innocence, thereby undermining the concept of ''innocent until proven guilty.'' Two U.S. senators stated, ''If the proposed rule goes into effect, innocent people will have to prove to the ATF that they are not firearms dealers when they, for example, try to resell firearms that are in the original packaging or represent that they can sell additional firearms to their friends. These types of activities do not make someone a licensed firearms dealer. Nothing in current law, including as amended by the BSCA, empowers the ATF to shift the burden to an innocent person to prove that keeping a firearm in its original packaging or discussing the sale of firearms to friends or family makes him a licensed firearms dealer.''

Other commenters asserted that the statutory provision saying that it is not necessary for the Government to prove intent to profit if the person was dealing in firearms for criminal purposes or terrorism runs contrary to the axiom that one is innocent until proven guilty and raises due process concerns under the Fifth Amendment. Others were concerned that the process of defending oneself during administrative processes to rebut a presumption would require people to set themselves up for self-incrimination during a subsequent criminal process. One commenter explained that using rebuttable presumptions shifts the burden of proof from the Government to the subject of the investigation, and runs counter to the Fifth Amendment, which they explained precludes using ''forced testimony'' against a person in a criminal trial unless waived. The commenter argued that if an accusation that a person is engaged in the business of dealing in firearms without a license is based upon a rebuttable presumption, then the person is unfairly and unconstitutionally placed in legal jeopardy. The person will lose the civil or administrative action against them, the commenter said, if they do not present facts to rebut the presumption, but then the information shared with the Government will be available for use against them in a criminal case. (The commenter cited *Allen* v. *Illinois*, 478 U.S. 364 (1986), *Minnesota* v. *Murphy,* 465 U.S. 420, 435 & n.7 (1984), and other cases.) In other words, the commenter added, the person is penalized for not responding to the inquiry or allegation based upon a presumption. (The commenter cited *Marchetti* v. *United States,* 390 U.S. 39 (1968).)

Department Response

The Department disagrees that the rebuttable presumptions in this rule violate the Due Process Clause of the Fifth Amendment. First, the rebuttable presumptions apply only to shift the burden of production, not the burden of persuasion. Although the presumptions expressly do not apply in criminal proceedings, even in that context, presumptions that shift only the burden of production do not violate due process. *See Ruan* v. *United States,* 597 U.S. 450, 463–64 (2022). Second, ''[t]he law is well established'' that presumptions shifting the burden of production ''may be established by administrative agencies, as long as there is a rational nexus between the proven facts and the presumed facts.'' *Cablevision Sys. Corp.* v. *F.C.C.,* 649 F.3d 695, 716 (D.C. Cir. 2011); *see also Cole* v. *U.S. Dep't of Agric.,* 33 F.3d 1263, 1267 (11th Cir. 1994); *Atchison, Topeka & Santa Fe R.R.* v. *Interstate Com. Comm'n,* 580 F.2d 623, 629 (D.C. Cir. 1978). The BSCA broadened the scope of persons who are required to be licensed under the GCA, and the implementing presumptions in this rule are necessary to provide persons with a greater understanding as to who is likely to be ''engaged in the business'' as a ''dealer'' under that new standard. The presumptions are narrowly tailored and based on specific firearms purchase and sale activities to effectuate that purpose. As a result, there is a rational connection between the facts to be proven—for example, frequent and multiple purchases and resales, accepting credit cards as a method of payment, advertising, etc.—and the presumed facts—being engaged in the business or having the requisite intent to profit. *See USX Corp.* v. *Barnhart,* 395 F.3d 161, 172 (3d Cir. 2004) (finding agency's ''rebuttable presumption [was] entirely reasonable'' and noting that the ''presumption is rebuttable and therefore avoids problematic mechanical operation'').

Contrary to commenters' assertions, the rebuttable presumptions in this rule, even when applied in a civil or administrative proceeding, do not alleviate the burden of persuasion on the Government to prove that a person is willfully engaged in the business without a license under the applicable evidentiary standard. They neither limit nor prescribe the manner in which a party can rebut such a presumption. Agencies may adopt evidentiary presumptions provided that the presumptions shift the burden of production, not the burden of persuasion (also sometimes referred to as the burden of proof). *Cablevision,* 649 F.3d at 716.[155] That is the case here. Because the rebuttable presumptions are merely evidentiary tools to assist the trier of fact in determining whether the Government has met its burden of production in a given proceeding and

[155] *See also Chem. Mfrs. Ass'n.* v. *Dep't of Transp.,* 105 F.3d 702, 706 (D.C. Cir. 2007); *U.S. Steel Corp.* v. *Astrue,* 495 F.3d 1272, 1284 (11th Cir. 2007) (internal quotation marks omitted)).

do not shift the burden of persuasion, this rule does not violate due process.[156] In the NPRM, the Department stated that a person ''shall not be presumed to be engaged in the business of dealing in firearms'' when the person engaged in certain types of conduct (*e.g.,* clearly a person is not presumed to be engaged in the business when that person's conduct is limited to activity the statute specifically excludes). However, to alleviate commenter concerns, the regulatory text of this final rule now makes clear that evidence of such conduct may also be presented as rebuttal evidence (*e.g.,* gifts, certain occasional sales, etc.), and further makes clear that additional types of reliable rebuttal evidence could be offered beyond those examples.

The Department acknowledges the commenters' concerns about the possibility of self-incrimination if they provide rebuttal evidence in an administrative or civil proceeding that could be used against them in a criminal proceeding. The Fifth Amendment privilege against compulsory self-incrimination, however, can be asserted ''in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'' and it ''protects against disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'' *Kastigar* v. *United States,* 406 U.S. 441, 444–45 (1972). The Fifth Amendment's protection against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but it also affords protection against having compelled responses provided in civil or administrative proceedings used against him in a later criminal prosecution. *Lefkowitz* v. *Turley,* 414 U.S. 70, 77 (1973). Moreover, it is not uncommon for individuals to have to balance the implications of providing testimony in a civil or administrative case against the potential that such testimony may be used in a future criminal proceeding. For instance, this circumstance can occur whenever a statute has criminal, civil, and administrative implications. *See, e.g.,* 15 U.S.C. 1825(a), (b) (civil and criminal penalties for violations relating to sales or exhibitions of horses that are sore); 18 U.S.C. 670(c), (d) (civil and criminal penalties for theft of medical products); 22 U.S.C. 2778(c), (e) (civil and criminal penalties for unlawful exportation of defense articles); 30 U.S.C. 820(a), (b), (d) (civil and criminal penalties for violations of mine health and safety standards); and 33 U.S.C. 533(a), (b) (civil and criminal penalties for failing to comply with lawful orders of the Coast Guard).

The statutory definition of ''terrorism'' existed in the GCA's definition of ''principal objective of livelihood and profit'' before the BSCA was passed, *see* 18 U.S.C. 921(a)(22) (2020), and remains there verbatim. The BSCA added that same definition to the new definition of ''to predominantly earn a profit'' in the GCA, as well. This rule merely: (1) moves that definition within the regulations to be a standalone definition so that it applies to both the term ''predominantly earn a profit'' and ''principal objective of livelihood and profit'' without repeating it in two places; and (2) makes a minor revision to identify the provisions to which the definition applies. This rule does not further interpret or define that term, and comments in that regard are beyond the scope of the rule.

i. Violates the Tenth Amendment

Comments Received

Some commenters opposed the proposed rule on the grounds that it violates the Tenth Amendment, which provides: ''The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'' U.S. Const. amend. X. Some of these commenters referred to the rule as a violation of the separation of powers or federalism. The majority of these commenters stated that the rule ''will override the authority of the states with overburdensome federal regulations and strip state's rights.'' One commenter suggested that this rule will ''intrud[e] [upon] states' responsibilities.'' Several commenters stated that the power to regulate commerce in firearms is not a power delegated to the Federal Government. Others stated that, although the Federal Government has the power to regulate interstate commerce in firearms, it has not been delegated authority to regulate commerce between people within a given state, or in intrastate commerce. One commenter stated that, ''as long as the transaction doesn't cross state lines, it cannot be regulated by the Federal government.'' A couple of commenters cited *McDonald* v. *City of Chicago,* 561 U.S. 742 (2010), for the proposition that each state has its own body of laws that reflect its unique needs, culture, and opinions of its residents, and has the autonomy to tailor public safety measures to these unique situations. These commenters stated that the proposed rule disregards this principle.

Department Response

The Department disagrees that the rule violates the Tenth Amendment. Commenters seemingly argued that the powers exercised by the Department in issuing the rule were ''powers not delegated to the United States by the Constitution, nor prohibited by it to the States.'' U.S. Const. amend. X. However, if Congress has acted within its power under the Commerce Clause, ''the Tenth Amendment expressly disclaims any reservation of that power to the States.'' *See New York* v. *United States,* 505 U.S. 144, 156 (1992). Simply put, a valid exercise of Congress' power is not a violation of the Tenth Amendment. Multiple courts have repeatedly and consistently upheld the GCA as a valid exercise of Congress' Commerce Clause power, *see, e.g., United States* v. *Hosford,* 843 F.3d 161, 163 (4th Cir. 2016); *United States* v. *Rose,* 522 F.3d 710, 716–19 (6th Cir. 2008); *Navegar, Inc.* v. *United States,* 192 F.3d 1050, 1054–1065 (D.C. Cir. 1999), and rejected challenges to the statute on Tenth Amendment grounds, *see, e.g., Bezet* v. *United States,* 714 F. App'x 336, 342–43 (5th Cir. 2017) (''[E]ach provision [of the GCA] that Bezet has standing to challenge was validly enacted under the commerce power or the taxing power. Therefore, the district court was correct to reject Bezet's claims under the Tenth Amendment.'').

As for commenters who argued Congress does not have authority to regulate any intrastate firearms transactions, regardless of its connection to interstate commerce, Congress may ''regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.'' *Gonzales* v. *Raich,* 545 U.S. 1, 17 (2005). *Raich* held that one situation in which ''Congress can regulate purely intrastate activity'' even if that activity is not itself commercial, is ''if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.'' *Id.* at 18. When there is a ''comprehensive framework for regulating the production, distribution, and possession'' of a commodity, the fact that the regulatory scheme

[156] *See Ruan* v. *United States,* 597 U.S. 450, 463–64 (2022) (Statute providing ''a presumptive device, akin to others we have recognized in a criminal context, which merely shift[s] the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution'' did not violate due process); *Alabama By-Products Corp.* v. *Killingsworth,* 733 F.2d 1511, 1517 (11th Cir. 1984) (regulatory presumption under 20 CFR 727.203(a)(1) that miner is presumed to be disabled with an X-ray showing of pneumoconiosis did not violate due process).

''ensnares some purely intrastate activity is of no moment.'' *Id.* at 22, 24. This analysis has been specifically applied to firearms. *See Montana Shooting Sports Ass'n* v. *Holder,* No. CV–09–147, 2010 WL 3926029, at *17 (D. Mont. Aug. 31, 2010) (''As *Raich* instructs, the fact that Federal firearms laws 'ensnare some purely intrastate activity,' such as . . . manufacturing and sales activity . . . , 'is of no moment.' Under *Raich,* the National Firearms Act and Gun Control Act constitute a valid exercise of federal commerce power, even as applied to the purely intrastate manufacture and sale of firearms . . . .'') (quoting *Raich,* 545 U.S. at 22), *aff'd,* 727 F.3d 975 (9th Cir. 2013); *see also United States* v. *Stewart,* 451 F.3d 1071, 1078 (9th Cir. 2006); *Hollis* v. *Lynch,* 121 F. Supp. 3d 617, 640 (N.D. Tex. 2015) (citing *Raich,* 545 U.S. at 22), *aff'd,* 827 F.3d 436 (5th Cir. 2016); *Rose,* 522 F.3d at 717–18.

j. Violates Other Constitutional Provisions

Comments Received

A small number of commenters stated that the NPRM violates the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments; the Ninth Amendment (which states, ''[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,'' U.S. Const. amend. IX); and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. These commenters did not explain how they thought the proposed rule violated these constitutional provisions. One commenter stated that the proposed rule constitutes restricted zoning that will deprive people of their rights and is therefore unconstitutional. Numerous other commenters stated that the NPRM is unconstitutional and deprives people of their rights, but did not provide detailed arguments, although some of these commenters based their statement on a belief that the rule requires anyone who sells a firearm to be licensed as a dealer or that it creates a universal background check. Several commenters stated that the Constitution does not grant the Federal Government, including Congress, the authority to regulate firearms or the trade in firearms, and any law or regulation that does so is unconstitutional. Some of these commenters specifically stated that the BSCA, and even the NFA and GCA, are unconstitutional laws.

Department Response

The Department disagrees that the proposed rule violates the Eighth Amendment's protection against excessive fines and cruel and unusual punishments. Criminal and civil penalties, including forfeiture, can be considered fines under the Eighth Amendment if they are punishments for an offense and, thus, must not be excessive. *Austin* v. *United States,* 509 U.S. 602, 619 (1993); *Disc. Inn, Inc.* v. *City of Chicago,* 72 F. Supp. 3d 930, 934 (N.D. Ill. 2014), *aff'd,* 803 F.3d 317 (7th Cir. 2015). Under the Eighth Amendment, a ''fine'' is ''excessive'' if it is ''grossly disproportional to the gravity of [the] offense.'' *United States* v. *Bajakajian,* 524 U.S. 321, 334 (1998). Here, the penalties for dealing firearms without a license are up to five years' imprisonment, a $250,000 fine, or both. *See* 18 U.S.C. 922(a)(1)(A), 923(a), 924(a)(1)(D), 3571(b)(3). The GCA does not require a minimum penalty, and the penalty in any particular case will vary according to circumstances, so the Department disagrees that the penalties associated with unlawfully dealing in firearms (which could be very low or none) are facially ''excessive.'' The Department may also seek forfeiture of the property involved in criminal activity. Courts have repeatedly found on a case-by-case basis that these are not excessive penalties, *see, e.g., United States* v. *Approximately 627 Firearms, More or Less,* 589 F. Supp. 2d 1129, 1135–37 (S.D. Iowa 2008), and the proposed rule does not increase the penalties for noncompliance with the GCA, which are set by statute.[157]

The Department also disagrees that the rule violates the commenters' rights under the Ninth Amendment. The BSCA amendments to the statutory definition of ''engaged in the business'' and this rule implementing those amendments constitute only a modest congressional expansion of the previous FFL licensing requirements, and do not infringe upon any constitutional rights. The commenters discussed an implied right to self-defense and a right to ''transfer nonliving personal property without government hindrance or supervision.'' This rule does not prevent any individuals from exercising self-defense, and no court has ever recognized a categorical right to transfer personal property free of government regulation. The Ninth Amendment ''does not confer substantive rights in addition to those conferred by other portions of our governing law.'' *Gibson* v. *Matthews,* 926 F.2d 532, 537 (6th Cir. 1991).

It is unclear how the commenters believe that the rule would violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment. First, the Fourteenth Amendment applies to the States and State actors, not Federal agencies. *See Shell* v. *United States Dep't of Housing & Urban Dev.,* 355 Fed. App'x 300, 307 (11th Cir. 2009). Second, the rule, like the statute, applies to all persons and does not burden one suspect class or group of people more than others. Instead, the rule helps to identify persons who are engaged in the business of dealing in firearms or have the predominant intent to earn a profit through certain firearms purchase and resale activities. Nor is the Government engaging in intentional disparate treatment of a suspect class or group of people regarding a fundamental right. This final rule has also complied with the requirements of the APA, including public notice and comment, of which the commenters availed themselves during the proposed rule stage. *See* 5 U.S.C. 553. With respect to a rulemaking of general and prospective applicability, the Due Process Clause does not require additional procedural safeguards. *See Bi-Metallic Inv. Co.* v. *State Bd. of Equalization,* 239 U.S. 441, 445 (1915); *see also General Category Scallop Fishermen* v. *Sec'y of U.S. Dept. of Commerce,* 720 F. Supp. 2d 564, 576 (D.N.J. 2010) (explaining that publication in the **Federal Register** satisfies notice requirements under the Due Process Clause).

The Department disagrees that this rule amounts to restricted zoning and is therefore unconstitutional. The commenter seems to suggest that because the BSCA and this rule will result in more firearms sellers being deemed to be ''engaged in the business'' within the meaning of 18 U.S.C. 921, those sellers will no longer be permitted to make firearms sales from their homes and will instead have to comply with State and local commercial zoning laws. However, State and local governments determine zoning classes and requirements pursuant to their police powers. *Carter* v. *City of Salina,* 773 F.2d 251, 254 (10th Cir. 1985) (''It is the general rule that zoning ordinances are in derogation of common-law property rights and find their authority through the state police power.''). Nothing in this rule purports to alter State and local zoning laws or dictate how those laws should treat firearms sellers who are ''engaged in the business'' of dealing in firearms under Federal law. Nor does the commenter point to any particular

[157] To the extent commenters argue that the fees required to be a Federal firearms licensee violate the Eighth Amendment, they are (1) not a fine, and (2) not excessive.

zoning restrictions that might apply to an individual firearms seller who would be ''engaged in the business'' of dealing in firearms under this rule. At bottom, this rule does not create additional zoning restrictions. Such restrictions, if they exist at all, are created and managed on the State, local, and Tribal levels.

9. Statutory Authority Concerns

a. Lack of Delegated Authority To Promulgate the Rule

Comments Received

A majority of the commenters opposed to the rule argued that ATF is exceeding its authority by promulgating the rule, and that it is the job of Congress to change the laws and the job of Federal agencies to enforce them. A majority of these commenters stated that they considered the proposed regulation to be a method of changing the law without passing new legislation and stated that Congress has given ATF no additional authority to ''re-define'' ''details'' in the law. One commenter stated that ''No federal agency has the right to interpret laws, amendments, or constitutions. That's what [C]ongress is for.'' A few others made similar statements. Other commenters stated that the NPRM is an executive order or a law itself, and ATF has no authority to change law via an executive order or by issuing new laws.

One commenter, instead of saying that ATF has no authority to promulgate regulations, stated that ATF has no authority to ''devise its own definitions.'' They further argued that the only exception to this is the term ''collector,'' because the statute specifically delegates authority to the Attorney General to further define that term. The commenter concluded that when Congress includes explicit authorization to define one term, it negates any implied regulatory power to expand definitions for other terms, quoting the *expressio unius est exclusio alterius* principle described in *Bittmer* v. *United States,* 598 U.S. 85, 94 (2023). A second commenter, in a similar but narrower vein, pointed to the ''specific definitions provided by Congress for both 'engaged in the business' and 'predominantly earn a profit.' '' These definitions, the commenter argued, ''should entirely foreclose any attempt by ATF to redefine those terms.'' The commenter quoted *Royce* v. *Hahn,* 151 F.3d 116, 123 (3d Cir. 1998), for the proposition that ''[s]uch an explicit reference to a statutory definition demonstrates a Congressional intent to forestall interpretation of the term by an administrative agency and acts as a limitation on the agency's authority.''

Some commenters stated that the proposed definition of ''engaged in the business'' is contrary to or an overreach of the BSCA or the FOPA. One commenter asked ''[w]here in the text of the FOPA does the ATF believe Congress expressly grants it the authority to redefine 'engaged in the business' as Congress has clearly defined it through several amendments made to the FOPA by Congressional legislative action?'' Another commenter, citing 18 U.S.C. 926(a) and section 106 of FOPA, 100 Stat. at 459, stated that the FOPA reduced ATF's regulatory authority under the GCA by changing the original phrase '' 'such rules and regulations as he deems reasonably necessary' '' to '' 'only such rules and regulations as are necessary.' '' The commenter asserted that this change means that ATF has the authority to enact only regulations that are ''necessary [for enforcement of the Act] as a matter of fact, not merely reasonably necessary as a matter of judgment.'' Another commenter, characterizing the BSCA, stated that ''[t]he essence of the change was simply that illegal firearm sales need not amount to a person's 'livelihood' for that activity to be criminally actionable. It was never intended to give the administration a blank check to comprehensively rewrite settled law or understandings about private firearms sales for lawful purposes or for the enhancement or liquidation of personal firearm collections.'' One commenter cited the legislative record for the GCA, contending that Congress declined to adopt a provision that would have made it a crime to violate any regulation promulgated pursuant to the GCA due to asserted concerns that the provision would delegate to ATF the authority to determine what constitutes a crime. The commenter concluded that the proposed rule ''would do exactly what Congress rejected when it enacted the GCA in 1968. It would redefine and expand GCA definitions, with the consequence that unlawful acts would be expanded by regulation. ATF has no such authority.''

A few commenters argued that the regulation exceeds ATF's authority because it criminalizes behavior or deprives people of something. As a result, these commenters assert that the alleged penal provisions must be clearly stated in the statute itself. One commenter stated that the regulation, ''with a stroke of a pen creates violations that may lead to fines, confiscation of assets and possibly jail time.'' Another added that, because the proposed rule involves criminal penalties, it must ''not criminalize any action that is either not clearly prohibited by the law or that is specifically prohibited by the law.'' ''Removing rights,'' added another commenter, ''should be a matter take[n] up before the full body of Congress and U.S. Citizens, not an un-elected group of individuals.'' An additional commenter couched the issue in terms of deference, citing cases like *United States* v. *Apel,* 571 U.S. 359, 369 (2014), for the proposition that because the GCA is a criminal statute, ATF's reading is not entitled to any deference.

Department Response

As an initial matter, the Department disagrees that this rule ''comprehensively rewrite[s]'' or otherwise alters ''settled law'' in a manner inconsistent with Congress's enactments. Most recently, Congress passed the BSCA in 2022, and this rule implements the GCA, as amended by the BSCA. The Department and ATF have the legal authority to promulgate regulations and rules that are necessary to implement, administer, and enforce the GCA, as amended by the FOPA and the BSCA, including its definition of ''engaged in the business'' as a dealer. *See* 18 U.S.C. 926(a); 28 U.S.C. 599A(b)(1), (c)(1); 28 CFR 0.130(a)(1)–(2); Treas. Order No. 221(1), (2)(d), 37 FR 11696–97 (June 10, 1972). This rule—which updates ATF's regulations in accordance with the BSCA's new statutory definition of when a person is considered to be ''engaged in the business'' and makes other related changes—is a valid exercise of that statutory authority. *See Nat'l Rifle Ass'n* v. *Brady,* 914 F.2d 475, 479 (4th Cir. 1990) (''Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.' '')

The rule is also consistent with ATF's historical experience implementing the GCA. In the original GCA implementing regulations in 1968, ATF's predecessor agency provided regulatory definitions of terms that Congress did not define in the statute. 33 FR 18555 (Dec. 14, 1968). Since that time, ATF has promulgated additional regulatory definitions to implement amendments to the GCA, including FOPA and the Brady Act. *See, e.g.,* Commerce in Firearms and Ammunition, 53 FR 10480 (Mar. 31, 1988) (providing definitions for, among other terms, ''dealer'' and ''engaged in the business''); Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 FR 34634 (June

27, 1997). Now that Congress has passed further legislation to amend the statutory definition of certain terms, it is logical and appropriate for ATF—consistent with its statutory authority and experience in administering the relevant statutory provisions—to review existing rules and promulgate new ones if necessary to properly implement that statutory change.

This rule is necessary to assist people, such as unlicensed persons seeking to comply with the law and fact finders in certain proceedings, to determine when firearms sellers are required to be licensed as wholesale or retail dealers under the expanded statutory definition of ''engaged in the business,'' and for ATF to effectively regulate the firearms industry. Indeed, numerous commenters stated that because the BSCA redefined ''engaged in the business'' to focus on a person's intent ''to predominantly earn a profit,'' regulatory updates were necessary to clarify when a license was needed and how ATF would consider and enforce certain aspects of firearms and sales that are relevant to the intent-to-profit analysis in the current marketplace.[158]

The Department also disagrees with commenters that the rule or its presumptions are inconsistent with the text or legislative history of FOPA,[159] or with the structure of the GCA. The GCA includes delegations of rulemaking authority that are both general and specific,[160] and its express grants of statutory authority to define particular terms do not negate the broader authority that Congress has granted to the Department to issue regulations that define additional statutory terms as necessary to carry out the GCA. Indeed, as congressional commenters have noted, the GCA as amended by FOPA and the BSCA authorizes the Department to utilize its expertise gained from decades of enforcement experience to further define terms or to issue other rules that are necessary to implement the GCA. In light of that delegation, the fact that Congress generally defined the term ''engaged in the business'' does not mean that the Department lacks the authority to further define that term.[161] In enacting the BSCA, Congress found it necessary to broaden the term ''engaged in the business,'' but did not provide guidance on how to apply that new definition to specific firearms transaction activities. This rule provides that necessary clarification in accordance with the Department's delegated authority.

The Department disagrees that the rule criminalizes behavior or imposes criminal penalties. Congress long ago both enacted the statutory requirement that persons who engage in the business of dealing in firearms must obtain a license and imposed criminal penalties for noncompliance with that statutory requirement. This rule, on the other hand, merely implements Congress's latest amendment to the definition of ''engaged in the business.'' Nothing in the rule criminalizes behavior or prohibits persons from engaging in the business of dealing in firearms; it merely implements the statutory requirement, as amended by the BSCA, that requires persons to become licensed if they wish to engage in that business.

b. Lack of Authority To Promulgate Presumptions

Comments Received

In addition to the concerns raised under Section IV.B.8.g of this preamble about the efficacy of the rule given that the presumptions will not be required in any criminal proceeding, several commenters argued that creating such presumptions is unlawful and problematic. Some commenters argued that nowhere in the rule did the Department cite any authority authorizing it to adopt or create presumptions applicable to statutory terms. Another commenter stated that ''ATF's recently proposed rule now aims to create several presumptions when a person is 'engaged in the business,' despite the [BSCA] definition that contains no such presumptions. It is clearly not the intent of Congress to include those presumptions in this proposed rule.'' A third commenter objected on the grounds that ''many of [the presumptions] concern common and entirely innocent conduct related to firearms transactions.''

Additionally, at least one commenter stated that the legislative history of the GCA clearly demonstrates that ATF cannot make the violation of a regulation a crime. As originally proposed, the commenter stated, the bill that became the GCA provided, ''[w]hoever violates any provision of this chapter *or any rule or regulation promulgated thereunder . . .* shall be fined not more than $5,000 or imprisoned not more than five years, or both.'' Prior to passage, however, Congress deleted the provision making it an offense to violate ''any rule or regulation promulgated thereunder.'' 114 Cong. Rec. 14,792, 14,793 (1968). The commenter concluded that, with the redefined and expanded GCA definitions in the proposed rule, unlawful acts would be expanded by regulation, which is contrary to the fact that all GCA offenses are defined in terms of violations of ''this chapter'' of the statute.

Moreover, commenters asserted, as a practical matter, that even with the disclaimer that the presumptions are only required in administrative and civil proceedings, it does not change the fact that 18 U.S.C. 924(a)(1)(D), which makes it a criminal act to engage in the business of dealing in firearms without a license, exists and carries prison time and high fines. One commenter questioned how ATF could say it would not use the presumptions in a criminal case if the agency intends for courts to be in a position to rely on the presumptions to create permissive inferences in jury instructions. Another commenter stated that the Department did not adequately explain how any presumption would be ''useful'' or in any way appropriate to a criminal proceeding, whether considered by the judge or jury, and that there is no

[158] *See, e.g.,* ATF–2023–0002–319816 (Dec. 7, 2023); ATF–2023–0002–362368 (Dec. 6, 2023); ATF–2023–0002–317174 (Dec. 5, 2023); ATF–2023–0002–281792 (Nov. 29, 2023); ATF–2023–0002–333284 (Nov. 26, 2023); ATF–2023–0002–262638 (Nov. 2, 2023); ATF–2023–0002–246750 (Oct. 25, 2023); ATF–2023–0002–171793 (Oct. 18, 2023); ATF–2023–0002–218598 (Oct. 17, 2023); ATF–2023–0002–84981 (Oct. 5, 2023); ATF–2023–0002–65889 (Sep. 19, 2023); ATF–2023–0002–43184 (Sep. 14, 2023); ATF–2023–0002–0538 (Sep. 10, 2023).

[159] The Fourth Circuit has explained that the FOPA amendments did not change ATF's authority to promulgate regulations necessary to implement the GCA. *See Nat'l Rifle Ass'n,* 914 F.2d at 478–79 (rejecting argument that FOPA requires courts to ''strike down [ATF] regulations if we do not find them strictly necessary and the least restrictive means of accomplishing the purposes of the [GCA]'').

[160] *Compare, e.g.,* 18 U.S.C. 926(a) (''The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .''); H.R. Rep. No. 90–1577, at 18 (1968) (''Section 926. Rules and regulations. This section grants rulemaking authority to the Secretary . . . .''); S. Rep. No. 90–1501, at 39 (1968) (similar), *with, e.g.,* 18 U.S.C. 921(a)(13) (''The term 'collector' means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define . . . .''); *id.* 923(g)(1)(A) (''Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe.''); *id.* 923(g)(2) (''Each licensed collector shall maintain in a bound volume the nature of which the Attorney General may by regulations prescribe, records of the receipt, sale, or other disposition of firearms.''); *id.* 923(i) (''Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.'').

[161] *See, e.g., Guedes* v. *ATF,* 45 F.4th 306, 314–19 (D.C. Cir. 2022) (upholding ATF regulation interpreting the statutory term ''machine gun''); *cf. Nat'l Rifle Ass'n,* 914 F.2d at 480–81 (ATF had the legal authority to define the statutory terms ''business premises'' and ''gun show or event'').

explanation as to how these presumptions become permissive inferences.

At least one commenter pointed out that jury instructions are written based on statutory language and applicable judicial decisions that interpret the law. As the GCA is a criminal statute, the commenter stated, ATF cannot expand it, and because the GCA definitions are the same in criminal and civil contexts, ATF cannot have rebuttable presumptions regarding the definitions that are different in a civil or administrative context. According to another commenter, this would violate the ''chameleon cannon'' in which courts have said statutory terms ''are not chameleons, acquiring different meanings when presented in different contexts.'' *Maryland* v. *EPA,* 958 F.3d 1185, 1202 (D.C. Cir. 2020); *see also Clark* v. *Martinez,* 543 U.S. 371, 382 (2005) (similar). Other commenters similarly cited *Leocal* v. *Ashcroft,* 543 U.S. 1 (2004), for the proposition that ATF is legally prohibited from employing a rebuttable presumption of liability in noncriminal proceedings that does not apply in the criminal context. Commenters pointed out that in *Leocal,* the Supreme Court stated that a statute with ''both criminal and noncriminal applications'' must be interpreted ''consistently, whether [courts] encounter its application in a criminal or noncriminal context.'' *Id.* at 11–12 n.8. Commenters also argued that an agency involved in the prosecution of a case does not get to tell the judge how to draft the jury instructions.

Additionally, commenters argued that the Department's use of presumptions in the civil and administrative context, but not the criminal context, runs afoul of the rule of lenity and is contrary to existing case law, specifically the Supreme Court's holding in *United States* v. *Thompson/Center Arms Co.,* 504 U.S. 505 (1992). In *Thompson/Center Arms,* commenters stated that the Court rejected ATF's interpretation of the application of a certain definition in the NFA. The Court concluded that ''although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness . . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor.'' *Id.* at 517–18. Commenters therefore argued that the Department's claim that the rebuttable presumptions are applicable to civil and administrative proceedings, but not criminal ones, is also impermissible.

Commenters also disagreed with the Department's characterization of case law in which the Department described that courts have relied on ATF's regulatory definition to decide whether the defendant was an ''unlawful user of or addicted to any controlled substance'' under the GCA. Specifically, commenters stated that in the cases cited in footnote 60 of the NPRM, 88 FR 62000, the courts relied on ATF's regulation because there was no applicable statutory definition, unlike the terms that are the subject of this rulemaking. Another commenter argued that none of the cases cited by the Department support the use of presumptions in an ''engaged in the business'' analysis in which a single data point would suffice to satisfy what is inherently a multifactor test. The commenter argued that an appropriate and relevant jury instruction would be for the jury to consider all the facts. In this sense, the commenter added, at most the NPRM could have: ''(i) provided a list (as numerous courts have provided in their opinions) of various types of factors that can legitimately play into an 'engaged in the business' determination; (ii) noted that such conduct involves a tremendous amount of gray area that cannot be resolved by unyielding regulation; and (iii) concluded that each case is to be decided on its own unique facts and circumstances.'' Lastly, at least one opposing commenter noted that the Department was also incorrect in referring to forfeitures as a civil or administrative proceeding for which the presumptions could be used because, the commenter said, forfeitures require a showing of intent by ''clear and convincing evidence'' under 18 U.S.C. 924(d)(1), not a presumed violation. Focusing on forfeiture, another commenter stated that ''[f]orfeitures may occur in civil, administrative, or criminal proceedings. ATF's proposed 'rebuttable presumptions,' in addition to being unauthorized by law, are particularly negated by the . . . requirement of clear and convincing evidence in § 922(a)(1) cases involving forfeiture.''

In contrast to the commenters opposed to the presumptions as a matter of law, one commenter in support of the rule suggested including the ''predominantly earn a profit'' presumptions under the EIB presumptions, rather than having them as separate sets of presumptions. The reason for this suggestion is that each of the proposed presumptions under ''predominantly earn a profit'' also demonstrates other elements of the statutory definition. For example, a person who purchases or secures physical space to display firearms not only demonstrates profit motive but also establishes that the seller ''devotes time, attention, and labor to dealing with firearms,'' therefore satisfying all elements of BSCA's revised statutory definition of ''engaged in the business'' as a dealer in firearms. Another commenter in support stated that in the final rule, ''ATF should consider clarifying that the conduct described in the list of rebuttable presumptions, while not creating presumptions in criminal prosecutions, may nonetheless be relevant and important when ATF prioritizes what conduct it focuses on when conducting criminal investigations.''

Department Response

The Department disagrees that it lacks the legal authority to promulgate rebuttable presumptions in ATF regulations. As discussed above, the Attorney General and ATF have the authority and responsibility to promulgate regulations necessary to enforce the provisions of the GCA, and a regulation that clarifies when a license is required is such a regulation. *See* 18 U.S.C. 926(a); *see also* H.R. Rep. No. 90–1577, at 18 (1968); S. Rep. No. 90–1501, at 39 (1968). Because the BSCA broadened the scope of persons who are required to be licensed under the GCA, this rule, including its presumptions, are necessary to implement the BSCA and provide persons with a greater understanding of who is likely to be ''engaged in the business'' as a ''dealer'' under that new standard. *See Nat'l Rifle Ass'n,* 914 F.2d at 479 (''Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.' '').

Further, ''[t]he law is well established that presumptions may be established by administrative agencies, as long as there is a rational nexus between the proven facts and the presumed facts.'' *Cole,* 33 F.3d at 1267.[162] The

[162] *See, e.g.,* 88 FR 31314, 31450 (May 16, 2023) (Department of Homeland Security (''DHS'') rule establishing rebuttable presumption that certain noncitizens are ineligible for asylum); 87 FR 65904, 66069 (Nov. 1, 2022) (Department of Education rule establishing rebuttable presumption that when a higher education institution closes and causes detriment to student loan borrowers, student loan borrowers who suffered that detriment are entitled to relief from loan repayment); 81 FR 34243, 34258 (May 31, 2016) (Small Business Administration (''SBA'') rule establishing rebuttable presumption of affiliation based on an identity of interest); 8 CFR 208.13(b) (DHS regulations creating rebuttable presumption that past persecution of refugee establishes well-founded fear of future persecution); 12 CFR 225.32 (Federal Reserve Board regulations

presumptions that the Department has chosen to promulgate are derived from ATF's extensive regulatory, enforcement, and investigative experience, and they are based on common firearms purchase and sales activities by dealers engaged in the business. As the Department has explained, each of the presumptions describes conduct that, in its experience, indicates that an individual is likely to be engaged in the business of firearms dealing (or, as applicable, acting with a predominant intent to profit). For example, persons who engage in frequent and multiple purchases and resales, accept credit cards as a method of payment, advertise, etc. are likely to be engaged in the business or have the requisite intent to profit. *See also, e.g.,* 88 FR 61999–62003 (NPRM setting forth the rationale underlying each presumption). Accordingly, there is a rational connection between the facts to be proven and the presumed facts. *See Cablevision Systems Corp.* v. *FCC,* 649 F.3d 695, 716 (D.C. Cir. 2011) (noting that a court must ''defer to the agency's judgment'' and uphold an evidentiary presumption so long as ''there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it'' (citation omitted)). The Department's determination that presumptions are necessary to carry out the GCA here is also informed by its experience in other regulatory contexts where the agency has incorporated presumptions and found them to promote a common understanding of, and consistent compliance with, the laws it implements.[163]

The Department acknowledges, as commenters noted, that failure to comply with the licensing requirement can have criminal implications. It is unlawful under 18 U.S.C. 922(a)(1)(A), 923(a), and 924(a)(1)(D) for any person to willfully engage in the business of dealing in firearms without a license. However, the Department disagrees with commenters' assertions about how the rule would apply in a criminal context. First, the presumptions in the regulatory text do not apply to criminal proceedings. Instead, persons seeking to comply with the licensing requirement should take them into account in determining whether they must obtain a license, and they apply in civil and administrative proceedings. This includes license denial or revocation proceedings for willful violations ''of this chapter or regulations issued thereunder,'' *see* 18 U.S.C. 923(d)(1)(C), 923(e), and civil/administrative asset forfeiture proceedings based on ''willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder,'' *see id.* 924(d)(1).

The Department also disagrees with the commenters' assertion that the rebuttable presumptions are contrary to the clear and convincing evidence standard for forfeiture in ''intended to be used'' violations of 18 U.S.C. 922(a)(1). Section 924(d)(1) provides for seizure and forfeiture of firearms and ammunition involved in the commission of several specified crimes. The statute also authorizes the forfeiture of any firearm and ammunition intended to be used in the commission of offenses set forth in 18 U.S.C. 924(d)(3)—which includes the prohibition against unlicensed dealing in 18 U.S.C. 922(a)(1). When a civil forfeiture action is based on the offenses in 18 U.S.C. 924(d)(3)(C), the Government is required to establish by a preponderance of the evidence (as required by 18 U.S.C. 983(c)(1)) the underlying violation that supports forfeiture (including inchoate offenses) and also, by clear and convincing evidence (as required by 18 U.S.C. 924(d)(1) and (d)(3)(C)) that the firearms and ammunition for which forfeiture is sought were intended to be used in that crime. When a criminal forfeiture action is based on the offenses in 18 U.S.C. 924(d)(3)(C), the Government, having already proven the underlying violation beyond a reasonable doubt, is required to establish by clear and convincing evidence (as required by 18 U.S.C. 924(d)(1) and (d)(3)(C)) that the firearms for which forfeiture is sought were intended to be used in that crime. Thus, the presumptions (or permissive inferences) would apply only to the Government's evidence to prove an individual is ''engaged in the business'' for purposes of the underlying section 922(a)(1) violation, not to the Government's burden of proving that a particular firearm was intended to be used in the section 922(a)(1) violation.

Moreover, the presumptions do not change the burden of proof applicable to forfeitures; they simply shift the burden of producing evidence in the underlying determination of whether a section 922(a)(1) violation occurred. If the Government seeks to seize a firearm on the basis that it was intended to be used in an unlicensed dealing offense by a person presumed to be ''engaged in the business'' under this rule, the Government would still have the burden of proving that intent by clear and convincing evidence (and the underlying offense by a preponderance of the evidence). And in civil forfeiture cases where the firearms to be forfeited were actually offered for sale by a person presumed to be engaged in the business under this rule, rather than simply intended to be used in such violation, the ''preponderance of the evidence'' burden of proof applicable to all civil forfeitures under 18 U.S.C. 983(c)(1) would apply to that forfeiture proceeding. *See* 18 U.S.C. 924(d)(1) (providing for the forfeiture of ''[a]ny firearm or ammunition involved in or used in any . . . willful violation of any other provision of this chapter [including section 922(a)(1)(A)]'').[164]

The rule recognizes the unique constitutional context in which criminal proceedings take place, where defendants are entitled to heightened procedural protections and the Government bears the burden of persuasion beyond a reasonable doubt, and makes clear that its presumptions do not apply in criminal cases. But that does not mean, as some commenters have suggested, that the Department has given the statute a different meaning in the civil and criminal contexts. In any proceeding that requires proof that an

creating rebuttable presumptions that determine when a company controls another company); 13 CFR 124.103(b) (SBA regulations creating rebuttable presumption that individuals who are members of certain groups are socially disadvantaged); 38 CFR 3.307 (Department of Veterans Affairs regulations creating rebuttable presumptions relating to exposure by veterans to certain chemicals or diseases).

[163] *See, e.g.,* 27 CFR 478.12(d) (''The modular subpart(s) identified in accordance with § 478.92 with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be part of the frame or receiver of a weapon or device.''); *id.* § 478.12(f)(1) (''Any such part [previously classified by the Director] that is identified with an importer's or manufacturer's serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be the frame or receiver of the weapon.''); *id.* § 478.92(a)(1)(vi) (''[F]irearms awaiting materials, parts, or equipment repair to be completed are presumed, absent reliable evidence to the contrary, to be in the manufacturing process'').

[164] *See, e.g., United States* v. *133 Firearms With 36 Rounds* of Ammunition, No. 08–cv–1084, 2012 WL 511287, at *3 (S.D. Ohio 2012) (''Where it is alleged that the firearm was 'involved or used in' any of the offenses listed in 18 U.S.C. 924(d)(3), the government's burden of proof is by a preponderance of the evidence.''); *United States* v. *Four Hundred Seventy Seven Firearms,* 698 F. Supp. 2d 890, 893 (E.D. Mich. 2010) (''[T]he statute's requirement of a heightened burden of clear and convincing evidence to prove intent does not apply to a forfeiture action premised on a firearm being actually *involved in or used in* a willful violation of 922(a)(1)(A).'').

individual was ''engaged in the business''—whether criminal, civil, or administrative—the Government has the burden to prove conduct that meets the definition in 18 U.S.C. 921(a)(21)(C), *i.e.,* that the person devoted time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. This rule further defines that term and sets forth certain activities that are indicative of being engaged in the business to provide clarification and guidance to persons who are potentially subject to the licensing requirement. These activities are indicative of being engaged in the business regardless of the type of proceeding in which the activities may ultimately be offered as proof. But the rule's delineation of evidentiary presumptions for use only in civil and administrative proceedings does not require courts to ''giv[e] the same [statutory] provision a different meaning.'' *Clark* v. *Martinez,* 543 U.S. 371, 380 (2005). As the proposed rule explained, in criminal cases, courts may decide to use the presumptions as permissive inferences, such as when drafting jury instructions, and nothing prevents the Department from requesting that criminal courts consider, or prevents such courts on their own from considering, the conduct underlying the rule's presumptions to determine whether an individual was ''engaged in the business'' (such as when instructing juries regarding permissive inferences).[165]

For example, the Department has concluded that a person who repetitively resells firearms within 30 days from purchase is likely to be ''engaged in the business'' requiring a license. A person potentially subject to the licensing requirement should take that interpretation into account in assessing their need for a license and, in a civil or administrative proceeding, the Government and court will apply that interpretation through rebuttable presumptions. Those presumptions do not apply in criminal proceedings, but that does not change the Department's interpretation that a person who repetitively resells firearms within 30 days from purchase is likely to be ''engaged in the business'' requiring a license, nor does it prevent a court presiding over a criminal proceeding from adopting the Department's interpretation and applying it in a manner consistent with the Constitution and criminal law. In a criminal proceeding, a court may, at its discretion, elect to instruct the jury that it may draw an inference that a person is ''engaged in the business,'' or has the ''predominant intent to earn a profit,'' based on evidence that the person repetitively resold firearms within 30 days from purchase, or engaged in any of the other activities set forth in the rule's presumptions. If the court decided to instruct the jury regarding such a permissive inference, that instruction would be consistent with the Department's interpretation of the statute contained in this rule.

The Department disagrees with commenters who imply that it is improper or unusual for a party, including the Government, to submit or advocate for proposed jury instructions in a case. Under the Federal Rules of Criminal Procedure, any party may request in writing that the court instruct the jury on the law as specified in the request, and any party may object to any portion of the instructions. *See* Fed. R. Crim. P. 30(a), (d). Independent bodies, including those that are private, quasi-judicial, and academic, also prepare form or pattern instructions. While criminal courts are under no obligation to adopt the Department's interpretation of ''engaged in the business,'' and a court's ultimate treatment of the Department's evidence might differ across criminal and civil proceedings, the Department's interpretation of the statutory term is the same across ''both criminal and noncriminal applications.'' *Leocal,* 543 U.S. at 11 n.8.

For similar reasons, the commenters' reference to the Supreme Court's decision in *Thompson/Center Arms* is inapposite. There, the Supreme Court applied the rule of lenity to resolve an ambiguous statutory term, even though it was construing that term in a ''civil setting,'' due to the statute's potential criminal applications. *See Thompson/Center Arms Co.,* 504 U.S. at 517–18. As discussed above, the Department's rule offers one definition of the statutory term ''engaged in the business,'' and its use of presumptions does not require that courts apply the term differently in criminal and noncriminal settings. Further, *Thompson/Center Arms* does not speak to the burden of proof or attendant evidentiary presumptions, and its invocation of the rule of lenity to resolve an ambiguous statutory term imposes no barrier to the Department establishing prospectively by regulation presumptions for persons potentially subject to the licensing requirement to consider and for use in civil and administrative proceedings.

As noted above, it is well established that administrative agencies can create rebuttable presumptions. This is the case even when the statute at issue has both civil and criminal components.[166] In *Chemical Manufacturers Association* v. *Department of Transportation,* for example, the D.C. Circuit did not invoke the rule of lenity or suggest that the Department of Transportation's presumptions would result in inconsistent interpretations, but rather upheld the presumption at issue because the agency ''adequately articulated a reasonable evidentiary basis for [it].'' 105 F.3d 702, 707 (D.C. Cir. 1997). As addressed in Section IV.B.8.g of this preamble, the presumptions in this rule are rationally based on ATF's regulatory, investigative, and law enforcement experience, supported by subject matter expertise and decades of applicable case law applying various presumptions in civil and administrative proceedings.[167]

[165] *See, e.g., United States* v. *Zareck,* Criminal No. 09–168, 2021 WL 4391393, at *68–69 (W.D. Pa. Sept. 24, 2021) (rejecting challenge to jury instructions that included an inference of current drug use based on the regulatory definition of ''unlawful user of a controlled substance'' in 27 CFR 478.11); *United States* v. *South,* No. 19cr43, 2020 WL 3489341 (N.D.W.V. June 26, 2020) (similar); Eighth Circuit Committee on Model Jury Instructions, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 266–68 (incorporating inference of current drug use in 27 CFR 478.11); *United States* v. *Perez,* 5 F.4th 390, 400 (3d Cir. 2021) (finding that application note to Federal sentencing guidelines allowed courts to draw a rebuttable presumption that a firearm is used in connection with a drug-trafficking offense where it is found in close proximity to drugs or drug paraphernalia); *United States* v. *Freeman,* 402 F. Supp. 1080, 1082 (E.D. Wis. 1975) (interpreting Selective Service regulations to create a rebuttable presumption that shifted to the defendant the burden of putting forward evidence showing he did not receive the order requiring him to report for service).

[166] *See* footnotes 162 and 163, *supra; see also, e.g.,* 17 CFR 255.1, 255.3(b)(4) (Securities and Exchange Commission (''SEC'') regulations implementing the Bank Holding Company Act of 1956, which provides for both criminal and civil penalties, *see* 12 U.S.C. 1847, and creating a presumption that the purchase or sale of a financial instrument by a banking entity is not for the trading account of the entity if it is held for 60 days or longer); *id.* § 255.20(g) (SEC regulation from same part establishing rebuttable presumption that a banking entity with limited assets and liabilities is in compliance with regulatory obligations).

[167] *See, e.g., Big Branch Res.* v. *Ogle,* 737 F.3d 1063, 1069 (6th Cir. 2013) (in disability benefits proceeding, claimant's proof of disability shifted the burden to employer's insurer to demonstrate otherwise); *Medina* v. *Cram,* 252 F.3d 1124, 1129 (10th Cir. 2001) (rebuttable presumption of qualified immunity in civil proceeding ''necessarily shifts the burden from the party favored by the presumption to the party rebutting it.''); *Scales* v. *I.N.S.,* 232 F.3d 1159, 1163 (9th Cir. 2000) (in deportation proceedings, evidence of foreign birth shifts burden to the petitioner to prove citizenship); *Garvey* v. *National Transp. Safety Bd.,* 190 F.3d 571, 580 (D.C. Cir. 1999) (''[O]nce the FAA shows that a pilot failed to follow a clear ATC instruction, the burden of production shifts to the pilot to offer an exculpatory explanation.); *Spilman* v. *Mosby-Yearbook, Inc.,* 115 F. Supp. 2d 148, 154 (D. Mass. 2000) (in copyright dispute proceeding, registration of the copyright created a rebuttable presumption

The Department disagrees with the commenters' recommendation to include the set of PEP presumptions under the EIB presumptions. While the Department agrees that the conduct underlying the PEP presumptions may often be found and proven in cases that depend on establishing that an individual ''engaged in the business,'' the EIB presumptions stand on their own because, once proven, they demonstrate a likelihood of devoting time, attention, and labor to dealing in firearms as a regular course of business in addition to the person's intent to predominantly earn a profit through the repetitive purchase and resale of firearms. In contrast, the PEP presumptions, once proven, demonstrate only a likelihood of a predominant intent to earn a profit through the repetitive purchase and resale of firearms, not that the person is presumed to be engaged in the business as a result of their actual repetitive purchasing or reselling of firearms. That the Government is able to produce evidence of intent sufficient to satisfy a PEP presumption does not necessarily mean that the evidence put forward is always sufficient to prove the other EIB statutory elements in a civil or administrative proceeding.

For example, if a person repetitively rents tables at gun shows over the course of several months to display firearms for resale, that conduct would demonstrate a predominant intent to profit from repetitive resales and, therefore, the second PEP presumption (repetitively renting physical space to display firearms for resale). Indeed, a person would not likely continue to rent or continuously purchase space at a cost if the person did not intend to profit from selling at gun shows, even if no firearms were actually sold. The seller is presumed to have a predominant intent to earn a profit through repetitive firearms purchases and resales even though there may not have been any actual purchases or resales that would rise to an EIB presumption. Repetitively renting tables at gun shows over the course of several months is certainly indicative of being engaged in the business; however, by itself, it does not yet demonstrate the other elements of being engaged in the business—devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. Those elements would still have to be proven even if there was evidence sufficient to demonstrate the seller's predominant intent to support a PEP presumption. In contrast, if the seller repetitively rents tables at gun shows over the course of several months to display firearms for sale, and repetitively resells firearms within 30 days after purchasing them, the person's conduct meets both the PEP and EIB presumptions. In addition to the second PEP presumption, the first EIB presumption (offering to sell firearms and demonstrating a willingness and ability to purchase and resell additional firearms) would be met because this conduct demonstrates not only a predominant intent to profit, but also the devotion of time, attention, and labor to dealing in firearms as a regular course of trade or business by actually transacting firearms.

c. Arbitrary or Capricious

Comments Received

Some commenters objected to the NPRM on grounds that it is arbitrary and capricious because, they said, it is nothing more than a politically motivated rulemaking designed to stop all private sales, create universal background checks, or establish a national firearms registry in furtherance of political agendas, rather than developing clear standards that apply over time. Others more specifically argued that the entire rule is arbitrary and capricious under 5 U.S.C. 706(2)(A) of the APA. Some of these commenters argued that the agency relied on factors that Congress did not intend for it to consider when enacting the BSCA. A few contended that the changes being made to the definition of ''engaged in the business'' were unnecessary because the definition as it was pre-BSCA has been in effect and working fine for a long time. Others said that changing the definition oversteps the authority allowed by the BSCA, which did not grant ''additional authority'' to ''re-define'' dealer, or asserted that the Department's definition does not simply clarify the law, which cannot be expanded without a solid basis.

Other commenters stated that the rule is arbitrary because it causes the proposed definition of a dealer ''engaged in the business'' to be less clear and makes it almost impossible to determine when one is in compliance. One of these commenters elaborated that ''[t]he proposed rule outlines a set of extremely complex, subjective, and arbitrary guidelines on how [ATF] will determine if an individual is engaged in the business of 2nd Amendment protected sales.'' Another commenter asserted that the rule was unfair because it changed the definition overnight without notice that most people would be aware of. A third stated the rule ''fails to provide any bright-line rules for individuals to ascertain whether they are actually 'engaged in the business' and instead claims that ATF will conduct a 'fact-specific inquiry' under which 'even a single firearm transaction' may suffice. . . . This is not a rule, nor is it knowable to the average, reasonable person. And yet, this Proposed Rule suggests alterations to Federal regulation that will bear the full force of criminal law. More, the Proposed Rule leaves complete and total discretion in the hands of ATF.''

Several commenters focused on the lack of a threshold number of firearms as an indicator of the arbitrary nature of the rule. One of these commenters explained that ''[t]he rule does not provide any rationale for why selling more than one firearm per calendar year should be considered engaging in the business of dealing in firearms. There is no evidence that this is a meaningful threshold, and there is no reason to believe that it will be effective in preventing straw purchases.'' Related to frequency, another commenter stated that ''the proposed rule negatively affects the public by providing the ATF exceptionally capricious leeway in its definition of 'repetitive'; since no clear definition is given, it is reasonable to assume that the ATF considers offering any of the listed firearms for sale more than once in the citizen's lifetime as repetitive.''

Other commenters stated that the rebuttable presumptions as a whole are ''a compilation of totally arbitrary criteria that just makes it hard for normal citizens to sell weapons to each other under non-business transactions.'' Others focused on specific presumptions as arbitrary or capricious. For example, a couple of commenters asserted that the firearm's condition is an unsupported and arbitrary basis for a rebuttable presumption that one is engaged in the business. One of these commenters elaborated that new buyers may need the manufacturer instructions on care and handling of the firearms, among other information contained on original packaging, as well as special tools, locks, and cases that come with the original packaging. As a result, selling a firearm with original packaging

of validity and shifted the burden to the respondent to prove invalidity of the copyright); *Idaho Mining Ass'n* v. *Browner,* 90 F. Supp. 2d 1078, 1087–98 (D. Idaho 2000) (upholding environmental regulations adopting a rebuttable presumption in favor of fishable/swimmable use designations); *In re The Medicine Shoppe,* 210 B.R. 310, 312 (N.D. Ill. 1997) (in bankruptcy proceeding, a properly filed claim creates a rebuttable presumption of validity and shifts the burden to the objector to produce evidence to overcome the presumption); *Sinatra* v. *Heckler,* 566 F. Supp. 1354, 1358–59 (E.D.N.Y. 1983) (in Social Security benefits proceeding, regulatory presumption served to shift the burden of going forward with evidence of receipt of notice of adverse determination).

may indicate nothing more than passing it on to a new owner. As another example, a commenter raised concerns about the resale of a firearm within 30 days after purchase, stating that ''an arbitrary 30 day rule to define those individuals engaged in firearms sales cannot possibly be based on any data and facts . . . . If it were based on actual data, the days would be 28, or 34, or 67, for example. My point is that 30 days is an arbitrary amount based on nothing other than making it an easy number to remember for policy and enforcement purposes.''

Some other commenters found the concept of ''profit'' to be arbitrary. One commenter stated that ''[s]elling at a profit does not equate to engaging in the business. That is totally absurd. Prices of firearms appreciate, as do any other valuable object.'' Another stated that '''the statutory definition further provides that proof of profit is not required . . .', which in other words means 'here at the ATF will charge you whether or not we have evidence of wrongdoing.' '' Another commenter, an organization that runs gun shows, stated that the application of the concept of profit in the rule not only exceeds the statutory scope, but also does not appropriately account for what constitutes a profit.

And finally, some commenters stated that the rule lends itself to arbitrary and capricious interpretation and enforcement, placing citizens at risk. For example, one commenter stated that ''[u]ltimately, this rule will only impair the rights of the law[-]abiding citizens and potentially create additional felons through what is merely an arbitrary and capricious rule.'' Another stated that ''[t]he rule would give the Attorney General broad discretion to determine who is a gun dealer and who is not, and it would subject gun owners to arbitrary and capricious enforcement actions.''

Department Response

The Department disagrees that the rule is arbitrary or capricious, or otherwise violates the APA. The BSCA amended the GCA, and the Department has invoked its rulemaking authority, *see* 18 U.S.C. 926(a), to promulgate regulations necessary to implement the GCA, as amended. As stated previously, ATF has been delegated the authority to further define statutory terms, such as ''engaged in the business,'' when necessary to administer and enforce the GCA.

While the BSCA broadened the definition of ''engaged in the business'' as it applies to dealers, it did not set forth or explain what specific firearms purchase and sale activities are sufficient for a person to be ''engaged in the business'' of dealing in firearms under the GCA. Many commenters stated that they believe this rulemaking provides much needed clarity about the persons who must obtain a license, thereby increasing the firearms transactions conducted through licensed dealers, helping to ensure that persons who are prohibited from receiving or possessing firearms do not receive them, and creating more licensed dealers who maintain records through which crime guns can be traced.

The Department disagrees that the rule is unclear or overly complex. The rule sets forth definitions of terms that are based on standard dictionary definitions and decades of case law interpreting ''engaged in the business.'' The rebuttable presumptions are based on specific, identifiable conduct and clearly defined in the regulatory text.

The Department explained its reasoning, both in the proposed rule and elsewhere in this final rule, for not adopting a specific numerical threshold of firearms that an individual must sell to be considered ''engaged in the business.'' *See* Department Response in Section IV.B.3 of this preamble. The Department disagrees with commenters who argued that a single sale, standing alone, would presumptively classify the seller as ''engaged in the business'' under this rule. The regulatory text explains that a single sale must be coupled with additional evidence to support a determination that the seller required a license. It is important to note that, in any event, all presumptions in this rule are rebuttable.

The Department disagrees with the comments that the presumptions are arbitrary. As explained previously, and in response to particular comments about specific presumptions, the presumptions are all based on the Department's investigative and regulatory enforcement experience,[168] as well as numerous post-FOPA court and administrative decisions cited in this rule.[169] Indeed, some of the regulatory text that commenters asserted is new or represents a significant change was adopted from ATF's published guidance issued almost eight years ago in 2016.[170] That guidance explained that ''there is no 'magic number' related to the frequency of transactions that indicates whether a person is 'engaged in the business' of dealing in firearms.'' [171]

The Department disagrees with the comments arguing that a firearm's condition—or the fact that a firearm is in, or sold with, original packaging that contains manufacturer instructions and other useful items—is an arbitrary basis for a rebuttable presumption. Persons who are engaged in the business of dealing in firearms often desire firearms that are in either a new condition, or a nearly new condition, accompanied by original packaging so they can command the highest price while quickly attracting buyers in the shortest amount of time. Moreover, purchasers of deadly, explosive-based weapons are more likely to trust the safety and reliability of new, factory-tested firearms, rather than used firearms in a lesser condition. Nonetheless, in response to comments regarding the presumptions that a person is engaged in the business if they repetitively resell or offer for resale new or like-new firearms, or firearms that are of the same or similar kind and type, the Department has revised those presumptions to apply only where the resales or offers for resale occurs within one year from the date of purchase (also referred to in this rule as a ''turnover'' limitation) to reduce the chance that personal collection firearms might fall within either of these presumptions. *See* 27 CFR 478.13(c)(3)(ii). In this regard, the Department agrees with some commenters that collectible firearms could be maintained in a like-new condition months or years after they were originally sold. However, based on the Department's extensive experience investigating and enforcing civil, administrative, and criminal cases against persons who were willfully engaged in the business without a license, it is unlikely that a collector or hobbyist would repetitively resell such firearms within one year after purchase if not to engage in the business of dealing in firearms. Of course, as the rule text states, the determination of whether a person is engaged in the business is a fact-specific inquiry. Thus, a person who intentionally stockpiles and sells new or like-new firearms, or the same make and model or variants thereof, with an intent to evade the one-year turnover limitation may still be considered to be engaged in the business if circumstances warrant that determination.

[168] *See Nat'l Mining Ass'n* v. *United Steel Workers,* 985 F.3d 1309, 1322 (11th Cir. 2021) (''Agencies are permitted to rely on their experience in the regulated field, so long as they explain what their experience is and how that experience informs the agency's conclusion.'').

[169] *See* footnotes 71–83, *supra.*

[170] *See* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?* 5 (Jan. 2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.*

[171] *Id.* at 5.

The Department's views have been further confirmed and supported by a survey ATF conducted of special agents who work on ''engaged-in-the-business'' criminal cases. The survey was conducted to better understand the appropriate turnover limitation, as these special agents have encountered bona fide collectors during the course of their work. In that survey, ATF asked how soon after purchase bona fide collectors typically resell a firearm in new or like-new condition with original packaging or firearms of the same make and model. Of the 116 agents who responded, 65 percent reported that, based on their observations, bona fide collectors typically resell a firearm that they purchased for their collection sometime after one year. Of that 65 percent, 13 percent added that many bona fide collectors do not resell for as long as five years after purchase, if ever. Another 15 percent of agents responded that they had observed some collectors resell a firearm sometime after six months. Only 6 percent of agents reported seeing a collector resell a firearm after 90 days, and only 1 percent of agents reported observing a resale within 60 days. The remaining 15 percent of agents did not provide a response because they had not closely observed the behavior of collectors. None of the agents reported collectors reselling firearms within 30 days after purchase. In addition, these results were about single sales of firearms; they did not report on frequency of repetitive sales, or sales involving multiple firearms. Given that 65 percent of agents reported that collectors do not typically resell even one firearm in new or like-new condition with original packaging or firearms of the same make and model within a year after purchase, the likelihood that collectors or hobbyists would engage in repetitive resales of such firearms within one year is low.

It is Congress, not the Department, that identified the predominant intent to profit as a key element of being engaged in the business of dealing in firearms, so commenters' concerns with the concept of profit's role in making EIB determinations are not addressed in this rulemaking. However, the Department agrees with the commenter who stated that actually ''[s]elling at a profit does not equate to engaging in [the] business'' because a showing of actual profit, whether or not expenses or inflation are considered, is not required to be engaged in the business. Rather, it is the predominant intent of obtaining pecuniary gain from sale or disposition of firearms that matters. *See* 18 U.S.C. 921(a)(22). Moreover, because the person's predominant intent to profit is the relevant fact, it does not matter how actual profit is calculated.

Finally, the Department disagrees that the rule lends itself to arbitrary or capricious enforcement of the dealer licensing requirement because the rule sets forth specific, identifiable evidence that is presumed to demonstrate that a person is engaging in the business, or predominantly intends to earn a profit. In any proceedings where such evidence is presented, it may be rebutted by the party alleged to be engaged in the business of firearms dealing to the extent such rebuttal evidence is available. The presumptions are based on purchase and resale activities that, in ATF's experience, are indicators of dealing in firearms, as well as court cases, which greatly reduces the possibility of inconsistent interpretation and enforcement.

d. Violates the Prohibitions Against Creating a Gun Registry

Comments Received

Numerous commenters objected to the regulation as a ploy by the Government to subject law-abiding gun owners who have the right to buy and sell firearms to a rigorous registration requirement. They claimed that the new definition of ''dealer'' would require any person who sells a firearm to obtain a license, and that being licensed requires a person to register all of their firearms, thereby creating a universal backdoor gun registry. A few commenters also stated that ATF already has and maintains ''nearly a billion entries of gun owner's information in a searchable database.''

Department Response

The Department disagrees that this rule creates a registry of firearms. First, the definition of ''engaged in the business'' as a dealer in firearms as implemented in this rule does not result in a requirement, directly or indirectly, that all persons who sell a firearm must be licensed. Under this rule, persons who sell firearms but who are not engaged in the business of dealing in firearms do not need to become licensed. This includes persons who make occasional sales to family members or FFLs, to enhance their personal collection, and to liquidate inherited firearms, among others. Section 478.13(e) of the regulatory text in this rule provides more information on conduct that does not support a presumption of being engaged in the business as a dealer in firearms.

Second, and more fundamentally, the rule does not create a firearms registry. Licensees are required by the GCA, *see* 18 U.S.C. 923(g)(1)(A), (g)(2), to complete and maintain records of production, acquisition, and disposition of all firearms at their licensed business premises for such period, and in such form, as the Attorney General may prescribe by regulations. But licensees are not required to register their firearms with ATF or to otherwise submit a listing of the firearms they own or sell. Although ATF has the authority to inspect a licensee's records under certain conditions, *see* 18 U.S.C. 923(g)(1)(B)–(C), the records belong to and are maintained by the licensees, not the government. Only after a licensee discontinues business do the GCA and implementing regulations require licensees to provide their records to ATF, which allows ATF tracing of crime guns to continue.[172] *See* 18 U.S.C. 923(g)(4); 27 CFR 478.127. In fact, 18 U.S.C. 926(a)(3) expressly provides that ''[n]othing in this section expands or restricts the [Attorney General's] authority to inquire into the disposition of any firearm in the course of a criminal investigation.'' [173] This rule does not in any way alter the longstanding legal requirements preventing ATF from creating a national firearms registry.

e. Violates 18 U.S.C. 242

Comments Received

Out of concern regarding their rights under the Second Amendment to the Constitution, several commenters claimed that by working on this rule, ATF officials are violating 18 U.S.C. 242, which makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States. Commenters also claimed that ATF officials and employees are likewise violating their oath of office to support

[172] The out-of-business firearms transaction records are indexed by abbreviated FFL number so that they may be accessed when needed to complete a firearm trace request involving a licensee that is no longer in business. Out-of-business firearms transaction records are not searchable by an individual's name or other personal identifiers. In 2006, ATF transitioned from using microfilm images of records to scanning records into a digital storage system with images that are not searchable through character recognition, consistent with ATF's design and use of its prior Microfilm Retrieval System.

[173] Federal law has long prohibited ATF from consolidating or centralizing licensee records. Since 1979, congressional appropriations have prohibited ATF from using any funds or salaries to consolidate or centralize records of acquisition and disposition of firearms maintained by FFLs. *See* Treasury, Postal Service, and General Government Appropriations Act, 1980, Public Law 96–74, 93 Stat. 559, 560 (1979). This annual restriction became permanent in 2011. *See* Public Law 112–55, sec. 511, 125 Stat. at 632.

and defend the Constitution (particularly the Second Amendment) under the same provision.

Department Response

The Department disagrees that any official involved in promulgating or implementing this rule is violating 18 U.S.C. 242 or any other criminal law. The regulations proposed and finalized herein do not raise constitutional concerns for the reasons given above. *See* Section IV.B.8 of this preamble.

C. Concerns With Specific Proposed Provisions

The Department received thousands of comments from the public concerned about specific provisions in the proposed rule. A majority of those concerns were in opposition to the rule, but ATF also received comments from individuals who generally supported the proposals. These specific comments originated from a variety of interested parties, including advocacy, sporting, and gun owners' organizations; gun safety organizations; lawmakers; gun enthusiasts; members of the general public; and persons with legal backgrounds. The topics included concerns regarding the proposed definitions, issues regarding the presumptions as a general matter, comments on some of the individual EIB and PEP presumptions, and questions about the transfer of firearms between licensees.

1. Definition of ''Dealer''

Comments Received

In commenting on whether the rule's definition of dealer is clear, a number of commenters mentioned that the rule does not include a numerical threshold of firearms or a specified time frame establishing when a person's activities become engaged in the business. As a result, for example, one commenter stated that an average person could not reasonably be expected to understand what activities would require them to get a license, which, the commenter said, essentially means that a single sale of a firearm by a private owner would require a dealer's license unless the seller is either selling to improve their collection or is liquidating their collection.

Other commenters were concerned about the places in which the proposed rule defined firearms purchase and sales activities as dealing. For example, one commenter stated that the reference to an international marketplace in the definition of ''dealer'' could be read to include activities that occur wholly outside the United States, which goes against the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application. The commenter did not think the Department intended to exercise extraterritorial jurisdiction and suggested the definition of ''dealer'' should be revised to make this clear. As another example, one commenter expressed concerns about the rule's clarification that dealing may occur wherever, or through whatever medium, qualifying activities may be conducted, suggesting that instead of clarifying, this is likely to create more confusion because having a license would then prohibit the person from selling in some locations. The commenter said that 27 CFR 478.100 is clear that a dealer can transact sales only at its licensed premises or a ''qualifying'' gun show or event. To be a qualifying gun show or event, the commenter said, it must be sponsored by an organization devoted to collecting, competitive use, or other sporting use of firearms. As an example, the commenter stated, ''it would be difficult to imagine a circumstance where a licensed dealer would be allowed to sell at a flea market, though private sales there might be legal.''

Finally, other commenters expressed concern about whether the rule would include certain persons as dealers. For example, one commenter, a large FFL, stated that it is unclear whether its individual employees must be separately licensed as dealers when working in the employ of an FFL. They stated that a plain reading of the proposed regulatory text suggests its employees would be required to be separately licensed. For example, they noted, an associate working in the commenter's customer service department is responsible for the physical repair of firearms returned for service. The associate is a ''person,'' performs the repair work, and obtains monetary compensation for the repairs via paycheck. The commenter asked if, in this scenario, the associate is a ''dealer'' requiring license as a gunsmith, even if the repairs they perform are made at the direction of the commenter, who itself is a licensee. Similarly, another commenter inquired whether the definition of being engaged in the business as a dealer now includes those who sell only component parts of a weapon, but not the whole weapon itself. Another commenter was also concerned about those who fabricate certain parts, but for a different reason. The commenter, who supported the overall definition of ''dealer'' because they believe it to be consistent with the BSCA and to enhance public safety, said, ''I have concerns about the broad reach concerning persons engaged in the fabrication fitment of barrels, stocks, [and] trigger mechanisms due to these parts being unregulated and not considered firearms under the current frame or receiver rule, as well as the GCA. *See* [Docket No.] 2021R–05F, AG Order No. 5374–2022. Despite this portion of the definition being in the previous definition, I . . . would recommend that this portion be dropped from the definition.''

Department Response

The Department disagrees that the rule does not explain who must be licensed as a ''dealer.'' The definition of ''dealer'' is, in relevant part, ''any person engaged in the business of selling firearms at wholesale or retail'' and was already established in the GCA and ATF regulations prior to the BSCA amendments. *See* 18 U.S.C. 921(a)(11)(A). The rule clarifies within this definition that a person can be considered a dealer regardless of the location or medium through which a person engages in the business. In the definition of ''engaged in the business'' as a wholesale or retail dealer, the rule then sets forth specific and defined conduct that will be presumed to be ''engaged in the business'' requiring a license as a ''dealer,'' as well as conduct that does not support a presumption and may be used as evidence to rebut any such presumption. *See* § 478.13(c), (e), (f).

The Department disagrees that a single sale of a firearm by a private owner, without more, would necessarily require a dealer's license under this rule. To the contrary, a dealer who is engaged in the business ''devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' 18 U.S.C. 921(a)(21)(C). To that end, one presumption established by this rule states that a person who sells or offers firearms for sale (even if a firearm is not actually sold) and then also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms (*i.e.,* to be a source of additional firearms for resale) is presumptively engaged in the business. Thus, it is clear from the rule's plain language that, to trigger this presumption, additional evidence is required beyond merely a single sale of a firearm.

The Department disagrees that the rule seeks to assert extraterritorial jurisdiction in excess of statutory authority by referencing ''international

marketplaces'' in the definition of ''dealer.'' The statutory prohibition at 18 U.S.C. 922(a)(1)(A) makes it unlawful for unlicensed persons ''to ship, transport, or receive any firearm in interstate or foreign commerce.'' Including ''international'' marketplaces in the definition of ''dealer'' is consistent with Congress's intent to regulate unlicensed sales in ''foreign'' commerce.[174] Additionally, the GCA, as recently amended by the BSCA, now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. *See* 18 U.S.C. 924(k)(2)(B). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see id.* 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for sale in another country would be violating 18 U.S.C. 924(k)(2)(B), among other provisions of U.S. law. This is not conduct ''wholly outside the United States,'' as the commenter suggests. Accordingly, this rule now clarifies in the definition of ''dealer'' that purchases or sales of firearms as a wholesale or retail dealer may occur ''at any other domestic or international public or private marketplace or premises.''

The Department disagrees with the commenter who said that the definition of ''dealer'' will cause more confusion because it includes dealing that ''may be conducted'' at a gun show or event, due to, as the commenter stated, some gun shows or events not being qualified under 27 CFR 478.100. Persons who want to engage in the business of dealing in firearms at a gun show or event must first apply for and receive a license at a business premises in the same State as the gun show or event, regardless of whether the gun show or event is qualified. During the application process, ATF advises the applicant during an application inspection concerning their responsibilities as a dealer, to include dealing only at qualified gun shows or events within the same State as their licensed business premises. To the extent that the definition's use of the phrase ''may be conducted'' causes some persons to incorrectly believe they may lawfully deal in firearms at gun shows or events that are not qualified, the phrase ''may be conducted'' has been replaced with ''are conducted'' in the final definition of ''dealer.''

With regard to the commenter's question whether an employee of a gunsmith who performs repair work, or fitment of barrels, stocks, and trigger mechanisms to firearms, is a ''dealer'' who must be licensed, the rule does not address who is ''engaged in the business'' as a dealer-gunsmith under 18 U.S.C. 921(a)(21)(D), and therefore must be licensed under 18 U.S.C. 921(a)(11)(B).[175] This rule addresses only who is engaged in the business as a dealer under 18 U.S.C. 921(a)(11)(A). Also, this rule does not require employees of dealers to be licensed separately. Firearms businesses carry out their operations through their employees.[176] Employees of dealers therefore do not require a separate license, provided the employees are acting within the scope of their duties on behalf of the licensee.[177]

Lastly, in response to the question whether the rule applies to persons who deal in component parts of a complete weapon, this rule applies to persons who engage in the business of dealing in ''firearms,'' as that term is defined by 18 U.S.C. 921(a)(3). This includes weapons that will, are designed to, or may readily be converted to expel a projectile under 18 U.S.C. 921(a)(3)(A), and the frames or receivers of any such weapons under 18 U.S.C. 921(a)(3)(B). Persons who engage in the business of dealing in any such firearms under the GCA must be licensed.

2. Definitions of ''Purchase'' and ''Sale''

Comments Received

In the NPRM, the Department proposed to define the terms ''purchase'' and ''sale'' as they pertain to the term ''engaged in the business'' of dealing in firearms. While some commenters agreed with including definitions for ''purchase'' and ''sale'' so persons cannot evade licensing through the barter or exchange of non-monetary items, other commenters believed the proposed definitions went too far. One commenter opined that the definition is so focused on barter, profit, and trade that it will allow ATF to find any nexus such that the agency would be able to detain, investigate, and refer for prosecution an honest series of sales, trades, or bartering that are not in any way executed as part of a business scheme. Other commenters opined that the definitions offered for these terms ''deviate from historical practices that allowed for the transfer and trade of firearms among private citizens with minimal government interference.'' Another considered the definitions to be generally consistent with the plain meaning of those terms.

Several commenters also offered suggestions to the regulatory text. One commenter stated that the definition of ''sale'' is too broad and includes ''Christmas gifts, because [the proposed definition does] not require[ ] for the firearm's delivery to be 'bargained-for in exchange,' [which is] the core of contract that distinguishes contract from gift.'' The commenter stated that ATF's definition of ''sale'' runs counter to the dictionary definition that is quoted in footnote 45 of the NPRM, 88 FR 61999. The commenter quoted this definition of ''sale,'' emphasizing that it references ''a *contract* transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).'' (Emphasis added by commenter) The commenter noted that ATF's regulatory definition does not include the term ''contract'' and therefore ignores that there must be consideration for a sale to have occurred. In a similar vein, a couple of other commenters emphasized that sales, trades, or exchanges of firearms occur on the basis of agreements or agreed exchanges between the parties and should therefore be permitted.

Another commenter raised a concern that ''the [proposed] definition of 'sale' could potentially include non-dispositional transfers. . . . Rather than use the term 'providing,' which could include many temporary transfers, the more statutorily consistent term would be 'disposing of.' The GCA uses the terms 'disposition' or 'dispose' in connection with the words 'sale' or 'sell' seven times in section 922. 18 U.S.C. 922(a)(6), 922(b)(2), 922(d), 922(d)(10),

[174] *See* footnote 48, *supra.*

[175] For more information on who must be licensed as a gunsmith, see *Definition of* ''*Frame or Receiver*'' *and Identification of Firearms,* 87 FR 24652 (Apr. 26, 2022).

[176] *See* ATF Ruling 2010–1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee,* at 2–3 (May 20, 2010), *https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download.*

[177] *See United States* v. *Webber,* No. 2:14–cr–00443, 2017 WL 149963, at *8 (D. Utah Jan. 13, 2017) (''[A]n employee of Cabela's is not engaged in the business of dealing in firearms because Cabela's has the profit motive and Cabela's is the party engaged in the repetitive purchase and resale of firearms. However, let us assume that the employee, who did not have his own FFL, began buying hundreds of guns from Cabela's and reselling them out of his home for personal profit. Cabela's maintains the A&D book, but the employee is not paid for his extracurricular activities. Under those facts, the Gun Control Act would prohibit the employee's conduct. The employee would not be permitted to circumvent the Gun Control Act's licensing requirement by engaging in the business of dealing in firearms with Cabela's FFL.'').

922(d)(11), 922(j).'' Therefore, the commenter suggested it would be more statutorily consistent to define the term as ''disposing of a firearm in exchange for something of value'' instead of ''providing a firearm in exchange for something of value.''

Department Response

The Department disagrees that the definitions of ''purchase'' and ''sale'' are overbroad and should not include bartering or trading firearms. As the rule points out, even before the BSCA, courts upheld criminal convictions where payment was made in exchange for firearms in the form of goods or services, rather than cash. Non-cash methods of payment may include contraband, such as drugs. A non-cash method of payment may also be used to conceal illicit firearms dealing, to include avoiding reporting requirements associated with transfers of cash.[178] Moreover, while the Department agrees with the commenters that one definition of ''purchase'' can include acquiring something of value by contract (*i.e.,* a ''bargained for'' exchange), the common definition of ''purchase'' is more generally defined to mean ''to obtain by paying money or its equivalent.'' [179] Nonetheless, to ensure that acquiring the firearm is understood to be intentional, the Department has added the words ''an agreed'' before ''exchange,'' as used in other comments that view an exchange more broadly than by contract. This includes an agreement to exchange something of value indirectly, such as payment of the seller's debt owed to a third party in exchange for a firearm.

Regarding the definition of ''sale,'' the Department disagrees that the proposed definition of that term is inconsistent with common dictionary definitions.[180] Moreover, giving bona fide gifts [181] continues to be excluded from conduct presumed to be engaged in the business, and evidence of such gifts can be used to rebut the presumptions that a person is engaged in the business. *See* § 478.13(e)(1), (f). Furthermore, the Department agrees that it is more consistent with the GCA to use the phrase ''disposing of a firearm'' rather than ''providing a firearm,'' in the definition of ''sale,'' and that change has accordingly been made.[182]

3. Definition of Engaged in the Business Generally

Comments Received

Numerous commenters did not agree with the Department's assertion in the proposed rule that a single firearms transaction or no sale at all may require a license. They believed that this runs counter to statutory language that emphasizes ''regular'' and ''repetitive'' manufacture and sale or purchase and resale of firearms. Commenters stated that ''repetitive'' cannot be proven by ''a single firearm transaction''; that the statute clearly requires a course of conduct of purchasing and reselling firearms repetitively. One commenter stated that the required repetitive purchase and resale of firearms means that ''[the] firearms must be purchased 'and' resold. If firearms are not purchased with the intention of resale at time of purchase, [they] fall[ ] under the exception.'' Otherwise, the commenter argued, simple purchases and sales are something any gun owner might do; that is why Congress carefully chose the word ''resale''—meaning ''the act of selling something again.'' Along this vein, at least one commenter suggested that the Department amend all the presumptions for engaged in the business to use the word ''resale'' or ''reselling'' rather than ''sale'' or ''selling'' to be consistent with the phrase ''repetitive purchase and resale of firearms'' in the GCA definition of dealer.

Another commenter also rejected the Department's position that ''there is no minimum number of transactions that determines whether a person is 'engaged in the business' of dealing in firearms,'' and that ''even a single firearm transaction, or offer to engage in a transaction [without any actual transaction], when combined with other evidence, may be sufficient to require a license.'' The organization identified six indicators in the GCA that they argued demonstrate that more is required, including: (1) use of ''firearms'' in the plural; (2) ''regular course,'' contemplating a series of events; (3) ''repetitive,'' meaning more than once; (4) requiring actual ''purchase and *re*sale,'' which (5) provides a contemporaneous conjunctive requirement; and (6) exempting ''sales, exchanges, or purchases,'' in the plural. The commenter concluded that these indicators require ATF to reverse its position.

Another organization emphasized that a person who makes occasional sales, exchanges, or purchases for enhancement of a personal collection or for a hobby, or to sell all or part of their personal firearms collection, is not engaged in the business as a dealer even if the person sells the firearms to ''predominantly earn a profit.'' ''Profit motive,'' they stated, ''is not relevant to activities that fit within the carve-out because it is an exception to the general 'engaged in the business' rule. This construction of the statute is extremely important because it covers common behavior for law-abiding gun owners.''

Some congressional commenters focused specifically on the presumptions in this light and stated that ''the civil and administrative presumptions ignore the occasional seller and hobbyist protections under the law. . . . Occasional sellers may keep firearms in their original packaging or discuss the purchase and resale of firearms with friends. Occasional sellers—because they are occasional sellers—may represent that they are able to get firearms. And occasional sellers may collect or even sell firearms of the same make and model. The proposed rule paints a broad brush to attempt to regulate conduct that is protected under the law for occasional sellers of firearms.'' An additional commenter stated that the statute's use of the plural form of ''occasional sales, exchanges, or purchases'' clearly indicates that multiple sales, exchanges, or purchases can be made by gun owners without rising to the level of dealing.

Indeed, at least one commenter in support of the presumptions suggested that the rule could be clearer about what constitutes an occasional sale. ''[W]hile it is not necessary for the final rule to establish a numerical ceiling for what constitutes 'occasional' sales or exchanges under 18 U.S.C. 921(a)(21)(C) (given the NPRM's general preference for a fact-specific inquiry),'' they said, it

[178] *See* 31 U.S.C. 5313(a); 31 CFR 1010.330 (reports relating to currency in excess of $10,000 received by a trade or business).

[179] *Purchase,* Webster's Online Dictionary, *https://www.merriam-webster.com/dictionary/purchase* (last visited Mar. 4, 2024); *Purchase,* Collins English Dictionary, *https://www.collinsdictionary.com/us/dictionary/english/purchase* (last visited Mar. 4, 2024) (''to obtain for money or by paying a price'').

[180] *See Sale,* Collins English Dictionary, *https://www.collinsdictionary.com/us/dictionary/english/sale* (last visited Mar. 4, 2024) (''exchange of property of any kind, or of services, for an agreed sum of money or other valuable consideration''); *Sale,* Oxford English Dictionary, *https://www.oed.com/search/dictionary/?scope=Entries&q=sale* (last visited Mar. 4, 2024) (''The action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration.'').

[181] For the definition of ''bona fide gift,'' *see* footnote 69, *supra.*

[182] *See* 18 U.S.C. 922(a)(6) (prohibiting false statements in connection with the ''sale or other disposition'' of a firearm); *id.* 922(b)(2) (prohibiting the sale or delivery of any firearm in violation of any State law or published ordinance at the place of ''sale, delivery or other disposition''); *id.* 923(g)(1)(A),(g)(2) (requiring licensees to maintain records of ''sale, or other disposition of firearms''); *id.* 923(g)(3)(A) (requiring licensees to prepare reports of multiple ''sales or other dispositions''); *id.* 923(j) (requiring that the gun show or event location of the ''sale or other disposition'' of firearms be entered in licensee records).

''should at minimum clarify that 'occasional' sales conduct should not be construed to include sales conduct that is consistently ongoing or that is regularly scheduled in a consistent or periodic fashion.''

One commenter stated that ATF has created a nebulous moving target without including a numerical threshold to determine when one is a dealer in firearms. Indeed, two commenters otherwise in support of the rule proposed adding a rebuttable presumption that the sale or transfer of five or fewer firearms is presumed to be selling or transferring firearms occasionally, whereas another commenter suggested 8–10 firearm sales as the appropriate number. One of the commenters cited to similar provisions in California (which the commenter stated has five firearms per year as its threshold) and other States to support the proposition that it is possible to set a number, while not necessarily agreeing that five is the reasonable threshold. These commenters stated that by adding this threshold, the public and law enforcement would have a clearer idea of when one is subject to, or exempt from, becoming licensed. Similarly, another commenter suggested a threshold number of five firearms per month would be reasonable because the vast majority of individual hobbyists and collectors would not even approach half of the limit. This commenter specifically stated, ''[t]his would leave no room for guessing and would send a strong message from the ATF that persons who may touch the limit would need to go ahead and obtain their FFL.'' Another commenter suggested that, rather than trying to define what ''engaged in the business'' means, it would be better to explain how a citizen may sell a firearm so as not to be considered a firearms dealer needing a license. Defining it from that direction, they added, would make any conduct outside that ''non-dealer'' definition presumptively conduct that requires a license.

An additional commenter suggested that, to alleviate the ''occasional seller exemption'' issue, ATF should treat the presumptions as permissive inferences in civil/administrative contexts as well as in criminal ones. ''This is a much more lenient standard for those who have not even repetitively sold or purchased a firearm,'' they stated, because permissive inferences are not mandatory, do not shift the burden of proof, and do not require a specific outcome. Similarly, a final commenter suggested that the first EIB presumption should instead be a permissive inference (dealing in firearms when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms). The commenter stated that, as a mandatory presumption, this presumption is too inflexible to be fairly applied, even on a case-by-case basis, but also that it does not allow for the case-by-case analysis the commenter said ATF purports to want. There is a tension between the presumptions that indicate a person is ''engaged in the business,'' the commenter added, and the exclusion from being engaged in the business for those who make only occasional sales. By its plain language, the commenter continued, the presumption includes anyone who intends to purchase or sell any number of firearms, regardless of whether they intend to do so for pecuniary gain or to enhance or liquidate a personal collection. ''This linguistic imprecision undercuts ATF's stated exemption of persons who only make occasional purchases, sales, or trades for the enhancement or liquidation of a personal collection,'' they concluded.

Department Response

The Department agrees with commenters that the GCA's definition of ''engaged in the business'' contemplates a person's devotion of time, attention, and labor to a regular trade or business of buying and selling more than one firearm, but disagrees that the statute requires any minimum number of firearms to actually be sold to be ''engaged in the business'' under the GCA, or that the EIB presumptions are contrary to the statutory language. While some commenters reference particular words or phrases in the statute, the statutory language must be considered as a whole. To be ''engaged in the business'' as a wholesale or retail dealer under 18 U.S.C. 921(a)(11)(A), a person must ''devote[ ] time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' 18 U.S.C. 921(a)(21)(C).

A person may ''devote[ ] time, attention, and labor to dealing in firearms as a regular course of trade or business,'' for example, by spending time, effort, and money each day purchasing, storing, and securing firearms inventory, and advertising or displaying those firearms for sale. The specific resale activities identified in each presumption reflect this devotion of time, attention, and labor to dealing in firearms as well as the element of intent. But it is only the intent element of the statute—to predominantly earn a profit—that mentions ''repetitive purchase and resale of firearms.'' There is no statutory requirement that firearms actually be sold; indeed, a dealer may routinely (*i.e.,* ''regularly'') devote time and resources working toward that goal as a course of trade or business, but never find a buyer or consummate any sales due to insufficient demand or poor sales practices. This is because the phrase ''repetitive purchase and resale of firearms'' refers to the method, or modus operandi, by which a person intends to engage in the firearms business.[183] Thus, under the statutory text and judicial interpretations of it, no actual sales are required if the intent element is met and the person's conduct demonstrates their devotion of time, attention, and labor to dealing in firearms as a regular course of trade or business.[184]

Intent may be inferred from a person's words or conduct.[185] Unlike a

[183] *See Palmieri,* 21 F.3d at 1268 (''Although the definition [of engaged in the business] explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi,* it does not establish a specific quantity or frequency requirement.'' (footnote omitted)); *Focia,* 869 F.3d at 1281–82 (''[N]othing in the [FOPA] amendments or the rest of the statutory language indicates that a person violates § 922(a)(1)(A) only by selling firearms as his primary means of income. And the word 'hobby'—which [defendant] suggests includes the regular sale of guns for profit and financial gain, so long as it is not the seller's primary source of income—simply cannot bear the weight that [defendant] seeks to put on it. The exact percentage of income obtained through the sales is not the test; rather, we have recognized that the statute focuses on the defendant's motivation in engaging in the sales.'').

[184] *See, e.g., King,* 735 F.3d at 1107 n.8 (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that ''Section 922(a)(1)(A) does not require an actual sale of firearms''); *Nadirashvili,* 655 F.3d at 119 (2d Cir. 2011) (''[T]he government need not prove that dealing in firearms was the defendant's primary business. Nor is there a 'magic number' of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers.'' (quoting *Carter,* 801 F.2d at 81–82)).

[185] *See Agnew* v. *United States,* 165 U.S. 36, 50 (1897) (referring to a ''presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent''); *cf. United States* v. *Scrivner,* 680 F.2d 1099, 1100 (5th Cir. 1982) (''[I]ntent may be inferred from words, acts, and other objective facts.''); *United States* v. *Arnold,* 543 F.2d 1224, 1225 (8th Cir. 1976) (''The requisite intent may be inferred from the acts of the defendant.''); *United States* v. *Spinelli,* 443 F.2d 2, 3 (9th Cir. 1971) (''It is clear that the Government need not adduce direct proof of intent. It may be inferred from the defendant's acts.''); *United States* v. *Ledbetter,* 432 F.2d 1223, 1225 (10th Cir. 1970) (''Intent may be inferred from the conduct of the

Continued

numerical threshold number of sales, the rule's EIB presumptions are all activities, based on case law and ATF's experience, that are indicative of the intent to earn a profit through the repetitive purchase and resale of firearms. With respect to the suggestion that there should be a five-firearm sale or transfer threshold for determining whether a person is engaged in the business, the Department's approach will allow it to more effectively enforce the licensing requirement for individuals who are engaged in the business. For example, even before the BSCA broadened the engaged in the business definition, the Department successfully prosecuted, and courts routinely upheld, multiple criminal cases in which the evidence presented would not have met a five-sale threshold, but other evidence made clear the individual was engaged in the business without a license.[186]

The terms ''sale'' and ''resale'' were used interchangeably in the NPRM because any sale after the firearm was produced and previously sold is a ''resale.'' When speaking of a firearm resale in the context of dealing, it is generally understood that it includes any sale of a firearm, including a stolen firearm, any time after any prior sale has occurred. Nonetheless, the Department agrees with the commenters that this was not explicitly stated in the NPRM, that using the term ''resale'' more consistently would be clearer, and that the intent element of the statute contemplates potential repetitive ''resales'' of firearms to be engaged in the business. For these reasons, the Department has revised the regulatory text to change ''sale'' to ''resale'' in various presumptions where that prefix (''re'') was not already used, and defined ''resale'' to mean ''selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person.'' This change aligns the regulatory text with the intent element in 18 U.S.C. 921(a)(21)(C), and makes clear that the term ''resale'' refers to any wholesale or retail sale of a firearm any time after it was previously sold by anyone.

In response to comments, the Department has also incorporated, as examples of rebuttal evidence: bona fide gifts, occasional sales to enhance a personal collection, occasional sales to a licensee or to a family member for lawful purposes, liquidation of all or part of a personal collection, and liquidation of firearms that are inherited, or liquidation conducted pursuant to a court order. *See* § 478.13(e), (f). The Department has also added language explicitly stating that, similar to the way the presumptions operate, these are not the only types of evidence that could be presented to rebut a claim of being engaged in the business. *See* § 478.13(g). Additionally, while the term ''occasional'' is not defined in the regulatory text, the Department agrees that the plain and ordinary meaning of that term means ''of irregular occurrence; happening now and then; infrequent.'' [187] The Department also agrees that regular or routine sales, exchanges, or purchases of firearms (even on a part-time basis) for the enhancement of a personal collection or for a hobby would not fall within the definition of ''occasional.''

The Department disagrees with the suggestion to instead define how a citizen may not be considered to be engaged in the business. Because of the myriad circumstances under which a person may sell a firearm, it would be difficult, if not impossible, for the Department to outline all the circumstances in which firearms might lawfully be sold without a license. However, the Department has set forth in the final rule a non-exhaustive list of conduct that does not support a presumption and can be used as evidence to rebut any of the narrowly tailored presumptions indicating that a person is engaged in the business of dealing in firearms. *See* § 478.13(e), (f).

Finally, the Department disagrees with the recommendation to change the rebuttable presumptions to permissive inferences in civil and administrative proceedings to alleviate concerns by occasional sellers of personal collection firearms. The Department believes that the use of rebuttable presumptions in civil or administrative proceedings will be much more effective at achieving compliance with the GCA, as amended by the BSCA, than voluntary permissive inferences or the existing factor-based approach to determining whether a person is engaged in the business. ATF's 2016 guidance, for example, outlined the general factors and some examples of being engaged in the business, but compliance with that guidance document was voluntary and it was not published in the **Federal Register** for broader distribution and attention by the public.[188] As such, it resulted in only a brief increase in the number of persons engaged in the business becoming licensed dealers (around 567).[189] The rule's approach is consistent with Congress's purposes in enacting the BSCA, which included, among other things, addressing significant non-compliance in the firearms market with the engaged in the business licensing requirements. *See* Section II.D of this preamble. Using rebuttable presumptions in this context is also consistent with the use of rebuttable presumptions in the GCA and other ATF regulations. Indeed, the GCA and implementing regulations already incorporate rebuttable presumptions in various other firearms-related contexts.[190]

4. Definition of Engaged in the Business as Applied to Auctioneers

Comments Received

Some commenters asserted that the Department should reconsider or make clearer the definition of ''engaged in the business'' as a dealer in firearms as applied to auctioneers. At least one commenter disagreed with conditioning an auctioneer's need for a license on whether that auctioneer takes possession of the firearm prior to the auction. The commenter stated that an auctioneer may take a deceased person's firearms into possession prior to the auction for purposes of safety and security and indicated that this kind of action does not make one a dealer. Another commenter stated the Department's attempt to distinguish between estate-type versus consignment-type auctions generates confusion because it seems that, under the rule, whether an auctioneer must be licensed depends on who owns the firearm (*i.e.,* an individual other than the auctioneer, versus an estate). In particular, the commenter stated that ATF's statement that an auctioneer would not need a license if acting as an agent of ''the owner or executor of an estate who is liquidating a personal collection,'' is inconsistent with other statements in the NPRM, which suggest that the exemption would apply only to estate sales (*e.g.,* ''[t]he firearms are within the estate's control and the sales made on the estate's behalf''). The commenter stated that it is the method or sale (consignment versus true

defendant and from circumstantial evidence which furnishes a basis for a reasonable inference.'').

[186] *See, e.g., Orum,* 106 F. App'x 972 (sold three guns on two occasions and testimony that defendant frequented flea markets and gun shows where he displayed and sold firearms); *United States* v. *Shah,* 80 F. App'x 31, 32 (9th Cir. 2003) (evidence of one sale and defendant's ''disposition as a person 'ready and able to procure' additional weapons''); *see also Hosford,* 82 F. Supp. 3d 660 (five transactions).

[187] *See* footnotes 70, 123, *supra.*

[188] *See* ATF, *Do I Need a License to Buy and Sell Firearms?* (Jan. 2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.*

[189] Source: ATF, Federal Firearms Licensing Center.

[190] *See* footnote 65, *supra.*

auction) that determines if the auctioneer exemption applies, not the origin of the firearm (estate versus personal collection). Separately, at least one commenter believed that, because auctioneers are exempt from the requirement to have a license under the rule, a family estate, or the heirs, would have difficulty selling their collection through an auction house in the future.

One organization, though not in support of the rule overall, recognized this portion as the Department's attempt to establish by regulation ATF's longstanding guidance for auctioneers. The commenter suggested that the Department further clarify how ''engaged in the business'' applies in various auction contexts. For instance, the commenter said it is not clear whether auction companies, which are commonly engaged by nonprofit organizations, would need to be licensed when assisting nonprofit organizations with their auctions. The commenter questioned whether an auction company that does not take possession of the firearms prior to the auction, or consign the firearms for sale, would be exempt from licensing requirements even though the firearms are not part of the nonprofit organization's ''personal collection'' as defined by the proposed rule. Separately, the same commenter asked whether nonprofit organizations that conduct auctions of donated firearms would need to obtain a license or whether their use of an FFL to facilitate the auction is sufficient. If the nonprofit itself must be an FFL, the commenter asked if it could coordinate with other FFLs out of State to facilitate auctions outside of the State where the nonprofit organization's business premises is located.

At least one commenter that supported the proposed rule overall urged the Department to provide further guidance to auctioneers that, to the extent an auctioneer operates in States that require background checks on private transactions, estate-type auctioneers risk aiding and abetting illegal transactions if they knowingly facilitate sales of guns without background checks. Further, the commenter, while recognizing the Department did not set any numerical thresholds to determine when a person is a dealer in firearms, suggested that it would be appropriate in this context to provide numerical thresholds because estate-type auctions represent a source of guns that can be purchased without background checks. They recommended that the Department clarify that if an estate-type auctioneer facilitates an individual auction involving more than five guns or facilitates auctions involving more than 25 guns in a one-year period, then they must be a licensed as an FFL or risk aiding and abetting liability under Federal law.

Department Response

This rule merely establishes by regulation ATF's longstanding understanding of the GCA's requirements with respect to auctioneers and does not affect the ability of persons to sell firearms through auction houses. Estate-type auctioneers are not required to be licensed because they are not devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. They are instead providing services as an agent of the owner on commission. These auctioneers are not in the business of dealing in firearms and do not themselves purchase the firearms. The auctioned firearms are within the estate's control and the sales are made on the estate's behalf. The rule uses the term ''estate-type'' auction to indicate that the firearms need not be part of a decedent's estate, but may instead have been acquired through certain other non-commercial means, such as a non-profit organization receiving a donation of firearms that the non-profit then auctions through an estate-type auctioneer who does not take ownership of the firearms or accept the firearms for resale on consignment. *See* § 478.13(a).

The Department agrees with the comment that there may be personal firearms that may be auctioned at an estate-type auction that do not fall within the rule's definition of ''personal collection,'' such as firearms that were acquired by an individual for self-defense. For this reason, the regulatory text in 27 CFR 478.13(a) has been revised to delete the reference to a ''personal collection'' when discussing how the regulation applies to auctioneers. The Department also agrees with commenters' concerns about limiting the auctioneer exception where the estate-type auctioneer takes possession of firearms prior to the auction for reasons other than consignment (*e.g.,* temporary safe storage and return to the estate). The main reason consignment-type auctions require a dealer's license is because the auctioneer has been paid to take firearms into a business inventory for resale at auction in lots, or over a period of time, *i.e.,* consigned for sale. In a ''consignment-type'' auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification, and has the legal authority to determine how and when they are to be sold. Consequently, the auctioneer dealer exception has been revised in § 478.13(a) so that it does not apply where the firearms for sale have been taken into possession on consignment prior to the auction.

The Department agrees that auctioneers must comply with Federal, State, and local laws. The Department therefore agrees with the comment that estate-type auctioneers must abide by State and local laws that require background checks when the auctioneer is assisting private parties in liquidating inventories of firearms on their behalf. However, no changes are being made as a result of that comment because the requirements imposed by State and local jurisdictions to run background checks do not determine whether a person is ''engaged in the business'' as a dealer under Federal law. Further, with regard to those auctioneers who obtain a license, the regulations already provide that a license ''confers no right or privilege to conduct business or activity contrary to State or other law.'' *See* 27 CFR 478.58.

Finally, as stated previously, the Department disagrees that there should be a minimum threshold number of firearms to be considered a dealer, whether through an estate-type auction or otherwise. Bona fide estate-type auctioneers are assisting persons in liquidating firearms inventories, not firearms that were acquired for the purpose of resale, and thus would not incur aiding and abetting liability.

5. General Concerns on Presumptions That a Person is Engaged in the Business

a. Overbreadth and Lack of Foundation

Comments Received

A general sentiment from commenters opposed to the proposed presumptions is that they are overbroad, would capture too many permissible sales by collectors, and are not valid indicators of unlawful activity or activity showing the person is an unlicensed gun dealer. The commenters opined that the presumptions include common, innocent behavior with firearms that firearm owners engage in every day, including the presumption, for example, that arises from evidence of selling firearms within 30 days after a purchase or selling firearms that are new or like-new, have original packaging, or are of the same or similar type of firearms. For example, one commenter stated that the presumptions would apply in a typical situation where a person has improved their financial situation and upgrades

multiple of their firearms from entry-level, inexpensive items to more expensive items that have more features or better reputation for reliability. This commenter argued that such a person's conduct in upgrading their collection would likely touch upon every single presumption. Similarly, another commenter explained how a person's conduct could fall within multiple presumptions without that person necessarily being engaged in the business. For example, the commenter said, a person purchases a 9mm firearm to carry concealed, but then does not like the recoil impulse and subsequently sells it in like-new condition within 30 days and with the original box. Subsequently, the commenter continued, the person purchases a second firearm and also does not like how it operates for concealed carry. If the person sells that second firearm in like-new condition within 30 days with the original box and it is a similar kind to the previously purchased firearm, then, the commenter concluded, that person would have multiple criteria factored against them as engaging in the business even though the person is not in fact engaging in the business of dealing in firearms.

Further, commenters stated the rule contradicts the scheme established by Congress and the new presumptions would apply to collectors in every instance despite the statutory language to specifically exempt from the licensing requirement ''occasional'' gun sales and gun sales from a ''personal collection.'' The presumptions, they stated, fail to recognize this exception. Some congressional commenters opposed to the rule stated: ''We merely struck the 'livelihood' language from the statute. This was done to prevent someone who should register as a firearms dealer from evading licensing requirements because he or she had another job that supported his livelihood. In other words, we wanted to clarify that if a person has a job and also operates a firearms business, he or she must still register as a firearms dealer. This was the law in many different jurisdictions across the country and consistent with the ATF's guidance. . . . In making this incremental clarification, we left in place all of the other language in the statute that needs to be considered by the ATF before deeming someone a firearms dealer. . . . Nothing in the presumptions take into account whether the individual devotes time, attention, and labor to dealing firearms. Similarly, the presumptions do not factor in whether the person repeatedly buys and sells firearms as a regular course of trade or business'' (footnote omitted).

Additionally, some commenters stated the proposed rule did not provide sufficient foundation or actual evidence for how any of the presumptions are linked to or give rise to criminal activity. Even though the Department cited observations and criminal and civil actions, one commenter stated these conclusions are ''based on a censored sample'' and are unreliable because the rule overstates the probative value of the behavior. The commenter argued that ATF would need to survey the likelihood that the circumstances giving rise to the presumption are present within the full class of persons who purchase firearms.

Department Response

The Department disagrees that the presumptions in the rule are overbroad and would capture innocent persons who only occasionally sell firearms from their personal collection without a license. The rebuttable presumptions are narrowly tailored to specific conduct that the Department has found through its investigative and regulatory enforcement experience, as well as numerous post-FOPA court and administrative decisions, to require a license. And crucially, the presumptions are rebuttable, so in the event a civil or administrative proceeding is brought, and a presumption is raised, it can be rebutted with reliable evidence to the contrary. Rebuttable presumptions are just that; they are not established fact, as some of the commenters suggest. And as stated previously, the presumptions shift only the burden of production; they do not change the burden of persuasion. Moreover, consistent with the statutory exclusions, the final rule expressly provides that a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms: (a) as bona fide gifts; (b) occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection; (c) occasionally to a licensee or to a family member for lawful purposes; (d) to liquidate (without restocking) all or part of the person's personal collection; or (e) to liquidate firearms that are inherited, or pursuant to a court order. *See* § 478.13(e). Evidence of these situations may be used to rebut any presumption in the rule, and the Department has clarified that this is not an exhaustive list. *See* § 478.13(f), (g). The Department is therefore providing objectively reasonable standards for when a person is presumed to be ''engaged in the business'' to strike an appropriate balance that captures persons who should be licensed because they are engaged in the business of dealing in firearms, without limiting or regulating occasional sales by personal collectors and hobbyists.

The Department disagrees that the proposed rule did not provide sufficient foundation or evidence for how the presumptions are linked to or give rise to criminal activity. First, the presumptions in the rule are based on decades of pre-BSCA criminal case law that continues to be applicable, and the proposed rule cites numerous ATF criminal cases brought against persons who engaged in the business without a license based on evidence cited in each presumption. The presumptions are also based on ATF's significant regulatory enforcement experience,[191] including tens of thousands of compliance inspections of licensed FFLs in the last decade. ATF also reviewed summary information on criminal cases from Fiscal Year 2018 to Fiscal Year 2023 that it investigated, or is currently investigating, involving violations of 18 U.S.C. 922(a)(1)(A) and 923(a), to assess the extent to which the presumptions were consistent with conduct engaged in by persons who are unlawfully dealing in firearms without a license. Hundreds of cases described conduct that would fall under one or more of the EIB or PEP presumptions. Each of the presumptions was supported by the conduct described in these cases, except one. ATF did not find a case that included conduct that would fall under the PEP presumption on business insurance. The Department has therefore removed that presumption in this final rule. *See* § 478.13(d).

The Department disagrees with some commenters that the EIB presumptions do not indicate that a person devotes time, attention, and labor to dealing firearms. Each presumption requires conduct that demonstrates the devotion

[191] To further confirm that the proposed PEP presumptions were grounded in the behaviors of licensees who are engaged in the business or applicants seeking to become licensed, ATF surveyed Industry Operations Investigators (''IOIs'') on their observations of active licensees and applicants during compliance and qualification inspections, respectively, regarding conduct that is described under the PEP presumptions. All PEP conduct had been observed by IOIs based on their experience inspecting various sizes and types of firearms businesses or applicants seeking to become licensed, except for the eighth PEP presumption (business insurance). For the eighth PEP presumption, IOIs indicated that, based on their experience of interacting with existing FFLs and FFL applicants who operate out of a residence, these types of businesses did not have or plan to have a business insurance policy that covered firearms inventory.

of time, attention, and labor to dealing in firearms through specific purchase and sale activities. For example, a person who purchases and resells firearms, and then offers to purchase more firearms for resale to the same person, has devoted time, attention, and labor to dealing in firearms as a regular course of business. The seller has expended time, effort, and money to locate and purchase firearms and locate interested customers, then offered to buy and sell more firearms to customers. The statutory definition of ''engaged in the business'' does not require a seller to have repeatedly purchased and resold firearms; rather, it is the person's intent to predominantly earn a profit through repetitive purchases and resales that must be proven. Each EIB presumption involves activities that tend to show this predominant profitmaking intent.

b. Enforcement of Presumptions

Comments Received

Several commenters stated that the proposed rule did not make clear to whom it would apply or how ATF or other law enforcement entities should consider the presumptions or criteria in an enforcement context. Commenters stated the rule needs to make clear what sales relating to personal collections or hobby are allowed without a license, so the public knows ahead of time if what they are doing requires a license. One commenter stated that there are no safe harbors in the rule that could encourage lawful and responsible behavior. The commenter suggested that it would be simpler to include a presumption that ''[a]ny seller of a firearm who first transfers that firearm to a licensee should be presumed not to be a dealer in firearms regardless of all other indicia.'' According to the commenter, transferring a firearm to a licensee first shows that the seller cares about creating a record of the sale more than simply maximizing profit, and so such sellers should not be considered dealers. Further, this suggested presumption would encourage the conduct of private transactions through FFLs and accomplish the statutory objectives and the Department's and ATF's policy goals. However, the commenter added that this suggested presumption should not be used to imply that a sale that does not occur through an FFL is automatically an unlawful transaction. Another commenter similarly suggested that ATF's chief concern with creating these presumptions is to keep people from avoiding background checks. As a result, they said, ATF should exclude from the presumptions all sales in which background checks are conducted, including sales to a current FFL, private sales facilitated through a current FFL, and sales of NFA firearms.[192]

Another commenter, who supported the rule, suggested that absent guidance from the Department about how the ''criteria'' would be weighted, an atmosphere of ambiguity and uncertainty exists for persons who sell or transfer firearms at gun shows, online, or through other means without an FFL, as well as for law enforcement and regulatory agencies enforcing the rule. The commenter suggested adding language to state that while no single factor is determinative, the Department will assign different weights to each factor depending on the context and circumstances of each case. For example, the commenter suggested that if a person rented a table at a gun show, the Department would consider the person to be engaged in the business if the person has displayed signs or banners with a business name or logo, offered warranties or guarantees for the firearms sold, or transferred firearms to residents of another State. Likewise, if the transaction occurs online, the commenter suggested the Department make clear in the rule that it will consider if the person created a website with a domain name that indicates a business activity, posted advertisements on online platforms that cater to firearm buyers and sellers, accepted payments through online services that charge fees for transactions, and whether the person has shipped firearms to persons who are residents of another State through online sales or transfers.

Another suggestion was that ''ATF should consider clarifying that the initial burden of producing evidence to establish an 'engaged in the business' presumption in a civil or administrative proceeding falls on the government.'' They further suggested the rule should also state that, after a determination that the initial evidentiary burden for a presumption has been met, the burden of producing reliable rebuttal evidence shifts to the other party, and if the other party fails to produce sufficient reliable rebuttal evidence, the presumption will stand. They also suggested that the final rule should clarify whether the examples of conduct in paragraph (c)(4) (now § 478.13(e) and (f)) of the NPRM's definition of ''engaged in the business''—that is not presumed to be ''engaged in the business''—are intended to serve as rebuttable presumptions or as rebuttal evidence. ''It appears,'' the commenter said, ''from their placement outside of (c)(3) that the (c)(4) examples are not designed to be rebuttable presumptions, but the final rule would benefit from clarifying how those examples are to be raised and applied in proceedings.''

Department Response

The Department disagrees that the rule does not make clear to whom it would apply. The rule implements the provisions of the BSCA that amended the definition of ''engaged in the business'' in the GCA as it applies to wholesale and retail dealers of firearms. Thus, the rule is applicable to any person who intends to ''engage in the business'' of dealing in firearms at wholesale or retail, as the rule further defines that term. Such persons must become licensed and abide by the applicable requirements imposed on licensees under the GCA and 27 CFR part 478. And the rule further explains that the rebuttable presumptions are applicable in civil and administrative proceedings (*e.g.,* license issuance and asset forfeiture), not in criminal proceedings, though courts in criminal cases may choose to use them as permissive inferences. *See* § 478.13(c), (h). The Department will exercise its discretion to utilize the presumptions set forth in the rule in civil and administrative cases and may recommend their use as permissive inferences in criminal proceedings, when appropriate.

The Department disagrees that the rule does not make clear what sales relating to personal collections or hobbies are allowed without a license. The proposed rule explicitly recognized the GCA's ''safe harbor'' provision that a person is not engaged in the business if the person makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby. 88 FR 61994, 62001–02. It also stated that a person would not be presumed to be engaged in the business if the person transfers firearms only as bona fide gifts. *Id.* Transfers of firearms for these reasons do not support a presumption that a person is ''engag[ing] in the business,'' and reliable evidence of these purposes may also be used to rebut any presumption and show that a person is not engaged in the business under the statute. *See* § 478.13(e), (f). The final rule also specifies that a person shall not be presumed to be engaging in the business when reliable evidence shows that the person is transferring firearms only to liquidate all or part of a personal collection of firearms. *See id.* In addition, the term ''personal collection'' is defined consistently with dictionary definitions to include firearms acquired

[192] *See* footnote 78.

''for a hobby,'' and explains the circumstances under which firearms transferred to a personal collection by a former licensee prior to license termination may be sold or otherwise disposed.

Nonetheless, to further allay the concerns of commenters who sought further clarification of the ''safe harbors,'' the Department is adding to this rule a list of conduct that does not support a presumption, as previously stated. *See* § 478.13(e). Reliable evidence of such conduct may also be used to rebut the presumptions. *See* § 478.13(f). The Department has also stated in the rule that the list of rebuttal evidence is not exhaustive. *See* § 478.13(g). Additionally, while the Department disagrees with the commenter that the regulatory text in the final rule needs to explain how the rebuttable presumptions shift the burden of production, the Department agrees with the commenter as to how they are to be applied. As an initial matter, a person will not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person only sells or transfers firearms for one of the reasons listed in § 478.13(e). Determining whether a presumption applies is a fact-specific assessment, as is determining whether a person is engaging in conduct that does not support a presumption, such as buying or selling firearms to enhance or liquidate a personal collection. For example, unlicensed individuals selling firearms at a gun show or using an online platform cannot merely display a sign or assert in their advertisement that the firearms offered for sale are from a ''personal collection'' and preclude application of a presumption. Instead, whether a presumption would apply requires an assessment of the totality of the circumstances, including an evaluation of the reliability of any such assertion regarding a ''personal collection.''

Once a proceeding is initiated, the burden of persuasion never shifts from the Government or plaintiff. If evidence sufficient to support a presumption is produced in a civil or administrative proceeding, the responding person has the opportunity to produce reliable rebuttal evidence to refute that presumption. If the responding person produces such reliable evidence, additional evidence may be offered by the Government or plaintiff to further establish that the person has engaged in the business of dealing in firearms, or had the intent to predominantly earn a profit through the repetitive purchase and resale of firearms, depending on which set of presumptions is applied. If the responding person fails to produce evidence to rebut a presumption, however, the finder of fact would presume that the person was ''engaged in the business'' of dealing in firearms, or had a predominant intent to earn a profit from the repetitive sale or disposition of firearms, as the case may be.

The Department agrees that a person should be able to rebut a presumption that they are engaged in the business of dealing in firearms requiring a license if the sales are occasionally only to an FFL or to a family member for lawful purposes. A person who only occasionally sells a firearm to a licensee is not likely to have a predominant intent to earn a profit because a licensee typically will offer less than a non-licensee for the firearm given the licensee's intent to earn a profit through resale.[193] The same reasoning applies to family members because the seller is less likely to have a predominant intent to earn a profit due to their pre-existing close personal relationship (*i.e.,* a less than arms-length transaction). For this reason, the occasional sale of firearms to a licensee or to a family member for lawful purposes has been added to the non-exhaustive list of examples of evidence that may rebut any presumption. § 478.13(e)(3), (f). However, the Department is not excluding from the presumptions a person who engages in private sales that are facilitated by a licensee. Even though such sales are certainly allowed,[194] a private seller likely intends to predominantly earn a profit from those arms-length sales even if the licensee requires a fee for the service of running a background check.

The Department disagrees with the comment that the rebuttable presumptions in the rule should be considered only as criteria that should be weighted and not as rebuttable presumptions. Of course, in the final determination of whether someone is ''engaged in the business,'' all the evidence, for and against, will be weighed by the fact finder. But that does not preclude the use of reasonable and supported rebuttable presumptions as part of that process. In that vein, to best clarify who is presumptively required to be licensed as a dealer, the rule identifies specific conduct that will be presumed to be ''engaging in the business'' with the intent to ''predominantly earn a profit.'' The presumptions are not factors; nor are they weighted according to the various circumstances described in each presumption because any one of them is sufficient to raise the presumption, and any may be rebutted by reliable evidence to the contrary.

c. Exemption From Presumptions

Comments Received

At least one commenter in support of the proposed rule raised concerns about the exception from the presumptions where a person ''would not be presumed to be engaged in the business requiring a license as a dealer when the person transfers firearms only as bona fide gifts or occasionally sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby, unless their conduct also demonstrates a predominant intent to earn a profit.'' [195] The commenter stated that, although a bona fide gift should suffice to rebut a presumption, the exclusion of these types of situations ''risks creating a significant loophole whereby firearms traffickers could shift the burden of proof simply by claiming that any suspicious transaction was a gift.'' The commenters cited *United States* v. *Gearheart,* No. 23–cr–00013, 2023 WL 5925541, at *2 n.3 (W.D. Va. Sept. 12, 2023) as an example of when a straw purchaser initially told investigators that she bought the gun as a gift.

By contrast, another commenter not in support of the rule stated that ''Congress affirmatively exempted from licensure *all* sales to expand or liquidate a private collection and occasional transactions—even with some profit motive—to

[193] *See* Enlisted Auctions, *How Do I Sell My Firearms?, https://www.enlistedauctions.com/resources/how-do-i-sell-my-firearms* (last visited Mar. 6, 2024) (''You can take your firearm to a local gun shop. Typically gun shops will buy your firearm from you at a lower price and then try to resell the firearm at a profit. Pros to this method are that you can take the firearm to the store, drop it off, receive your payment and you are done. Downside is that you do not typically receive market value for your firearm. Think of it as trading in a vehicle. When you trade in your car at a dealership, the dealer never pays you what the car is worth on the open market.''); Dunlap Gun Buyers, *How to Sell a Gun in Maryland: A Comprehensive Guide* (Sept. 8, 2023), *https://www.cashmyguns.com/blog/how-to-sell-a-gun-in-maryland* (''Gun owners can sell their firearm to a local dealer. This is a good way to help ensure gun owners are complying with gun laws in Maryland for firearm sales. However, sellers may be leaving money on the table by selling for much less than the gun's actual market value.'').

[194] *See* ATF, *Facilitating Private Sales: A Federal Firearms Licensee Guide, https://www.atf.gov/firearms/docs/guide/facilitating-private-sales-federal-firearms-licensee-guide/download* (last visited Mar. 6, 2024); ATF Proc. 2020–2, *Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers* (Sept. 2, 2020), *https://www.atf.gov/rules-and-regulations/docs/ruling/atf-proc-2020-2-%E2%80%93-recordkeeping-and-background-check-procedure/download.*

[195] 88 FR 62001–02.

enhance a collection or for a hobby. But ATF now seeks to presume the opposite for a wide array of transactions.''

Department Response

The Department disagrees that the bona fide gift exception is a ''loophole'' for multiple reasons. First, transferring a firearm as a bona fide gift to another person is not a ''sale'' because there is no ''exchange'' or payment of money, goods, or services for the firearm. Second, a person who is not otherwise engaged in the business as a dealer and truly intends to give a firearm as a gift does not ordinarily devote time, attention, and labor to firearms dealing as a trade or business or show the predominant intent to earn a profit through the repetitive purchase and resale of firearms. The *Gearhart* case cited by one of the commenters is not a case of dealing in firearms without a license; rather, it is a case where a person aided and abetted a straw purchaser to buy a firearm for himself—the actual buyer—not for resale to others. Third, as in all fact-based proceedings, a party must establish through evidence that a claim of fact is reliable in order to use that fact in their favor. That determination is made by the finder of fact, not the proponent of the argument. Fourth, to the extent that gifts are mutually exchanged between both parties, as the commenter recognizes, the transfer of bona fide gifts is evidence that can be used to rebut any presumption. Once the Government proves an exchange, or offer to exchange, firearms for something of value, the responding party may submit evidence to show that the firearms were transferred only as bona fide gifts.

The Department disagrees with the commenter that this rule causes all firearms transactions to be deemed engaged in the business of dealing in firearms, but agrees that the rule should make clear that an occasional sale only to obtain more valuable, desirable, or useful firearms for a personal collection or hobby, or liquidation of all or part of a personal collection, should not be presumed to be engaging in the business. Based on the Department's agreement with this comment, the final rule adds this activity to the list of conduct that does not support a presumption and as evidence that can rebut any presumption should a proceeding be initiated. *See* § 478.13(e)(2) and (4), (f). However, as explained previously, the term ''liquidation'' is inconsistent with a person acquiring additional firearms for their inventory (*i.e.,* ''restocking''), and that has been made clear in a parenthetical in the regulatory text. *See* § 478.13(e)(4).

d. Use of Presumptions in Particular Proceedings

Comments Received

Several commenters expressed concerns about the application of the presumptions in criminal contexts or in administrative or civil contexts. More than one commenter expressed that there was confusion as to whether ATF will use the presumptions (either the engaged in the business presumptions or the intent to predominantly earn a profit presumptions) in criminal proceedings. One of the commenters raised concerns about when and how ATF will use the presumptions in administrative or civil proceedings. The commenter stated that much of ATF's administrative jurisdiction is over existing FFLs, which are already engaged in the business and thus not affected by the rule. The commenter then asked whether ATF intends to apply the presumptions to ''FFLs who transfer firearms for unlicensed individuals that ATF believes are 'engaged in the business?' '' They expressed concerns that this would mean holding FFLs responsible for whether their customers are unlawfully engaging in the business ''under the nebulous standards of the proposed rule,'' which would make it too risky for any FFL to ever facilitate a third-party transfer. The commenter suggested that the only other possibility was to use the presumptions in forfeiture actions, but these were substantially restricted as part of FOPA and were not amended as part of the BSCA.

Department Response

The Department acknowledges commenters' confusion about the application of the presumptions to criminal, civil, and administrative proceedings. This final rule makes clear that the rebuttable presumptions are to be used by persons potentially subject to the licensing requirement to consider whether they must obtain a license, as well as in civil and administrative proceedings, but they do not apply to criminal proceedings. Civil and administrative proceedings include, for example, civil asset forfeiture and administrative licensing proceedings.[196] However, as discussed in Section IV.B.9.b of this preamble, this final rule indicates that a court in a criminal case, in its discretion may, for example, elect to use the presumptions as permissive inferences in jury instructions.[197]

Criminal investigations, prior to formal charging, are covered by separate policies, rules, and legal limitations, and are not within the scope of this rule. The final rule does not suggest the presumptions be used in criminal proceedings to shift the Government's burden of proof to the defendant. In criminal proceedings, the Due Process Clause prohibits the prosecution from using evidentiary presumptions in a jury charge that have the effect of relieving the prosecution of its burden of proving every element of an offense beyond a reasonable doubt.[198] This rule does no such thing.

Regarding civil or administrative proceedings involving existing licensees, the Department disagrees that the standards in the rule are ''nebulous.'' The presumptions identify specific conduct that is presumed to be engaging in the business, and the presumptions are to be applied in all civil and administrative proceedings where there is evidence of such specific conduct. Indeed, licensees have long been prohibited by the GCA from willfully assisting persons they know are engaged in the business of dealing in firearms without a license. *See* 18 U.S.C. 2; 922(a)(1)(A). Moreover, the BSCA's amendment at 18 U.S.C. 922(d)(10) now prohibits licensees or any other person from selling or otherwise disposing of a firearm to a person knowing or having reasonable cause to believe that such person intends to sell or otherwise dispose of the firearm in furtherance of a Federal or State felony, including 18 U.S.C. 922(a)(1). These violations of the GCA may be brought against a licensee, or the licensee's firearms, in a civil forfeiture or administrative licensing proceeding. For example, if a licensed dealer sold firearms to a known member of a violent gang who the dealer knew was repetitively selling the firearms within 30 days from purchase to other gang members, the dealer's license could be revoked under 18 U.S.C. 923(d)(1)(C) for willfully aiding and abetting a violation of section 922(a)(1)(A), and potentially for willfully violating section 922(d)(10). Under these circumstances, the gang member would be presumed to be engaged in the business, and evidence of the gang member's repetitive sales could be put forward in the administrative action to revoke the dealer's license.

However, for the Government to take administrative action on that basis against an existing licensee, or a license applicant, it would still need to prove the person committed the conduct

[196] *See* footnote 85, *supra.*

[197] *See* footnote 66, *supra.*

[198] *See Francis,* 471 U.S. at 313.

willfully. *See* 18 U.S.C. 922(a)(1)(A), 923(d)(1)(C), 923(e). Even if a presumption applied in a given case against a licensee, the Government would still have to prove that a licensee facilitating a private sale knew of an unlicensed dealer's purchase and resale activities without a license, and either purposefully disregarded the unlicensed dealer's lack of a license or was plainly indifferent to it. Thus, a licensed dealer who inadvertently facilitates occasional private sales for an unlicensed person whom the licensee does not know is engaged in the business, and who is not plainly indifferent to the seller's need for a license, would not be liable for the private seller's misconduct.

6. EIB Presumption—Willingness and Ability To Purchase and Sell More Firearms

Comments Received

Generally, commenters opposing this EIB presumption stated it was too broad and provided several examples of typical conduct that would be captured under the presumption requiring a person to obtain an FFL. Gun collectors' associations stated that most people who collect firearms or engage in the sale of firearms for a hobby are willing to buy or willing to sell. A commenter provided additional examples in which the commenter stated that ATF could presume a person is unlawfully engaged in the business, such as a person downsizing a personal collection by a single firearm while expressing a desire to continue downsizing, selling one firearm while offering to buy another, or trading one firearm for another in someone else's collection. Likewise, some commenters believed that any gun owner who discusses sales of firearms with friends or relatives or who makes repetitive offers to sell a firearm in order to secure a reasonable price will need to be licensed because of the first presumption.

Specifically, some commenters argued that this presumption would capture and penalize sellers who make statements as a part of normal interactions, such as ''I need money to settle my divorce. That's why I'm selling this Colt 1911. If you like this one, I also have another with a consecutive serial number. Yeah, I'm losing money on them, but I need the cash.'' This type of statement or innocuous statements such as, ''[M]y wife makes me sell a gun to buy a new one, so I'm always buying and selling guns'' are being wrongfully equated to criminal actors who may say to an undercover officer, ''I can get you whatever you want'' or that he can ''get plenty more of these guns'' and ''in a hurry'' for the right amount of money. Commenters indicated that a huge difference between these two scenarios is the totality of the circumstances. The rule, they argued, is incorrectly crafted to avoid the need for any totality of the circumstances analysis, so that only one firearm, one presumptive circumstance, or ''possibly one overriding circumstance'' is necessary, coupled with the subjective assessment of an agent.

Another commenter suggested that ATF could amend the presumption to correct the issue. ''Presently,'' the commenter said, ''the language is too broad to function as a rebuttable presumption because its plain language meaning places it in conflict with the presumption that an occasional seller is *not* 'engaged in the business.' If ATF amended this presumption to include a frequency element, it would rectify this issue.'' (emphasis added by commenter). The commenter suggested one option could be, ''[a] person will be presumed to be engaged in the business of dealing in firearms when the person, on a recurring basis, sells or offers for sale firearms, and also represents to potential buyers a willingness and ability to purchase and sell additional firearms, or otherwise demonstrates the person's willingness and ability to act as a dealer in firearms on a recurring basis,'' and added that this alternative would add the necessary frequency element and also correct a disjunctive ''or'' included in the original to make the presumption clearer.

Department Response

The Department disagrees with the comments that the first EIB presumption is too broad, or that collectors or hobbyists will be unable to maintain or downsize their personal collections without a license under the first EIB presumption in the rule. A person who makes repetitive offers to sell firearms to downsize or liquidate a personal collection does not fall within the presumption, which requires not only that the person sell or offer for sale firearms, but also demonstrate a willingness and ability to purchase and resell additional firearms that were not already part of their personal collection. This conduct is sometimes referred to as ''restocking.'' [199] Nonetheless, to make this point clear, the following parenthetical has been added in the first EIB presumption: ''(*i.e.,* to be a source of additional firearms for resale).'' § 478.13(c)(1). This presumption, like the others, may be rebutted with reliable evidence to the contrary in any proceeding.

The Department disagrees that the first presumption is too broad to function as a presumption without a time limitation because it conflicts with the statutory exception for occasional sales to enhance a personal collection. Persons who resell (or offer for resale) firearms and hold themselves out to potential buyers or otherwise demonstrate a willingness and ability to purchase and resell additional firearms for resale are engaged in the business, according to well-established case law. For example, in *Carter,* 801 F.2d at 82, the Second Circuit found there was sufficient evidence that the defendant engaged in the business in violation of 18 U.S.C. 922(a)(1) even though he made only two sales four months apart. The Court explained that, ''[a]lthough the terms 'engage in the business of' and 'dealing in' imply that ordinarily there must be proof of more than an isolated transaction in order to establish a violation of this section . . . [the] defendant's conduct was within the intended scope of the statute'' because ''the statute reaches those who hold themselves out as a source of firearms.'' [200] There is no need for a time limitation because such persons are holding themselves out as a source of additional firearms for resale, thereby demonstrating a present intent to engage in repetitive purchases and resales for profit. This presumption merely shifts the burden of production to the responding person to show that those resales occurred only occasionally to enhance a personal collection, liquidate inherited firearms, or were otherwise not sold to engage in the business as a dealer.

7. EIB Presumption—Spending More Money on Firearms Than Reported Income

Comments Received

Numerous commenters stated that this presumption is broad and unclear. A couple of commenters questioned the meaning of ''applicable period of time'' in this presumption, with one commenter claiming that the presumption would ''assume the majority of purchasers of high end collectible firearms [are] 'engaged in the business' off of merely the fact [that]

[199] *See Restock,* Cambridge Online Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/restock* (last visited Mar. 7, 2024) (''to replace goods that have been sold or used with a new supply of them''); *Restock,* The Britannica Online Dictionary, *https://www.britannica.com/dictionary/restock* (last visited Mar. 7, 2024) (''to provide a new supply of something to replace what has been used, sold, taken, etc.'').

[200] 801 F.2d at 81, 82 (internal quotation marks omitted); *see also* footnote 68, *supra.*

they purchased a gun more expensive than their income for some period.'' Other commenters also stated there are many ways people might not have reportable gross income. For example, adult children may not have any gross taxable income, so buying and selling even two firearms in a year could trigger the presumption. Similarly, commenters noted that retired collectors with little or no reportable gross income compared to their assets could be at significant risk of being considered dealers without even offering a gun for sale or for spending as little as $200 to advertise the sale of a firearm on *GunBroker.com* or in a similar publication.

Another commenter provided specific examples of how law-abiding gun owners who should not be considered dealers could easily be dealers under this presumption. For instance, a California peace officer, who suffers career-ending injuries and goes through the appropriate process, would be eligible for ongoing disability payments of 50 percent of base pay, none of which is taxable. Under this pattern of facts, the commenter argued, a law-abiding gun owner with such a disability award and no other income could be presumed to be a dealer if they sold only one firearm of any value. The commenter asserted that many military members are in a similar situation where they may receive disability pay that is not taxable. In all these cases, these people might need post-separation income or to buy and sell firearms without ever desiring to be dealers or making a profit on the sales, but they run the risk of being presumed to be dealers based on this second presumption. An additional commenter similarly stated the ''provision that a person who spends more money than their reported gross taxable income on purchasing firearms for resale, has no basis what-so-ever in 'profit.' Profit is based on a sum in excess of all costs. Not gross income. Further, many retired people have a small gross taxable income compared to their assets.''

One commenter claimed that assorted welfare benefits are excluded from gross income and that, to the extent that those benefits ''benefit disproportionately persons based on race or other classification,'' the second presumption is constitutionally suspect. The commenter said that ATF needs to justify the use of gross income in this presumption, which could have a disproportionate impact on persons on the basis of race. Similarly, at least one commenter in support of the proposed rule also suggested that this presumption could potentially create an ''unreliable'' standard, whereby high-income dealers could sell large amounts of firearms without ever being subject to the presumption, while a single sale could be enough to subject a person with low or fixed income to the presumption of unlawful dealing. The commenter advised that for this specific presumption, the Department adopt a numerical threshold of ten gun sales per year, which would make applying this presumption easier for courts and law enforcement while avoiding the inequities of ATF's income-based approach.

Department Response

In proposing this presumption, the Department noted that the likely intention of a person who expends more funds on the purchase of firearms in an ''applicable period of time'' than the total amount of their reported gross income for that period would be to resell the firearms for a profit. As noted by several commenters, however, there are several situations in which individuals with income that is not reportable as gross taxable income—such as those receiving disability or welfare benefits, retired firearm collectors, retirees drawing on Roth IRAs, and young adult children—could expend that non-reportable income at levels in excess of their gross reported income to purchase firearms, yet not intend to resell those firearms for a profit. Application of a gross income presumption to such individuals, commentors argued, would unfairly require them to disprove that they were engaged in the business when they purchased a firearm or firearms. While such circumstances would seem to be unlikely, the Department acknowledges they could occur. The Department similarly acknowledges that commenters' observations regarding the potential disparate effect of a gross income-based presumption on low-income individuals, while also unlikely, may occur. In light of these considerations, the Department has decided not to include a gross income-based presumption in this final rule and has removed it from the final rule.

Although the Department has determined not to include a gross income-based presumption in this final rule, the Department notes that evidence of expenditures for the purchase of firearms in excess of an individual's reported gross income may nevertheless be relevant to the factual assessment as to whether an individual is engaged in the business. As amended by BSCA, the relevant assessment under the GCA is whether a person's intent in engaging in firearms sales is predominantly one of obtaining pecuniary gain; the financial circumstances of an individual engaged in the repetitive acquisition and sale of firearms is therefore relevant to this assessment.

8. EIB Presumption—Certain Types of Repetitive Transactions

a. Repetitively Transacting Firearms Through Straw Persons/Sham Businesses

Comments Received

With regard to this presumption, at least one commenter questioned why it was needed if straw purchasing is already a felony, while another commenter raised no objection to a presumption that relied on other crimes to establish the presumption. A couple of commenters did not agree with the straw purchaser presumption because it could unfairly capture unlicensed persons, as demonstrated in the following scenarios. For example, they said, collectors purchase firearms on the used firearms market, which is the only place to find vintage firearms, but they could trigger this presumption without being aware they had purchased the firearm through a straw seller. Similarly, an unlicensed person who innocently sells two firearms that he no longer finds suitable for self-defense would be presumed to be engaged in the business if the buyers of the firearms turn out to be straw purchasers.

One commenter suggested that ''[t]he final rule should clarify that while firearm sales involving illicit straw middlemen and contraband firearms are indicative of the seller's criminal purposes, these sales are also indicative of an individual's predominant intent to profit when undertaking the sales. The conduct can indicate both at the same time, and, as the NPRM notes, it is the illicit nature of the middleman activity and firearm types that increases the profitability of the sale. While the criminal purposes involved in such sales obviate ATF's need to prove profit under BSCA's definition of 'to predominantly earn a profit,' it does not obviate the fact that such sales are in fact predominantly motivated by profit.''

The same commenter, who generally supported the rule, had a suggestion for improving this presumption. They stated that, ''[w]hile sensible as currently drafted and deserving of inclusion in the final rule, this presumption would benefit by clarifying whether the word 'repetitively' in the Proposed Rule is intended to apply to the phrase 'sells or offers for sale' in the same way that it clearly applies to 'purchases for the purpose of resale.' ''

Department Response

The Department disagrees that the presumption addressing straw purchasers is not needed because straw purchasing is already a felony. While it is true that straw purchasing is a felony,[201] all persons who engage in the business of dealing in firearms are required to be licensed, even if the means by which those firearms are purchased and sold is unlawful. Moreover, the Department agrees with the comment that firearms purchases and sales through straw individuals and sham businesses are indicative of an individual's predominant intent to profit from those repeated illicit sales. In any event, Federal law provides that the Government is not required to prove profit, including an intent to profit, where a person is engaged in regular and repetitive sales for criminal purposes, pursuant to 18 U.S.C. 921(a)(22). Making repetitive resales through straw individuals or sham businesses for the purpose of engaging in the business without a license is a criminal purpose.[202] The statute itself thereby provides notice to such persons that they may be unlawfully engaging in the business of dealing in firearms.

At the same time, collectors who innocently purchase and sell firearms from or through a straw purchaser without knowing the person was acting for someone else, or purposefully disregarding or being plainly indifferent to that fact, would not incur liability for engaging in the business without a license. The Government must prove willful intent in all relevant licensing and forfeiture proceedings. For example, if the Government were to deny an application for a license because of previous unlawful unlicensed dealing, it must show that the applicant ''willfully violated'' the unlicensed dealing prohibition at 18 U.S.C. 922(a)(1). *See* 18 U.S.C. 923(d)(1)(C).

The Department agrees that the term ''repetitively'' applies to purchases of firearms in the same way as it applies to sales of firearms. Consequently, the Department has added the word ''repetitively'' before ''resells or offers for resale'' with respect to the straw/sham business and unlawfully possessed firearms presumptions. *See* § 478.13(c)(2).

b. Repetitively Purchasing Unlawfully Possessed Firearms

Comments Received

As with the presumption related to straw purchasing or sham businesses, at least one commenter said that the presumption is unnecessary because unlawful possession of certain firearms can already be prosecuted as a stand-alone felony. The commenter also questioned the need for this presumption because no legitimate business would deal in illegal firearms, and so buying and selling such firearms would show that a person is not engaged in the business. The commenter further noted that there is no way for a person to know if the firearm they acquire is stolen because ''[t]here is no database where a would-be purchaser, or seller for that matter, may check if a gun is stolen.'' The commenter similarly questioned how an average person would know if a particular firearm was imported illegally, providing the example of a vintage World War I Luger that could have been brought to the United States legally in 1919 as a souvenir, or smuggled into the country illegally in 1970. Another commenter noted that the NPRM did not explain how possession of certain unlawful firearms (stolen guns, those with serial numbers removed, or those imported in violation of law), in addition to its own separate crime, also constitutes unlawful dealing. The commenter added that the GCA draws no connection between being engaged in the business as a dealer in firearms and the unlawful possession of certain types of firearms.

By contrast, at least one commenter in support of the rule suggested that the Department add ''weapons, the possession of which is prohibited under [S]tate or local laws'' to the list of examples in the presumption of firearms that cannot be lawfully purchased or possessed.

Department Response

The Department disagrees that the presumption addressing buying and selling of prohibited firearms is not needed because possession of such firearms is already a crime. As with dealers who transact through straw individuals, which is also a Federal crime, all persons who engage in the business of dealing in firearms are required to be licensed even if the firearms purchased and sold by the business are also unlawful to possess. Contraband firearms are actively sought by criminals and earn higher profits for the illicit dealer because of the additional labor and risk to acquire them. Illicit dealers will often buy and sell stolen firearms and firearms with obliterated serial numbers because those firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing. However, bona fide collectors who occasionally purchase and resell firearms from their personal collections without knowing the characteristics of the firearms that make them unlawful to possess would not incur liability for engaging in the business without a license. There is always a requirement for the Government to prove a willful intent to violate the law in any proceeding arising under 18 U.S.C. 922(a)(1), 923(a), 923(d)(1)(C), or 923(e). In addition, each presumption may be refuted with reliable evidence that shows the person was not engaging in the business, such as evidence that they were occasionally reselling to obtain more valuable firearms for their personal collection. *See* § 478.13(f). Moreover, under the BSCA, 28 U.S.C. 534(a)(5), once licensed, dealers who may have innocently purchased unlawful firearms will now have access to the FBI's National Crime Information Center database to verify whether firearms offered for sale have been stolen.

The Department agrees with the comment that it should revise this presumption on repetitive purchases and resales to clarify that it includes firearms unlawfully possessed under State and local law. The fact that profit motive is buttressed by the illicit nature of the product applies equally to firearms that are illegal under State law. One of the primary purposes of the GCA was to enable the States effectively to regulate firearms traffic within their borders. *See* Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90–351, sec. 901(a), 82 Stat. 197, 225–26.[203] And, according to the comment from Attorneys General representing 20 States and the District of Columbia, ''many guns are trafficked across [S]tate lines, exploiting the differences in [S]tate regulations.'' Accordingly, the Department has revised the presumption to make it clear that it includes all firearms that cannot lawfully be purchased, received, or possessed ''under Federal, State, local, or Tribal law,'' and cites the Federal prohibitions only as examples. § 478.13(c)(2)(ii).

[201] *See* 18 U.S.C. 932 (prohibiting straw purchasing of firearms); 922(a)(6) (prohibiting false statements about the identity of the actual purchaser when acquiring firearms); 924(a)(1)(A) (prohibiting false statements made in licensee's required records).

[202] *See* 18 U.S.C. 922(d)(10) (making it unlawful for any person to sell or otherwise dispose of a firearm to any person knowing or having reasonable cause to believe that such person, including as a juvenile, intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, including sec. 922(a)(1)).

[203] *See also* S. Rep. No. 90–1097, at 28 (1968); H.R. Rep. No. 90–1577, at 6 (1968); S. Rep. No. 90–1501, at 1 (1968).

9. EIB Presumption—Repetitively Selling Firearms in a Short Period of Time

a. Repetitively Selling Firearms Within 30 Days After Purchase

Comments Received

Numerous commenters disagreed with the presumption that a person is a dealer if they repetitively sell or offer for sale a firearm within 30 days after originally purchasing the firearm. Commenters noted that this presumption shows ATF's lack of understanding of the firearms community. Commenters stated it is common for people, including collectors and firearm enthusiasts, to find themselves in a situation where they buy a firearm and quickly regret the purchase. They disagreed with the Department basing the presumption on the assertion that stores have a 30-day return period. Some commenters stated that stores frequently have strict no-return policies, and other commenters stated that stores frequently offer a ''non-firing inspection period'' within which a customer can return the firearm. This means that if the customer fires the gun after purchase and does not like it, the person has no choice but to sell the firearm as used. Another commenter provided common scenarios where they claimed a person would be presumed to be a dealer under this presumption. In one example, a non-licensee who buys two firearms that do not work or fulfill their intended role and subsequently sells them within 30 days would be presumed to be engaged in the business because of the ''repetitive'' sales of the firearms within 30 days of purchase. The commenter also suggested that a person who inherits a firearm collection from a parent and chooses to sell those firearms by auction or by other private sale within 30 days would be subject to prosecution under this presumption.

At least one commenter in support of the rule recommended that the period for this presumption be extended from 30 days to 90 days to make it more difficult for people to structure transactions in a way that would evade licensing and background check obligations.

Department Response

The Department disagrees with commenters that it is common for persons to repetitively purchase and resell firearms within 30 days without a predominant intent to profit, such as by selling unsuitable or defective firearms. Common sense and typical business practices dictate that it is more consistent with profit-based business activity than collecting to buy and resell inventory in a short period, and as stated previously, that is true especially when the firearm could be returned yet is resold instead. For one thing, multiple firearms would have to be purchased and resold within that 30-day period of time to trigger the presumption. Thus, even assuming a person could not return a firearm, which is not always the case, it is unlikely that there would be more than one unsuitable or defective firearm that would need to be resold during the 30-day period unless the person is engaged in the business.[204] And, as with the other presumptions, this presumption may be refuted by reliable evidence to the contrary to account for less common circumstances raised by the commenters.

With regard to the suggestion to extend the 30-day period to 90 days, the Department disagrees. The Department believes that the turnover presumption for persons actively engaged in the business of dealing in firearms of varying conditions, kinds, and types is more likely to occur within a relatively short period of time from the date of purchase. While the Department understands that some licensees will not accept returns, 30 days is a reasonable time frame within which ATF can distinguish those who are engaged in the business from those who are not because many licensees, including licensed manufacturers, will accept returns of unsuitable or defective firearms within that period of time. *See* footnote 81, *supra.*

Finally, the Department disagrees that a person who inherits a personal collection and liquidates it within 30 days after inheritance falls within the 30-day turnover presumption. The presumption applies only to persons who repetitively resell firearms within 30 days ''after the person purchased the firearms.'' § 478.13(c)(3)(i). A person who inherits a personal collection does not, in the absence of other factors, ''purchase'' or exchange something of value in order to receive the firearms. To further clarify, the final rule also lists, as rebuttal evidence, the specific example of a person who liquidates inherited firearms. *See* § 478.13(e)(5)(i), (f).

b. Repetitively Selling New or Like-New Firearms

Comments Received

Of the several presumptions, some commenters believed that this presumption hurts collectors, who are not licensees, the most because they value the original condition of firearms and, as such, frequently keep firearms in like-new condition and with their original packaging. Again, commenters stated that including this presumption demonstrates the Department's and ATF's lack of understanding of how the community values firearms. One commenter pointed out, as an example, that ''[t]he National Rifle Association has three collector grades for new or like new modern firearms—'New,' 'Perfect,' and 'Excellent'—which represent the three most coveted and sought-after grades,'' and included a link to an article on how to evaluate firearms. Another commenter noted that it is fairly standard for a person to buy a firearm, shoot it a few times, and then sell it in the original box in a private sale because selling the firearm in its original box contributes to the value of the firearm. This, the commenter noted, should not be considered to be engaging in the business. Numerous commenters noted that owners keep firearms in the original boxes not out of criminality, but for collectability. At times, the packaging may be more valuable than the firearm. Therefore, a gun might appear to be ''like new'' possibly months or years after a transaction and one may be presumed to be engaged in the business under this presumption if the person later sells their like-new firearm with the original packaging. Further, ''like new in original packing firearms are . . . the most sought after of collectible firearms,'' said one commenter. At least one commenter stated that this rule will make firearms less safe if individuals discard the original packaging, which often includes warnings and safety information about the firearm, in order

[204] Further support for a 30-day resale presumption comes from ATF's experience observing persons who sell firearms at gun shows. Because of the frequency of gun shows, unlicensed dealers have a readily available marketplace in which to buy, display, and sell numerous firearms for a substantial profit within one month. According to one study, there were 20,691 guns shows in the United States that were promoted and advertised between 2011 and 2019, with 2,299 gun shows per year. *See* David Pérez Esparza et al., *Examining a Dataset on Gun Shows in the US, 2011–2019,* 4 Journal of Illicit Economies and Development 86, 87 (2022), *https://storage.googleapis.com/jnl-lse-j-jied-files/journals/1/articles/146/submission/proof/146-1-1646-1-10-20220928.pdf;* see also Crossroads of the West, *2024 Gun Show Calendar* 1, *https://www.crossroadsgunshows.com/wp-content/uploads/2024/03/Calendar-2024.pdf* (last updated Mar. 20, 2024) (48 gun shows in Arizona, California, Nevada, and Utah in 2024); Gun Show Trader, *Missouri Gun Shows, https://gunshowtrader.com/gunshows/missouri-gun-shows/* (last visited Mar. 26, 2024) (57 gun shows in Missouri and Arkansas in 2024); Gun Show Trader, *Central Indiana Gun Show Calendar, https://gunshowtrader.com/gunshows/central-indiana/* (last visited Mar. 8, 2024) (54 gun shows in Indiana in 2024).

to avoid being considered a dealer under the presumption when they later want to sell the firearm.

Department Response

The Department does not agree that most persons who repetitively purchase and resell firearms that are in a new condition, or like-new condition in their original packaging, lack a predominant intent to earn a profit. That is too broad an assessment. On the contrary, the Department has found—based on its experience as described above—that this type of behavior is an indicator of being engaged in the business with a predominant intent to earn a profit from dealing in firearms in pristine condition.[205] This is even more likely to be the case when the new or like-new firearms are repetitively purchased and resold within a one-year period of time. However, the Department acknowledges commenters' concerns and agrees that true collectors may hold collectible firearms for a long period of time, and that some collectible firearms may appear to be like-new months or years after purchase. Therefore, to reduce the possibility that these ''new'' or ''like-new'' firearms [206] are part of a personal collection, and to account for the higher likelihood that repetitive resales of such firearms in a relatively short time period are made with an intent predominantly to earn a profit, the Department has incorporated a one-year turnover limitation into the presumption. *See* § 478.13(c)(3)(ii)(A). The Department believes that persons acting with a predominant intent to earn a profit are likely to repetitively turn over firearms they purchase for resale within this period. In addition, ATF's experience [207] is that collectors and hobbyists routinely retain their personal collection firearms for at least one year before resale, so the Department believes this is also a reasonable period that would not pose a burden on collectors and hobbyists.[208] As with the other presumptions, this one may be refuted with reliable evidence to the contrary.

c. Repetitively Selling Same or Similar Kind/Type Firearms

Comments Received

Numerous commenters stated that this presumption targets collectors who often focus on collecting a specific type or kind of firearm (*e.g.,* Colt single action revolvers, over-under shotguns, or World War II-era bolt-action rifles) and would thus be more likely to sell firearms by the same manufacturer or of the same type to enhance their collection. ''Virtually every collector or hobbyist focuses their efforts on specific manufactures and types of firearms. They are for the most part devoted to something,'' said one commenter. The commenters claimed that ''a collector liquidating his collection will almost assuredly be presumed to be engaged in the business, especially if he requires more than one incident to sell his collection,'' but the collector ''is doing exactly that which is explicitly allowed by statute.''

Some commenters strongly disagreed with ATF's description that ''[i]ndividuals who are bona fide collectors are less likely to amass firearms of the same kind and type than amass older, unique, or less common firearms'' because this disregards not only the fact that collectors can purchase and sell common firearms that do not hold antique value, but also what is known in the firearms community as ''pattern collecting.'' According to commenters, some people purchase the same type of pistol or rifle over and over again, in every single iteration imaginable, which can vary due to manufacturing date, manufacturing location, minute changes in the firearms, or any number of reasons. In pattern collecting, a person would have multiple firearms for sale that look exactly the same to a lay person. For instance, one commenter asked if a seller would be subject to this presumption if they sold a small collection of highly valuable 19th century Winchester lever action rifles, which would be of the same kind and type. Similarly, another commenter said that large portions of the modern firearms market can be considered ''of similar kind,'' pointing out that a ''Gen 3 Glock in 9mm Luger is of similar kind to a polymer Walther in 9mm or a Palmetto State Armory Dagger in 9mm. The 9mm polymer pistol market has a lot of variety, but [those firearms] can all be considered 'of similar kind.' '' The commenter noted further that individuals might have numerous 9mm polymer pistols in their personal collection because it makes it easier to acquire ammunition, and if magazines or accessories are interchangeable, it makes it easier to have a variety of configurations at hand at a lower cost. The commenter also noted that many modern sporting rifles would also be considered of ''similar kind'' if they can all be chambered in the same caliber. The commenter stated that it is overbroad for the Department to assume that someone selling modern firearms of the same type is more likely to be a dealer in firearms because collecting is not limited to curio and relic firearms.

One commenter expressed concerns about how firearms of the same or similar kind and type could be ascertained and quoted an example from the proposed rule's discussion about the ''same kind and type'' presumption. As quoted by the commenter, the proposed rule stated that this presumption may be rebutted based on ''evidence that a collector occasionally sells one specific kind and type of curio or relic firearm to buy another one of the same kind and type that is in better condition to 'trade-up' or enhance the seller's personal collection.'' The commenter added, ''using 'same kind and type' is not correct. For instance, a [Curio and Relic] (C&R) [license] holder sells a bolt-action Mosin-Nagant rifle in 7.62x54r, then uses the funds to purchase a Star Model B pistol in 9x18. Are these (Mosin-Nagant & Star Model B) the 'same kind and type' or not? Both are clearly collectable C&R firearms, while one is a bolt-action rifle and the other a pistol.''

Department Response

As with the previous EIB presumption, the Department disagrees that collectors are likely to repetitively purchase and resell firearms that are of the same or similar kind and type without a predominant intent to earn a profit, at least not within a relatively short period of time. If a person is accumulating and repetitively reselling the same or similar kinds and types of firearms as part of a personal collection as defined in this rule, they can use evidence that they are doing so to

[205] *See* footnote 82, *supra.*

[206] For purposes of this rule, the Department interprets the term ''new'' in accordance with its common definition to mean, ''having recently come into existence,'' and the term ''like new'' to mean ''like something that has recently been made.'' *See, e.g., New,* Merriam-Webster Online Dictionary, *https://www.merriam-webster.com/dictionary/new* (last visited Mar. 8, 2024); *Like New,* Merriam-Webster Online Dictionary, *https://www.merriam-webster.com/dictionary/like%20new* (last visited Mar. 8, 2024). The Department understands that collectors commonly grade or rate collectible firearms as a means of determining their appreciated value over time, insurance, collectability, etc. However, this presumption is not aimed at collectible firearms and is not making a distinction based on a firearm's grade or rating in relation to commonly accepted firearms condition standards, such as those contained in the NRA Modern Gun Condition Standards or the Standard Catalog of Smith & Wesson. *See* Jim Supica, *Evaluating Firearms Condition,* NRA Museums, *https://www.nramuseum.org/gun-info-research/evaluating-firearms-condition.aspx* (last visited Mar. 26, 2024).

[207] See the discussion under the Department's response in Section IV.B.9.c of this preamble.

[208] In further support of a one-year time limit, 18 U.S.C. 923(c) provides that after one year, firearms transferred by a licensee from the licensee's business inventory to the licensee's personal collection are no longer deemed business inventory.

enhance or liquidate their personal collection to refute the presumption.

Nonetheless, to substantially reduce the possibility that these ''like-kind'' firearms are part of a personal collection, as stated previously, a one-year turnover limitation has been incorporated into the presumption and, as always, any presumption may be rebutted with reliable evidence to the contrary.[209] *See* § 478.13(c)(3)(ii)(B). It is unlikely that persons who collect the same or similar kinds and types of firearms for study, comparison, exhibition, or for a hobby will repetitively resell them within one year after they were purchased.

Finally, in response to commenters' concerns about determining which firearms would be of the same kind and type, the Department has made some changes. First, as to the comment on whether the Mosin and Star firearms described would be the same kind and type, the Department notes that the Mosin-Nagant rifle in 7.62x54r and the Star Model B pistol in 9x18 are not the same or similar kind and type of firearms. They are of a different manufacturer (Mosin-Nagant v. Star), model (M1891 v. BM), type (rifle v. pistol), caliber (7.62x54R v. 9x18), and action (bolt action v. semiautomatic). They share almost no design features and would thus not be subject to the ''same kind and type'' presumption. Nonetheless, to avoid any confusion about the meaning of ''same kind and type'' of firearms, and to allow for collectors who obtain multiple firearms of the same type, but from different makers and of different models, the Department has substituted the more precise term ''same make and model'' in the final rule. *See* § 478.13(c)(3)(ii)(B).

Further, to clarify the meaning of ''similar'' in this context, the final rule now instead refers to ''variants thereof'' (*i.e.,* variants of the same make and model). *See id.* The term ''variant'' is already defined in 27 CFR 478.12(a)(3) to mean ''a weapon utilizing a similar frame or receiver design, irrespective of new or different model designations or configurations, characteristics, features, components, accessories, or attachments.'' Thus, to identify a ''variant'' of a particular make and model, the design of the frame or receiver of one firearm is compared to the design of the frame or receiver of the other firearm, regardless of newer model designations or configurations other than the frame or receiver.[210] For example, an AK–74M is a rifle variant of the original AK–47 rifle. ''The notable changes in the AK–74M include a 90-degree gas block, a lightened bolt and bolt carrier, a folding polymer stock, a new dust cover designed to resist the recoil of an attached grenade launcher, [and] a reinforced pistol grip.'' Alexander Reville, *What are all the AK Variants?, guns.com* (Jan. 5, 2024), *https://www.guns.com/news/what-are-ak-variants.* But none of the changes found in the AK–74M involve a design modification to the receiver—the housing for the bolt—so that firearm is a rifle variant of the original make and model (AK–47 rifle). *See* 27 CFR 478.12(a)(4)(vii). Likewise, an AR-type firearm with a short stock (*i.e.,* pistol grip) is a pistol variant of an AR–15 rifle because they share the same or a similar receiver design. *See* 27 CFR 478.12(a)(3), (f)(1)(i). Repetitive resales of firearms that are the same make and model, or variants of the same make and model, within a year of purchase, demonstrate that the firearms were likely purchased and resold as commodities (*i.e.,* business inventory), as opposed to collectibles. Thus, to identify a firearm subject to this presumption, the rule now looks to the make and model of a firearm and its ''variants'' (as defined in 27 CFR 478.12(a)(3)) which are generally easy to determine by comparing the design of the frame or receiver—the key structural component of each firearm repetitively sold. As with the other presumptions, this one may be rebutted with reliable evidence to the contrary.

10. EIB Presumption—Selling Business Inventory After License Termination

Comments Received

Commenters raised concern over the impact of this presumption on certain former licensees. Commenters stated that they believe this EIB presumption will hurt recently retired FFLs who might need to sell off firearms due to financial hardship. Some commenters stated that the rule would punish former FFLs, holding them to a different and more onerous standard than persons who were never licensed, and disagreed with ATF's statement in justification of the presumption that a ''licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a 'personal collection.' '' 88 FR 62003. They stated that ATF offered no citation for this proposition and ignored that a firearm might be acquired first for business inventory and later become a part of a personal collection. They argued that the former FFL should be entitled to sell part or all of that collection under the statute without becoming a dealer. Further, they argued that, unlike the other presumptions affecting former FFLs, there is no time limitation, which in essence means this presumption bars a former FFL from ever selling firearms that were in their business inventory for any purpose without triggering the presumption of again being engaged in the business. This puts former licensees in an untenable position never contemplated by Congress. One commenter suggested that, at a minimum, the rule should grandfather in former FFLs who went out of business prior to this rule becoming effective and allow them to treat those former business-inventory firearms as a personal collection even if all the proposed criteria of that presumption (now § 478.13(c)(4)), such as formal transfer from the A&D book, were not followed.

An additional commenter suggested that ATF should consider supplementing this presumption with an additional presumption that any formerly licensed firearms dealer, or person acting on their behalf, that sells or offers to sell multiple guns that were in the former FFL's business inventory at the time the license was terminated will be presumed to be ''engaged in the business'' unless the firearms are disposed of through a sale to another FFL.

Department Response

The Department disagrees that this EIB presumption is contrary to the GCA, or that firearms that were repetitively purchased for resale by licensees can be considered part of a ''personal collection'' if they were not transferred to a personal collection prior to license termination. The GCA at 18 U.S.C. 923(c) clearly contemplates that any business-inventory firearms transferred while the person is a licensee must be held in a personal collection by the licensee for at least one year before the firearms lose their status as business inventory. However, when a licensee does not transfer business inventory firearms to a personal collection prior to license termination, the firearms remain

[209] Per footnote 208, this time period is also supported by 18 U.S.C. 923(c).

[210] In addition to the fact that the term ''variant'' was incorporated into ATF regulations in 2022, *see* 87 FR 24735, this term is well understood by the firearms industry and owners. *See, e.g.,* Alexander Reville, *What are all the AK Variants?, guns.com* (Jan. 5, 2024), *https://www.guns.com/news/what-are-ak-variants* (''[T]he AK has gone through several revisions over the years, creating more modern variants. In fact, what you find yourself calling an AK–47 might just be something different.''); Aaron Basiliere, *The AR–15 Pistol: The Rise of America's Rifle Variant, catoutdoors.com* (Apr. 19, 2022), *https://catoutdoors.com/ar-15-pistol/.*

business inventory.[211] Such firearms were not acquired for a personal collection, and were not transferred to one, and cannot be said to have lost their status as firearms purchased for resale with a predominant intent to profit simply because the licensee is no longer licensed to sell them. Moreover, allowing former licensees to continue to sell business inventory after license termination without background checks and records through which crime guns can be traced clearly undermines the licensing requirements of the GCA. It also places such former licensees at an unfair competitive advantage over current FFLs, who are continuing to sell firearms while following the rules and procedures of the GCA. Indeed, there would be little point revoking a license for willful violations of the GCA by a non-compliant FFL if the former licensee could simply continue to sell firearms without abiding by the requirements under which they purchased the firearms with the predominant intent to profit, and by which the compliant FFLs abide. As to concerns that a former licensee might need to quickly sell its inventory to stave off financial hardship, the former licensee is still free to sell firearms from this inventory on occasion to a licensee. *See* §§ 478.57(b)(1), (c); 478.78(b)(1), (c).

Under the rule, this presumption operates in conjunction with the new liquidation-of-business-inventory provisions in 27 CFR 478.57 (discontinuance of business) and 478.78 (operations by licensee after notice), which allow former licensees to either liquidate remaining business inventory to a licensee within 30 days after their license is terminated (or occasionally to a licensee thereafter), or transfer what is now defined as ''former licensee inventory'' (firearms that were in the business inventory of a licensee at the time of license termination, as distinguished from a ''personal collection'' or other personal firearms) to a responsible person of the former licensee within that period. Under these new provisions, when firearms in a former licensee inventory are transferred to the responsible person, they remain subject to the presumptions in this rule. Such firearms were repetitively purchased for resale and cannot be considered part of a ''personal collection'' as that term is defined in the rule. Firearms in a former licensee inventory differ from those in a personal collection or other personal firearms in that they were purchased repetitively as part of a business inventory with the predominant intent to earn a profit. Persons who continue to sell those business inventory firearms, including those transferred to a responsible person of the former licensee, other than occasionally to an FFL, will be presumed to be engaged in the business without a license, though the presumption may be refuted with reliable evidence to the contrary.

The Department disagrees with a commenter's suggestion to grandfather in former FFLs who went out of business prior to the effective date of the rule and allow them to treat former business inventory as a personal collection. Prior to the rule, former licensees and their responsible persons were not entitled to sell their business inventories after license termination if their predominant intent was to obtain livelihood and pecuniary gain from those sales. This rule merely establishes by regulation the guidance ATF has provided for at least ten years and of which the FFL community has been aware; that is, ATF has long advised former licensees in written notices of revocation, expiration, and surrender not to engage in the business after license termination by selling the business inventory.[212] Continuing to sell business inventory would undermine the licensing requirements of the GCA.

The Department agrees with a commenter's suggestion to incorporate a presumption that a formerly licensed dealer who sells firearms from the former business inventory is engaging in the business unless the firearms are sold to a licensee. An occasional sale to a licensee generally does not show a predominant intent to profit because a licensed dealer is likely to pay less than fair market value to buy a firearm for resale from an unlicensed person given the licensed dealer's intent to profit. Nor does it present the same public safety concerns associated with unlicensed dealing because the purchasing dealer would record the acquisitions and dispositions and run background checks when they resell the firearms. For these reasons, in addition to allowing liquidation of a business inventory to a licensee within 30 days, this presumption has been amended by the final rule to allow former licensees (or a responsible person acting on their behalf) to occasionally sell ''former licensee inventory'' firearms to an active licensee after the initial 30-day liquidation period in accordance with the discontinuation of business provisions at §§ 478.57(b)(2) and 478.78(b)(2) without triggering the EIB presumptions. However, if the former licensee (or responsible person) sells former licensee inventory more frequently than occasionally to a licensee after the initial 30-day liquidation period, they are subject to the presumptions in this rule.

11. EIB Presumption—Selling Business Inventory Transferred to a Personal Collection Prior to License Termination

Comments Received

Commenters disagreed with inclusion of this last presumption in which a former licensee (or responsible person acting on behalf of the former licensee) is presumed to be a dealer if they sell or offer to sell firearms that were transferred to their personal collection prior to license termination, unless those firearms were transferred to the former licensee's personal collection without intent to willfully evade firearms laws and one year has passed from the date of transfer to the personal collection.

At least one commenter stated that prior unlawful transfers do not necessarily taint a future transfer, nor do they demonstrate that a former FFL continues to be engaged in the business. The commenter stated that there would be no possible way for former FFLs, whose licenses were revoked and who may be prohibited or facing practical circumstances that preclude them from being re-licensed in the future, to liquidate their former inventory that was not transferred to a personal collection to ATF's satisfaction. The commenter also noted that section 923(c) applies only to licensees and that none of the provisions apply to an unlicensed person who happened to formerly have held an FFL. In other words, the commenter seemed to question how the Department could require former FFLs or even responsible persons, who are non-FFLs, to abide by certain restrictions upon license revocation, such as disposing of the former business inventory in a particular manner; as former licensees, the commenter argued, they automatically do not have ''business inventory.'' This is particularly true, the commenter stated, as a former licensee

[211] *See* ATF, *Important Notice: Selling Firearms AFTER Revocation, Expiration, or Surrender of an FFL* 1 (June 3, 2021) (''If a former FFL is disposing of business inventory, the fact that no [firearms] purchases are made after the date of license revocation, expiration, or surrender does not immunize him/her from potential violations of 18 U.S.C. 922(a)(l)(A). Instead, business inventory acquired through repetitive purchases while licensed are attributed to the former FFL when evaluating whether subsequent [firearms] sales constitute engaging in the business of dealing in firearms without a license.''); ATF, *Important Notice: Selling Firearms AFTER Revocation, Expiration, or Surrender of an FFL* 1 (Dec. 1, 2014) (same).

[212] *See* footnote 211, *supra.*

whose license was revoked—and who, by law, may never be able to be a licensee again—may be precluded from ever transferring their firearms under any circumstances (other than by giving them away as free gifts).

Furthermore, a commenter stated, section 923(c) adds that ''nothing in this chapter shall be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms, subject only to such restrictions as apply in this chapter to dispositions by a person other than a licensed manufacturer, importer, or dealer.'' The commenter concluded that this means, under the statute, a dealer may acquire a personal collection while they are a dealer or while going out of business and may later dispose of that collection under the same rules as other non-dealers, except as provided in 18 U.S.C. 923(c). The commenter also noted that nothing in either 18 U.S.C. 921(a)(21)(C) or 923 discusses a required intent at the time the firearm is acquired, and ATF provided no citation to support the ''proposition that firearms acquired by an FFL are not (or cannot be) for a 'personal collection.' '' While all can agree that the predominant purpose of the FFL is to earn a profit, the commenter stated the proposed rule ignores the fact that many FFL holders are also firearm collectors or enthusiasts, and that often many of the firearms that are put into the business inventory are for the personal collection of the FFL holder or its responsible persons.

One of the commenters stated that this presumption seems to apply to all firearms transferred to any responsible person of an FFL, even if those guns were transferred to that responsible person via an ATF Form 4473 and a background check was conducted. They stated this presumption overlooks the fact that an FFL may have dozens of responsible persons who may change frequently, and that a former responsible person may have no say in the business dealings once they are gone; in fact, the person may not even know that the business has given up or lost its license. Yet, they said, ATF's presumption now seeks to hold that former responsible person to a burdensome presumption based on their former employer's decision to cease its firearms operations.

The commenter stated that this presumption seems contrary to ATF's existing position that a transfer to a personal collection happens as a matter of law once the license is given up because there is no more business inventory as a result of the firearms business ceasing operations. They cited ATF's National Firearms Act Handbook, ATF E-Publication 5320.8 (Apr. 2009), *https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download* (''NFA Handbook''), as an example of the agency's position; they said that, in section 14.2.2 of the NFA Handbook, ATF stated, ''FFLs licensed as corporations, partnerships, or associations, who have been qualified to deal in NFA firearms and who go out of the NFA business, may lawfully retain their inventory of these firearms . . . as long as the entity does not dissolve but continues to exist under State law.'' Further, as a practical matter, the commenter stated that it is not clear how a company going out of business would store the firearms ''separately from, and not commingled with the business inventory'' to meet the definition of ''personal collection'' when the company no longer has a business inventory due to its going out of business. The rule, they argued, provides no clarity for how former FFLs are to treat their business inventory if the former FFL just allowed firearms to come into their collection after their business ceased but did not meet all of the requirements set out by ATF.

Department Response

The Department disagrees that this EIB presumption is contrary to section 923(c) of the GCA. Contrary to the implicit views of the commenters, an FFL that loses or surrenders its license is not thereby immune from the provisions of the GCA. As provided by section 923(c), for licensees to dispose of firearms from a personal collection, they must be transferred from the business inventory to a personal collection and maintained in that collection for at least one year before they lose their status as business inventory. This rule implements section 923(c) by establishing a presumption that resales or offers for resale of such firearms show that the former licensee is engaging in the business. Thus, licensees who know they will be going out of business by reason of license revocation, denial of renewal, surrender, or expiration cannot simply transfer their business inventory to a ''personal collection'' the day before license termination, and two days later, sell off the entire inventory as liquidation of a ''personal collection'' without background checks or transaction records. Such firearms were not personal firearms acquired for ''study, comparison, exhibition . . . or for a hobby.'' However, consistent with section 923(c) and this rule, once the one-year period has passed, the former licensee will no longer be presumed to be engaged in the business without a new license if they later liquidate all or part of the personal collection, assuming the firearms were received and transferred prior to license termination without any intent to willfully evade the restrictions placed on licensees by the GCA. This includes licensees whose licenses were revoked or denied renewal due to willful violations if they transferred business-inventory firearms to their personal collection or otherwise as personal firearms prior to license termination in accordance with the law.

The Department disagrees with the comment that, under the law, prior unlawful transfers do not ''taint a future transfer.'' The GCA at 18 U.S.C. 923(d)(1)(C) authorizes approval of an application for firearms license if the applicant ''has not willfully violated any of the provisions of this chapter or regulations issued thereunder.'' If ATF previously revoked or denied license renewal for willful violations of the GCA or its implementing regulations, then under the law, that former licensee may be denied a firearms license in the future. *See id.* This provision shows that prior unlawful activity is relevant to future dealing in firearms. Moreover, section 923(c) deems firearms to be part of a business inventory if their transfer to a personal collection ''is made for the purpose of willfully evading the restrictions placed upon licensees.'' This demonstrates that Congress was specifically concerned with licensees evading the requirements of the GCA through improper transfers to a personal collection. Therefore, as to the comment that ATF cannot require former licensees (or a responsible person acting on their behalf) to abide by regulations addressing their former business inventory, the Department believes that it has the authority under the GCA to take enforcement action, such as to deny a license or seize firearms for forfeiture, when a former licensee (or a responsible person acting on their behalf) has willfully violated the rules concerning winding down licensed business operations, 27 CFR 478.57 or 478.78 (as applicable). The former licensee (or a responsible person acting on their behalf) is presumed to be engaged in the business without a license if they thereafter sell off that business inventory (unless they transfer it within 30 days after license termination to a former licensee inventory, and thereafter only occasionally sell a firearm from that inventory to a licensee)—inventory that they did not transfer to a personal collection or

otherwise as a personal firearm prior to license termination and then retain for a year, as required.

Regarding responsible persons while they are acting on behalf of such licensees, the Department does not agree that such persons will be unaware of the termination of the license. As set forth in 18 U.S.C. 923(d)(1)(B) and this rule, responsible persons are only those responsible for the management and policies of the firearms business. They are not sales associates, logistics personnel, engineers, or representatives who might have little control over or understanding of the firearms business operations or license status. Responsible persons acting on behalf of a former licensee must therefore be careful not to sell business inventory of the former licensee without a license. Nonetheless, the final rule makes clear that responsible persons of former licensees who (1) after one year from transfer, sell firearms from their personal collection that were transferred from the former licensee's business inventory before license termination, or (2) occasionally sell firearms to a licensee that were properly transferred to a former licensee inventory after license termination, are not presumed to be engaged in the business due to those sales (assuming they did not acquire or dispose of those firearms to willfully evade the restrictions placed on licensees).

Regarding the comment that this presumption applies to all firearms transferred to any responsible person of a licensee, even if those firearms were transferred to that responsible person on an ATF Form 4473 and a background check was conducted, the Department disagrees that the presumption applies. Responsible persons who properly received a firearm from the then-licensee's business inventory on an ATF Form 4473 for their own personal use, in accordance with 27 CFR 478.124, are not subject to the liquidation presumption because they now own the firearm disposed to them by the business. Subsequent termination of the license has no bearing on the responsible person's prior acquisition of a personal firearm. The liquidation presumption does not apply to former responsible persons who are selling what are now their own personal firearms. Any subsequent sale of those personally owned firearms is evaluated the same way as any other firearm transactions by unlicensed persons.

12. Definition of ''Personal Collection (or Personal Collection of Firearms, or Personal Firearms Collection)''

Comments Received

At least one commenter noted that the proposed definition of personal collection, which excludes any firearm purchased for the purpose of resale with the predominant intent to earn a profit, is problematic because collectors buy guns with the purpose of eventual resale when they locate and can afford guns of higher quality and rarity. This sentiment was echoed by several commenters who asserted that the proposed rule negatively affects collectors and hobbyists by requiring them to become licensed dealers simply because they want to sell or trade some firearms from their personal collection. For instance, one commenter stated that a hobbyist may purchase a firearm in degraded condition, or lacking components. This commenter indicated that they should not be considered engaged in the business of dealing even if they made a reasonable profit simply because they refurbished or upgraded the lawfully acquired firearm and sold it for a personal reason.

Another commenter stated the definition of ''personal collection'' was too vague, leaving room for misinterpretation. The commenter stated that, without more clarity, licensees will have difficulty determining whether their occasional sale for personal collection enhancement falls within that scope, and the definition will create further confusion among licensees and law enforcement officials.

Some commenters stated that the definition of ''personal collection,'' and also the examples of what constitutes a hobby, are too narrow. First, they explained that the hobbies mentioned in the statute and the regulation as examples focus heavily on activities that involve shooting firearms (*e.g.,* hunting, skeet, or target shooting) but do not mention non-shooting hobbies, such as curio collecting. Further, they questioned why ''personal collection'' is limited to non-commercial purposes and pointed out that commercial entities that are not engaged in the business of dealing in firearms frequently use firearms for commercial business purposes. They provided examples, including a hunting outfitter that might have a collection of firearms for use in the commercial hunting enterprise, yet the firearms would still be considered part of a personal collection, or an armored car company having firearms for protection that would be in the company's personal collection and not in a business inventory. These businesses are engaged in a business and have firearms, but they are not engaged in the business of dealing in firearms even if they, for example, buy firearms to upgrade ones used by the truck drivers or replace old ones taken on hunting trips by clients. Similarly, at least one commenter noted that firearms acquired as part of teaching and safety instruction activities would not be covered under the proposed definition of personal collection and therefore, according to the commenter, an owner whose firearm ownership grew because of these activities and who then sold some firearms would not be exempt from being engaged in the business even though that person might not have acquired the firearms for purposes of resale with the predominant intent to earn a profit.

Another commenter stated that the definition of personal collection is so narrowly defined it would exclude transfers of firearms to law enforcement and make ''the somewhat common 'Gun Buy-Back' scheme unlawful.'' The commenter suggested the following scenario: ''An estate may include any number of firearms. The inheritor receives what previously may have been considered a personal collection. Whatever the size or value, the new owner has no association with any 'study, comparison, exhibition, or hobby' and would like to be rid of them. Currently, some new owners transfer their firearms to municipal police at a local 'gun buy-back event.' '' But under the new definition, the commenter added, ''[t]ransferring any number of firearms for even limited pecuniary gain (even directly to law enforcement in exchange for marginally valued gift cards) would be a [F]ederal crime. Byrne grants could no longer fund these activities.''

Other commenters also noted that the proposed definition means that firearms acquired by an individual for any other purpose, such as for self-defense, would not be part of a personal collection. Commenters stated that studies show that about two-thirds of Americans report owning firearms primarily for ''defense'' or ''protection.'' Without including firearms acquired for self-defense as part of a personal collection, commenters believed that ATF is trying to create a third classification of owned firearms, *i.e.,* firearms that are owned by non-licensees but are not acquired for ''study, comparison, exhibition, or for a hobby.'' In essence, commenters argued that the definition is incorrectly limited to firearms that are for noncommercial, recreational enjoyment.

Some commenters, including some gun collectors' associations, argued that the proposed definition erodes statutory protections for nonbusiness conduct by conflating ''sales, exchanges, or purchases of firearms for the enhancement of a personal collection'' and ''for a hobby.'' In other words, the proposed definition includes ''hobby'' within ''personal collection'' rather than it being its own safe harbor. Commenters stated that the ''for a hobby'' provision and the ''for a personal collection'' provision are two separate and distinct items, meaning that a person who purchases or sells firearms occasionally as a collector or for a hobby is not a firearms dealer and not required to be licensed, and that ''personal collection'' and ''hobby'' must have distinct meanings.

Commenters provided suggestions on how the term ''hobby'' could be defined. One commenter suggested the definition be broader to mean ''a group [of] firearms that a person accumulates for any reason, other than firearms currently in the business inventory of a current licensee.'' One commenter, while supporting ATF in considering the ''totality of the circumstances when determining if one is 'engaged in the business,' '' suggested the rule ''could benefit from specific examples that help collectors and hobbyists understand when they may incite the need for licensure and to help confirm the intent of the rule.''

In a similar vein, another commenter in support of the rule provided a suggested clarification of when a gun sale would be part of a hobby. They said the rule parenthetically describes ''hobby'' in the definition of ''personal collection'' as follows: ''(*e.g.,* noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting).'' As a result, the commenter suggested the rule ''could clarify that, to be covered by the exception, a hobbyist may only engage in gun sales to serve an interest in such 'noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting.' '' The same commenter also suggested that the rule ''should clarify that the hobby exception to the 'engaged in the business' definition does not cover an individual whose hobby is gun selling to generate profit.''

A different commenter in support of the rule proposed other clarifying language to create a rebuttable presumption for when a sale or transfer of a firearm is presumed to be part of a hobby. The proposed addition would specify that a person who meets all of the following criteria will be presumed to be selling or transferring firearms as part of a hobby: when the collection (A) has been appraised by an expert who is qualified to evaluate firearms; (B) has been documented by photographs that show each firearm and its serial number; (C) has been catalogued by serial numbers and other identifying features; (D) has been insured by an insurance company that covers firearms; (E) has been displayed in a secure location that is not accessible to unauthorized persons; and (F) has not been used for hunting, sporting, or self-defense purposes. The commenter proposed that this presumption would help infrequent sellers or those who transfer firearms for personal reasons distinguish between regular commercial sales and ''occasional'' or ''hobby'' sales.

The same commenter also suggested adding a similar rebuttable presumption providing that a person is presumed to be selling or transferring firearms for hunting, sporting, or self-defense purposes when the person sells or transfers a firearm that is suitable for hunting certain game animals, participating in certain shooting competitions, or providing protection against certain threats. The commenter also suggested a presumption based on a threshold number of sales per year as an additional way to help distinguish infrequent sellers. This suggested presumption would read, ''a person who sells or transfers five or fewer firearms per calendar year shall be presumed to be selling or transferring firearms occasionally. This presumption may be rebutted by evidence that shows that the person is engaged in the business of dealing in firearms. A person who sells or transfers more than five firearms per calendar year shall be presumed to be engaged in the business of dealing in firearms. This presumption may be rebutted by evidence that shows that the person is not engaged in the business of dealing in firearms.''

Other commenters stated that the portion of the definition of ''personal collection'' stating that licensees can only consider firearms as a part of their personal collection if they are stored separately from and not comingled with business inventory and appropriately tagged as ''not for sale'' would be difficult to operationalize and would make things complicated not only for the business but also for the employees of that business. These commenters stated that the rule does not allow for licensed (or otherwise lawfully permitted) concealed carry activities. For instance, a business could be cited for a violation if an employee carries their personal firearm to work on their person if the employee temporarily puts it in desk drawer or work bench. Additionally, to avoid potential liability, they opined that the employee would have to tag their personal firearm as not for sale. These commenters argued that ATF should either remove the requirement for FFLs to store personal collections separately from business inventory or clearly exclude firearms owned by persons and carried on or about the person for self-defense.

Another commenter stated that the rule inappropriately requires FFLs going out of business to ''dispose'' of the firearms in their business inventory to themselves in order for such firearms to be considered part of their personal collection. They added that such a transfer to a personal collection happens as a matter of law once the license is given up, because there is no more business inventory, because the firearms business has ceased.

Department Response

The Department agrees that collectors who purchase firearms for a personal collection are permitted under the GCA, as amended, to occasionally sell them to enhance their collection or liquidate them without being required to obtain a license. However, firearms that are purchased by collectors or hobbyists for the purpose of resale with the intent to predominantly earn a profit cannot be said to primarily have been accumulated for study, comparison, exhibition, or for a hobby.[213] They are considered commercial firearms or firearms obtained for financial gain, not part of a personal collection. Many of the criticisms of the definition of ''personal collection'' have one misconception in common: that any person who amasses multiple firearms without a license and without criminal purpose has, by definition, a ''personal collection,'' or is a ''collector'' under the statute.[214] But that is not correct. This

[213] *See The Federal Firearms Owner Protection Act: Hearing on S. 914 Before the S. Comm. on the Judiciary,* 98th Cong. 50–51 (1983) (response of Robert E. Powis, Deputy Assistant Secretary, Dep't of the Treasury, to questions submitted by Sen. Hatch) (''The proposed definition states that the term [''with the principal objective of livelihood and profit''] means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and necessary gain, as opposed to other intentions such as improving or liquidating a personal firearms collection. It does not require that the sale or disposition of firearms is, or be intended as, a principal source income or a principal business activity. This provision would make it clear that the licensing requirement does not exclude part-time firearms businesses as well as those firearms collectors or hobbyists who also engage in a firearms dealing business.'').

[214] Under the GCA, 18 U.S.C. 921(a)(13), the term ''collector'' means ''any person who acquires, holds,

Continued

assertion is akin to saying that any person who walks around with change in their pockets for daily use has a coin collection or is a coin collector.

The Department has revised the definition of ''personal collection'' in the final rule to make it clear that firearms a person obtains predominantly for a commercial purpose or for financial gain are not within that definition. This distinguishes such firearms from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, which are included in the definition of ''personal collection,'' but which the person may also intend to increase in value. Nonetheless, the Department agrees that collecting ''curios or relics'' (as defined in 27 CFR 478.11), ''collecting unique firearms to exhibit at gun club events,'' ''historical re-enactment,'' and ''noncommercial firearms safety instruction'' should be added to the specific examples of firearms acquired for a ''personal collection,'' and has added them to this final rule.

The Department disagrees that the definition of ''personal collection'' is so narrowly defined that it would preclude personal firearms that are inherited from being sold under a common government ''gun-buy-back'' program. First, the occasional sale of inherited firearms to a government agency is not conduct that would likely fall within any presumption or otherwise rise to the level of being engaged in the business of dealing in firearms. Second, sales of inherited firearms, whether or not they are part of a personal collection, are generally not made by a person who is devoting time, attention, and labor to dealing in firearms with a predominant intent to profit. To make this clear, the Department has added liquidation transfers or sales of inherited firearms as conduct that does not support a presumption of being engaged in the business. The Department also included reliable evidence that a person was liquidating inherited firearms in the types of evidence that can be used to rebut any presumption. *See* § 478.13(e)(5)(i), (f). For these reasons, a person would not be presumptively engaged in the business if they only sold inherited firearms to a government agency as part of a ''gun-buy-back'' program, regardless of whether the firearms fell within the definition of ''personal collection.''

The Department disagrees with commenters who said that the definition of ''personal collection'' is too vague and acknowledges that the definition does not include firearms owned by commercial entities and used for commercial business purposes. The definition is from standard dictionary definitions, and firearms acquired by commercial entities are not ''personal'' or a ''collection,'' and cannot be said to be part of ''personal collection.'' [215] That, however, does not necessarily mean commercial entities that own firearms are engaged in the business of dealing in firearms under the statute or this rule. When a company, such as an armored car company or hunting outfitter, purchases firearms for a business inventory, their predominant intent is not likely to be earning a profit by repetitively purchasing and reselling firearms. While the operations of each company must be examined on a case-by-case basis to determine, for example, if they are engaged in the business of dealing in firearms on a part-time basis, such companies generally do not need to be licensed.

The Department also disagrees with commenters who indicated that ''personal collection'' is too narrow because it does not include firearms purchased for self-defense. The dictionary definition of ''collection'' means ''an accumulation of objects gathered for study, comparison, or exhibition or as a hobby.'' [216] This common definition is consistent with how the GCA views a ''collection.'' The GCA, 18 U.S.C. 921(a)(13), defines the term ''collector'' as ''any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define.'' The regulations have long further defined the term ''curios or relics'' as ''[f]irearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended . . . as offensive or defensive weapons.'' For this reason, the definition of ''personal collection'' in this rule does not include firearms that have no special interest to the collector or hobbyist other than as weapons for self-defense or defense of others, as has been clarified in the final rule.[217] At the same time, the Department recognizes that 18 U.S.C. 921(a)(21)(C) allows persons to make occasional sales, exchanges, or purchases of firearms ''for a hobby.'' For this reason, the Department has defined the term ''personal collection'' more broadly than just a collection of curios or relics, and has included firearms for ''noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction.''

Moreover, by definition, all firearms are ''weapons'' that will, are designed to, or may readily be converted to expel a projectile, and are therefore instruments of offensive or defensive combat.[218] 18 U.S.C. 921(a)(3)(A). Some firearms that can be used for personal defense may also be collectibles or purchased for a hobby, while others may not. Additionally, including all firearms usable for self-defense in the definition of ''personal collection'' is inconsistent with the statutory scheme

or disposes of firearms as curios or relics.'' A firearm is a ''curio'' or ''relic'' when it: (1) is ''of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons''; and (2) either (a) was manufactured at least 50 years prior to the current date, (b) was certified by a museum curator to be a curio or relic of museum interest, or (c) derives a substantial part of its monetary value from the fact that it is novel, rare, bizarre, or because of its association with some historical figure, period, or event. 27 CFR 478.11.

[215] *See* footnote 88, *supra.*

[216] *Collection,* Merriam-Webster Online Dictionary, *https://www.merriam-webster.com/dictionary/collection* (last visited Mar. 7, 2024); *see also Collection,* Brittanica Online Dictionary, *https://www.britannica.com/dictionary/collection* (last visited Mar. 7, 2024) (''a group of interesting or beautiful objects brought together in order to show or study them or as a hobby'').

[217] *See, e.g., Tyson,* 653 F.3d at 202–03 (''Tyson called himself a firearms 'collector,' which, if true, would also have shielded him from criminal trafficking liability. See 18 U.S.C. 921(a)(21)(C) (stating that one who 'makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms' is not a 'dealer in firearms'). These were lies designed to game the system. After all, none of the firearms purchased by Tyson were antiques and his behavior was decidedly inconsistent with that of a collector.''); *Idarecis,* 164 F.3d 620, 1998 WL 716568, at *3 (unpublished table decision) (''[Defendant] nevertheless argues that the definition of a gun 'collection' in § 921(a)(21)(c) should be read more broadly than the definition of a gun 'collector' in order to encompass the guns [Defendant] owned and sold. We cannot say that the district court's failure to instruct the jury on the collection exemption pursuant to § 921(a)(21)(C) was plain error. There is no case authority to suggest that there is a distinction between the definition of a collector and of a collection in the statute.''); *Palmieri,* 21 F.3d at 1269 (''[A] 'collector' is defined as 'any person who acquires, holds, or disposes of firearms as curios or relics . . . . ' *Id.* sec. 921(a)(13). Section 922(a) requires inquiry into both the defendant's conduct and status. If the conduct constituted engaging in the business of dealing in firearms, then it is illegal unless the defendant is a licensed dealer. On the other hand, sales by a licensed or unlicensed collector from a personal collection in furtherance of a hobby are not illegal. Once the conduct is deemed equivalent to the business of dealing, however, collector status will not shield a defendant from liability under § 922(a).'').

[218] *See Lunde Arms Corp.* v. *Stanford,* 107 F. Supp. 450, 452 (S.D. Cal. 1952), *aff'd,* 211 F.2d 464 (9th Cir. 1954) (''To be a firearm an implement must be a weapon. . . . A weapon is defined in Webster's New International Dictionary, 2nd edition, as: 'An instrument of offensive or defensive combat[.]' '').

of the GCA. The GCA places restrictions on dealing in firearms, but permits individuals to make ''occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby'' or sell all or part of a personal collection. 18 U.S.C. 921(a)(21)(C). Including all firearms usable for self-defense in the definition of ''personal collection'' would allow the limited definitional exclusions for enhancing and liquidating a personal collection to swallow the rule that dealers in firearms must be licensed, because one could nearly always claim that a firearm was purchased or sold to improve or liquidate the firearms one keeps for self-defense. That assertion is not consistent with the common definitions of ''collection'' or ''hobby.'' In addition, it would potentially create similar problems with the GCA provision that places limitations on the disposition of firearms transferred by licensees to their ''personal collection.'' 18 U.S.C. 923(c). It could also create a conflict with the provision of the United States Sentencing Guidelines that allows persons convicted of certain firearms violations in some situations to receive a reduction in their sentencing offense level if they possessed firearms ''solely for lawful sporting purposes or collection.'' [219] U.S.S.G. 2K2.1(b)(2).

Whether a firearm is part of a personal collection or for a hobby depends on the kind and type of firearms,[220] and courts have also looked to the nature and purpose for which they are accumulated.[221] This is not to say individuals or companies cannot buy or sell firearms that are primarily for self-defense or protection of others under this rule. It just means that those other personal firearms are not necessarily part of a ''personal collection,'' and persons who buy or sell such firearms cannot avail themselves of the statutory exception for personal collections in 18 U.S.C. 921(a)(21)(C) unless the firearms are of a type and purpose to qualify as personal collection firearms. To make this point clear, the definition of ''personal collection'' has been revised to state that ''[i]n addition, the term shall not include firearms accumulated primarily for personal protection: *Provided,* that nothing in this definition shall be construed as precluding a person from lawfully acquiring firearms for self-protection or other lawful personal use.'' § 478.11.

The Department has made it explicit in this final rule that firearms acquired for a hobby—including noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting, or historical re-enactments—may be part of a ''personal collection.'' Therefore, reliable evidence of occasional sales of such firearms only to obtain more valuable, desirable, or useful firearms for the person's personal collection would not support a presumption and may be used to rebut any EIB presumption.[222] *See* § 478.13(e)(2), (f). However, as stated previously, the Department will not set a minimum threshold number of firearms to determine when a person is engaged in the business or occasionally selling firearms to enhance a personal collection. While not included in the regulatory text, the plain and ordinary meaning of the term ''occasional'' should be read to mean ''infrequent or irregular occurrence,'' [223] and to exclude firearm sales, exchanges, or purchases that are routinely or regularly made (even on a part-time basis).

The Department agrees with the comment that the phrase ''or for a hobby'' in 18 U.S.C. 921(a)(21)(C) has a meaning independent of the term ''collection.'' The rule therefore incorporates that phrase into the definition of ''personal collection,'' and expressly recognizes that firearms that may not be considered ''collectibles'' are also included in the definition of ''personal collection.'' Under this combined definition, firearms acquired ''for a hobby'' are, for example, those acquired for ''noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction.''

The Department agrees with commenters that the requirement, in the definition of ''personal collection of a licensee,'' that licensees must segregate business inventory from personal firearms in the proposed rule was not

[219] *See United States* v. *Miller,* 547 F.3d 718, 721 (7th Cir. 2008) (''Miller concedes that he kept the shotgun for security against intruders, rather than as part of a collection. It follows that § 2K2.1(b)(2) does not reduce Miller's offense level.''); *United States* v. *Bertling,* 510 F.3d 804, 807, 811 (8th Cir. 2007) (defendant was not entitled to sentencing guidelines calculation reduction for sporting purposes or collection where he possessed a handgun for personal protection); *United States* v. *Halpin,* 139 F.3d 310, 310–11 (2d Cir. 1996) (possession or use of a gun for purposes of personal protection, or protection of others, does not qualify a defendant for a sentence reduction for sporting purposes or collection); *United States* v. *Dudley,* 62 F.3d 1275, 1277 (10th Cir. 1995) (same); *United States* v. *Gresso,* 24 F.3d 879, 881–82 (7th Cir. 1994) (''[T]he Sentencing Commission allows a reduction in *penalty* for certain types of possession; these favored uses [of sporting purposes or collection] do not include self-protection. It is easy to understand why self-protection is not included. Attempting to distinguish as a practical matter between defensive and potentially offensive purposes might be next to impossible.''); *United States* v. *Cousens,* 942 F.2d 800, 803–04 (1st Cir. 1991) (same).

[220] *Cf. United States* v. *Hanson,* 534 F.3d 1315, 1319 (10th Cir. 2008) (''[T]he type of gun here, which is most commonly used for self-protection, weighs against Mr. Hanson's claim that he purchased it entirely for a sporting purpose.''); *United States* v. *Wilder,* 12 F. App'x 297, 299 (6th Cir. 2001) (some of the defendant's firearms were not suited for hunting or target practice, and so the U.S.S.G. 2K2.1(b)(2) sentence reduction did not apply); *United States* v. *Lewitzke,* 176 F.3d 1022, 1028 (7th Cir. 1999) (affirming the district court's finding that defendant's guns were not of the type normally used for target shooting and therefore weighed against granting the reduction); *United States* v. *Hause,* 26 F. App'x 153, 154 (4th Cir. 2001) (same with inexpensive handgun that was not the sort of firearm that would be considered collectible).

[221] *See United States* v. *Fifty-Two Firearms,* 362 F. Supp. 2d 1308, 1314–15 (M.D. Fla. 2005) (''[Defendant] did not merely make occasional sales or exchanges of firearms to enhance his personal collection or for a hobby. Rather, he possessed a significant number of inexpensive shotguns, rifles, and handguns for resale.''); *Hannah*' 2005 WL 1532534, at *3 (rejecting a defendant's argument that purchases and sales of firearms were made for the enhancement of his personal collection or for a hobby where ''[n]one of the firearms had any historical value''); *cf. United States* v. *Baker,* 501 F.3d 627, 629 (6th Cir. 2007) (affirming the district court's decision not to apply sentencing guideline 2K2.1(b)(2) because ''the gun was not 'stored in a manner showing that it was valued or treasured,' nor was it 'polished and treated as one would treat something that was part of a collection' ''); *United States* v. *Denis,* 297 F.3d 25, 33–34 (1st Cir. 2002) (same where a rifle was stored loaded and near cash to protect marijuana sales, rather than kept for sporting purposes as alleged); *United States* v. *Clingan,* 254 F.3d 624, 626 (6th Cir. 2001) (upholding denial of the collection sentence reduction, and noting that ''[n]one of the weapons were antiques or of other special value''); *United States* v. *Miller,* 224 F.3d 247, 251 (3d Cir. 2000) (affirming the district court's denial of the 2K2.1(b)(2) sentence reduction to the defendant's sentence for dealing in firearms without a license under 18 U.S.C. 922(a)(1)(A) because the firearms sold were not ''solely for sporting purposes or collection'' where the defendant was convicted for firearms trafficking); *United States* v. *Zakaria,* 110 F.3d 62, 1997 WL 139856, at *3 (4th Cir. 1997) (unpublished table decision) (''In the present case, there was substantial evidence showing that Zakaria purchased the firearms with the sole intent of selling them to his cousin for illegal export to Pakistan; not for placing them in his private collection.''); *United States* v. *Andrews,* 45 F.3d 428, 1994 WL 717589, at *3 (4th Cir. 1994) (unpublished table decision) (denying sentence reduction, saying ''[a]lthough Andrews possessed a large number of guns that were unloaded and on display in his den, they generally were common shotguns and rifles typically not 'collected' in the narrow sense of being 'collectors' items'''); *United States* v. *Gonzales,* 12 F.3d 298, 301 (1st Cir. 1993) (same with respect to accumulation by a felon of ''a small arsenal of handguns'' allegedly for sporting purposes or collection).

[222] *See, e.g., Approximately 627 Firearms,* 589 F. Supp. 2d at 1135 (''[Claimant] offered credible testimony that he was an avid hunter, and that 'maybe 20 to 25' of the firearms at issue were his personal guns. The firearms which [Claimant] held for personal use are not subject to forfeiture simply because the vast majority of seized firearms were 'involved in' [dealing without a license].'' (citation omitted)).

[223] *See* footnote 123, *supra.*

meant to apply to personal firearms ordinarily carried by the licensee. It was meant to apply only to personal firearms that are stored or displayed on the licensee's business premises, which should not be commingled with business inventory. For this reason, the applicable language in this final rule's definition of ''personal collection of licensee'' has been revised to clarify that it applies only to personal firearms ''when stored or displayed'' on the business premises.

The Department disagrees that transfer of firearms in a business inventory to a personal collection (or otherwise as a personal firearm) by an FFL ''happens as a matter of law'' when the FFL goes out of business. Under the GCA, 18 U.S.C. 923(c), a business inventory of firearms held by a licensee only becomes part of a ''personal collection'' (or otherwise a personal firearm) if the firearms were transferred from the licensee's ''business inventory into such licensee's personal collection'' (or other personal firearms) while the person is licensed, and one year has passed from the time of transfer. Additionally, such disposition or any other acquisition cannot have been made by the licensee for the purpose of willfully evading the restrictions placed on licensees. Under this rule, the licensee must take affirmative steps to accomplish this task.[224] It does not occur automatically by operation of law, and it would frustrate the operation of the GCA for such restrictions to apply to a licensee one day before discontinuance of business but not one day after.

13. Definition of ''Responsible Person''

Comments Received

Some commenters generally agreed with the Department's proposed definition of ''responsible person,'' stating it is important for accountability and oversight. Other commenters stated that the definition of ''responsible person'' needed more clarity because, without it, there may be unintended consequences for individuals engaged in legitimate firearms transactions, further complicating what they referred to as an already complex regulatory landscape. For instance, one commenter, a large FFL with thousands of employees, stated the definition of ''responsible person'' is overbroad and could capture hundreds of employees in its company. As examples, they listed logistics and shipping associates; marketing and sales associates; value stream managers; group and team leads; associates responsible for establishing and disseminating standard work and job instructions as they pertain to firearms manufacture, destruction, transfer, and testing; customer service associates; engineers; and product and project managers involved in firearms design and manufacture. The commenter added that, were all these employees to be considered responsible persons, it would become extremely burdensome to add them to their license as well as timely update the license as people join or leave the company. The commenter, therefore, suggested that the designation of a responsible person should be based on (1) the person's responsibilities, and (2) the licensee's designation of the person as a responsible person.

Another commenter stated that the proposed regulatory definition of ''responsible person'' is contrary to the statute at 18 U.S.C. 923(d)(1)(B), which they said describes an applicant for a license to include, ''in the case of a corporation . . . any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association.'' The commenter stated that the proposed regulatory definition adds words that are not in section 923(d)(1)(B), specifically ''*business practices* of a corporation, partnership, or association *insofar as they pertain to firearms.*'' The commenter argued that ''practice'' is the ''actual performance'' of something or even ''a repeated customary action,'' regardless of whether the action is permitted by or contrary to the organization's management or policies. Despite the Department's explanation that store clerks or cashiers cannot make management or policy decisions with respect to firearms and are unlikely to be considered a ''responsible person,'' the commenter asked whether gun store clerks who direct ''business practices'' each time they perform their job duties could be captured under the regulatory definition. The commenter asserted that the Department was trying to capture more people as responsible persons than Congress intended by adding those emphasized phrases, which the commenter characterized as amorphous and unexplained.

Another commenter also stated the definition is too broad on grounds that the words ''indirectly'' and ''cause the direction'' are unclear terms. The commenter suggested the Department adopt the definition of ''responsible person'' from the explosives context, where it is defined in 18 U.S.C. 841(s) as ''an individual who has the power to direct the management and policies of the applicant pertaining to explosive materials.''

Department Response

The Department disagrees that the definition of ''responsible person'' is overbroad; it merely establishes by regulation the longstanding definition used on ATF Form 7/7CR, Application for Federal Firearms License, based on statutory language in 18 U.S.C. 923(d)(1)(B). The Department declines to fully adopt the definition set forth in the Federal explosives laws at 18 U.S.C. 841(s), because, although it is similar, it does not include persons who indirectly possess the power to direct or cause the direction of the management and policies of an entity, as identified in section 923(d)(1)(B). The Department does not intend, by means of this rule, to change how persons apply the current definition of ''responsible person'' on ATF Form 7/7CR. Nonetheless, the Department agrees with commenters that the term ''responsible person'' would benefit from some additional clarity, as follows. First, to help ensure that persons do not interpret the term ''business practices'' to cover sales associates, logistics personnel, human resources personnel, engineers, and other employees who cannot make management or policy decisions on behalf of the licensee with respect to the firearms business, the Department has removed the term ''business practices'' from the definition of ''responsible person'' in the final rule and intends to remove the term ''business practices'' from ATF Form 7/7CR in the future. Second, to ensure that persons understand the term ''applicant'' in 18 U.S.C. 923(d)(1)(B) to include as ''responsible persons'' sole proprietors and individuals with authority to make management or policy decisions with respect to firearms for companies (including limited liability companies) the definition in this final rule includes sole proprietorships and companies. This will make it clear that all licensees (including sole proprietors and limited liability companies) must

[224] 27 CFR 478.11 (definition of ''personal collection'' requires that for a firearm to be in a ''personal collection,'' the acquisition of the firearm must be recorded in the licensee's acquisition book, recorded as a disposition from the licensee's inventory to a personal collection, maintained and stored separately for one year, and not have been acquired or transferred with the intent to willfully evade the GCA); *cf. Zakaria,* 110 F.3d 62, 1997 WL 139856, at *2 (holding that licensee's sale to his cousin was from his business inventory as a matter of law, saying ''[w]e find that the district court reasonably interpreted 18 U.S.C. 923(c) (1994) and 27 CFR 178.125a (1996) to contain a default provision which provides that the sale of firearms held for less than one year which are not properly recorded pursuant to 27 CFR 178.125a(a), regardless of how acquired, are to be considered to be from the licensee's business inventory.'').

inform ATF of responsible persons who have the authority to make management or policy decisions with respect to firearms, and ensure they undergo a background check. At the same time, the Department does not intend to include in the definition of responsible persons those employees who have no authority to make management or policy decisions that impact the firearms portion of a licensed business.

14. Definition of ''Predominantly Earn a Profit''

a. Overbreadth

Comments Received

Numerous commenters expressed concern over the scope of the term ''predominantly earn a profit.'' Some commenters raised questions regarding ''intent to earn a profit,'' noting that it is only logical for a person selling a good, like a firearm, to want to earn a profit and that it would be ridiculous to expect any private seller to sell a firearm for less than its expected value. For instance, one commenter stated they had a small gun collection of primarily curio and relic firearms and would set a sales price based on their perception of the firearm's market value. This person stated that while they might make some money, their motivation is not to make a profit (noting that their last sale was to pay a medical bill) but they believe they would be required to get an FFL under the rule.

In a similar vein, some commenters opined that they would have to sell their firearms at a loss to avoid generating a ''profit'' and that the proposed rule would prevent an owner from receiving fair market value for their firearms. Similarly, other commenters pointed out how a person might avoid the ''intent'' requirement. One commenter asked if a person who states that their primary goal is not to earn a profit and acts as a nonprofit organization can, as a result, sell as many guns as they like without becoming licensed. Another commenter noted that under IRS rules of ''income,'' an even exchange of goods means there is no income or profit, and that if there is no profit, there is no business activity. This commenter believed that, if the buyer and seller determine the value of the items and make an even exchange, then the buyer should not be captured under the definition of ''predominantly earn a profit.'' Other commenters questioned who would determine who made a ''profit'' where a trade involved no cash, but a person instead traded a gun and a laser sight for a different gun.

Another commenter critiqued the definition, stating that it has been expanded to include any pecuniary gain, which they stated is overbroad. The commenter argued that the definition fails to recognize that all sales have some motive of pecuniary gain; otherwise a seller would give away or destroy their firearm. They stated that not only does the GCA expressly allow non-licensees to make occasional sales, but nothing in the GCA prohibits non-licensees from attempting to derive pecuniary gain from their occasional sales. One organization argued that the definition would apply even when a person is selling a firearm on consignment because, if a person consigned their firearm to an FFL, that person would be reselling with the intent to predominantly earn a profit and therefore would need to be licensed, even though the transaction is facilitated by an FFL.

Department Response

The Department disagrees that the rule's definition of ''predominantly earn a profit'' is overbroad. The definition merely implements the statutory definition ''to predominantly earn a profit'' in 18 U.S.C. 921(a)(22), which defines that term, in relevant part, to mean that ''the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.'' The Department agrees that some persons who sell firearms do not have the predominant intent to profit through repetitive purchase and resale even if they do intend to obtain pecuniary gain from firearms sales (*e.g.,* where the intent to obtain such gain is a secondary motive). However, even if a person has a predominant intent to earn a profit, it does not automatically follow that they are always engaged in the business. A predominant intent to profit through repetitive resale of firearms is only one element of being engaged in the business.

Under the BSCA, a person's intended use for the income they receive from the sale or disposition of firearms is not relevant to the question of whether they intended to predominantly obtain pecuniary gain. If a person must sell their previously acquired firearms to generate income for subsistence, such as to pay medical or tuition bills, they are still subject to the same considerations as persons who intend to sell their firearms to go on a vacation, increase their savings, or buy a sports car. If persons repetitively resell firearms and actually obtain pecuniary gain, whether or not it was for support or subsistence, that gain is evidence demonstrating the intent element of being engaged in the business. However, the Department emphasizes that a single or isolated sale of firearms that generates pecuniary gain would not alone be sufficient to qualify as being engaged in the business without additional conduct indicative of firearms dealing. For example, a person who bought a firearm 40 years ago and now sells it for a substantial profit to augment income during retirement is not engaged in the business because the person's intent was not to earn that pecuniary gain through repetitive purchases and resales of firearms.

With regard to the comment about nonprofit organizations, they can also have the predominant intent to earn a profit from the sale or disposition of firearms. They just do not distribute their profits to private owners (although their employees can receive compensation).[225] In response to commenters who questioned whether a like-kind exchange would result in a profit, or whether the IRS would consider it ''profit,'' the Department reiterates that the relevant standard is not whether an actual profit is earned under the definition of ''engaged in the business.'' The standard is whether the person who exchanged the firearms for money, goods, or services had the predominant intent to earn a profit—meaning to obtain pecuniary gain—through repetitive firearms purchases and resales.

The Department disagrees with some commenters who said that a person always has a *predominant* intent to earn a profit when selling or disposing of a firearm. For example, a person may wish to get rid of unsuitable or damaged firearms quickly, so the person intends to sell them at a loss for less than fair market value. In that case, there is only an intent to minimize a pecuniary loss, not obtain a pecuniary gain. Likewise, a person who only transfers firearms: as bona fide gifts; occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection; occasionally to a licensee or to a family member for lawful purposes; to liquidate (without restocking) all or part of a personal collection; or to liquidate firearms that are inherited, or

[225] *See Myths About Nonprofits,* Nat'l Council of Nonprofits, *https://www.councilofnonprofits.org/about-americas-nonprofits/myths-about-nonprofits* (last visited Mar. 7, 2024) (''The term 'nonprofit' is a bit of a misnomer. Nonprofits can make a profit (and should try to have some level of positive revenue to build a reserve fund to ensure sustainability.) The key difference between nonprofits and for-profits is that a nonprofit organization cannot distribute its profits to any private individual (although nonprofits may pay reasonable compensation to those providing services).'').

pursuant to court order, does not usually have a predominant intent to earn a profit from those activities. This is true even if the seller has a secondary motive to obtain pecuniary gain from those sales. To make this clear, the final rule now expressly states that any such evidence may be used to rebut the presumptions. *See* § 478.13(e), (f).

The Department agrees with commenters who suggested that a person who consigns firearms for sale (consignor) may have a predominant intent to earn a profit from the sale of the firearms; however, that does not end the inquiry because that person is often not devoting time, attention, and labor to dealing in firearms as a regular course of trade or business. The person engaged in the business is the seller who accepts the firearms on consignment (consignee), is paid to take the firearms into a business inventory for resale, and determines the manner in which to market and resell them on the consignor's behalf.[226] Like consignment-type auctioneers, firearms consignment businesses must be licensed because they are devoting time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.

b. Government Proof of Intent To Profit Through Repetitive Purchase and Resale

Comments Received

Other commenters raised concerns that the proposed definition of ''predominantly earn a profit'' does not require a person to have actually obtained pecuniary gain. Some congressional commenters stated, ''under the proposed rule, the ATF would require someone to prove he or she is not a firearms dealer in instances where no firearms are actually exchanged or sold'' and opined that that situation was not consistent with the statute.

Some commenters stated that even though the proposed rule incorporates to ''predominantly earn a profit'' from the BSCA, the proposed definition includes language that directly contradicts the statute and legislative history of the GCA. They stated that Congress made clear that it is not necessary for the Government to prove profit in cases involving the repetitive purchase and disposition of firearms for criminal purposes or terrorism, meaning that it is necessary for the Government to prove profit in all other cases. Thus, they argued that the added phrase ''[f]or purposes of this definition, a person may have the intent to profit even if the person does not actually obtain pecuniary gain from the sale or disposition of firearms'' and explanation from ATF that one can be a dealer without ever making a purchase or sale are both contrary to the statute. Commenters stated that ATF may not relieve itself of the congressionally imposed burden to prove profit. Another commenter pointed out that eliminating the need for profit is in tension with the concept of being in a business; if a business does not make a profit, then they cease to exist.

Moreover, at least one commenter disagreed with all the cases that were cited in support of the claim that the Government does not need to prove that the defendant actually profited. The commenter claimed that three of the cases cited—*United States* v. *Wilmoth,* 636 F.2d 123 (5th Cir. Unit A Feb. 1981), *United States* v. *Mastro,* 570 F. Supp. 1388 (E.D. Pa. 1983), and *United States* v. *Shirling,* 572 F.2d 532 (5th Cir. 1978)—were decided before there was any statutory mention of ''profit'' as it relates to dealing. They noted that two other cases—*Focia,* 869 F.3d 1269 and *United States* v. *Allah,* 130 F.3d 33 (2d Cir. 1997)—were not on point because in both cases the Government had shown that defendants profited.

Department Response

The Department disagrees with commenters who said that the GCA requires that a person actually obtain pecuniary gain. The only ''profit'' element in the GCA—both before and after the BSCA was enacted—is the intent to profit through the repetitive purchase and resale of firearms. This is because the statutory terms ''to predominantly earn a profit'' through the repetitive purchase and resale of firearms in 18 U.S.C. 921(a)(22), and ''with the principal objective of livelihood and profit'' in 18 U.S.C. 921(a)(23), are both defined to mean ''the intent underlying the sale or disposition of firearms is predominantly one of obtaining . . . pecuniary gain.'' One does not need to realize a profit to have the intent to profit.

The Department does not agree with commenters who argued that the proviso concerning the disposition of firearms for criminal purposes demonstrates otherwise. The statement that ''proof of profit shall not be required'' in that proviso requires neither proof of profit nor proof of intent to profit for persons who engage in the regular or repetitive purchases and dispositions of firearms for criminal purposes or terrorism. *See United States* v. *Fifty-Two Firearms,* 362 F. Supp. 2d 1308, 1324 (M.D. Fla.), *adopted by* 362 F. Supp. 2d 1323 (M.D. Fla. 2005) (''[P]roof of profit motive is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.'' (citing 18 U.S.C. 922(a)(22) and Eleventh Circuit Pattern Jury Instruction No. 34.1). Reading that proviso to, by negative implication, require proof of profit—and intent to profit—with respect to other forms of engaging in the business would be contrary to the plain text of the definition of ''to predominantly earn a profit,'' which refers to the ''intent underlying the sale or disposition of firearms.'' 18 U.S.C. 921(a)(22); *see also id.* 921(a)(23) (definition of ''with the principal objective of livelihood and profit,'' similar). It would also be contrary to decades of Federal case law on 18 U.S.C. 922(a)(1).[227]

Some commenters asserted that, because some of the criminal cases cited in the proposed rule referenced the fact that the defendant actually profited from firearms sales, the cases support their conclusion that actual profit must be proven in an engaged in the business case. The Department disagrees. Of course, proof of actual profit may be presented in a case, but that does not mean it is required. Proof of actual profit is merely cited by courts in cases, such as *Focia,* 869 F.3d at 1282 (defendant ''immediately turned around and sold them at a steep profit''), and *Allah,* 130 F.3d at 44 (defendant ''had several people bring him 'dough' from selling guns for him 'in the streets' ''), as evidence that supported findings that the defendant had the requisite intent to profit. But evidence of actual profit is not necessary where the totality of the facts otherwise demonstrates the predominant intent to profit. For example, if the defendant admitted to an undercover officer that he wanted ''to make a whole lot of money'' from reselling the firearms to the officer, that evidence would likely be sufficient to prove a predominant intent to earn a profit from those sales. Moreover, where a person engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism, no proof of profit, including, as explained above, the intent to profit, is required at all in an engaged in the business case. *See* 18 U.S.C. 921(a)(22).

[226] *See, e.g., United States* v. *Strunk,* 551 F. App'x 245, 246 (5th Cir. 2014) (Defendant ''without being licensed, sold firearms entrusted to him by others for the purpose of sale. Such conduct is unquestionably prohibited by the legislation's text.'').

[227] *See* footnote 96, *supra.*

c. Suggestions on Meaning of Profit

Comments Received

Numerous commenters stated that the definition of ''predominantly earn a profit'' with its presumptions will capture practically all firearms owners who wish to sell their personal or inherited firearms because the value of firearms typically increases over time and will thus always result in a profit. Several commenters stated that profit should be defined to avoid misinterpretation while others asked how profit should be calculated or made suggestions. For example, one commenter asked if the labor to customize a firearm or any additional parts that are added should be included in a calculation of profit.

Similarly, numerous commenters pointed out that determining profit does not account for inflation and indicated that it should. Commenters provided examples of how they would not earn a profit, or would make a minimal profit, from the sale of a firearm due to inflation. For example, one commenter posited that if a person purchased a firearm for $600 ten years ago and sold it in the present for $750, this could be viewed as making a profit, but it would actually be a loss in real terms because the purchasing power of $600 was greater ten years ago than the purchasing power of $750 is today due to inflation. At least one commenter asserted that ATF's proposed definition of ''profit'' is problematic under the U.S. tax code, as inflation is not allowed to be accounted for in the ATF definition, even though it is an adopted measure of the price of all goods.

Gun collectors' associations said the definition does not take into account any other expense or time value of money associated with the sale of the firearm, which is a part of any normal calculation of ''profit'' and hence is beyond proper basis of an interpretive regulation. Additionally, they stated that the costs gun collectors incur to attend events should be factored into any reasonable definition of ''profit.''

Similarly, to account for the change in time in the fair market value of goods, another commenter proposed adding language providing that ''[i]f a private individual sells a firearm that they have purchased for more than the original purchase price, they are not considered to be selling the firearm for the purpose of primarily making a profit if the fair market price of the firearm has increased since the original date of purchase.''

Department Response

The Department agrees that a person who liquidates inherited firearms from a personal collection at fair market value, absent additional circumstances indicating otherwise, typically does not have a predominant intent to profit from those sales. While the person may have an intent to receive pecuniary gain when they sell these firearms and may or may not have a predominant intent to profit, the person would not be ''engaged in the business'' because liquidating this one set of inherited firearms does not constitute dealing as a regular course of trade or business. Nevertheless, because the Department believes that persons in such a scenario typically do not have a predominant intent to profit, the Department has incorporated, as conduct that does not support a presumption, and as rebuttal evidence, a person who only ''liquidate[s] firearms [t]hat are inherited.'' § 478.13(e)(5)(i), (f).

In response to commenters who said that any profit should account for inflation, or expenses incurred, again, the statute does not require proof of actual profit. The statute's and rule's focus is on the person's predominant intent to profit, not on whether a person actually profits. Because the focus is on a person's intent, it makes no difference whether the costs or inflation mentioned by the commenters are included in the sales price or in assessing actual profit.

The Department disagrees with the commenter who suggested that a private individual automatically does not have an intent to profit if they sell a firearm that was purchased for more than the original purchase price if the fair market price of the firearm has increased since the original date of purchase. The Department declines to make this a blanket exception or rebuttal evidence to the current presumptions because the fair market value of the firearm may have increased substantially more than the original purchase price. The details of any particular situation may vary, and those facts may impact the determination of intent. Based on these facts, the seller may or may not have had a predominant intent to earn a profit from that sale.

d. Other Suggestions Related to Definition of ''Predominantly Earn a Profit''

Comments Received

Many commenters proposed various changes to the definition of the term ''predominantly earn a profit'' that they felt would narrow the scope of when a person has intent to predominantly earn a profit such that they are ''engaged in the business'' of dealing in firearms. Proposed exceptions included excluding when a person earns less than $5,000 per year or when they sell fewer than ten guns a month. One commenter suggested that certain scenarios be excluded because while there may be monetary gain there is no desire to increase the collection or buy firearms. These scenarios include liquidation at fair market value of inherited firearms or firearms passed down through a family member, liquidation of firearms at fair market value due to financial hardship or disability, and liquidation of firearms at fair market value due to loss of interest or change in a hobby.

Similarly, one commenter pointed out that ''predominantly'' under 26 U.S.C. 118(c)(3) means ''80 percent or more'' and argued that ATF's proposed definition should be consistent with this statutory provision in the Internal Revenue Code. Therefore, the commenter suggested that ATF's definition of dealer should be amended to someone who engages in selling or disposing of firearms ''where the intent is to obtain a pecuniary gain in 80 or more of the total transactions involving firearms as defined by'' 18 U.S.C. 921.

Another commenter suggested that the term be revised to be clear that a collector can liquidate all or part of their collection by having a table at a gun show without requiring them to become a Type 01 FFL. Still another commenter suggested that the text should make clear the sources or methods used to acquire the firearm that is subsequently resold to ''predominantly earn a profit.''

Department Response

The Department disagrees that the scope of the PEP presumptions should be limited to when a person earns less than $5,000 per year from selling firearms, or when they sell fewer than ten guns per month. The amount of money a person makes when intending to earn a profit through repetitively purchasing and reselling firearms may be relevant in determining whether a person is engaged in the business. The fact that a person earns a large amount of profit from repetitively reselling firearms may be evidence that a person had a predominant intent to profit from those sales. However, there is no statutory requirement that a person make a certain amount of money (or any money at all) to have a predominant intent to profit. Persons who operate a part-time firearms business that earns less than $5,000 per year, or even a firearms business that loses money due to poor salesmanship or lack of demand, would still be engaged in the business

if they devote time, attention, and labor to dealing with the predominant intent to profit through repetitive purchases and resales of firearms. As stated previously, it is the seller's intent to predominantly earn a profit that determines whether a person needs a license, not the number of sales or amount of profit.

The Department disagrees that the sale of firearms at fair market value due to financial hardship or disability is evidence sufficient to exclude a person from being considered engaged in the business, or to rebut the presumptions. The statute's definition of ''engaged in the business'' does not create an exception for people who intend to engage in firearms dealing to earn income for support or subsistence; the definition as amended by the BSCA focuses only on a person's devotion of time, attention, and labor to that business and intent to earn a profit, not the uses to which they put any resulting profit or income. As a result, providing evidence that a person is engaging in the business of firearms dealing for livelihood reasons does not rebut any of the elements that constitute being engaged in the business.

As to the suggestion that the term ''predominantly'' be defined consistently with 26 U.S.C. 118(c)(3) as ''80 percent or more,'' such that 80 percent of the transactions must be for pecuniary gain, the Department declines to do this. First, 26 U.S.C. 118(c)(3) is a definition of ''predominantly'' that is used to determine whether a regulated public utility that provides water or sewage disposal services may exclude certain amounts expended on those services from their gross income. This calculation has no connection or similarity to intent, let alone the context of firearms sales. Second, the GCA contains no such limitation. A person may have the predominant intent to profit from the sale or offer to sell a single firearm, even if the person has no such intent with respect to other firearms being sold.[228]

In response to a commenter who suggested that the regulations be changed to make it clear that a collector can liquidate all or part of their collection by having a table at a gun show without a license, the Department has revised the final rule to state that reliable evidence that the person resells firearms only occasionally to obtain more valuable, desirable, or useful firearms for their personal collection, or to liquidate a personal collection, does not support a presumption and can be used to rebut any presumption. § 478.13(e)(2) and (4), (f).

15. Presumptions That a Person Intends to Predominantly Earn a Profit

Comments Received

Commenters stated that none of the individual presumptions that a person has the intent to predominantly earn a profit are supported by the Federal statute and raised concerns that they generally penalize entirely innocent and natural conduct of non-licensee sellers. Commenters stated these criteria are overbroad and fail to differentiate between genuine business activity and casual or incidental actions related to firearms. They stated that it is unfair for ATF to presume an intent to profit in scenarios where no such intent exists and that these presumptions make it effectively impossible for an unlicensed person to sell their firearm without running afoul of the rule. Indeed, one commenter stated that all avenues to make a personal sale were cut off and that he ''cannot fathom how [he is] supposed to sell ANY firearm without being presumed to be engaged in the business under these rules. This rule says that [he] can sell part of [his] collection, but [he] cannot see a way to do so without being presumed to be engaged in the business under this rule.'' At least one commenter stated that all the presumptions ignore the statutory requirement that the intent ''underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain.''

Similarly, one commenter noted that determining when someone acts to ''predominantly earn a profit'' requires not determining that a profit was made, but rather, the underlying motivating factor for that person's actions. The commenter disagreed that any of the presumptions listed are indicators of such motivation; rather, they said, these presumptions reflect efficient and timely ways to sell a firearm and do not speak at all to the person's motivation when buying the firearm initially. For instance, they said, a person who wants to sell their car will take all actions possible to get the best price for it, such as advertising, providing maintenance records, renting space to list it online or a visible place to park it. A person wanting to sell their firearm would take similar steps, but these actions that trigger the presumptions do not shed light on the motivation for the purchase or transaction.

A few other commenters were concerned about the fact that they have owned firearms for a long time and are reaching an advanced age at which they will need to sell them. One such commenter stated, ''The idea of a profit is to sell something for more than it was purchased for. In my collection I have firearms that were obtained over 40 years ago. Inflation has raised their value so that any sale will make a profit. This means I am a dealer.'' Another explained that he is not a collector per se, but is a firearms competitor who thus has a number of firearms that ''one day I must dispose of due to my advancing age. This would eliminate me from making private sales from my own holdings. The sale of which would generate a 'profit' since all were bought years ago when prices were much lower. The only choice this would leave me would be to sell on concession through a dealer . . . if I could find one willing to take the goods.''

Commenters stated that many businesses have a large inventory of firearms for business purposes but are not licensed; these include armored car services, security companies, farmers, ranchers, and commercial hunting operations. If ''predominantly earn a profit'' is separate from ''engaged in the business'' as a set of presumptions, the commenters added, then a security company keeping track of its firearm inventory and the cost of obtaining those firearms for tax or other reasons would be captured under any of the presumptions listed under ''predominantly earn a profit.'' Or a hunting outfitter with a large inventory of firearms for client use would easily be captured under a ''predominately-earn-a-profit'' presumption if they have security services like monitored alarms or cameras. The commenters concluded that the rule might therefore have the unintended consequence of reducing public safety if some people avoid certain security measures, such as monitored alarms, to avoid being presumed to be engaged in the business because they qualified for one of the ''predominantly earn a profit'' presumptions.

One comment noted that ''while this set of presumptions is separate from the presumptions that establish that a person meets the definition of 'engaged in the business,' evidence of the conduct described in this set of presumptions can serve to rebut evidence of conduct that, under paragraph (c)(4) (now § 478.13(e)) of the Proposed Rule's definition of 'engaged

[228] The term ''predominant'' is commonly defined as ''more noticeable or important, or larger in number, than others.'' *Predominant,* Cambridge Online Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/predominant* (last visited Mar. 17, 2024); *see also Predominant,* Oxford English Dictionary, *https://www.oed.com/dictionary/predominant_adj?tab=meaning_and_use#28860543* (last visited Mar. 17, 2024) (''Having ascendancy, supremacy, or prevailing influence over others; superior, predominating.'').

in the business,' is presumed not to be engaged in the business.'' They suggested that ATF further clarify this.

Department Response

The Department disagrees that the presumptions that separately address the BSCA's new intent element—''to predominantly earn a profit'' through the repetitive purchase and resale of firearms—penalize innocent and natural conduct of sellers who are not engaged in the business. Nothing in this rule creates any new penalties. The PEP presumptions serve only to establish the intent element. Even when that element is satisfied, a person would not be engaged in the business unless the other statutory requirements are present, including the requirements that the person ''devote[ ] time, attention, and labor to dealing in firearms as a regular course of trade or business'' and that the person is engaging, or intends to engage, in ''the repetitive purchase and resale of firearms.'' 18 U.S.C. 921(a)(21)(C).

As the preamble and regulatory text explain, the EIB presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. *See* § 478.13(g). There are many other fact patterns that could support a finding that a person is engaged in the business requiring a license. The presumptions are tools that assist persons, including firearms sellers, investigators, and fact finders, to understand a set of common situations that have been found over the course of decades to indicate that a person is engaged in the business. Similarly, these PEP presumptions are not the only fact patterns that could support a finding that a person has a predominant intent to earn a profit, but they are tools to assist in assessing the element of intent. At the same time, there are other fact patterns, such as where a person advertises a valuable collectible firearm for sale from a personal collection that could generate a substantial profit, that would not require a license. The fact that the collector, or even a company, intends to earn a profit from the sale or disposition of a firearm is not, by itself, dispositive as to whether that person is engaged in the business of dealing in firearms requiring a license. These presumptions apply only to an individual's or entity's predominant motivation in selling the firearm, and like other presumptions, they may be refuted with reliable evidence to the contrary.

The Department disagrees that these presumptions do not address a person's motivation. First, as stated previously, actual profit is not a requirement of the statute—it is only the predominant intent to earn a profit through the repetitive purchase and resale of firearms that is required. Indeed, a person may repeatedly advertise and display firearms for sale, and therefore demonstrate a predominant intent to earn a profit from repeatedly reselling the firearms purchased, but never actually find a buyer. Second, as stated previously, intent appropriately may be inferred from a person's words or conduct demonstrating such intent.[229] The motivation to predominantly obtain pecuniary gain from the repetitive sale or disposition of firearms can be demonstrated when a person takes certain preliminary steps to earn a profit, such as those reflected in the PEP presumptions. Generally, persons who do not intend to profit from firearms sales are not going to expend time, attention, labor, and money to repetitively advertise, secure display space, maintain profit documentation, hire security, set up business accounts, or apply for business licenses. And even if they do expend such time, attention, and labor without a predominant intent to earn a profit, the person can bring forward reliable rebuttal evidence to refute the presumed intent.

The Department disagrees with the commenter who stated that a collector who holds firearms in a personal collection for many years would always show a profit due to inflation when they are sold, and would therefore automatically be considered a dealer. As stated previously, a showing of actual profit is not dispositive as to whether a person is engaged in the business. Rather, it is the predominant intent of obtaining pecuniary gain from the repetitive purchase and resale or disposition of firearms that matters. *See* 18 U.S.C. 921(a)(22). However, a person who is occasionally selling firearms from a personal collection to enhance it, or who liquidates it, typically does not have that intent, which is why this final rule states that reliable evidence of those activities and intent does not support a presumption and may be used to rebut any presumption. *See* § 478.13(e), (f).

The Department agrees that security companies, farmers, ranchers, and hunting outfitters that do not purchase firearms primarily for resale would be unlikely to have a predominant intent to earn a profit from liquidating their businesses' firearms, particularly since these firearms have likely lost their value over time due to constant use and handling. Non-firearms-dealing businesses may simply want to quickly sell them in bulk to a licensee for less than fair market value, in order to purchase new firearms. However, even if such businesses were to resell their firearms with a predominant intent to profit, that would not automatically mean that they were engaged in the business of dealing in firearms. The intent to profit is only one element of being engaged in the business; the other elements of dealing would also have to be established. Therefore, if these businesses engaged in conduct that falls under one of the PEP presumptions and are presumed to have a predominant intent to profit, that does not mean they are also necessarily presumed to be engaged in the business of dealing in firearms.

The PEP presumption on recordkeeping is about keeping records to document, track, or calculate profits and losses from firearms purchases and resales, not about general recordkeeping of a firearms inventory or merely the cost of obtaining the firearms. Nonetheless, to avoid confusion as to when it applies, this PEP presumption has been revised to read, ''[m]akes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale.'' § 478.13(d)(2)(iii). Therefore, as revised, the presumption is clarified to show that it does not include persons who merely keep track of their firearms or what they spend on them.

The Department does agree that the PEP presumption on securing a business security service to protect inventory is somewhat overbroad as drafted in the NPRM, and has therefore limited it in this final rule to maintaining security for both firearms assets and repetitive firearms transactions. *See* § 478.13(d)(2)(v). While some businesses may purchase firearms, and eventually liquidate them, such activity may be for reasons completely unrelated to any profit motive for the firearms transactions. In contrast, if they secure business security services to protect both their firearms assets and transactions, they are presumed to have a predominant intent to profit from those transactions. The focus of the licensing provisions in the GCA is on firearms transactions, not merely storing or maintaining firearms as assets. So, for example, if a business or other person merely purchases firearms for their own use, but not to enter into transactions involving those firearms, they would not fall under this presumption because it is unlikely they would hire business security to protect firearms transactions.

The Department declines to adopt a commenter's suggestion that evidence of

[229] *See* footnote 186, *supra.*

conduct identified in the PEP presumptions be used to ''rebut'' conduct not presumed to be engaged in the business (listed in paragraph (c)(4) of the NPRM's definition of engaged in the business, and now in § 478.13(e)). Section 478.13(e) is not a list of rebuttable presumptions. Rather, it is a nonexhaustive list of conduct that does not support a presumption of engaging in the business. As such, reliable evidence that a person is or was engaging only in such conduct can be used to rebut any presumption. In addition, the rule has been revised to state that the examples of rebuttal evidence set forth in the rule are not an exhaustive list of evidence a person may present to rebut the presumptions. *See* § 478.13(g).

16. PEP Presumption—Promotion of a Firearms Business

Comments Received

Several commenters disagreed with the inclusion of ''[a]dvertises, markets, or otherwise promotes a firearms business (*e.g.,* advertises or posts firearms for sale, including on any website, establishes a website for offering their firearms for sale, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally'' as a presumption in determining whether a person has the intent to predominantly earn a profit.

First, commenters noted that Congress explicitly rejected limitations on the private transfers of firearms pursuant to classified ads and gun shows, implying that ATF cannot now include in its rule a presumption that advertising or promoting a firearms business shows predominant intent to profit. Additionally, commenters stated that such advertisements in a classified advertisement hardly qualify someone as having such intent and that this is criminalizing protected behavior. For instance, the commenters said, if a person is liquidating a personally owned NFA weapon because of a move to a State where possession of the item would be unlawful, they believed that the presumption would capture such a person who posts an advertisement on the internet to sell their NFA weapon even if they lose money on the sale. In fact, stated one commenter, the presumption is so broad it could apply to posting even a single firearm for sale on a website, which is a common occurrence where the seller did not purchase the firearm with intent to profit and is most likely losing money on the sale. The commenter stated that there is ''no indicia that a seller who posts on a website is doing so for pecuniary gain'' so ''the presumption lacks any connection to the statutory definition of 'predominantly earn a profit.' ''

Similarly, a couple of gun collectors' associations stated this first presumption essentially limits all sales to word of mouth if a seller does not want to be captured under the presumption. A third association added, ''[m]ost who collect firearms or engage in the sale of firearms for a hobby are willing to buy or willing to sell, but this in and of itself [does] not establish by a preponderance that they are doing so to 'predominately earn a profit'. . . . The changes in the law did not provide that a person could not advertise a firearm for sale, put a price tag on it, place it for sale on the internet, or rent a table at a gun show.'' In another commenter's view, the presumptions also preclude word-of-mouth sales. They stated that the definition of ''engaged in the business'' does not require that a firearm actually be sold, so long as the person holds themselves out as a dealer. So, they added, ''[i]n other words, if I *converse* with another person and *offer* to sell a personal firearm or represent to that person that I have a willingness, and ability, to purchase and/or sell other personal firearms [which occurs regularly if one is a collector], I am a Dealer. I would ask how, exactly, a person who wanted to actively seek out and add firearms to his/her collection would do so if you are not allowed to actually converse about it or negotiate with the owner of that firearm? . . . You can't 'spread the word' among other people as that activity also presumes you are a dealer.'' One company raised a concern over whether certain brand ambassadors that promote company products, or associates that go to trade shows who promote their company, would now be presumed to be engaged in the business of dealing in firearms.

In contrast, another commenter made a suggestion to strengthen this presumption with regard to online sales advertising because they found, through their own research, that the number of online sales advertisements for firearms through sites such as Armslist was overwhelmingly listed by unlicensed sellers rather than licensed dealers. They suggested that ATF should also consider stating that any person who engages in online conduct that falls within this presumption on more than one discrete occasion will qualify for a rebuttable presumption that the person is ''engaged in the business'' of firearms dealing. ''Put differently,'' they explained, ''the [I]nternet is the epicenter of the unregulated firearm sales market—and repeatedly advertising for sales online should be presumptively considered to be holding oneself out as a dealer. Plainly describing such an additional rebuttable presumption . . . would make it much clearer that a person's second or subsequent use of online advertising, marketing, or posting of firearms for sale puts the burden on the seller to provide rebuttal evidence demonstrating that their multiple online advertisements are not engaging in the business of firearms dealing.''

Department Response

The Department disagrees that the presumption that a person demonstrates a predominant intent to profit from selling firearms if the person ''advertises, markets, or otherwise promotes a firearms business'' is unfounded. Advertising or promoting a firearms business has long been recognized as a primary way of increasing sales and profits [230] and nothing in this rule prohibits or criminalizes isolated private transfers of firearms using classified advertisements and at gun shows. The presumption is narrowly tailored based on the Department's regulatory and enforcement experience, court decisions with similar fact patterns, and the investigations and prosecutions it has brought over the years. Because promoting a firearms business requires investing time and money, persons typically do not engage in such activities without intending to profit from resulting sales and recoup potential advertising costs in the process. As a result, advertising or promoting a firearms business is activity that indicates a person has a predominant intent to profit from firearms sales. This presumption does not prevent or hinder individuals from advertising to promote occasional private transactions, as intent to

[230] *See, e.g., The Importance of Marketing for Your Firearms Company,* The Coutts Agency, *https://couttsagency.com/digital-marketing-for-firearms-companies* (last visited Mar. 18, 2024) (''Whether you're an established name in the firearms manufacturing sector or you're a new firearm company looking to find your niche on the national level, marketing is how you'll achieve your goals.''); Joshua Claflin, *Maximizing ROI With Effective Firearms Marketing Tactics (The Complete Guide),* Garrison Everest (Nov. 24, 2023), *https://www.garrisoneverest.com/firearms-marketing/maximizing-roi-with-effective-firearms-marketing-tactics-complete-guide* (''Marketing serves as the bridge between firearms businesses and their target audience. It's not just about promoting products; rather, it's about building firearm brand recognition, establishing trust, and nurturing long-term customer relationships.'').

predominantly earn a profit is just one element of being engaged in the business.

Nonetheless, the Department acknowledges commenters' worries that an advertisement for an isolated firearms sale might cause them to be presumed to have a predominant intent to profit through the repetitive purchase and resale of firearms. Therefore, to increase the likelihood that promoting or advertising a firearms business as covered by this presumption relates to persons who predominantly intend to earn pecuniary gain from the sale of firearms, the presumption has been revised to add the words ''repetitively or continuously'' before ''advertises, markets, or otherwise promotes a firearms business.'' § 478.13(d)(2)(i). Thus, persons who do not repetitively or continuously advertise or otherwise promote a firearms business are excluded from the presumption that they predominantly intend to profit from repetitive sales of firearms. Of course, like the other presumptions, this one may be rebutted with reliable evidence to the contrary.

With regard to employees of licensees who promote a firearms business, such individuals do not need to be licensed because businesses ''carry out operations through their employees,'' and no transfer or disposition of firearms occurs when they are temporarily assigned firearms for business purposes. ATF Ruling 2010–1, *Temporary Assignment of a Firearm by an FFL to an Unlicensed Employee,* at 2 (May 20, 2010), *https://www.atf.gov/firearms/docs/ruling/2010-1-temporary-assignment-firearm-ffl-unlicensed-employee/download.* These employees operate under the license of the business, and the business sells firearms under the requirements of the GCA (*e.g.,* background checks). However, a contractor who is not an employee would demonstrate a predominant intent to earn a profit from firearms sales by promoting another person's firearms business, or posting firearms for sale for someone else, particularly a company. This does not mean that such persons are themselves engaged in the business, but they are promoting a firearms business with the predominant intent to earn a profit from the sale or distribution of those firearms, and thereby assisting another person engaging in the business of dealing in firearms without operating under their license.

The Department also disagrees with the alternative suggestion that any person who advertises firearms online on more than one discrete occasion should qualify for a rebuttable presumption that the person is ''engaged in the business'' of firearms dealing. The presumption relates to advertising a ''business,'' and the Department recognizes that persons who wish to dispose of all or part of a personal collection, or ''trade up'' to enhance their personal collection, for example, are likely to occasionally offer for resale firearms from their personal collection online. To be engaged in the business, the Department believes those offers must be accompanied by additional evidence. That could include repetitive offers for resale within 30 days after the firearms were purchased, or within one year after purchase if the firearms are new or like-new in their original packaging or the same make and model, or a variant thereof. That is not to say that other fact patterns will not demonstrate engaging in the business; however, the Department has carefully considered these issues and narrowly tailored the presumptions in this rule based on its regulatory and enforcement experience, court decisions with similar fact patterns, and the investigations and prosecutions it has brought over the years.

17. PEP Presumption—Purchases or Rents Physical Space

Comments Received

Commenters disagreed with this PEP presumption that purchasing, renting, or otherwise securing or setting aside permanent or temporary physical space to display firearms at gun shows or elsewhere is an indication of intent to profit. Commenters stated this presumption is contrary to the statutory protection for those who wish to sell all or part of a personal collection and contrary to Congress's intent in passing 18 U.S.C. 923(j), which permits licensees to temporarily conduct business at certain gun shows. Citing FOPA's legislative history, S. Rep. No. 98–583 (1984), one commenter stated that Congress's intent in passing section 923(j) was to put licensed dealers at parity with non-licensees, whom Congress assumed could already sell at gun shows. Further, another commenter stated that, ''[t]he act of renting space at a gun show is obviously protected under the BSCA if the person is only making 'occasional sales, exchanges, or purchases' or if the person is using the space to sell 'all or part of his personal collection of firearms.' ''

At least one commenter indicated that collectors or individuals often rent temporary physical space at gun shows to dispose of any excess guns such as World War II firearms, like Mausers, and to complete firearms transactions face-to-face. Likewise, at least one commenter stated that often private persons display firearms at a gun show, and they will have FFLs process the transactions. This does not demonstrate that these private persons are dealers with an intent to profit, they said. At least one commenter said that a space to store firearms is not an indicator of intent to profit or being engaged in the business; rather, that person might simply want to store their firearms safely.

One commenter stated that these criteria are so broad ''that a seller of popcorn who rents a table at a gun show would presumptively be engaged in the business of selling firearms under the proposed rule.'' Another commenter went so far as to state that this presumption ''would turn literally every gun owner who has ever sold a gun into an unlicensed firearms dealer'' because everyone who possesses firearms sets aside physical space to display or store them.

Department Response

The Department agrees with commenters that collectors may secure or set aside physical space in which to store firearms from their personal collections that they offer for resale, including at a gun show. For this reason, the presumption in the final rule deletes the words ''or store,'' and replaces the phrase ''otherwise secures or sets aside'' with ''otherwise exchanges (directly or indirectly) something of value to secure,'' to ensure that merely setting aside space to store or display firearms is not included in the presumption, and that only persons who secure space at a cost in order to profit from firearm sales are included. *See* § 478.13(d)(2)(ii). In this regard, the Department continues to believe that it is appropriate to presume that persons who repetitively or continuously secure permanent or temporary physical space at a cost to display firearms they offer for resale primarily intend to earn a profit from those sales. This is true even if the firearms are sold at a gun show, and nothing in the GCA purports to authorize non-licensees to rent space at a gun show to deal in firearms without a license. The GCA provision addressing guns shows, 18 U.S.C. 923(j), authorizes licensees to conduct operations temporarily at gun shows under certain limited conditions, not non-licensees. Again, this does not mean that a collector who occasionally sells a firearm from a personal collection at a gun show is required to be licensed. The presumption means only that the collector likely has a predominant intent to obtain pecuniary gain from the

sale of that firearm. To be considered a dealer, evidence would be required to show that the collector has devoted time, attention, and labor to dealing in firearms as a regular course of trade or business. And if a proceeding were to be brought against a collector, that person could refute the presumption with reliable evidence to the contrary.

To make this clear, the final rule has been revised to state that certain conduct, including liquidating a personal collection or occasionally reselling firearms to improve a personal collection, is conduct that does not support a presumption that a person is engaged in the business. *See* § 478.13(e)(2) and (4). Additionally, to increase the likelihood that this presumption targets persons who predominantly intend to earn pecuniary gain from the sale of firearms, the Department has revised the presumption to add the words ''repetitively or continuously'' before ''purchases, rents, or otherwise exchanges (directly or indirectly) something of value to secure permanent or temporary physical space to display firearms they offer for resale.'' *See* § 478.13(d)(2)(ii). The word ''continuously'' was added to cover instances where a person buys a single location and occupies it for this purpose over an extended period. This presumption includes nontraditional commercial arrangements to secure display space (such as charging a higher membership or admission fee in exchange for ''free'' display space, or authorizing attendance at a gun show or sales event in exchange for something else). The phrase ''directly or indirectly'' was added to include indirect exchanges and clarify that nontraditional commercial arrangements are included. The presumption excludes persons who do not repetitively or continuously purchase, rent, or otherwise exchange something of value to secure physical space to display firearms they offer for resale. Of course, like the other presumptions, this one may be rebutted with reliable evidence to the contrary. *See* § 478.13(f).

18. PEP Presumption—Records of Profits and Losses

Comments Received

Numerous commenters objected to including records to calculate profits or losses from firearms purchases and sales as a presumption that determines one has intent to earn a profit as a dealer in firearms because it is a common behavior for any firearms owner to keep such records. The commenters stated that the presumption is overbroad based on their belief that a person who keeps any sort of records of firearms, often for insurance purposes just like they would for a car or home, would be considered a dealer. They noted that keeping such records is important not only for insurance purposes but also to help with recovery of a stolen firearm. Some commenters also thought that this presumption could hurt collectors who have a Type 03 license because they are required to keep a collector's bound book where they record their purchases and sales. They noted that, under this presumption, ATF could presume they have the wrong type of license and they would be forced to get a dealer's license. Similarly, some commenters noted that the IRS requires investors or collectors to keep information on purchase history including acquisition date, improvement to the asset and cost of the asset to determine taxable gain upon sale. An additional commenter stated that businesses like a security company would keep track of their firearms inventory and track the cost of obtaining those firearms for tax and other reasons, but the law surely does not presume such a company is a firearms dealer. The commenters appeared to indicate that keeping such documentation for a transaction does not necessarily make the person a dealer. At least one commenter stated this presumption discourages the very behavior (*i.e.,* personal recordkeeping) that ATF should want to encourage while other commenters noted that the Personal Firearms Record, P3312.8, that ATF encourages people to keep for purposes of protecting their property and to aid in recovery of stolen firearms, could now be used against them to make them a dealer. One of these commenters added that even a licensed collector of curios and relics ''would risk liability under this presumption, because they are in fact *required* by ATF to maintain such documentation. However, the NPRM will presume that even *these* FFLs simply have the *wrong* FFL (collector, not dealer).''

Department Response

The Department disagrees that keeping records to calculate profits and losses does not indicate a predominant intent to earn a profit from the sale or disposition of firearms. The point of making or maintaining such a record is to document profits or other pecuniary gain from firearms transactions. However, to further clarify this point, and to address comments regarding businesses that purchase and use firearms for purposes other than resale, the final rule revises this PEP presumption to say that the person ''[m]akes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale,'' not merely to document profits and losses from firearms purchased for other commercial (or noncommercial) purposes. § 478.13(d)(2)(iii).

The commenter is incorrect that the collector bound book, maintained by Type 03 licensed collectors of curios or relics pursuant to 27 CFR 478.125(f), is a record that documents profits and losses from firearms purchases and sales. The format for that record in § 478.125(f)(2) does not require any information concerning the purchase or sales prices of the curio or relic firearms, or profits and losses from those sales. Another commenter is incorrect that ATF Form 3312.8, Personal Firearms Record (revised Aug. 2013), *https://www.atf.gov/firearms/docs/guide/personal-firearms-record-atf-p-33128/download,* is a record of profits and losses. It does not document profits and losses from the purchase and resale of firearms, nor does it document the sales price—it documents only the cost of the firearm(s) at the time the person acquired them and the person or entity to whom the firearms are transferred, if any. Contrary to commenters' assertions, individuals can certainly make and maintain records of their personal inventories of firearms for insurance purposes without documenting profits and losses from firearms transactions. The presumption requires the latter, which is rebuttable by reliable evidence to the contrary.

Finally, in response to the comment that tracking profits is necessary for tax purposes, the Internal Revenue Code taxes only income from capital gains on personal property, meaning a positive difference between the purchase price and the sales price.[231] Money or other benefits a person receives from sales of depreciated personal firearms would not be reported as income (or treated as a capital gain for tax purposes). Thus, the primary reason for a person to track, for tax purposes, funds a person receives from selling firearms would likely be to account for pecuniary gain they predominantly intend to make from the sales. To the extent that the pecuniary gain is recorded for tax purposes from appreciating collectible or hobby firearms, or to record capital losses on firearms sales, that evidence can be used to rebut the presumption that the pecuniary gain recorded was the

[231] *See Topic No. 409, Capital Gains and Losses,* IRS, *https://www.irs.gov/taxtopics/tc409* (last updated Jan. 30, 2024).

person's predominant intent.[232] But it is inconsistent with the case law and ATF's regulatory and enforcement experience (and common sense) to say that maintaining these types of financial records is not indicative of profit-motivated business activity.

19. PEP Presumptions—Secures Merchant Services for Payments and Business Security Services

Comments Received

Commenters disagreed with, and stated they were confused by, the presumptions that a person is intending to predominantly earn a profit as a dealer in firearms if they use a digital wallet or use the services of a credit card merchant to accept payments, or if they hire business security services, such as a monitored security system or guards for security. At least one commenter argued that the presumption for using third-party services to ''make[ ] or offer[ ] to make payments'' seems to target buyers of firearms who make electronic payments rather than purported dealers who accept electronic payments when they sell the firearms. They noted that one case that the Department cited in footnote 97 of the NPRM, *United States* v. *Dettra,* 238 F.3d 424, 2000 WL 1872046, at *2 (6th Cir. 2000) (unpublished table decision), focuses on a defendant selling firearms, *i.e.,* accepting payments, rather than making payments. The commenter opined that the presumption is overbroad because it could make a dealer out of anyone who makes electronic payments for firearms using a business account. This would capture any business that purchases .22LR rifles for instructional purposes. The commenter said that even if the presumption is meant to target people who accept payments, the language is still overbroad. The commenter offered a particular hypothetical in which, they said, it would seem that ATF would presume a dentist has intent to earn profit as a firearms dealer if the dentist sells a patient a firearm after a visit, tacks it onto the dental bill, and accepts credit card payment for that entire bill. Because the presumption could include a case such as the hypothetical dentist, they argued that it is clear the presumption is overbroad. They claimed every eBay seller must worry about becoming a dealer under this presumption. Another commenter stated that electronic transactions are commonplace even for occasional firearms transactions. The commenter stated that the Department should not focus on a specific method of payment but rather focus on other factors such as the frequency, volume, and commercial nature of sales as well as the person's intent to earn a profit.

Some commenters were of the opinion that having a security service to protect one's firearms is simply a means of responsible firearm ownership and that they are now being penalized for the use of a digital payment app for a single firearms transaction. At least one commenter disagreed with the characterization in footnote 98 of the NPRM where the Department stated, ''for profit business are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property.'' The commenter stated that it is fairly common for individuals to have a personal security system in their home that can cost as little as $100 per year after initial installation, and that such a system is not necessarily an item reserved for business owners alone. Similarly, other commenters stated that the presumption for using security services needs to be clarified because it seems entirely too broad. They argued that a plain reading of the presumption is that intent to predominantly earn a profit exists when the person selling a firearm has an alarm system at their business to protect any business assets. For example, they questioned whether a gas station with a centralized alarm service where the owner keeps a firearm that is the gas station's property is considered a dealer because the station has an intent to predominantly earn a profit for an entirely unrelated transaction (such as selling gas). The commenters also questioned whether a company that keeps its company firearms in a securely monitored warehouse would be considered a dealer if it one day sells its old firearms to a dealer so it can buy new ones for its employees. The commenters argued this could extend even to a sheriff's department with a security system when it trades in old duty guns. One commenter characterized the projected outcomes in these scenarios as nonsensical and overbroad, and questioned whether the security services presumption was instead meant to cover firearms transactions and business assets that include firearms rather than, as the commenter had read the NPRM, security services purchased to secure any business assets.

Department Response

The Department agrees with commenters that the presumption about securing merchant services, such as electronic payment systems, is meant to be directed at firearms sellers, not at individual firearms purchasers. For this reason, the phrase ''makes or offers to make payments'' has been deleted from the presumption, which now applies only to merchant services ''through which the person intends to repetitively accept payments for firearms transactions.'' § 478.13(d)(2)(iv).

The Department disagrees that individual firearms sellers that use online services, such as eBay, purchase or secure ''merchant services as a business.'' These sellers are not securing merchant services as a business, and the online companies often distinguish between the services they provide to merchants and the services they provide to individuals seeking to sell personal items.[233]

Additionally, the manner in which merchants accept payments is a strong indicator of a predominant intent to earn a profit. Private citizens generally do not sign up for credit card processing services. Merchants are persons engaged in a profit-making business, and those services are designed to accept payments on behalf of profit-seeking sellers,[234] though individual firearms sellers may also have an intent to earn a profit when selling online. Again, this does not mean that a person is ''engaged in the business'' requiring a license when they occasionally sell a firearm from a personal collection with the intent to profit. That person must also devote time, attention, and labor to dealing in firearms as a regular course of trade or business. For this reason, the Department does not believe the merchant service PEP presumption is overbroad, especially as revised in this final rule in light of comments received. And, as with the others, the presumption may be refuted with reliable evidence to the contrary (*e.g.,* by the hypothetical dentist).

Some commenters also misunderstood the security service presumption, which applies only to ''business security services . . . to protect business assets or transactions,'' not to personal security services. The Department recognizes that some

[232] This evidence could include, for example, that the 28 percent collectibles capital gains tax was paid on income earned from those sales, as reported on IRS Form 8949.

[233] *See, e.g., eBay for Business,* eBay, *https://www.ebay.com/sellercenter/ebay-for-business* (last visited Mar. 26, 2024).

[234] *See, e.g., Venmo for Business,* Venmo, *https://venmo.com/business/profiles/* (last visited Mar. 26, 2024); *Sell in person with Shopify Point of Sale,* Shopify, *https://www.shopify.com/pos/free-trial/sell-retail; Your unique business. Our all-in-one solution,* PayPal, *https://www.paypal.com/us/webapps/mpp/campaigns/business/contact* (last visited Mar. 26, 2024); *I'm a Small Business Using Zelle,* Zelle, *https://www.zellepay.com/faq/small-business-using-zelle* (last visited Mar. 26, 2024).

individuals have a central-station monitoring system, but the regulatory text is clear that it applies only to a central-station monitoring system registered to a business. In addition, what is being protected are business assets that include firearms or transactions that include firearms. Nonetheless, to reduce the concern that a business not engaged in the business of dealing in firearms would be considered to have the predominant intent to earn a profit by securing business security services, the Department has revised the presumption to replace the word ''or'' with ''and'' so the presumption applies only where business security services have been secured to protect both firearms ''business assets'' and firearms ''transactions.'' *See* § 478.13(d)(2)(v). This clarifies the scope of the presumption in response to commenter concerns.

20. PEP Presumptions—Establishes a Business Entity, Trade Name, or Account, or Secures or Applies for a Business License

Comments Received

For these two presumptions under ''predominantly earn a profit,'' commenters argued that they were too broad and that whether a person establishes a business entity or has a business license has nothing to do with intent to predominantly earn a profit. Some commenters asserted that a lot of people have an all-purpose business license that could be for any number of purposes. Some States require multi-use licenses, the commenters said, such as combined resale and use ones. In those cases, a company that simply uses firearms as part of their business operations, rather than dealing in firearms as their business, would have a business license and be presumed to be dealing in firearms. Having one, these commenters argued, does not necessarily mean that a person has intent to earn a profit as a dealer in firearms. One commenter believed that a business that sells gun accessories would be forced to register as a licensee. Another suggested that the presumption would also treat other businesses that have firearms, like a security company, as dealers merely because they have a business license or are established as a business entity in an arena other than firearms sales.

Another commenter, who identified as a firearm owner, stated that a true FFL is a legal business but that a trade or transaction between two law-abiding citizens does not constitute a reason for one to obtain an FFL. One commenter noted that the case, *United States* v. *Gray,* 470 F. App'x 468, 469–70 (6th Cir. 2012), cited in the NPRM in support of the business entity presumption, involved facts much more indicative of unlicensed dealing than simple use of a business name. The commenter said the circumstances of that case stand in stark contrast to a situation where an owner of an antique store who decides to sell the family's World War I-era firearm at the store and could now be captured as a dealer under this presumption.

Department Response

The Department disagrees that the business entity and business license presumptions have nothing to do with an intent to predominantly earn a profit from its firearm sales or dispositions. Establishing a business entity or account ''through which the person makes or offers to make firearms transactions'' is often a preliminary step to engaging in the business of dealing in firearms with the predominant intent to earn a profit. A separate business entity can potentially provide liability protection, which is particularly advantageous when selling dangerous instruments, like firearms. A business entity or account can make it easier to sell firearms for a profit and may provide certain discounts or benefits when doing so. Likewise, a business license to sell firearms or merchandise that includes firearms is direct evidence of an intent to earn a profit from repeated firearms transactions. Indeed, a firearms business cannot operate lawfully without it.[235] While the Department agrees that there may be businesses that primarily sell merchandise other than firearms, such as an antique store, such businesses are profit-seeking, and are likely to sell any firearms at least on a part-time basis with the predominant intent to earn a profit. As stated previously, even part-time firearms businesses are required to be licensed.[236] Again, intent to predominantly earn a profit is just one element of engaging in the business.

In response to commenters who said that some States may have general business licenses that are required to engage in any business, the presumption would apply only if the license allowed them to sell firearms as part of their business operation. Of course, if they do not resell firearms, then that business would not be presumed to have a predominant intent to profit from firearms purchases and resales. To the extent commenters asserted that there are licensed businesses that may technically be licensed to sell firearms, but primarily buy and use firearms, and do not devote time, attention, and labor to dealing in firearms as a regular course of business, they can offer reliable rebuttal evidence, as with any of the presumptions.

21. PEP Presumption—Purchases a Business Insurance Policy

Comments Received

A few commenters, including an FFL, stated that one cannot presume that a person or company has intent to earn a profit and is engaged in the business of dealing in firearms merely because they have a business insurance policy that covers firearms. They noted that many non-firearms businesses, whether it be a hunting outfitter or an armored security company, have one or more firearms owned by the entity or business. If the business has insurance for its property, which would cover the firearms owned and used by the business, it is not clear why this should result in a presumption that a completely unrelated transaction is an indication of intent to predominantly to earn a profit. The commenters said that these are not the types of entities meant to be FFLs.

Department Response

The Department notes that most firearms businesses purchase business insurance policies that cover their firearms inventory in the event of theft or loss, which, unfortunately, is not uncommon. The Department also agrees with commenters that a business insurance policy may also be purchased by a variety of companies that purchase and use firearms and are not necessarily primarily intending to profit from

[235] *See, e.g.,* State of Maryland, *Obtain Licenses or Permits, https://businessexpress.maryland.gov/start/licenses-and-permits* (last visited Apr. 2, 2024) (''State and local governments require many industries to have permits or licenses to operate. A business license is required for most businesses, including retailers and wholesalers. A trader's license is required for buying and re-selling goods.''); State of Colorado, *Do I Need a Business License, https://www.coloradosbdc.org/do-i-need-a-business-license/* (last visited Apr. 2, 2024) (''In Colorado, if you are selling tangible goods, you are required to collect State Sales Tax and will need a Sales Tax License.''); State of Michigan, *Who Needs a Sales Tax License, https://www.michigan.gov/taxes/business-taxes/sales-use-tax/resources/who-needs-a-sales-tax-license* (last visited March 2, 2024) (''[R]etailers must be licensed to collect tax from their customers and remit the sales tax to the State of Michigan''); State of Ohio, *Licenses & Permits, https://ohio.gov/jobs/resources/licenses-and-permits* (last visited Apr. 2, 2024) (''Businesses are required to register with the Ohio Secretary of State to legally conduct business in the state—this is commonly called a business license.'').

[236] *See* 27 CFR 478.11 (definition of ''dealer'' includes those engaged in the business on a part-time basis); *In the Matter of SEL.L. Antiques,* Application No. 9–87–035–01–PA–00725 (Phoenix Field Division, July 14, 2006) (denied applicant for license that repetitively sold modern firearms from unlicensed storefront).

selling or disposing of their business inventory. For example, a firearms business inventory maintained by a security company whose guards use the firearms daily, or a hunting outfitter that rents firearms on its business premises, likely have firearms that have lost their value over time due to constant use and handling. The company may decide to sell these firearms simply to upgrade from old to new firearms without intending to earn a profit. In addition to these considerations, as discussed in detail earlier in this preamble (*see* Section IV.C.5.a (Department Response) of this preamble, *supra*), ATF examined records of cases and investigations it initiated between 2018 and 2023 for examples of fact patterns that align with the rebuttable presumptions in the proposed rule. The agency did not find examples other than the criminal case cited in the NPRM involving business insurance. 88 FR 62006 n.101. For these reasons, the Department has revised the final rule to remove this presumption. *See* § 478.13(d)(2).

22. Concerns With Disposition of Business Inventory After Termination of License

Comments Received

Commenters stated that while they thought it was notable that the Department addressed the disposition of an FFL's business inventory upon license revocation or termination, they did not think that ATF struck the ''right balance'' between law enforcement concerns and business owners so that a licensee can avoid financial ruin after having its license terminated. One commenter said the Department created a ''Catch-22'' situation regarding transfers because, in the commenter's opinion, ''1. Former inventory not transferred to a personal collection may never be transferred; 2. Former inventory that was unlawfully transferred may never be transferred; and 3. Former inventory that was transferred cannot be transferred for one year.'' (Emphasis omitted.) Other commenters stated that the additional requirements that establish how to dispose of remaining inventory are unwarranted burdens that make it more challenging to wind down operations in an efficient manner. They stated that the process should be more streamlined to ensure fairness and flexibility. At least one commenter criticized the 30-day period in which a licensee is expected to liquidate their inventory, stating that it would take a minimum of 90 or 120 days. Similarly, another commenter stated it was completely unreasonable that an FFL who has voluntarily surrendered their license or has had it revoked would have to wait a year before they could start selling their inventory privately.

One commenter said the proposed rule was arbitrary and had conflicting standards within the proposed text regarding disposition of inventory. In this commenter's opinion, ''a person or company no longer having an FFL (and persons acting on their behalf) may transfer their remaining firearms inventory to another third-party current FFL for liquidation under section 478.78, but may not do so under section 478.11. The result is an arbitrary and confusing conflict . . . .'' At least one commenter thought the rule would make it impossible for an FFL who has had their license revoked to keep their inventory while at least one other commenter thought the impact of the rule would mean they could never sell their inventory if a former licensee then needed a license to liquidate the inventory. Another commenter believed this portion of the rule should have more detail and be clearer because without it there is an increased chance of non-compliance and confusion among FFLs. At least one commenter objected to the 30-day time frame the rule would add to §§ 478.57 and 478.78, stating that no such timeline is required by the GCA.

One commenter noted that, if a former FFL transferring their business inventory to another FFL is not considered ''engaged in the business,'' then there would be no reason for ATF to limit the time period for when such transactions can take place. In other words, they indicated that for such a transaction, the former FFL still seems to be ''engaged in the business''; otherwise, there would not be a time limit on when they could act. If that is the case, the commenter stated, the rule does not make clear the effect of a former licensee transferring their firearms to another licensee and questioned whether an FFL could face revocation for facilitating others ''engaging in the business'' without a license.

Finally, another commenter stated that the rule fails to adequately address the potential for exploitation of inventory liquidation by former licensees. ''While it is important to outline lawful ways for former licensees to dispose of their inventory upon license revocation or termination, the rule does not establish sufficient safeguards to prevent the diversion of firearms into the illegal market,'' they wrote. The commenter added that this oversight leaves room for abuse.

Department Response

A license may be terminated for a number of reasons, whether it is a voluntary surrender of license or an involuntary termination due to license revocation or denial upon renewal. The regulations in the past have not clearly addressed lawful methods for disposing of business inventory before or after license termination. In the case of a licensee who does not dispose of its business inventory prior to license termination, both the former licensee and law enforcement are placed in a difficult situation. Because this inventory consists of firearms repetitively purchased for resale with predominant intent to profit, it was clearly purchased as part of a regular course of business or trade. If the former licensee now sells the firearms after termination of the license to dispose of inventory, the former licensee could be engaging in the business of dealing in firearms without a license and violating the law. Particularly in the case of former licensees whose licenses were revoked or denied due to willful violations, such persons would unjustly profit from their illegal actions. Further, allowing such sales would mean that a significant number of firearms would be sold without background checks or the ability to trace them if later used in crimes. This is an outcome the BSCA was intended to reduce by amending the definition of ''engaged in the business'' to increase licensure of persons engaged in the business with a predominant intent to earn a profit. *See* Section II.D of this preamble.

The Department disagrees that licensees face financial ruin if their license is terminated and they cannot sell their inventory. As an initial matter, licensees who voluntarily terminate their firearms license have the option of waiting to surrender their license until after they have liquidated their inventory. The final rule allows former licensees that did not have the opportunity to properly dispose of their business inventory before license termination to do so after termination by either selling their remaining ''former licensee inventory'' to an active licensee within 30 days after license termination, or transferring the former licensee inventory to a responsible person who may lawfully possess those firearms. *See* §§ 478.11 (definition of ''former licensee inventory''), 478.57(b), 478.78(b). The new term ''former licensee inventory'' is necessary to clarify that business inventory transferred to a responsible person after license termination is not a ''personal collection'' within the meaning of 18

U.S.C. 921(a)(21)(C), and accordingly, former licensees or responsible persons who devote time, attention, and labor to selling ''former licensee inventory'' as a regular course of trade or business to predominantly earn a profit will be presumed to be engaged in the business of dealing in firearms. *See* 18 U.S.C. 922(a)(1)(A), 923(a). If a former licensee needs more time in which to sell their business inventory to an active licensee, the Director may authorize an additional period of time for good cause.

The Department acknowledges that some commenters were confused about the relationship between the presumption based on liquidation of business inventory in the definition of ''engaged in the business,'' now in § 478.13(c)(4) of the final rule, and provisions about the discontinuance of business and operations by licensees after notice in §§ 478.57 and 478.78. Those proposed provisions were meant to be read together. Like the two discontinuance provisions at §§ 478.57 and 478.78, the two liquidation-of-business inventory presumptions distinguish between pre-termination and post-termination disposal of business inventory.

If the former licensee disposes of the business inventory properly before license termination, they will have several options for disposing of the firearms, one of which is to transfer firearms from the business inventory to their personal collection or otherwise as a personal firearm so long as they meet two conditions, *i.e.,* that they retain the firearms for at least one year from the date or transfer and they do not transfer the firearms to willfully evade the restrictions placed on licensees. *See* 18 U.S.C. 923(c). The corresponding presumption related to firearms transferred before license termination aligns with these requirements. *See* § 478.13(c)(5). If the former licensee (or responsible person acting on behalf of the former licensee) sells a firearm: (a) after license termination that was transferred to the former licensee's personal collection or otherwise as a personal firearm, but (b) before one year has passed from the date of that transfer, or (c) the sale is other than as an occasional sale to a licensee, that sale would fall under § 478.13(c)(5) and the person would be presumed to be dealing without a license. However, once the year has passed from the transfer date, they may occasionally sell firearms properly transferred to their personal collection or otherwise as personal firearms to anyone without falling under this presumption, unless the transfer was made to willfully evade the restrictions placed on licensees.

If the former licensee did not dispose of business inventory before license termination, it becomes ''former licensee inventory'' (see new definition under § 478.11, below), and the former licensee has two options to dispose of it within 30 days after license termination: liquidate to a licensee, or transfer to a responsible person of the former licensee. Under revised §§ 478.57(c) and 478.78(c), the date, name, and address of this responsible person (which can include a sole proprietor or an individual who is acting on behalf of a business entity) must be recorded as the transferee of such firearms in the licensee's disposition record prior to delivery of the records by the end of the 30 days, in accordance with 18 U.S.C. 923(g)(4) and 27 CFR 478.127.[237] If the recipient responsible person thereafter sells the transferred former licensee inventory, other than as an occasional sale to a licensee, they will fall under § 478.13(c)(4) and be presumed to be dealing without a license.

To make this relationship between the post-termination discontinuance provision and the related presumption more clear, the presumption, which is located in the final rule at § 478.13(c)(4), has been revised to state that it does not apply when the business inventory is being liquidated to a licensee either within 30 days of termination of license, or occasionally thereafter, in accordance with § 478.57 or § 478.78, as the case may be. The presumption now further states that it does not matter whether such firearms were transferred to a responsible person after the license was terminated under 27 CFR 478.57(b)(2) or 478.78(b)(2); the presumption would apply if those transferred firearms are subsequently resold outside the 30-day window other than as an occasional sale to a licensee. The Department has changed the term ''personal inventory'' to ''former licensee inventory'' to make it easier to distinguish between the former licensee's personal collection firearms and other personal firearms, which a former licensee may treat the same way as other non-licensees, and the business inventory transferred to themselves that must be treated differently from personal collection firearms and other personal firearms. *See* §§ 478.57(b)(2), 478.78(b)(2).

The Department disagrees that the limited 30-day period for liquidation to an active licensee is inconsistent with the GCA. While the Department recognizes that such sales may be conducted to predominantly earn a profit, the recipient licensee will be recording them in its business inventory and running NICS background checks when those firearms are further distributed into commerce. The final rule also makes clear that any such transfers of remaining inventory within the 30-day period must appropriately be recorded as dispositions in the licensee's records prior to delivering the records after discontinuing business consistent with 27 CFR 478.127. *See* §§ 478.57(c), 478.78(c). This will ensure that any liquidated/transferred firearms may be traced if they are later used in a crime. The rule is therefore necessary to prevent former licensees from selling off numerous business inventory firearms at retail without abiding by these important requirements of the GCA. It also provides a reasonable ''winding down'' period that is fully consistent with the relinquishment of licensee records requirement under the GCA. *See* 18 U.S.C. 923(g)(4) (records this chapter requires to be kept shall reflect when a firearms or ammunition business is discontinued, and, if succeeded by a new licensee, shall be transferred to that successor; where the discontinuance is absolute, the records shall be transferred within 30 business days to the Attorney General).[238] Licensees who are terminating their license should begin the winding-down process well before the license is terminated. Otherwise, they run the risk of having unsold inventory they cannot easily sell without either engaging in the unlicensed business of dealing in firearms after they terminate their license, or being able to sell only on occasion to a licensee. Selling before license termination also ensures that background checks are run on purchasers, and dispositions are appropriately recorded.

The Department disagrees with the comment that the rule fails to address the potential for exploitation of inventory liquidation by former licensees. The rule addresses the

[237] This is consistent with the requirement for licensees to record the personal information of an individual authorized to receive firearms on behalf of a business entity. *See* ATF Form 4473, at 4 (Aug. 2023), *https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download* (''When the transferee/buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the business must complete section B of the form with his/her personal information, sign section B, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity; and (B) the name and address of that business entity.'').

[238] This provision is also consistent with the 30-day winding down period for licensees who incur firearms disabilities under the GCA during the term of their current license. *See* 27 CFR 478.144(i)(1).

potential for diversion in several ways. Consistent with 18 U.S.C. 923(c), it limits the ability of former licensees to liquidate business inventory firearms by establishing two rebuttable presumptions that a person is engaged in the business when those firearms are sold—§ 478.13(c)(4) and (5). With regard to firearms transferred by a licensee to a personal collection prior to license termination, the presumption still applies even if one year has passed from the transfer if the transfer or any other acquisition was made for the purposes of willfully evading the restrictions placed upon licensees. 18 U.S.C. 923(c). Moreover, as provided by amended §§ 478.57 and 478.78, after license termination, former licensees have limited sales options that would avoid the presumption in § 478.13(c)(4), such as sales to an active licensee where the risk of diversion is limited.

23. Concerns With the Procedure To Transfer of Firearms Between FFLs

Comments Received

Some commenters remarked on the requirement that FFLs follow verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of part 478 instead of using ATF Form 4473 for transfers between licensees. At least one commenter thought this provision should be made clearer to avoid interruptions in the transfer of firearms, while another thought the proposed changes were unnecessarily complex and increased the risk for administrative errors. This commenter stated that ''[l]icensees should be allowed to use the existing streamlined form, which is already widely used and understood by both licensees and the ATF.'' At least one commenter stated that a phrase in the proposed amendment to § 478.124—''for the sole purpose of repair or customizing''—should be deleted because it is not part of 18 U.S.C. 922(a)(2)(A). That statutory provision only provides, in relevant part, that ''this paragraph [prohibiting transfer in interstate commerce to a non-licensee] and subsection (b)(3) shall not be held to preclude [an FFL] from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received.''

Department Response

The Department disagrees that the changes proposed to be made to 27 CFR 478.124(a) are unnecessarily complex and increase the chance for administrative errors. To the contrary, licensees know that ATF Form 4473 documents the transfer of a firearm from a licensee to an unlicensed person. It is not intended to be used by a licensee to purchase personal firearms. If a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record asserting it is a ''personal firearm,'' then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime. The well-established procedure for licensees to purchase firearms is through the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of 27 CFR part 478.

Regarding the comment that the phrase ''for the sole purpose of repair or customizing'' should be stricken from § 478.124(a), that provision allowing a limited exception to the requirement to complete an ATF Form 4473 has long been found in the regulations and this rule does not change that proviso in any manner. Allowing licensees to sell or otherwise dispose of firearms without completion of this form or recording NICS checks on the form would undermine the purposes of the GCA and BSCA. Crime gun traces would not be able to be completed, and there would be no way to verify that the identity of firearms purchasers had been checked, or that background checks had been properly run. The Department therefore disagrees with the comment seeking to remove this phrase.

D. Concerns With the Economic Analysis

1. Need for Rule

Comments Received

One commenter stated that the Department's need for this rulemaking was contrived without the Department providing any facts or persuasive arguments. The commenter specifically challenged the statement in the preamble that ''ATF has observed a significant level of noncompliance with the GCA's licensing requirements even prior to the BSCA,'' and asked for the number of incidents of noncompliance and by what standard that level of noncompliance was determined to be ''significant'' enough to justify rulemaking. The commenter also stated that a rulemaking should not be justified by a presidential executive order, ''which is not now nor has it ever been a reason for rulemaking sufficient for APA purposes.'' The same commenter also stated that the agency has not identified any market failure demonstrating that, in the absence of the rule, the free market will fail to reach the optimal number of gun sales outside of current FFL dealers.

Department Response

The Department disagrees that the need for this regulation was ''contrived without any facts or persuasive arguments.'' The Department has explained the public safety need for this rule and has extensively laid out and discussed the facts and arguments supporting that need in both the NPRM and in this final rule. For reference, those discussions are included in the Background discussion in Section II.D of this preamble, in the Benefits section of the Executive Order 12866 economic analysis in Section VI.A.7 of this preamble, throughout Section III of this preamble (which includes the Department's discussion of proposed revisions from the NPRM), elsewhere in the Department's responses to comments under Section IV of this preamble, and in other portions of this preamble. This rulemaking implements certain statutory changes enacted by Congress in the BSCA, which Congress passed in the interest of public safety after at least one mass shooting in which the perpetrator purchased a firearm from an unlicensed dealer. In addition, this final rule implements the Department's response to Executive Order 14092, which was also issued to implement and enforce the BSCA's statutory changes and public safety goals.

The public safety justifications referenced above include the accounts and analysis of ATF agents and investigators with years of experience enforcing the relevant provisions of the GCA, who reported significant levels of firearms dealing that was not in compliance with pre-BSCA statutory licensing requirements. More specific data or statistics regarding such noncompliance, as requested by the commenter, are not readily available and not needed in light of the Department's experience and the other public safety justifications underlying this rule.

Finally, the Department is not required to identify any market failure demonstrating that, ''in the absence of the rule, the free market will fail to reach the optimal number of gun sales outside of current FFL dealers.'' For example, OMB Circular A–4 (2003) specifically recognizes that ''[c]orrecting market failure'' is ''not the only reason'' for regulation, and allows regulations based on other social purposes.[239] In

[239] Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A–4, at 5 (2003) (''OMB Circular A–4''), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.* Because the

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addition, Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993), permits agencies to promulgate rules that are necessary to interpret the law or are necessary due to compelling need, which includes when private markets are not protecting or improving public health and safety. This rule is necessary on both grounds. As explained throughout this preamble, there is a public safety need for this rulemaking. This position on public safety is supported by the facts and arguments laid out by the Department and affirmed by the hundreds of thousands of public comments ATF received in support of this rulemaking that specifically explained that the rule is needed for public safety (in many cases emphasizing that the rule is the minimum action needed to address public safety). *See* Sections IV.A.1–2, 4–7 of this preamble.

2. Population Accuracy

Comments Received

Various commenters objected to the Department's calculation of the population impacted by this rulemaking. Some of these commenters argued that the Department's high population estimate (328,296, which was derived from the Russell Sage Foundation (''RSF'') survey) should be used as the primary cost estimate, including one commenter who opined that the RSF-derived estimate was more accurate because, they stated, the Department's subject matter expert (''SME'')-derived estimate uses a single, private party firearm sales website as the primary source of unlicensed firearms seller numbers. This same commenter added that the RSF survey considered multiple mediums of firearm sales.

In addition, various commenters opined that the Department's population estimates were not accurate or requested more ''accurate'' numbers. A couple of commenters provided critiques of the methodology used to generate population estimates. These commenters opined that the Department should use standards accepted by scientific, peer-reviewed journals as the basis for estimating the relevant population. Furthermore, they opined that the Department's population estimates should have used statistical calculations such as ''[c]onfidence intervals, [p]-[v]alues, and K-values.'' Primarily, these commenters objected to the Department's SME estimate that Armslist may constitute 50 percent of the market share for online non-FFL sales, contending that this estimate is not supported by data and that using an SME-derived estimate is biased and unsupported. One commenter stated that *Gunbroker.com* is the largest online marketplace where people perform private firearms transactions and suggested that the impacted population would be higher if the Department included individuals conducting private sales on that website. Another commenter went further, stating that ''the number put forth by ATF, an estimation of 24,540 to 328,926 unlicensed persons who could be considered 'engaged in the business' of dealing firearms, is at worst a shot in the dark, and at best, an educated guess.'' This commenter noted that there are ''numerous other venues in which firearms are sold, including *GunBroker.com,* as well as social media platforms such as Facebook, where clever sellers can get around the Facebook Marketplace rules against selling firearms.''

Finally, one commenter opined that this rule will affect all persons who own firearms in the United States and even some portions of the population that have never owned a firearm. None of these commenters provided data recommendations or alternate sources of relevant data except as noted above.

Department Response

The Department does not agree that the SME/online sample and the SME-derived primary estimate it put forth in the NPRM are less viable than the RSF survey-derived estimate it also included for comparison. Each estimate is necessarily imperfect due to the paucity of data on how many unlicensed persons currently sell firearms and how many such persons would need to be licensed under this rule. The estimates from each source the Department used have different limitations, which is why the Department included them both as potential alternatives. The SME-derived estimate is based on historical data and experience with unlicensed sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. The Department thus considers its SME-derived estimate to be a more reliable data source for this purpose than the RSF survey. The RSF survey was not limited to capturing sales by unlicensed persons, which is the population potentially impacted by this rule. Rather, the authors sought to establish the total number of citizens who sold their firearms over a given period, not the current number of unlicensed sellers who are engaged in the business of firearms dealing or who are making sales on publicly accessible marketplaces and platforms. As a result, the population set derived from the RSF results is significantly higher and includes people who would not be covered by the rule. The Department thus considers the SME-derived estimate to be more realistic.

It is because the RSF survey used a larger sample that the Department provided the RSF population estimates in the NPRM analysis as an alternative unlicensed seller population set (and continues to do so in this final rule). However, in order to be able to meaningfully compare results from the two starting sets of unlicensed seller population estimates (SME-derived and RSF-derived), the Department applied the same treatment regarding the rule's potential impact to both numbers. This included applying the same SME estimates to both starting populations to determine, for each group, the proportion of unlicensed sellers affected by various provisions of the rule. For example, the Department applied the same SME estimate of the proportion of unlicensed sellers estimated to be engaged in the business without a license under the rulemaking (approximately 25 percent) to each starting population, as well as the same estimate of the proportion of those sellers who are likely to be either unwilling or unable to become licensed as an FFL as a result of the rule (10 percent). Because there is no other source of data on the size of these groups of currently unlicensed dealers likely to be impacted by this rule, the Department used the best estimates from SMEs as the percentages for each, and then applied those estimates to both starting population sets for consistent treatment and comparable outcomes. In the NPRM, the Department explained these estimates, solicited public comment on them, requested alternative data sources and models, and welcomed more accurate data on the number of unlicensed persons selling firearms. However, the Department did not receive any specific information—including any alternative data sources

NPRM was published in September 2023, prior to the November publication of the 2023 version of OMB Circular A–4, the Department based its Executive Order 12866 economic analysis in the NPRM on the 2003 guidance. Although the November 2023 version of OMB Circular A–4 supersedes the version from 2003, OMB allowed agencies to continue following the 2003 version in final rules published prior to January 1, 2025, if their NPRM relied on the 2003 version and was published prior to February 29, 2024. *See* Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A–4, at 93 (2023), *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.* Accordingly, the Department is continuing to follow the 2003 version of OMB Circular A–4 in this final rule.

or models—or more accurate numbers in response.

At this time, the Department does not consider any peer-reviewed statistical sample to be possible, much less perfectly accurate. Typically, peer-reviewed journal articles use research data they gather themselves or a database, such as for the U.S. Census, from which to extrapolate a number, such as a covered population. The Department noted, and continues to note, that it is currently not possible for the Department to base population estimates in this rule on a peer-reviewed statistical sample because there is no database that could be used to extrapolate a population as specific as unlicensed individuals who may be selling firearms, let alone one that includes data on factors from which to determine the population of such individuals who may be engaged in the business as a dealer under the definitions included in this rule. The very limited options for source data make it impossible to arrive at a more precise number than is currently reflected in this rule. The Department reiterates, however, that this rule will not impact all individuals who own a firearm, nor will it require everyone who sells a firearm to become a licensed dealer.

While the journal and news articles cited by the commenters may estimate the population of individuals who own a firearm, these numbers are still estimates and are not any more accurate than the Department's estimates (as requested or suggested by these commenters), nor do they pertain more specifically to the situation covered by this rule. Based on the little information available, the Department used a related literature review, and combined professional expertise and an online site sample to provide two estimates on population. OMB Circular A–4 encourages agencies to use the ''best reasonably obtainable scientific, technical, and economic information available,'' including peer-reviewed literature ''where available.'' [240] The Department did so using the two estimates described above: one (the RSF survey) gleaned from a peer-reviewed journal article about survey results that correlated with the data set relevant to this rule more than any other article the Department was able to find; and another gleaned from SME knowledge and experience, and sampling from a website (Armslist) that identifies which sellers are licensed and is recognized as being a popular online site used by the potentially affected population to sell firearms.

As for the comments suggesting that ATF incorporate another online site, GunBroker, into the analysis, the Department concurs that a subset of non-FFL sellers on GunBroker may also be considered ''engaged in the business'' despite already transferring firearms advertised online through an FFL intermediary. However, the Department already accounted for the existence of online platforms other than the one it sampled (Armslist) by assigning a 50 percent share of the market to all other platforms, including GunBroker. Nonetheless, in response to the comments, ATF requested further SME estimates of the relative proportions of Armslist and GunBroker sales as part of the total, as well as social media. Website traffic data for GunBroker and Armslist and additional and more specialized SME opinions were incorporated into the model and informed the Department's assumptions. As a result, the Department has revised its estimate of the portion of unlicensed population making sales through Armslist from the initial 50 percent of the online marketplace to 30 percent, adjusting the estimate of total unlicensed sellers that use non-traditional mediums accordingly. These changes are reflected in Section VI.A.2 of this preamble.

3. Sample Size and Confidence Interval

Comments Received

One commenter stated that the Department did not specify the methodology used to determine and collect the sample size included in the NPRM. In particular, they stated the Department did not specify whether the sampling obtained on Armslist was collected ''randomly, stratified random, [or] non-random.'' Furthermore, this commenter stated that the Department did not include the results of the sampling for public inspection and that the commenter was thus unable to verify the Department's claim that the sample size has a 95 percent confidence interval. Another commenter recognized that the Department used a sample size generator to estimate a sample size but stated that the confidence interval cannot be calculated without knowing the standard deviation of a sample. One commenter questioned how the Department derived its estimate of individuals ''engaged in the business'' from the sample collected from Armslist when Armslist does not indicate whether sellers meet the statutory definition of being ''engaged in the business.'' This commenter stated that not providing the methodology through which the Department made this calculation was a violation of the APA and the Small Business Regulatory Enforcement Fairness Act (''SBREFA'').

Department Response

The Department decided to take a random sample from among the firearms listings on Armslist to use in its survey. A sample-size calculator was then used to determine the statistically valid sample size from those listings, as explained in more detail in both the NPRM and this final rule under the methodology section (Section VI.A.2) of this preamble. A standard deviation was not separately calculated because the Department assumed a normal distribution, which is in accordance with usual practice when there is no reason to anticipate that the data may skew in one direction or another and the sample is used to calculate a population rather than a regression or other statistically driven analysis. Therefore, in accordance with standard practice, to estimate the sample size, the Department assumed the largest standard deviation (0.5 or 50 percent) to obtain the most conservative (largest) sample size. While the sample is one unit of measurement at a single point in time over a several-day period, the Department verified its viability by taking another sample after the comment period closed, to determine that the overall population remained stable over time.

The Department acknowledges that there are inherent limitations to the lower estimate. However, the Department's prior experience helped inform its estimate as well. As explained in the NPRM's Benefits section, the Department previously provided guidance in 2016 to sellers, clarifying the circumstances in which they would need to obtain a license as a dealer under the previous statutory definition, which focused on similar factors to those included in this rule. Thereafter, the Department encountered an increase of only 567 new FFL applications. This and similar historical data support the SME estimates arising from the combined information and Armslist sampling. Furthermore, regardless of the sales or transaction volume of firearms, the number of FFLs has been relatively stable over time.

The Department derived its estimate of unlicensed individuals by extrapolating from Armslist listings. Armslist uses the categories of ''private party'' ''and ''premium vendors.'' When the Department reviewed the entries, it found that the premium vendors were

[240] OMB Circular A–4, at 17, *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

all listed as FFLs. Therefore, the sample did not include entries categorized as premium vendors. Although the ''private party'' sales did not indicate whether they were FFLs or unlicensed sellers, other information included in the listings indicated that ''private party'' sellers were likely to be home-based individuals rather than FFLs with funds to advertise on the website. Nonetheless, the Department could not be certain, so the sample from Armslist (and thus the estimated population of unlicensed sellers) might be larger than the actual number of unlicensed sellers. Because the population estimate was being used to estimate impact and potential cost for purposes of this rulemaking, the Department erred on the side of overinclusiveness (thus generating a potentially larger overall population of unlicensed sellers, higher cost estimates, and potentially more impacted persons) rather than underinclusiveness (by instead trying to remove some of the private party sellers that could potentially be FFLs).

Generally, the Department incorporated a model where the relative size of the total online marketplace was derived from the estimated size and characteristics of Armslist. From there, the Department made estimates regarding the total unlicensed market both online and offline, before filtering for intention and incentives. Again, as there is no definitive source of accurate data from which to generate these numbers and resulting estimates, the Department was forced to use available data, public comments, and internal surveys of SMEs who have specialized, often decade-long experience with the industry to meet its standard of best available information.

4. Russell Sage Foundation Model Calculation

Comments Received

One commenter argued that the population derived from the Russell Sage Foundation (''RSF'') survey data (the NPRM's high estimate) was overcalculated, including transactions that the commenter did not believe required a license, such as ''family, friends, gifts, inheritance, trades, and other.'' This commenter further suggested that the portion of the total unlicensed seller population considered to be engaged in the business in both the RSF and SME-derived models should be less than 10 percent, not the 25 percent estimated by the SMEs. Furthermore, they stated the Department incorrectly used the overall percentage of RSF survey dispositions over the course of five years rather than ''annualizing'' that survey result over the course of five years.

One commenter could not recalculate how the Department used the RSF survey to calculate percentages. Another commenter estimated that the affected population of individuals is 478,000 and that the methodology used by the Department over-estimated the population by a minimum of 45 percent. Overall, this commenter estimated that this rule will have a marginal increase of 150,000 new FFLs. The commenter, however, did not point to or provide a data source for their numbers. One commenter challenged the RSF data, claiming the model is based on a ''small sample size of just 2,072 gun-owning respondents, providing questionable representativeness.'' Moreover, by analyzing ''outdated 2015 survey data,'' the commenter suggested that the study fails to account for increases in the rates of American gun ownership in recent years, and that the Department therefore undercounted the number of sellers this rule would affect. The commenter cited a 2020 Gallup study [241] that estimated that what the commenter described as a ''whopping 32 percent'' of adults own firearms, not 22 percent as estimated in the 2015 RSF survey data.

Department Response

The Department partially agrees with the commenter's suggestion that firearms transfers listed in the RSF survey that involve ''family, friends, gifts, inheritance, trades, and other'' should not be included in the Department's estimate. The RSF survey did not include sufficient information about private transactions between friends and families, as gifts, inheritances, or other similar transfers, from which the Department could assess whether any of those transferors might have been engaged in the business as a dealer. However, the rule specifically excludes these categories of transactions—*e.g.,* transactions between family, as gifts, or due to inheriting firearms—when they are not made repetitively with predominant intent to profit. In the Department's experience, most such transactions have not involved a dealer engaged in the business of dealing in firearms as defined in this rule. Therefore, the Department did not include RSF survey results involving private transactions between friends and families in the NPRM. However, transactions such as trading or bartering, or sales conducted through FFLs, such as wholesale and retail dealers, are more likely to include transactions involving qualifying ''engaged in the business'' dealers, so the Department included them to calculate the RSF survey-generated population estimate it used in the NPRM. The Department explained this in the NPRM and does so again in this final rule under Section VI.A of this preamble.

Although a commenter suggested that ATF's SME-derived estimate that 25 percent of the population of unlicensed sellers would be engaged in the business under this rule was too high, they did not provide a basis for their recommended estimate of 10 percent. The commenter suggested that ATF's estimate of the unlicensed seller population was too high, but even if that were true, it would not affect what percentage of such unlicensed sellers would be determined to be engaged in the business under this rule. In addition, the commenter suggested that the estimate of those engaged in the business under this rule should not include unlicensed sellers who solicit background checks from FFLs, but the Department disagrees with this, as discussed in detail in Section IV.D.10 of this preamble. As a result, the Department continues to use the SME-derived estimate of 25 percent for the population of currently unlicensed sellers who would be deemed engaged in the business under this rule.

The Department concurs with the commenter's understanding that, in the RSF survey, the sales rate of personal firearms was 5 percent over the course of five years rather than 5 percent over one year as initially interpreted by the Department. Accordingly, the Department recalculated its estimate, using a personal sales rate of 5 percent over the course of five years, or 1 percent annually.

The RSF survey contained many percentages and descriptions of different types of firearms transactions. As explained in response to comments under Section IV.D.1–2 of this preamble, the RSF survey and resulting journal article were not designed to capture or address information specifically relevant to this rule. As a result, the data the Department could glean from the RSF survey, while useful in some respects, were not directly on point for purposes of making estimates related to the area affected by this rule. In addition, the RSF survey results are compiled in a way that does not provide accurate data on, or align with, issues related to whether a seller or transaction might be among the total potentially affected population base or might be

[241] *What Percentage of Americans Own Guns?,* Gallup: The Short Answer (Nov. 13, 2020) (summarizing Gallup's crime poll for September 30 to October 15, 2020), *https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx.*

among the portion that could qualify as engaged in the business under this rule. This is not a flaw in RSF's data but is a result of different focuses between RSF's article and this rule.

Because this rule is focused on dispositions (or ''sales'') of firearms, the Department used only survey results and percentages outlined in the Dispositions portion of the RSF survey journal article on page 51 and made its best effort to include categories that were potentially likely to contain relevant kinds of transactions, while excluding categories that were less likely to contain such transactions. The Department therefore continues to use those NPRM percentages as derived from the RSF survey to determine the high population estimate in this final rule.

The Department acknowledges that the estimated populations are estimates using the best available information and are not perfect. However, the Department disagrees that there will now be 478,000 individuals who must be licensed. The commenter who made that assertion did not provide a source or data to support this estimate. As explained above, there is no definitive source of accurate data from which to generate these numbers and resulting estimates. As a result, the Department used available data combined with public comments and internal surveys of SMEs with specialized, often decades-long experience with the industry, to meet its standard of best available information. Nonetheless, as discussed elsewhere in this preamble and based on comments pointing out calculation errors from using the RSF survey, the Department has reduced the overall high estimated population of the estimated affected individuals. For more information, please see the discussion under Section VI.A.2 (Population) of this preamble.

Finally, the Department concurs that the percentage of individuals owning a firearm in the United States may have changed since 2015 and, as a result, now uses the 32 percent estimate from the more recent Gallup study the commenter cited. Nonetheless, the Department disagrees that the sample size of gun owners in the RSF survey is, as the commenter suggested, ''too small,'' with ''just 2,072 gun-owning respondents.'' The RSF study surveyed 3,949 persons; of that number, 2,072 respondents stated they owned firearms. The RSF sample size of 3,949 is larger than the sample size in the Gallup study of 1,049 survey respondents cited by the commenter. However, while both samples are statistically viable sample sizes, the Department has elected to use the commenter's suggestion of the more recent Gallup study.

5. Inability To Comply

Comments Received

One commenter suggested that the Department did not account for individuals who wish to become an FFL but are not otherwise able to obtain a license due to State or local zoning ordinances, or even restrictions from a Homeowner's Association (''HOA''). This commenter further suggested that the Department should calculate a loss of social welfare due to the indirect reduction of firearm sales resulting from this rule and indirect requirements stemming from local restrictions. One commenter suggested that there may be individuals who, after publication of this final rule, will choose to leave the market of selling firearms altogether so as to avoid coming under scrutiny under this new definition.

Department Response

The Department concurs that there may be individuals who are restricted from engaging in commercial activity from their homes or other spaces by State, county, and local laws or ordinances, or by residential HOAs. Individuals who fall under this category may apply for a zoning permit or variance through their local jurisdictions, or may arrange to conduct sales from a rented business premises or other space that permits commercial activity instead. But some may nonetheless choose not to continue making supplemental income through firearm sales activity from residential spaces. However, the Department notes that these persons, if making commercial sales from such locations, were most likely already prohibited from such sales before this rule was issued, unless they had requested a permit, variance, or other appropriate exception. Zoning ordinances and HOA restrictions on commercial activity often include limitations on foot traffic, number of employees, or the amount of interference with neighbors.[242] Most of these zoning restrictions are not predicated on whether a resident is formally established as a business, whether they sell firearms versus some other product (although there may also be additional ordinances specifically addressing firearms), or whether they are determined by Federal law to be engaged in the business as a firearms dealer. But the Department has no source (and no commenter provided any) from which to gather data on the number of people who might have been permitted to sell firearms under their zoning or HOA requirements before this rule and would now be unable to continue selling firearms for this reason.

However, there may also be other subsets of individuals who are affected by this rule and may choose to leave the firearm sales market for personal reasons. For example, some people may not want to go through the process of getting a license or some may not agree with it on principle and would rather forego firearms sales than comply. The Department acknowledges that there may be individuals who leave the market for a variety of reasons, including zoning ordinances, licensing requirements, or personal philosophy. Although the Department does not have data from which to extrapolate an estimated percentage for each such group, based on past experience with parallel requirements and SME expertise, the Department has combined these groups into a single estimate for individuals who may leave the firearm sales market for personal reasons, which is now accounted for in the economic analyses in Section VI.A of this preamble.

6. Costs of the Rule

a. Accuracy of Costs

Comments Received

Other commenters stated that it was unclear how accurate the costs and time burdens were that ATF calculated for the rule asserted that ATF underestimated costs, or alleged that ATF's estimates were ''random'' or had no ''data to support them.'' Another commenter asked how many of the 30,806 Armslist listings were, for example, selling inherited firearms, whether any of the listings were misclassified as ''private'' when they actually involved a licensed dealer, or whether the 30,806 listings were representative of the typical number of listings at any given time. This commenter also asked whether the average of 2.51 listings per seller was skewed by a minority of extreme outliers. One commenter suggested that the population characteristics derived from Armslist could not be used to generalize the potentially affected population that use non-traditional mediums (such as other online platforms) outside Armslist.

[242] *See* Van Thompson, *Zoning Laws for Home Businesses,* Hous. Chron.: Small Business, *https://smallbusiness.chron.com/zoning-laws-home-businesses-61585.html* (last visited Mar. 7, 2024); A.J. Sidransky, *Home-Based Businesses: Challenges for Today's Co-ops, Condos and HOAs,* New Eng. Condominium (Oct. 2016), *https://newenglandcondo.com/article/home-based-businesses.*

One commenter stated that, based on their calculations, the rule would ''cost private citizens about $338 to obtain a new license, and $35 to $194 annually to maintain the license.'' Additionally, in the commenter's opinion, this new rule would cost the government ''$116 million to process new licenses.'' Another commenter provided their own cost estimate of the rule and estimated that the 10-year annualized cost would be $18,813,987.17 or 14.7 times more expensive than ATF's primary estimate. Another commenter noted that the Department rounded cost estimates, including rounding wages from $16.23 to $16, which they stated could result in a 6 percent difference in total amounts. This commenter argued that costs considered in rulemakings should not be rounded (or should be rounded to the penny) to avoid the rounding errors that, they stated, were present in the Department's analysis.

A few commenters stated that the Department did not include compliance costs such as alarms, cameras, gun safes, secure record storage, and secure doors. One of these commenters further estimated that such security items cost them $1,000, plus monthly monitoring charges of $40. An additional and separate gun safe can range from $1,000 to $3,000, they stated, and a security door would cost between $800 and $1,000. Furthermore, this commenter stated that the Department did not include liability insurance, much less labeling costs. Another commenter suggested that the Department did not include business start-up costs such as attorney drafting of articles of incorporation or other legal advice. One commenter suggested that the rule would increase litigation costs. Another commenter suggested that the Department's estimate of the costs should include the costs of obtaining a State dealer's license and local and State business licenses, because, they said, people who now get licensed at the Federal level to engage in the business of dealing firearms will also have to be licensed as a business and as a dealer at the State level.

Department Response

The Department disagrees that ATF's estimated costs are ''random'' or are not supported by data. They are, however, estimates. Wherever possible, the Department used publicly available information to calculate costs and time burdens. Where relevant, the Department included footnotes and explanations regarding the calculations. Where applicable, the Department provided (and continues to provide) sources and methodologies demonstrating its means of determining the overall cost of the rule. Sources of data included, but were not limited to, fees required by ATF to apply for a license, costs for having photographs or fingerprints commercially taken (as posted by private companies), and similar costs of obtaining a license. However, despite best efforts, the Department acknowledges that not all licensing costs, like time burdens, could be substantiated in the same manner by third-party or publicly available data. In these cases, ATF made estimates based on its experience, such as the time needed to obtain fingerprints or passport photographs.

In the NPRM, the Department welcomed comments as to any assumptions made, and in particular solicited input about any countervailing costs or time estimates that commenters felt the Department could not or did not consider. In this final rule, the Department considered the suggestions it received in response and, where appropriate, updated the overall costs of the rule, including by incorporating new data or updating to a more appropriate source. For example, the final rule uses wage inflation per the Bureau of Labor Statistics (''BLS'') rather than BLS's Consumer Product Index to update household income, based on a commenter's suggestion and further Department assessment.

The Department acknowledges that estimates that round to the penny might differ from estimates that do not. However, the Department disagrees that rounding to the penny provides the public a more accurate total cost of the rule in this context because, as discussed above, there is an inherent lack of precise numbers that arises from estimating a total population or total cost without a comprehensive database, registry, survey, or other source of accurate data. OMB Circular A–4 allows agencies to make predictions and estimates during the rulemaking process and provides guidance for accuracy in making such estimates. It instructs agencies to make their estimates based on the precision of the underlying analysis. For example, OMB Circular A–4, section G (Precision of Estimates) suggests that an estimate of $220 million implies rounding to the nearest $10 million.[243] In accordance with this guidance and to avoid misrepresenting the Department's estimates as a more precise cost value than they are (as rounding to the penny would indicate), the Department continues to choose to round estimates to the dollar.

In response to comments on the Armslist sampling, the agency acknowledges that Armslist does not label vendors based on whether they are engaged in the business of firearms dealing or not. Armslist uses the categories of ''private party'' and ''premium vendors.'' When the Department reviewed the entries, it found that the premium vendors were all listed as FFLs. Therefore, the sample did not include entries categorized as premium vendors. Although the ''private party'' sales did not indicate whether they were by FFLs or unlicensed sellers, other information included in the listings indicated that ''private party'' sellers were likely to be unlicensed individuals rather than FFLs with funds to advertise on the website.

Nonetheless, the Department cannot be certain, so the sample size from Armslist (and thus the estimated population of unlicensed sellers) might be larger than the actual number of unlicensed sellers. However, even if we assume all the private party sellers on Armslist are unlicensed (which we cannot conclusively ascertain), not all unlicensed sellers of firearms will qualify as being ''engaged in the business'' under this rule. Some portion of them will be persons selling without the requisite intent to profit and only occasionally, selling inherited firearms, selling to upgrade a personal collection, selling to exchange for a curio or relic they prefer, selling to acquire a firearm for hobbies like hunting, or other similar situations. Many persons fitting into various of these categories will be unaffected by this rule to the extent that they would potentially not meet the requirements to be engaged in the business as a dealer, depending on the specifics of their operation.

Because of the known existence of such sellers in potentially large numbers, and to account for the uncertainty of the number of individuals sampled who might simply be engaging in activities not affected by this rulemaking, the Department estimated that, of all private sellers of firearms, 25 percent might be deemed to be ''engaged in the business'' and the other 75 percent will not be affected.

In response to the comment asking whether the average of 2.51 listings per seller was skewed by a minority of extreme outliers, the Department used this number as an average per seller in order to estimate the number of sellers in the sample set of listings from Armslist. The number of firearms per seller was otherwise not relevant to the Department's calculations. The sampled

[243] *See* OMB Circular A–4, at 46, *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

sellers on Armslist in the private sales category varied in the number of firearms they had listed for sale, skewed to mostly selling one firearm or to a few selling multiple firearms. This partially informed the Department's estimate that approximately 75 percent of the population of currently unlicensed sellers would not be deemed engaged in the business under this rule and accordingly would not need to obtain a license.

With respect to the comment about whether Armslist could be used as a proxy for other sellers on other online platforms, the Department is unclear how sellers of firearms on Armslist might have significantly different characteristics than those of firearms sellers on other online platforms. Generally, there are two types of sellers on online platforms, licensed (FFLs) and unlicensed persons. While there may be differences in certain terms and conditions on given websites—for example, GunBroker requires that firearm transactions be mediated through a local FFL while Armslist does not—those aspects of online sales are not relevant to determining the affected population or calculating the costs of this rule. The terms and conditions that online platforms offer are also not impacted by this rule and will continue to be set at the discretion of the entities operating such platforms. Sellers on online platforms such as Armslist may continue to perform in-person transactions simply by making a phone call to perform a NICS background check for a buyer and will not be required to use a local FFL to complete a firearms transaction like sellers on GunBroker. These characteristics that may differentiate between online platforms do not affect the costs or the impacts to sellers due to the requirements of this rule.

The Department disagrees that items such as alarms, cameras, gun safes, or other security measures are costs under this rule. Although it recommends FFLs consider purchasing such items for security purposes and theft avoidance, the Department does not require—in this rule or anywhere else—that they purchase such items. Therefore, the Department is not including these costs in this rule. The Department also did not include litigation costs because possible future lawsuits are speculative.

The Department disagrees that the costs of the rule should include costs for all persons who are dealing in firearms to also obtain State dealer's licenses and State and local business licenses. Persons who are purchasing and reselling firearms in a State have always been required to follow State and local laws regarding licensing and business operations. The fact that the statute is now further defining the circumstances in which such individuals will be required to be licensed at the Federal level does not change State licensing requirements.[244] This regulation does not change the GCA statutory definition, as amended by the BSCA, and it does not require any State to adopt any presumptions or other clarifying provisions under Federal law into their State requirements. So, in general, State licensing requirements or costs are not affected by this rule. However, ten States and the District of Columbia tie their dealer licensing requirements to the definition of dealer at 18 U.S.C. 921 or the dealer licensing requirements at 18 U.S.C. 923 (though not to any ATF regulations) or require that a person with a Federal firearms license for dealing must also get a State dealer's license. As a result, in those 11 jurisdictions, firearms sellers who must get a Federal firearms license for dealing due to the changes in the BSCA and, therefore, this rule, will likely also need to obtain State dealer licenses for the same reason. The Department has added those costs in the economic analysis under Section VI.A.3 of this preamble.

b. Derivation of Leisure Wage Rate

Comments Received

Some commenters had questions or concerns about the leisure wage rate. One commenter asked why ATF referred to the Department of Transportation (''DOT'') guidance as a method of determining a leisure wage rate. A few commenters opined that the calculated leisure wage rate was too low. One of these commenters estimated that a $16 leisure wage would not result in a livable household income. Another commenter suggested that an average occupational wage rate of $34 per hour was more realistic since individuals would be considered engaged in the business of dealing in firearms and not engaged in leisure time.

Another commenter stated that the Department underestimated the leisure wage rate, which should have been adjusted from $16 to $19.48 to account for wage inflation between April 2020 and the present (which this commenter calculated to September 2023). This commenter used the BLS's Consumer Price Index (''CPI'') as a means of calculating wage increases over time to $19.48.

Department Response

The Department assumes that currently unlicensed persons who may be affected by this rule are not already engaged in a full-time occupation of selling firearms for their income because, if they were, they would already either be licensed in compliance with the GCA as it existed before the BSCA or working for such a licensee. The Department therefore also assumes these persons are not paying themselves a specific wage from their monetary gain from selling their firearms as, typically, a sideline. In other words, the changes enacted by this rule are not likely to cause individuals to qualify as being engaged in the business based on having a full-time or part-time job, including a job working for an FFL, where they get paid salaries or hourly wages as part of an occupation. Instead, the firearms sales activities that would require unlicensed individuals to obtain a license as a result of this rule likely constitute a supplemental source of income or a side business. Such activities are not correlated to an actual wage because they are typically done on the side and this rule does not require FFLs to pay themselves an occupational wage. The affected dealers typically have another job that generates an occupational wage, receive retirement pay, or receive similar primary income. As a result, ATF used a leisure wage to calculate the cost of their non-work time spent on dealing, rather than an occupational wage.

As such, the BLS does not track or assign a specific wage in this context, as there is no wage involved. Nonetheless, the Department recognizes that the rule imposes an opportunity cost of time on persons who will now need to apply for and maintain a license in order to continue dealing in firearms. In the NPRM, the Department therefore assigned a monetary value to that unpaid, hourly burden, as a comparison in ''cost,'' even though these persons are not likely paying themselves an hourly wage for such duties. As a result, the Department opted to use a ''leisure'' wage rather than a retail wage and continues to do so in this final rule. The Department used DOT's guidance on the value of travel time to calculate a leisure wage rate in the NPRM. During the final rulemaking process, however, the Department determined that the methodology used by the Department of Health and Human Services (''HHS'') to calculate the cost of time that persons use to perform actions that are not part of an official occupation is a more

[244] *See* 27 CFR 478.58 (Federal license confers no right or privilege to conduct business or activity contrary to State or other law, grants no immunity for violations of State or other law, and State or other law grants no immunity under Federal law or regulations.).

accurate measure of the relevant leisure wage rate than the DOT methodology used in the NPRM. As a result, the Department has used HHS's methodology to derive the leisure wage it used for this final rule. Because HHS's methodology relies on BLS data that is updated on a monthly basis, the Department does not need to use an inflation-adjusted wage rate as suggested by the commenter.

Using this methodology, the Department raised the leisure wage rate to $23 an hour, which is higher than the $19 suggested by the commenter. For more discussion on how the new wage of $23 per hour was derived, see Section VI.A.3 of this preamble.

c. Hourly Burden

Comments Received

One commenter suggested that the Department underestimated the hourly burdens to complete a Form 7 application and to undergo a licensing inspection. This commenter estimated that it would take more than one hour to read, understand, and complete a Form 7. In addition, they said, the estimated hourly burdens should include the time needed to closely read and understand hundreds of pages of Federal laws and regulations, which they estimated would take at least 22 hours (100,000 words at 75 words per minute). They also estimated that it would take an additional 5.5 hours to read Form 7 and acknowledge it via signature prior to the license being issued, and 4.5 hours to do a renewal Form. Therefore, this commenter estimated that the per FFL cost should be $1,165, to account for 27.5 hours of work, at an average hourly occupational wage rate of $34 per hour, in addition to the $230 cost of items such as the Form 7 application fee, fingerprints, and photographs.

Department Response

The Department concurs with the commenter that the estimated time for inspections was underestimated and has revised the amount of time needed to perform an inspection. From additional research it conducted based on the comment, ATF found that ATF Industry Operations Investigators (''IOIs'') report an average of 15 hours for an initial inspection and 34 hours for a compliance inspection, as opposed to the three hours for each inspection estimated under the NPRM. These averages account for all sizes of licensee operations, some of which may take far less time to inspect and others of which may take far more time, depending on various factors about the licensee's operations. Accordingly, the Department has revised and updated the hourly burdens for initial and compliance inspections in Section VI.A of this preamble.

However, the Department disagrees with the commenter regarding the hourly burden to complete a Form 7. First, the Form 7 application itself is only four pages long and the questions for the person establishing the license are on only pages 1 and 2. They also primarily pertain to the individual's personal demographics and what type of license the individual is requesting.[245] For ease of access, pages 3 and 4 include the responsible person questionnaire that an applicant can fill out about another person if the applicant is applying for an FFL license to include more than one person. Form 7 also includes instructions and definitions of terms, to make filling out the form easier and faster. They are for reference, as needed, and do not necessitate reading and studying in such a way that would require significant additional time. In addition, the Department's hourly burden calculation does not need to account for a person taking any time to read regulations and laws. Most persons who need to fill out Form 7 are unlikely to need to read regulations or laws in order to do so. Moreover, the Department prepares guidance documents that summarize the relevant regulations, and those guidance documents are freely available online and do not necessitate any reading and studying that would require significant additional time. In addition, if a person did wish to read the regulation, the relevant regulatory text is about five pages long at 12-point font and does not require significant additional time to read. Nonetheless, the Department has added familiarization costs to the costs outlined in Section VI.A.3 of this preamble.

The Department also notes that Form 7 has undergone public review and OMB review through the required Paperwork Reduction Act process, including detailed explanations for the time burden the Form entails. Those vetted and approved numbers form the basis for estimates included in the NPRM and now in the final rule regarding this Form. Therefore, hourly burdens to complete Form 7 and travel times to obtain items such as forms, fingerprints, and photographs have not been modified because Form 7 can be requested by mail or downloaded via the internet. Furthermore, fingerprints and photographs are commercially available throughout the United States for employment or passport purposes. The Department has determined that travel times and mileage costs have been appropriately calculated.

d. Office Hours/Business Operational Costs

Comments Received

One commenter suggested that the Department failed to include business operational costs stemming from maintaining at least one hour of operation or availability every week, as they believe Form 7 requires. This commenter estimated that, based on a wage rate of $34 an hour, maintaining business operations for one hour a week for 52 weeks would cost an individual 52 hours, or $1,768 in wages. They also suggested that the cost of becoming a licensee and maintaining a license to deal in firearms should include hourly burdens of 40 hours a week for 50 weeks, allowing for two weeks of vacation.

Another commenter suggested that this rule did not include expenses or time burden associated with selling a firearm. This commenter further suggested that these expenses should be subtracted from any ''profit'' from a sale. A third commenter suggested that ATF should include the time factor to run a business operation, and another commenter suggested including insurance and retirement as costs to comply with the rule.

Department Response

The Department disagrees with the commenter's analysis regarding operational costs. Neither this rule, nor any existing Federal firearms regulation, requires that a licensed dealer maintain full-time business hours, much less hire staff or provide benefits. As discussed in more detail under Section IV.D.6.b of this preamble, unlicensed sellers who would be affected by this rule would not have been engaging in the business as their full-time occupation; full-time firearms sellers were clearly already covered by the GCA licensing requirements before the BSCA and this rule and are thus not counted in the affected population. Therefore, the unlicensed sellers who would be affected by this rule would not have been earning a wage from such activities or paying staff. This rule does not change that, nor does it require that such sellers begin engaging in such activities as part of obtaining a license to deal in firearms. As a result, the Department is not requiring or anticipating that these individuals will,

[245] *Application for Federal Firearms License,* ATF Form 7 (5300.12)/7CR (5310.16) (revised Oct. 2020), *https://www.atf.gov/file/61506/download.*

as a result of this rule, begin paying themselves an occupational wage with benefits. In addition, the Department acknowledges that Form 7 requires that an applicant list at least one business hour per week during which they are available and may be contacted for information or scheduling purposes in the event the newly licensed individual needs to be inspected. But there is no requirement that the affected individual engage in or maintain actual business operations or otherwise actively sell firearms during this time (or during any other specified time or frequency); that individual would be able to maintain the operational hours and frequency that they had prior to being licensed. Therefore, no additional operational opportunity costs were assessed in this final rule.

The time burden associated with the sale of a firearm or to run a business operation is not included because these actions are not required by this rule and are otherwise considered to be ''sunk'' costs. The same is true for other operational costs, including insurance and retirement benefits. Because the rule does not require that a business operator incur any such costs, it is reasonable to presume that, to the extent such costs are incurred, the business operator was already incurring them before the rule, or will only incur them thereafter on a voluntary basis. This rule only requires individuals that are engaged in the business of dealing in firearms to apply for and maintain a license to be a dealer in firearms. The only costs this rule requires to be incurred are costs to become a licensed dealer and costs to maintain that license. While the Department agrees that an individual may have expenses and time burdens with respect to the actual sale of a firearm or to operate a business, these actions are not required by the Department, are voluntary, and are not considered costs of this rule.

e. Costs to the Government

Comments Received

One commenter calculated the annual Government cost as derived from the RSF survey—the ''high'' population estimate—and estimated that, using the upper population estimate, the Government cost is about 14.7 times higher than the Department's estimated Government cost.

Department Response

The Department agrees that using the population estimates derived from the RSF survey would result in a higher government cost estimate. However, for reasons discussed in Section IV.D.2 of this preamble, the Department included the RSF estimate for comparative purposes so people could see the possible options but believes that the more accurate estimate is the lower SME-based estimate. As mentioned above, the SME-derived estimate is based on real historical data and experience with relevant sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. The Department thus considers it to be a more reliable data source for this purpose than the RSF survey and therefore uses the SME-derived estimate as the primary estimate for this rulemaking.

7. Impact on Jobs and Economy

Comments Received

One commenter suggested that requiring additional firearms sellers to become licensed will increase the prices of firearms sold in the marketplace. This commenter further estimated that the total U.S. firearms market was $32.1 billion as of 2022 and that this rule, based on their own estimates, would cause a 0.099 percent increase in firearm prices across the overall firearms market. The commenter used an internal model to compare the cost of the rule to their estimated increase in prices; from that, they estimated that the increased prices they assessed would result in 0.89 percent fewer firearm sales, which would in turn result in fewer jobs, including jobs represented by newly licensing these sellers as FFLs. Based on their internal modeling, this commenter estimated that this rule will indirectly result in a loss of 350 direct retail jobs. The commenter went on to estimate that, including supplier jobs, the rule will indirectly result in over 550 fewer jobs and a total of $26.5 million in lost wages and benefits. Finally, this commenter estimated that the American economy would be $70 million smaller.

Department Response

The Department disagrees with the commenter's assessment of the effect this rule will have on the price of firearms and the effect on the U.S. firearms market and overall economy. The Department has reviewed the literature provided by the commenter and determined that the estimated impacts on the economy, retail jobs, wages, and subsequent taxes detailed by the commenter's internal literature are largely not connected to the market impacted by this rule. The literature cited by this commenter primarily focused on existing licensees, their retail jobs, and their firearms market. The literature does not cover unregulated persons who sell firearms on the secondary market. While there may be some effects due to an increase in the number of licensed FFLs, the new licensees that would be generated by this rule have already been selling, and would continue to sell, firearms on the secondary market, and thus would not impact the primary market. Based on the totality of public comments and the Department's experience and analysis, the Department has no basis to believe that persons obtaining new licenses under the clarifications in this rule would enter the primary firearms market industries of manufacturing firearms, becoming intermediaries, or engaging in retail sales of new firearms. Instead, the majority of the unlicensed sellers who would need to obtain a license pursuant to this rule already obtain firearms through existing retail FFLs and subsequently resell them on the secondary market. Some also acquire firearms through estate sales or other secondary sources. Since this buying and further reselling secondary market has been and will continue to operate, the Department does not estimate a significant impact on the firearms industry as suggested by this commenter.

8. Impact on Existing FFLs

Comments Received

Some commenters suggested that the rule would cause windfall gains to current FFLs under the belief that the rule would require all firearm transactions to be done through an existing FFL. Other commenters claimed that the rule would make it harder to lawfully transfer firearms due to the costs of obtaining and maintaining an FFL. Several individuals claimed that the rule would cause more so-called ''mom-and-pop'' businesses to go out of business.

Department Response

The Department acknowledges that this rule will create more FFLs, which will result in an increase in the amount of licensed competition. However, competition from these new licensees does not equate to an increase in sales competition, nor is the competition new, because those same people who will be required to obtain licenses under the rule are currently selling as unlicensed dealers. And they are operating at an unfair advantage. As one set of commenters pointed out, ''[a]s recognized in the Proposed Rule, these requirements would come at modest cost to most people falling under the

clarified definition. Furthermore, requiring regulatory compliance by dealers operating on the margin of the current scheme would have the equitable effect of subjecting them to the same requirements as current FFLs engaged in substantially similar business activities.'' These sellers would have already existed in the marketplace under the baseline prior to this rule, but they have been operating and competing with FFLs in a largely unregulated state—without being subject to the laws and regulations under which FFLs are required to operate. Rather than adding competition to existing FFLs, clarifying when sellers are likely to be engaged in the business under this rule and would need to become licensed would increase equity in the marketplace by extending costs and obligations incumbent upon all existing FFLs to include currently unlicensed sellers that are acting as dealers in firearms.

There may be additional positive market effects on FFLs as a result of their serving as an intermediary for private party firearm transactions at a greater rate, but the Department finds this effect difficult to estimate based on the lack of existing data sources and subject matter expertise. However, the Department disagrees that this rule will cause more ''mom-and-pop'' businesses to go out of business. The majority of existing licensees are considered to be small businesses and will continue to operate as small businesses. Furthermore, as other commenters have pointed out and as discussed in Sections IV.D.10.c and IV.D.12 of this preamble, many States already require background checks for all private party transactions and any costs associated with such background checks are not due to this rule. Finally, a newly licensed seller who might newly need to undertake background checks may do so under FBI processes by making a simple phone call for free. The Department included these qualitative effects of the rule.

9. License Revocation Costs

Comments Received

One commenter questioned ATF's assumption that, upon revocation of a license, the underlying market value of the revoked FFL's existing inventory of firearms would be unchanged when sold or transferred to another FFL's inventory. This commenter suggested that during a comprehensive sale or transfer of an existing FFL's inventory to another FFL, the selling FFL would need to liquidate their existing inventory at a loss to the purchasing FFL. In other words, the commenter suggested the selling FFL would experience an adverse price when liquidating their existing inventory.

Another commenter suggested that the adverse price response described above would be large. The same commenter also suggested that those who choose to surrender their FFLs must still liquidate their business-owned firearm assets within 30 days, with the same adverse price response of those who have had their license revoked, rather than engage in an ''orderly, lawful liquidation'' as ATF estimates.

Department Response

The Department estimated that the rule would likely have a qualitative impact on FFLs that fail to comply with existing regulations and requirements, mainly due to the rule's clarification of what must occur with their existing inventory when their license is terminated. FFLs that have had their licenses terminated before this rule were already not permitted to engage in unlawful means of disposing of their remaining inventory, but the rule makes the lawful options clearer. However, ATF revokes or denies renewal of FFL licenses very rarely, with a *de minimis* 0.093 percent of all active FFLs being revoked annually as described below in Section VI.A.4 of this preamble. Furthermore, the economic impact of transferring inventory to another FFL is unclear, given the range in volume and value of firearm inventories. Public comment was specifically sought on these topics, but the Department did not receive any data. In addition, the disposal requirements are not expected to have an adverse cost impact on FFLs that choose to cancel or not renew their licenses. Because such FFLs do so voluntarily, they know in advance that they will need to dispose of their inventory and thus do not have the same disruption and urgency that disposition due to a license revocation would potentially carry.

10. Benefits of the Rule

a. Costs Outweigh the Benefits

Comments Received

A couple of commenters opined that the costs of this rule outweigh the benefits. Of those two commenters, one calculated a 188 percent increase in Form 7 applications but stated there would be less than a 0.2 percent increase in background checks resulting from that increase in FFLs. Further, this commenter suggested that the ''actual number of firearm transactions at licensed dealers is likely a good bit higher'' because ''[m]ultiple guns can transfer based off of one background check.''

One commenter asserted that ATF incorrectly included individuals who sell firearms through existing licensees and, therefore, no benefit should accrue from such individuals because these firearm transactions are already subject to the background check process. The commenter further stated that the Department failed to account for sellers that currently undergo background checks for all private transactions, as required by certain States. This commenter estimated that 50 percent of the population lives in States that already require background checks and thus implied that any benefits derived from the rule are not as abundant as stated by the Department.

Department Response

The Department disagrees that the benefits of the rule are outweighed by the costs, as outlined in the economic analysis in Section VI.A.6 of this preamble. The value society places on the qualitative social benefits of the rule cannot be quantitatively represented in a way that would allow them to be compared to the quantitative costs of licensing more people, so the comment's comparison of the two is not accurate or appropriate. People know that society has placed a high positive value on increasing the licensure of sellers who engage in the business of dealing, in aid of public safety, because Congress passed a law to change the definition for that purpose. In addition, hundreds of thousands of commenters on this rule have also expressed that they place a high positive value on increasing licensure for public safety needs. But people cannot place a numerical value on the qualitative benefits flowing from those statutory changes and thus from this rule. However, there are quantitative benefits that relate to the subject indirectly. The Department does not have sufficient data from which to assess these indirect benefits and has thus not included or relied on them as quantitative benefits resulting from this rule. However, the Department is including some quantitative illustrative considerations in response to this comment as they shed some light on the indirect benefits. For example, there are studies that have examined the economic costs of gun violence. Those studies have demonstrated that the annual healthcare and medical costs of firearms violence alone run into the billions.[246] Therefore,

[246] *See, e.g.,* Everytown for Gun Safety, *The Economic Cost of Gun Violence* (July 19, 2022), *https://everytownresearch.org/report/the-economic-*

even a marginal decrease in firearms violence as a result of this rule would constitute a large enough quantitative benefit from the rule to offset the estimated costs of the rule.

The Department further disagrees that there is a marginal decrease in returns with respect to the costs attributed to this rule. This rule is primarily intended to implement the BSCA and to accordingly reduce the means by which a prohibited person can obtain firearms, including those subsequently used in a crime. The ratio between the number of Form 7 applications versus the number of background checks versus how many firearms a buyer can purchase under one background check is not relevant in determining benefits. In other words, benefits stem from having more firearms sellers be licensed, for multiple public safety reasons (as discussed in this section and Section IV.D.10 of this preamble)). These benefits are not solely the result of increasing background checks, so the perceived increase in the number of background checks does not offset the rule's benefits. In addition, even comparing the number of background checks with and without the rule would not be accurate because there are other factors involved. For example, although some prohibited persons do attempt to purchase firearms from FFLs, many currently buy from unlicensed dealers. Imposing a requirement that those dealers now be licensed would likely deter more prohibited persons from trying to purchase firearms, which would decrease the number of background checks. The number of firearms that are being purchased and resold per transaction is also not relevant. Multiple transactions already occur pursuant to a single background check and neither the BSCA nor this rule are directed at reducing firearm transactions. The commenter's comparison of the number of firearms that are purchased and resold per transaction therefore also does not result in an offset of the rule's benefits.

An increase in background checks is not the only benefit accrued from requiring that persons engaged in the business as dealers obtain a license. Increasing the number of licensed dealers also results in an increase in sellers who maintain firearms transaction records, submit multiple sales reports, report theft and losses of firearms, and respond to crime gun trace requests. These activities are directly correlated with an increase in the number of prohibited persons who are denied firearm purchases, law enforcement's ability to investigate and retrieve lost or stolen firearms before they can be used in crimes or trafficked, and law enforcement's ability to trace firearms that have been used in crimes and use them to find the perpetrators, among other benefits. This is particularly beneficial for States that have higher rates of straw purchasing or are otherwise larger sources of firearms trafficking, but it benefits society as a whole because each of these actions help law enforcement reduce criminal activities and opportunities. Furthermore, the Department believes that this rule will increase background checks, primarily in States that have less stringent background check requirements, which reduces the potential sources of firearms trafficking.

The Department concurs with the statement that the economic analysis model failed to account for sellers that currently undergo background checks for all private transactions, as required by certain States, but disagrees that the fact that some States currently require background checks for private firearm transfers reduces the benefits accrued from this rule. While the Department acknowledges that certain States already require background checks, States that currently do not require background checks pose a greater risk to public safety. These States tend to have higher rates of straw purchasing or otherwise are sources of firearms trafficking. Although State requirements that all sales undergo background checks could be relevant in general terms, they do not reduce the benefits accrued from this rule because relatively few States have universal background check requirements, because State background checks differ with respect to their thoroughness and which databases are utilized, and because the benefits of increasing licensees are not solely due to an increase in background checks. Please see Section VI.A.7 of this preamble for more information about States and firearms trafficking.

The Department further disagrees that the benefits derived from the rule should be reduced to account for unlicensed persons who sell firearms or obtain background checks through existing FFLs (either voluntarily or due to State requirements).

As a result of the comments on this topic, the Department has added a discussion of State background checks, tracing, and firearms trafficking to the Benefits discussion in Section VI.A.6 of this preamble to supplement the Department's position that the benefits of this rule outweigh the costs.

b. Lack of Benefits From Licenses

Comments Received

One commenter argued that benefits attributed to this rule ''do not flow from licenses''; rather, the rule's benefits are derived from the act of undergoing background checks and maintaining records. This commenter also stated that the Department failed to use denied background checks and responsiveness to traces as a benefit to the rule, suggesting, according to the commenter, that this rule does not address public safety as stated by the Department.

Department Response

The Department disagrees that the act of obtaining and maintaining a license does not directly contribute to the safety and welfare of the public. Congress chose to make the dealer the ''principal agent of federal enforcement'' in ''restricting [criminals'] access to firearms.'' *Huddleston* v. *United States,* 415 U.S. 814, 824 (1974). As the Supreme Court explained in a later case, *Abramski,* 573 U.S. at 172–73:

> The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's ''business premises'' by prohibiting, except in limited circumstances, the sale of a firearm ''to a person who does not appear in person'' at that location. Other provisions then require the dealer to check and make use of certain identifying information received from the buyer. Before completing any sale, the dealer must ''verif[y] the identity of the transferee by examining a valid identification document'' bearing a photograph. § 922(t)(1)(C). In addition, the dealer must procure the buyer's ''name, age, and place of residence.'' § 922(b)(5). And finally, the dealer must (with limited exceptions not at issue here) submit that information to the National Instant Background Check System

cost-of-gun-violence/ (estimating $1.57 billion in directly measurable medical costs to taxpayers due to firearms violence, including immediate and long-term medical care, mental health care, and ambulance and patient transport (not including costs to families, survivors, and employers); Nathaniel J. Glasser et al., *Economics and Public Health: Two Perspectives on Firearm Injury Prevention,* 704 Annals Am. Acad. Pol. & Soc. Sci. 44 (''The direct and associated medical care costs of firearm injury are high. In 2019, medical costs associated with firearm fatalities totaled an estimated $233million (CDC 2022). For nonfatal firearm injuries in 2019, the estimated 12-month attributable medical care cost was $24,859 per patient (Peterson et al. 2019; Peterson, Xu, and Florence 2021). While further research is needed to estimate long-term-care costs, the annual direct medical cost of firearm injuries has been conservatively estimated to exceed $2.8 billion (CDC 2022).''); Government Accountability Office, *Firearm Injuries: Health Care Service Needs and Costs* (2021), *https://www.gao.gov/assets/gao-21-515.pdf* (finding that initial inpatient costs from firearms violence in 2016 and 2017 were more than $1 billion, plus another 20 percent for physician costs, and additional first-year costs of $8,000 to 11,000 each for 16 percent of such patients, and stating that there are additional costs thereafter).

(NICS) to determine whether the potential purchaser is for any reason disqualified from owning a firearm. See §§ 922(t)(1)(A)–(B).

The benefits of this rule therefore stem from bringing potential purchasers onto a licensed business premises to prevent prohibited persons from obtaining firearms, channeling the commerce in firearms through licensed dealers so that State and local law enforcement can regulate firearms commerce in their borders, and allowing the tracing of crime guns. Making it harder for prohibited persons to obtain firearms makes it less likely that such persons will use a firearm in a crime. To the extent that a firearm purchased through an FFL is used in a crime, that firearm can then be traced by law enforcement. Furthermore, should firearms be stolen from an FFL, there are requirements that thefts be reported so that ATF and local law enforcement can analyze theft patterns for future reduction purposes. This approach helps to ensure that regulated firearms continue to be used for legal purposes and not criminal activities.

c. Lack of Empirical Data

Comments Received

Some commenters asserted that the proposed rule would not improve public safety, and cited statistics to support their view. One commenter stated that the proposed rule would not hinder criminals or save lives. In support of that view, the commenter stated that the State of Washington's per capita gun murder rate increased by more than 26 percent following its 2014 passage of universal background checks (''UBCs'') versus an unnamed neighboring State that the commenter stated had no such increase and no UBC requirement. Another commentator stated that numerous studies, including in peer-reviewed journals, found that the correlation between gun control measures and reduction in gun violence is negligible. *See* Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981–2010,* 103 Am. J. Pub. Health 2098 (2013) (cited by the commenter as in the *Journal of the American Medical Association* instead). Another commenter stated that the Bureau of Justice Statistics shows that less than 1 percent of individuals obtain firearms at gun shows. Finally, some commenters believed the proposed rule itself is reactive or lacks supporting evidence, analysis, or well-considered evidence to show that it will have a meaningful impact on crime reduction or improve public safety.

Similar to the comments on the population estimates, one commenter stated that the benefits lacked empirical data that would demonstrate the effects on public safety. The commenter referenced a peer-reviewed study that stated that each percentage point increase in gun ownership increased the homicide rate by 0.9 percent. One commenter questioned the lack of quantifiable benefits, including the lack of tracing data.

Many commenters who supported the proposed rule referenced research showing that one in five firearms are sold without a background check [247] and further stated that allowing firearms to be purchased without a background check is a significant threat to public safety. One commenter reinforced this sentiment by citing an article from *Bloomberg.*[248] Some commenters stated that firearms that are purchased without a background check cannot be later be traced. Many public commenters agreed with the rule and suggested that requiring background checks for sales of firearms increases public safety.

Department Response

The Department disagrees that there is no quantitative data to support the analysis in the NPRM and the public safety justification for the provisions of this rule; on the contrary, there is much data in support. Such data include the National Firearms Commerce and Trafficking Assessment (''NFCTA'') referenced by one commenter and released by ATF as a two-volume report in May 2022 and January 2023.[249] That report revealed, for example, that even though only 3 percent (41,810) of crime guns traced between 2017 and 2021 were acquired from licensees at a gun show, the percentage of those traces increased year-over-year by 19 percent. And as ATF noted in the report, ''[i]t is important to recognize that this figure does not represent the total percentage of recovered crime guns that were sold at a gun show during the study period as private citizens and unlicensed dealers sell firearms at gun show venues. National data, however, are not available on unregulated firearm transfers at gun shows.'' [250]

Furthermore, the Department disagrees with the commenter's interpretation of the article in the *American Journal of Public Health.* The commenter argued that the article found that any correlation between gun control measures and reduction in gun violence is negligible. But the article states, ''[g]un ownership was a significant predictor of firearm homicide rates (incidence rate ratio = 1.009; 95% confidence interval = 1.004, 1.014). This model indicated that for each percentage point increase in gun ownership, the firearm homicide rate increased by 0.9%.'' Siegel, Ross, & King, *supra,* at 2098. The Department interprets this article to suggest that for every percent increase in gun ownership, there is almost a comparable (almost 1:1 ratio) increase in firearm homicide, which is not negligible. In other words, for every percent increase in firearms ownership, there was an almost equal percentage increase in firearm homicide.

However, the Department concurs with many of the statistics provided by the commenters and has incorporated those statistics into the economic analysis in Section VI.A of this preamble. Additionally, the Department used information provided by the commenters to illustrate the effectiveness of tracing data to help determine firearms trafficking or straw purchasing patterns. Finally, the Department compared commenters' statistics on States that require background checks for all private firearms transactions to States that have the highest and lowest time-to-crime statistics and determined that States with the least restrictive background check requirements may be larger sources of firearms trafficking and straw purchases. For more details, *see* Section VI.A.7 of this preamble, which discusses the benefits of the rule.

[247] German Lopez, *Study: 1 in 5 gun purchases reportedly go through without a background check,* Vox (Jan. 4, 2017), *https://www.vox.com/policy-and-politics/2017/1/4/14153594/gun-background-check-study* (discussing a study published in the *Annals of Internal Medicine*).

[248] Brentin Mock, *Mapping How Guns Get Around Despite Background Check Laws,* Bloomberg (Oct. 22, 2015), *https://www.bloomberg.com/news/articles/2015-10-22/40-percent-of-gun-owners-got-them-without-background-checks.*

[249] ATF, *National Firearms Commerce and Trafficking Assessment: Firearms in Commerce* (May 5, 2022), *https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download;* ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two* (Jan. 11, 2023), *https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two.*

[250] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 14 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download.*

11. Federalism Impact

Comments Received

One commenter estimated that this rule will increase the number of FFL dealers nationwide by 903 percent. Many States will have a subsequent ''massive burden'' due to this increase, the commenter concluded. This commenter also suggested that due to the burden this rule will have on States, the Department should have included a federalism summary impact statement as to how these new licensees will affect State regulatory agencies. This commenter suggested that this rule will have a significant impact on States because many States license FFLs themselves, separately from the Federal licensing scheme. In addition, another commenter stated that the proposed rule presented a potential conflict in which an individual might be engaged in a business operation requiring a license under Federal law but might not be required to obtain a license under State law. The commenter added that this would create potential problems for people who are legally required to hold an FFL, but then are prohibited from operating or possessing such a license under local ordinances. They also stated that ATF is seeking to broadly regulate a field that states have already addressed in different ways.

Another commenter challenged the NPRM's statement that ''[t]his rulemaking would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments.'' They claimed that ATF failed to consider the impact of its expansion of mandatory background checks for firearm transactions on State, local, and Tribal government budgets, as those political entities may have to expand their staffing and infrastructure to respond to a greater number of declined background checks.

Department Response

The Department disagrees that a federalism impact statement is needed for this rulemaking under Executive Order 13132. Nothing in this rule changes how State and local authorities conduct background checks or otherwise regulate persons engaged in a firearms business. This rule, which implements the GCA, and the changes made to it by the BSCA, does not preempt State laws or impose a substantive compliance cost on States. Under 18 U.S.C. 927, no provision of the GCA ''shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the statute so that the two cannot be reconciled or consistently stand together.'' State and local jurisdictions are therefore free to create their own definitions of terms such as ''engaged in the business'' to be applied for purposes of State or local law within their respective jurisdictions. They are free to mandate their own requirements concerning the licensing of firearms dealers.

State licensing schemes for retail dealers in firearms (or merchandise that includes firearms) stand on their own and are not dependent on Federal law. If persons have been engaged in a firearms business requiring a State or local business license, then they should have acquired the State or local business license regardless of the new rule. In fact, as set forth below, the new rule looks to whether a person ''[s]ecures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms'' to help determine whether a person is engaged in the business requiring a license under Federal law, 18 U.S.C. 922(a)(1) and 923(a). *See* 27 CFR 478.13(d)(2)(vii) (definition of ''predominantly earn a profit'') (final rule).

The Department disagrees with the estimate that the rule will significantly or uniquely affect small governments due to increased background checks by local authorities since 22 States already require background checks for private party sales. Of the States that do not currently require background checks for all private sales, only three States (Florida, Tennessee, and Utah) [251] do not rely on Federal law enforcement for their background checks and are ''point of contact'' States in which designated State agencies conduct NICS checks.

12. Regulatory Flexibility Act

Comments Received

Various commenters stated that this rule, by increasing operational and administrative costs, will have a significant and disproportionate impact on, or otherwise destroy, small businesses (some of which have operated for decades) or even destroy a sector of business. One commenter stated that the proposed rule inappropriately did not contain an analysis under the Regulatory Flexibility Act (''RFA''). The same commenter opined that small businesses may not have the resources or infrastructure to comply with enhanced recordkeeping requirements. Another commenter opined that with more people applying for a license, existing FFLs that operate a brick-and-mortar store will go out of business.

One commenter requested various data regarding the analysis performed under the RFA. This commenter stated that ATF may not have properly considered small entities and further asked a series of questions:

1. ATF did not list a cost per business. . . . What is the average additional cost a small business would incur as a result of this rule?

2. Why did the ATF not include [the additional cost] in the published rule?

3. What alternatives [for small businesses] did ATF consider?

a. What would have been [the alternatives'] impact on small entities?

b. Why were these alternatives deemed insufficient?

c. Why did the ATF not explain the alternatives in its original RFA analysis?

4. ATF anticipates that nearly 25,000 new individuals or entities must register as a firearm dealer. Of these entities, how many does the ATF anticipate will stop selling firearms?

5. What impact will this rule have on existing FFL dealers, many of whom are small businesses and how did ATF assess the costs of this rule on large entities, compared to the 25,000 new small businesses it created?

6. What impact does the ATF believe adding 25,000 new FFL dealers will have on the price of firearms?

7. Why did ATF not explain this rule's impact on the 25,000 businesses?

Department Response

The Department disagrees that this rule will destroy a whole sector of business (*i.e.,* the firearms industry). FFL dealers are a subsector of the firearms industry, and the impact on some dealers will not destroy that subsector or the entire firearms industry. The firearms industry is significantly large and robust, and the impact of this rule affects only a small portion of one subsector of it. In any event, as stated above in Section IV.D.8 of this preamble, the Department believes that, rather than adding competition to existing FFLs, requiring sellers engaged in the business under this rule to become licensed adds equity to the marketplace by spreading costs and obligations incumbent upon all existing FFLs to include currently unlicensed sellers that are acting as

[251] FBI, *How We Can Help You: NICS Participation Map* (Feb. 1, 2024), *https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics.*

dealers in firearms. There may be additional positive market effects on FFLs as a result of them serving as an intermediary for private party firearm transactions at a greater rate, but the Department finds this effect difficult to estimate based on the lack of existing data sources and subject matter expertise. Finally, the Department does not believe the congressionally mandated recordkeeping requirements constitute a significant burden for a small business. Many existing FFLs are small businesses and already comply with the recordkeeping requirements.

Regarding the first and second questions on small business impacts, the Department did not distinguish between the cost of individuals complying with this rule versus small businesses complying with this rule. For the purposes of this rule and Final Regulatory Flexibility Act analysis, the Department assumed individuals becoming licensed will become small businesses and the cost per person (or small business) is outlined in Section VI.A.3 of this preamble, discussing ''Costs for Unlicensed Persons Becoming FFLs.'' The Department did not determine that there were additional costs beyond those individuals (or newly formed businesses) complying with this rule; therefore, no other costs were attributed to small businesses that were not already outlined in Section VI.A.3 of this preamble.

Regarding the third question on consideration of alternatives, the Department considered alternatives in the NPRM (88 FR 62016 and 62017) and discusses them in the final rule in Section VI.A.8 of this preamble. No separate alternative was considered for small business specifically because it was assumed that all individuals complying with this rule will become small businesses. Other alternatives suggested during the comment period and the Department's response to such suggestions are discussed in Section IV.D.13 of this preamble. All alternatives (including the proposed alternative) were considered alternatives for small business compliance. All impacts considered in the alternatives and all impacts under this rule were considered to be alternatives and regulations for small business compliance. Alternatives such as lower fees or guidance were deemed insufficient for various reasons, including that fees are imposed by statutory requirement and guidance alone would result in insufficient compliance. These alternative discussions are outlined below in Section VI.A.8 of this preamble (''Alternatives'') and above in the Department's response to comments received on alternatives in Section IV.D.13 of this preamble. The Department did not discuss alternatives targeted at small businesses separately from alternatives aimed at all affected parties because they were deemed to be one and the same.

Regarding the fourth question, on the estimated number of individuals leaving the market: of the individual or new entities affected by this rule, the Department estimates in this final analysis that 10 percent of affected individuals (or potential entities) may opt to stop selling firearms. Discussions on that are located in Sections IV.D.2 (''Population Accuracy''), IV.D.4 (''Russell Sage Foundation Model Calculation''), and VI.A.2 (''Population'') of this preamble.

Regarding the fifth question, as responded to in Section IV.D.8 (''Impact on Existing FFLs'') of this preamble, there may be some impact on existing FFLs as there will now be more licensed dealers. However, these newly licensed dealers have been selling firearms prior to this rule, and most of them will continue to sell firearms regardless of this rule, so the impact on existing FFLs will not be significant since the overall number of firearm transactions are unlikely to be significantly affected. For a more detailed discussion, please see Section IV.D.8 of this preamble.

Regarding the sixth question, the Department does not anticipate a significant impact on the prices of firearms. The firearm transactions affected by this rule are primarily firearms sold on the secondary market (*i.e.,* previously purchased firearms for resale). Furthermore, sales of these firearms have been and will continue to occur regardless of the implementation of this rule; therefore, no impact on the prices was considered. The Department further notes that this rule is not affecting the manufacture or importation of firearms, so supply is considered to be stable.

Regarding the seventh question, the Department considered the impact of this rule on all unlicensed sellers (or newly created businesses) and addressed cost under Section VI of this preamble. As mentioned above, no distinction was made between small businesses because it was assumed that all unlicensed sellers (or businesses) affected by this rule are small.

13. Alternatives

Comments Received

One commenter opined that only retailers of firearms who own brick-and-mortar stores should be required to have a license. Another commenter suggested using a minimum threshold number and accounting for inflation to define a dealer. One commenter suggested a stricter background check for all firearms transactions. Another suggested that ATF charge a $10 per application fee for a dealer's license, not $200. Two commenters suggested a plethora of alternatives, including education for individuals and local law enforcement. One of those two commenters also suggested revisions to the NFA and GCA for items such as increasing the fees of NFA weapons, and the other commenter suggested that the Department track and report on citizens using firearms to prevent a crime or protect themselves. One commenter suggested that, rather than expanding the Federal licensing requirements, ATF should institute a permitting system where purchasers could use a firearms ID or demarcation on their license to provide proof of ability to purchase firearms.

A commenter recommended leaving the regulations as they are but suggested adding straw purchases because ''ATF has estimated that 50 percent of the illegal firearms market is conducted through straw purchases.'' Another commenter agreed and said that rather than implementing universal background checks, ATF should focus on cracking down on illegal straw purchases.

Department Response

The Department disagrees that only retailers who operate out of brick-and-mortar stores should be required to have licenses. Currently, a portion of ATF's existing FFLs include high-volume sellers of firearms who do not operate in brick-and-mortar store locations; they should not be excluded from licensing requirements simply because they sell from other locations or through other mediums. There are unlicensed sellers who operate out of brick-and-mortar locations and others who do not; the law requires any such sellers who qualify as engaged in the business as a dealer to be licensed. The BSCA does not distinguish on the basis of where the sales occur—and the rule provides details to aid people in understanding that approach. The BSCA was enacted with the intent to increase, not reduce, the population of regulated dealers. Therefore, this alternative has not been included in the analysis.

As explained in detail in the NPRM, the Department considered, but did not propose, a specific number of firearms sales as a threshold for being engaged in the business as a dealer. Although some commenters suggested this alternative again, they did not provide any

information or reasons to overcome or refute the explanations and evidence cited in the NPRM discussion on this topic. As those reasons still hold true, the Department continues to decline to adopt this alternative.

The Department understands that some commenters consider the license fee of $200 and other costs related to obtaining a license too costly for some people transacting in firearms as part of a hobby or to enhance a personal collection. However, the Department does not set the application fee or the costs of obtaining photographs or fingerprints. The application fee is set by statute and the Department cannot change it.[252] The other costs (such as for photographs or fingerprints) are set by private companies and similarly cannot be changed by the Department. Nonetheless, the rule does not require occasional sellers of firearms as part of a hobby or to enhance personal collections to obtain a license, so the costs of complying with this rule would not present a burden to them. Instead, the rule impacts persons who have been engaging in certain repetitive firearms dealing that demonstrates they are engaged in the business as a firearms dealer and should be licensed. For these reasons, the Department declines to pursue alternatives to licensing fees.

The Department previously considered and rejected guidance as an alternative means of implementing the statutory changes to the definition of ''engaged in the business.'' The Department does not believe guidance would be an effective method, based partly on prior experience with guidance on this topic. ATF's 2016 guidance, for example, outlined the general factors and examples of being engaged in the business under the statutory definition of that term in effect at the time,[253] but compliance with that guidance document was voluntary and it was not included in the Code of Federal Regulations for broader distribution to the public. Therefore, the guidance resulted in only a brief increase in the number of persons engaged in the business becoming licensed dealers. Although this increase of 567 additional dealers illustrated that people would try to comply with the licensing requirement when they better understood the requirement, this approach was not effective enough, by itself, to address the problem of unlicensed dealing.

A regulation is much more effective at achieving compliance with the GCA, as amended by the BSCA, than guidance that is both voluntary and distributed by ATF at gun shows or other venues when the agency is present (or found online if people search for it). People recognize that a regulation sets the requirements they must follow and affects all those participating in the topic area; they also know where to look for a regulation. Now that the BSCA has redefined ''engaged in the business,'' there is even more of a need to ensure that unlicensed people who meet the definition of that term understand that they are violating the law if they do not obtain a license. And if the Department does not update its regulations, they would not accurately reflect the statutory text and would thus create confusion.

As a result, the Department did not select the alternative to publish only guidance documents in lieu of this regulation because guidance alone would be insufficient as a means to inform the public in general, rather than solely the currently regulated community. Guidance would not have the same reach and attention as a regulation, and it would not be able to change existing regulatory provisions on the subject of ''engaged in the business'' or impact intersecting regulatory provisions. The Department considers it necessary to use a regulatory means of putting sellers who continuously or repetitively engage in firearm sales on notice regarding the impacts the statute will have on them, and to clarify the parameters of the new definition. For more detail, please refer to Section VI.A.8 of this preamble.

The Department did not consider the remaining alternatives proposed by commenters, such as creating and including educational training, cracking down on straw purchases, or adopting a buyer permitting system, because they are outside the scope of this rulemaking and the Department's NPRM. ATF will provide training and outreach as it routinely does, but such activities are not included in a regulation.

V. Final Rule

Subsections in Section V

A. Definition of ''Dealer''

The rule finalizes, with minor edits, the amendments proposed in the NPRM to the definition of ''dealer'' in 27 CFR part 478, which clarify that this term includes such activities wherever, or through whatever medium, they are conducted. In this regard, the Department replaced the words ''may be conducted'' with ''are conducted'' to help ensure that the definition is not interpreted as authorizing a firearms business to operate at unqualified gun shows, events, or other locations, where such activities could not serve as a proper business premises at which a license could be issued under the GCA.

B. Definition of Engaged in the Business—''Purchase,'' ''Sale,'' and ''Something of Value''

To conform with designation of paragraphs elsewhere in this rule, the final rule redesignates paragraphs (a) through (f) of the ''engaged in the business'' definition in § 478.11 to paragraphs (1) through (6) and continues the numerical designation in new paragraphs thereafter. The rule finalizes the definitions of ''Purchase,'' ''Sale,'' and ''Something of value'' with minor amendments. First, for consistency across those who deal in firearms, the definitions were moved in the definition of ''engaged in the business'' to a new paragraph (7), to apply, not only to the definition of ''dealer in firearms other than a gunsmith or pawnbroker,'' but generally to all persons engaged in the business of dealing in firearms. This includes importers and manufacturers who are authorized by 27 CFR 478.41(b) to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured. Second, in the definitions of ''purchase'' and ''sale,'' the words ''an agreed'' were inserted before ''exchange for something of value'' to clarify that the transaction must be intentional. Such transactions include indirect exchanges of something of value. Third, the Department revised the term ''sale'' to change ''providing

[252] Application fees for firearms regulated under the GCA are set by 18 U.S.C. 923(a). Rates for the NFA special (occupational) tax (SOT) are established by 26 U.S.C. 5801(a).

[253] *See* ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?* (2016), *https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo125446/pdf/GOVPUB-J38-PURL-gpo125446.pdf.*

to'' to ''disposing of'' to be more consistent with the statutory language, and for further clarity, to define the term ''resale'' as ''selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person.'' Finally, the phrase ''legal or illegal'' was added at the end of the definition of ''something of value'' to make clear that the item or service exchanged for a firearm could be one that is unlawful to possess or transfer (*e.g.,* a controlled substance).

C. Definition of ''Engaged in the Business as a Dealer in Firearms Other Than a Gunsmith or Pawnbroker''

The rule finalizes the definition of ''engaged in the business'' of wholesale or retail dealing in a new section of the regulation at § 478.13, instead of keeping the definition under the overall definitions section at § 478.11, due to its length. In conjunction with this change, the final rule has also moved the definition of ''predominantly earn a profit'' to § 478.13 because it is an element of the definition of ''engaged in the business as a dealer.'' As a result of consolidating the two definitions into one integrated section, the rule also eliminated duplication of identical paragraphs on rebuttal evidence, the non-exhaustive nature of the listed rebuttal evidence, and applicability to criminal proceedings, which were previously located in each definition. In conjunction with these changes, the final rule has also included cross-references to these definitions in § 478.11.

D. Definition of Engaged in the Business as Applied to Auctioneers

The rule finalizes the definition of ''engaged in the business'' of wholesale or retail dealing with minor edits to make clear that estate-type auctioneers may assist in liquidating all firearms as a service on commission without a license, not merely those in a personal collection (as that term is defined in this rule). Additionally, the final rule addresses the concerns of estate-type auctioneers by limiting the caveat for possession of the firearms prior to the auction of the firearms to those that are ''for sale on consignment.''

E. Presumptions That a Person Is Engaged in the Business

The rule finalizes the presumptions that a person is ''engaged in the business'' of dealing in firearms at wholesale or retail by making the following changes: (1) in the introductory paragraph (a), separating the definition of ''engaged in the business'' in that paragraph from a new paragraph (b), ''fact-specific inquiry,'' which sets forth the factual analysis courts have historically applied to determine whether a person falls within the definition in paragraph (a); including in paragraph (b) the example to compare a single firearm transaction, or offer to engage a transaction, in which a person represents to others ''a willingness and ability'' to purchase more firearms for resale, which may require a license, with ''a single isolated firearm transaction without such evidence'' that would not require a license; and adding the following at the end of the same paragraph (b): ''At all times, the determination of whether a person is engaged in the business of dealing in firearms is based on the totality of the circumstances''; (2) revising the sentence at the beginning of the presumptions to move the phrase ''[i]n civil or administrative proceedings'' to the beginning of the sentence, and adding ''it is shown that'' before ''the person—''; (3) adding the prefix ''re'' before ''sell'' and ''sale'' in the various presumptions to more closely track the statutory definition of ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C); (4) adding to the EIB presumption on willingness and ability to purchase and sell more firearms the parenthetical ''(*i.e.,* to be a source of additional firearms for resale)'' to clarify what it means to represent to potential buyers or otherwise demonstrate a willingness and ability to purchase and resell additional firearms; (5) removing the EIB presumption relating to gross taxable income to address concerns raised by commenters about how it would apply in certain low-income situations; (6) revising the EIB presumption on certain types of repetitive transactions to add the word ''repetitively'' before ''resells or offers for resale'' to more closely track the statutory language in 18 U.S.C. 921(a)(21)(C); (7) revising the same EIB presumption to make it applicable to firearms that cannot lawfully be purchased, received, or possessed under Federal, State, local, and Tribal law, not merely under Federal law (as the citations made it appear to commenters), and to explain that firearms not identified as required under 26 U.S.C. 5842 are among the types of firearms that cannot lawfully be possessed; (8) revising the EIB presumption on repetitively selling firearms in a short period of time to include a time limitation of one year with respect to repetitive resales or offers for resale of firearms that are new or like new, and those that are the same make and model; in addition, revising and limiting the presumption for firearms that were the ''same or similar kind'' to those firearms that are of the ''same make and model, or variants thereof''; (9) revising the EIB presumption on liquidation of business-inventory firearms by a former licensee that were not transferred to a personal collection prior to license termination, to reference the rules pertaining to liquidation of former licensee inventory in §§ 478.57 and 478.78 to ensure that they are read consistently with each other; (10) revising the EIB presumption on liquidation of firearms transferred to a personal collection or otherwise as a personal firearm prior to license termination, to reference the rules pertaining to the sale of such firearms in 18 U.S.C. 923(c) and 27 CFR 478.125a(a) to ensure that they are read consistently with each other; (11) adding explanatory headers for the paragraphs in the regulatory text; (12) clarifying, in a new paragraph, that the list of conduct not supporting a presumption that a person is ''engaged in the business'' is also evidence that may be used to rebut any presumption should an enforcement proceeding be initiated; and (13) expanding the list of conduct that does not support a presumption to not only include firearms resold or otherwise transferred as bona fide gifts and those sold occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection, but also those sold ''[o]ccasionally to a licensee or to a family member for lawful purposes''; ''[t]o liquidate (without restocking) all or part of the person's personal collection''; ''[t]o liquidate firearms that are inherited'' or ''[p]ursuant to a court order; or ''[t]o assist in liquidating firearms as an auctioneer when providing auction services on commission at an estate-type auction.''

F. Definition of ''Personal Collection (or Personal Collection of Firearms, or Personal Firearms Collection)''

The rule finalizes the definition of ''Personal collection (or personal collection of firearms or personal firearms collection)'' with some additional clarifying edits. First, headers were added to each main paragraph for clarity. Second, a parenthetical was added to clarify that ''collecting curios or relics'' and ''collecting unique firearms to exhibit at gun club events'' are examples of firearms accumulated ''for study, comparison, exhibition,'' and that ''historical re-enactment'' and ''noncommercial firearms safety instruction'' are examples of firearms accumulated ''for a hobby.'' Third, to clarify the nature of the firearms not

included in the definition of ''personal collection'' due to the fact that they were purchased for the purpose of resale with the predominant intent to earn a profit, the following was added to examples in the parenthetical: ''primarily for a commercial purpose or financial gain, as distinguished from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, but which the person may also intend to increase in value).'' Fourth, to clarify that firearms accumulated primarily for self-protection are not included in the definition of ''personal collection,'' but can be purchased for personal use, the following was added: ''In addition, the term shall not include firearms accumulated primarily for personal protection: *Provided,* that nothing in this definition shall be construed as precluding a person from lawfully acquiring a firearm for self-protection or other lawful personal use.'' Finally, minor edits were made to the definition of personal collection as it pertains to licensees, to explain that licensees may transfer firearms to a personal collection ''or otherwise as a personal firearm,'' and that the separation requirement for personal firearms applies ''[w]hen stored or displayed on the business premises,'' as distinguished from those personal firearms that are being carried by the licensee for self-protection.

G. Definition of ''Responsible Person''

The rule finalizes, with minor changes, the amendments proposed in the NPRM to the definition of ''responsible person'' in 27 CFR part 478. The proposed definition was revised to remove the term ''business practices,'' which term was considered confusing and overbroad to some commenters. It was also changed to explain that sole proprietorships and companies are included in the list of businesses that have responsible persons and to indicate that both the individual sole proprietor and their authorized employees are responsible persons. This change ensures that individual sole proprietors (who are always responsible for the management and policies of their firearms businesses), companies, and their authorized employees will be identified as responsible persons when submitting an Application for License, Form 7/7CR, and undergo the required background check.

H. Definition of ''Predominantly Earn a Profit''

The rule moves the definition of ''predominantly earn a profit'' into a stand-alone section with the definition of ''engaged in the business'' at § 478.13. The rule also breaks down the definition of ''predominantly earn a profit'' into subparagraphs for ease of reference and finalizes that definition with minor edits to the last sentence in the first paragraph. Specifically, the final rule adds the word ''intended'' before ''pecuniary gain,'' consistent with the statutory language. The rule also finalizes the introductory paragraph to the ''Presumptions'' subsection with minor edits. Specifically, the sentence at the beginning of the paragraph was revised to move the phrase ''[i]n civil or administrative proceedings'' to the beginning of the sentence; the phrase ''from the sale or disposition'' of firearms was changed to ''the repetitive purchase and resale'' of firearms, to more closely track the statutory language; and ''it is shown that'' was added before ''the person.'' Additionally, the following clarifying edits were made to the set of presumptions in the definition of ''predominantly earn a profit'': (1) the term ''repetitively'' was added into various presumptions to better focus them on persons who are reselling firearms with the requisite intent under the statute; (2) in the PEP presumption on marketing, the words ''or continuously'' were inserted at the beginning to include advertising that is perpetual, and the phrase ''on any website'' was revised to ''through the internet or other digital means''; (3) the PEP presumption on purchasing or renting space was revised by adding ''repetitively or continuously'' to the beginning to better demonstrate the requisite intent, and by removing the phrases ''or otherwise secures or sets aside'' and ''or store,'' and replacing those phrases with ''or otherwise exchanges (directly or indirectly) something of value to secure,'' to focus the presumption on firearms that are displayed for resale by a person who has paid for that service, and to make clear that the item or service exchanged for a firearm could be either a direct or an indirect form of payment (*e.g.,* payment of cash or an indirect membership or admission fee); (4) the PEP presumption on maintaining records was revised to make clear that ''repetitive'' firearms purchases for resale are being tracked; (5) the PEP presumption on purchasing or otherwise securing merchant services was limited to those through which a person intends to repetitively accept payments for firearms transactions, to focus on the seller as opposed to the purchaser or end user of firearms who makes or offers to make payments for firearms transactions, and to add the word ''repetitive'' before ''firearms transactions'' to further support the intent element of the statute; (6) the PEP presumption on securing business security services was limited to those services intended ''to protect firearms assets and firearms transactions,'' to focus on businesses that conduct transactions involving firearms rather than those that may purchase security services solely to protect or store their business inventory for company use; and (7) the PEP presumption on business insurance policies was removed to address commenter concerns and because information indicated it was not commonly found in ATF cases.

I. Disposition of Business Inventory After Termination of License

Several changes were made to the liquidation provisions on the disposition of business inventory by a former licensee after termination of license, 27 CFR 478.57 and 478.78. Specifically, with respect to business inventory that remains after license termination, the term ''personal inventory'' was replaced with the term ''former licensee inventory'' to better explain the business nature of this inventory. A definition of ''[f]ormer licensee inventory'' was added to 27 CFR 478.11, which includes a sentence to explain that ''[s]uch firearms differ from a personal collection and other personal firearms in that they were purchased repetitively before the license was terminated as part of a licensee's business inventory with the predominant intent to earn a profit.'' The liquidation provisions at 27 CFR 478.57(c) and 478.78(c) now expressly require that transfers of firearms in a former licensee inventory must be appropriately recorded as dispositions in accordance with 27 CFR 478.122(b) (importers), 478.123(b) (manufacturers), or 478.125(e) (dealers) prior to delivering the records after discontinuing business consistent with 27 CFR 478.127. This will allow former licensee inventory to be traced if later used in crime and is consistent with the existing delivery of records requirement in 18 U.S.C. 923(g)(4) and 27 CFR 478.127. The liquidation provisions also expressly state, in §§ 478.57(b)(2) and 478.78(b)(2), that transferring former licensee inventory to a responsible person of the former licensee within 30 days after license termination does not negate the fact that the firearms were repetitively purchased, and were purchased with the predominant intent to earn a profit. Finally, the liquidation provisions now expressly recognize that a responsible person of a former

licensee may occasionally sell a firearm even after the 30-day liquidation period to a licensee without being presumed to be engaged in a firearms business. *See* §§ 478.57(c), 478.78(c).

J. Transfer of Firearms Between FFLs and Form 4473

The rule finalizes the provision on the proper procedure for licensee transfers of firearms to other licensees, 27 CFR 478.124(a), with a minor edit to add the phrase ''or otherwise as a personal firearm'' after ''personal collection.'' The rule makes it clear that Form 4473 may not be used by sole proprietors when they transfer to themselves other personal firearms that are not in a ''personal collection'' as defined in this rule. § 478.124(a).

K. Effect on Prior ATF Rulings

ATF publishes formal rulings and procedures to promote uniform understanding and application of the laws and regulations it administers, and to provide uniform methods for performing operations in compliance with the requirements of the law and regulations. ATF Rulings represent ATF's guidance as to the application of the law and regulations to the entire state of facts involved, and apply retroactively unless otherwise indicated. The following ruling is hereby superseded: ATF Ruling 96–2, *Engaging in the Business of Dealing in Firearms (Auctioneers)* (Sept. 1996), *https://www.atf.gov/file/55456/download.*

L. Severability

Based on the comments received in opposition to this rule, there is a reasonable possibility that this rule will be subject to litigation challenges. The Department has determined that this rule implements and is fully consistent with governing law. However, in the event any provision of this rule, an amendment or revision made by this rule, or the application of such provision or amendment or revision to any person or circumstance, is held to be invalid or unenforceable by its terms, the remainder of this rule, the amendments or revisions made by this rule, and the application of the provisions of such rule to any person or circumstance shall not be affected and shall be construed so as to give them the maximum effect permitted by law. The Supreme Court has explained that where specific provisions of a rule are unlawful, severance is preferred when doing so ''will not impair the function of the [rule] as a whole, and there is no indication that the regulation would not have been passed but for its inclusion.'' *K Mart Corp.* v. *Cartier, Inc.,* 486 U.S. 281, 294 (1988); *see also Sw. Elec. Power Co.* v. *EPA,* 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only challenged portions of a rule). It is the intent of the Department that each and every provision of this regulation be severable from each other provision to the maximum extent allowed by law.

For example, if a court invalidates a particular subpart of § 478.78 of the final rule concerning the liquidation or transfer procedure of former licensees, that invalidation would have no effect on other subparts of § 478.78 or the rest of the final rule and its provisions, which should remain in effect. The Department's intent that sections and provisions of the final rule can function independently similarly applies to the other portions of the rule.

VI. Statutory and Executive Order Review

Subsections in Section VI

A. Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094 (Modernizing Regulatory Review) amends section 3(f) of Executive Order 12866.

OMB has determined that this proposed rule is a ''significant regulatory action'' under Executive Order 12866, as amended by Executive Order 14094, though it is not a significant action under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB. While portions of this rule merely incorporate the BSCA's statutory definitions into ATF's regulations, this rule will likely result in additional unlicensed persons becoming FFLs to the extent that currently unlicensed persons intend to regularly purchase and resell firearms to predominantly earn a profit.

1. Need for Federal Regulation

This final rule implements the BSCA by incorporating statutory definitions into ATF's regulations and clarifying the criteria for determining when a person is ''engaged in the business'' requiring a license to deal in firearms. The rulemaking is necessary to implement a new statutory provision that alters the definition of being engaged in the business as a wholesale or retail firearms dealer; to clarify prior regulatory provisions that relate to that topic; and to establish by regulation practices and policies on that issue. In addition to establishing specific, easy-to-follow standards regarding when buying and selling firearms presumptively crosses the threshold into being ''engaged in the business,'' the rule also recognizes that individuals are allowed by law to occasionally buy and sell firearms for the enhancement of a personal collection or a legitimate hobby without the need to obtain a license. As discussed in detail under this rule's Background discussion (Section II.D of this preamble), in the Benefits section of this economic analysis (Section VI.A.7 of this preamble), throughout Section III discussing each revision as it was originally proposed, in the Department's responses to comments under Section IV of this preamble, and in other portions of this rule, the changes in this rule—like the statutory provisions they implement—were designed to address public safety needs. Specifically, this rulemaking implements the statutory changes enacted by Congress in the BSCA, which Congress passed in the interest of public safety after at least one mass shooting in which the perpetrator purchased a firearm from an unlicensed dealer. Congress was also concerned with prohibited persons receiving firearms without background checks and significant increases in straw purchasing and firearms trafficking, all of which increase public risk of gun violence and occur more frequently when persons dealing in firearms are unlicensed. Unlicensed dealers also hinder law enforcement efforts to track and curb these prohibited and endangering activities. Congress deemed those public safety needs compelling enough, and the private market response insufficient, such that it was necessary to pass a law to address them. This rule is necessary to further address those same public safety needs and implement Congress's statutory

response. Executive Order 12866 [254] permits agencies to promulgate rules that are necessary to interpret the law or are necessary due to compelling need, which includes when private markets are not protecting or improving public health and safety. This rule is necessary on both grounds. The Department considered other alternatives to rulemaking and determined they would be insufficient to meet its articulated public safety needs or to fully interpret and implement the law.

2. Population

This rule implements a statutory requirement that affects persons who repetitively purchase and resell firearms, including by bartering, and are required to be, but are not currently, licensed. As described in the preamble of this final rule, these may be persons who purchase, sell, or transfer firearms from places other than traditional brick-and-mortar stores, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order, or over the internet (*e.g.,* an online broker, online auction); through the use of other electronic means (*e.g.,* text messaging service or social media raffle); or at any other domestic or international public or private marketplace or premises. A person may be required to have a license to deal in firearms regardless of where, or the medium through which, they purchase or sell (or barter) firearms, including locations other than a traditional brick-and-mortar store.

Furthermore, because those willfully engaged in the business of dealing in firearms without a license are violating Federal law, these individuals often take steps to avoid detection by law enforcement, making it additionally difficult for the Department to precisely estimate the population. Therefore, for purposes of this analysis, the Department used information gleaned from Armslist, an online broker website that facilitates the sales or bartering of firearms, as a means of estimating a population of unlicensed persons selling firearms using online resources.[255] The Department focused its efforts on estimating an affected population using Armslist since that website is considered to be the largest source for unlicensed persons to sell firearms on the internet.[256]

Out of a total listing of 30,806 entries in the ''private party'' category (unlicensed users) on Armslist, the Department viewed a random sample [257] of 379 listings, and found that a given seller on Armslist had an average of three listings per seller.[258] Based on approximately 30,806 ''private party'' (unlicensed) sales listings on Armslist, the Department estimates that there are approximately 12,270 unlicensed persons who sell on that website alone, selling an average of approximately three firearms per user.[259] The Department estimates that Armslist may hold approximately 30 percent of the market share among websites that unlicensed sellers may frequent. This means the 12,270 estimated unlicensed persons on Armslist would be about 30 percent of all such online sellers, and that the estimated number of unlicensed sellers on all such websites would therefore be approximately 40,900 nationwide. The estimate of Armslist's market share is based on ATF Firearms Industry Programs Branch (''FIPB'') expert opinion, news reports,[260] and public web traffic lists.[261] This estimate of the online market share proportion held by Armslist has been revised downward from the initial estimate of 50 percent used in the NPRM, based on public comment and additional data sources that supported attributing a larger share of the unlicensed firearm market to GunBroker than had originally been estimated. GunBroker had been originally included with other smaller platforms within the remaining (non-Armslist) 50 percent of the online market. However, due to the new estimates of GunBroker's proportion of the online market share, the Department has increased its estimated total market share for the non-Armslist platforms (inclusive of GunBroker) to 70 percent of the online marketplace.

To better estimate both online and offline sales, the Department assumes, based on best professional judgment of FIPB SMEs [262] and with limited available information, that the national online marketplace estimate above might represent 40 percent of the total national firearms market, which would also include in-person, local, or other offline transactions like flea markets, State-wide exchanges, or consignments to local FFLs within each of the 50 States. This estimate of the online marketplace has been revised upwards from the 25 percent estimate that was published in the NPRM to 40 percent in the final rule, based on more in-depth SME questioning in the course of reviewing each aspect of the models due to public comments about other parts of the models. Given the lack of data on the question of online avenues for unlicensed firearm sales, and the illicit nature of firearms trafficking, the limited empirical inputs that exist must be contextualized using qualitative and subjective assessments by industry experts. ATF also solicited additional opinions from the public and incorporated those that were found to be credible into the Department's population model.

While the above analysis would bring the total estimated market of unlicensed sellers to approximately 102,250 persons,[263] this figure must be reduced by the estimated subset of this population of persons who occasionally sell their firearms without needing to obtain a license (*e.g.,* as part of their hobby or enhancement of their personal collection). The Department assumes this subset of unlicensed sellers constitutes the majority of the unlicensed seller market, based on estimates from FIPB SMEs. Based on limited available information, the best assessment from FIPB SMEs is that, based on their long-time experience with the firearms industry, at least 25 percent of the estimated total number of

[254] *See also* OMB Circular A–4 at 5, *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

[255] *See www.armslist.com.*

[256] Colin Lecher & Sean Campbell, *The Craigslist of Guns: Inside Armslist, the online 'gun show that never ends,'* The Verge (Jan. 16, 2020). *https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation* (''Over the years, [Armslist] has become a major destination for firearm buyers and sellers.''); Tasneem Raja, *Semi-Automatic Weapons Without a Background Check Can Be Just A Click Away,* National Public Radio (June 17, 2016), *https://www.npr.org/sections/alltechconsidered/2016/06/17/482483537/semi-automatic-weapons-without-a-background-check-can-be-just-a-click-away* (''Armslist isn't the only site of its kind, though it is considered to be the biggest and most popular.'').

[257] In accordance with standard practice, to estimate the sample size, the Department assumed the largest standard deviation (0.5 or 50 percent) to obtain the most conservative (largest) sample size.

[258] Using an online sample size calculator, the Department determined that a statistical sample for a universe of 30,806 listings would require a sample size of 379, using a 95 percent confidence level and a confidence interval of five. A random sample of 379 was gathered between March 1 and 2, 2023. *Sample Size Calculator,* Calculator.net (last accessed April 8, 2024), *https://www.calculator.net/sample-size-calculator.html.*

[259] 12,270 unlicensed individuals = 30,806 ''private party'' unlicensed listings on Armslist/2.51 average listings per user.

[260] *See* footnote 256, *supra.*

[261] Such lists are available at *https://www.similarweb.com/website/armslist.com/#overview.*

[262] Experts were identified within ATF and interviewed in a group setting to reach a consensus. These conclusions were validated based on best professional estimates by additional ATF personnel, who are familiar with the field and with the industry, until a reasonable estimate was accepted by all of them. *See* OMB Circular A–4 at 41.

[263] The Department's online estimate of 40,900 individuals is equal to at least 40 percent of the national firearms market. Thus, 100 percent of that estimated firearms market would be 40,900/.4 = 102,250.

unlicensed sellers may be considered ''engaged in the business'' under this rule and would subsequently need to become an FFL in order to continue repetitively selling firearms. The actual number may be higher or lower, and the Department does not have data to support a higher number, but FIPB SMEs do expect their estimate to be conservative and closer to the lower end of a possible range. Using the information gleaned from Armslist and multiplying it according to these estimated percentages, the Department estimates that 25,563 unlicensed persons may be classified as engaged in the business of firearms dealing and thus affected by this rule, an upward revision from the 24,540 estimate included in the NPRM.

Finally, the Department has introduced an additional assumption into its revised model: the proportion of unlicensed persons who would be considered ''engaged in the business'' under this rule but who are unwilling or unable to become FFLs and will instead choose to cease their dealing in firearms altogether. These persons may choose this option due to the new requirements, other disincentives such as costs or discomfort with inspections, prohibitions or restrictions in their respective State or local laws, ordinances or HOA rules, or other reasons. Based on the public's responses to previously published firearms rules and regulations, Department SMEs estimate that this group constitutes approximately 10 percent of all currently unlicensed sellers who would be required to obtain a license under this rule. Removing this segment from the total population of 25,563 persons affected by this rule results in an estimated 23,006 unlicensed persons engaged in the business of firearms dealing who would, under the rule, apply for licenses in order to continue repetitively selling firearms.

Because there is no definitive data on this topic, the actual number of unlicensed sellers may be higher. Therefore, the Department also calculated a second possible estimate using information published by RSF based on a survey it conducted regarding a similar, but differently sourced, estimated population of private sellers of firearms.[264] This survey showed that 22 percent of the U.S. adult population owned at least one firearm (56.84 million adults).[265] In the NPRM, the Department used this 22 percent figure, applied to the U.S. Census as a basis for the population, to calculate this second population estimate of individuals owning firearms. However, one public commenter suggested the Department use a more recent survey (Gallup Survey, published in 2020), which showed that the number of U.S. adults owning firearms was 32 percent.[266] The Department concurred and has updated the estimated population of individuals owning a firearm from 22 to 32 percent (82.7 million individuals) in this second model.[267] However, the Department continues to use the RSF survey data for the remaining estimates, such as number of transactions, because the Department still considers that survey to provide the best available data, and no other sources were provided by public commenters.

The RSF survey found that 5 percent of the total population transferred firearms in some manner over the course of five years, or an annualized total of 1 percent of owners (826,699 individuals).[268] Of the owners that transferred a firearm, 71 percent did so by selling (586,956 individuals). Of those that sold a firearm, 51 percent (299,348 individuals) sold through various mediums (*e.g.,* online, pawnshop, gun shop) other than through or to a family member or friend (which likely would not be affected by this rule).[269] Of the owners that transferred a firearm, an additional 10 percent (82,670) did so by trading or bartering rather than selling. Thus, taking the 299,348 that sold and the 82,670 that traded or bartered according to these survey results, the total number of unlicensed persons that might transfer a firearm through a manner that could be affected by this rule is 382,018. Of the 382,018 unlicensed persons selling, trading, or bartering firearms under this RSF-derived estimate, the Department continues to estimate (as it did in the SME-derived estimate described above) that 25 percent (or 95,505 unlicensed individuals) may be engaged in the business of firearms dealing with an intent to profit and thus potentially affected by this rule. Consistent with the modification introduced in the SME-derived model, the Department also reduced this estimate by 10 percent to account for the proportion of unlicensed persons unwilling or unable to become FFLs as required by this rule. This brings the estimated population of unlicensed persons ''engaged in the business'' who would obtain licenses in order to continue selling under this rule to 85,954 using this RSF/Gallup-derived model.

In sum, based on the limited available sources of information, the Department estimates that either 23,006 or 85,954 could represent the number of currently unlicensed persons who might be engaged in the business as defined in this rule, and who would obtain a license to continue engaging in the business of dealing in firearms in compliance with the rule. The SME-derived estimate of 23,006 is based on real historical data and experience with relevant sales activities, combined with sampling from an online sales site and ATF's law enforcement and regulatory experience. Because of this, the Department considers the SME-derived estimate to be a more reliable data source than the RSF/Gallup estimate and uses it as the primary estimate. Nevertheless, for purposes of this final analysis, the Department provides the estimated costs under both population estimates.

The first cost that may apply to both estimated populations is the cost of initial familiarization with the final rule. Given the widespread attention, awareness, and publicly available discourse on these and other firearm regulations, and the nature of the firearms community, existing firearms owners would not need to spend a greater amount of time researching regulations and becoming updated on these topics than they already do as a regular course of activity. The

[264] Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). *The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey.* The Russell Sage Foundation Journal of the Social Sciences *3*(5), 38–57 (pp. 39 and 51). *https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02.*

[265] *Id.* at 39.

[266] *What percentage of Americans own guns?,* Gallup: The Short Answer (Nov. 13, 2020), *https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx.*

[267] 82,699,849.92 (rounded to 82,699,950, or 82.7 million) owners of firearms = 258,343,281 individuals living in the United States multiplied by 32 percent.

[268] 826,699 individuals transferring a firearm = 82,699,850 individuals owning a firearm multiplied by 1 percent.

[269] The RSF survey did not distinguish individuals who sold to family or friends on a recurring basis from those who made an occasional sale; nor did it distinguish between those who did so with intent to earn a profit from those who did not. As noted earlier in the preamble, a person who makes only occasional firearms transfers, such as gifts, to immediate family (without the intent to earn a profit or circumvent requirements placed on licensees), generally does not qualify as a dealer engaged in the business. Although it is possible that some portion of the RSF set of family and friend transferors might qualify as dealers if they engage in actions such as recurring transfers, transfers to others in addition to immediate family, or transfers with intent to profit, the survey did not provide enough information for the Department to make that determination. Therefore, the Department erred on the side of caution by assuming, for the purpose of this analysis, that the persons identified on the RSF survey as engaging in transfers to family and friends would likely not be affected by this rule, since, in general, such transfers are less likely to be recurring or for profit.

Department therefore assumed familiarization costs would be minimal for existing firearm owners and particularly for the affected population of sellers. Nevertheless, because of widespread attention and ATF outreach, among other efforts, the Department has costed a familiarization burden of approximately 12 minutes on all unlicensed sellers to account for the time they might spend gleaning guidance or accessing online blogs to determine whether the rule applies to them. Based on HHS's methodology for leisure time, the Department attributes a rounded value of $23 per hour for the estimated 12 minutes spent gaining familiarization with the rule, which amounts to an individual burden of $5 per unlicensed seller. Under the SME model, this cost would fall on all 102,250 sellers, while under the RSF model it would fall on all 382,018 sellers. Familiarization costs would amount to $470,350 in the first year of implementation under the primary SME model, and $1,757,283 in the first year under the alternative RSF model.

3. Costs for Unlicensed Persons Becoming FFLs

As stated earlier, consistent with the statutory changes in the BSCA, this rule implements a new statutory provision that requires individuals to become licensed dealers if they devote time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. Costs to become an FFL include an initial application on Form 7, along with fingerprints, photographs, and a qualification inspection. This application requires fingerprints and photographs from the person applying and, in the case of a corporation, partnership, or association, from any other individual who is a responsible person of that business entity.

For purposes of this analysis, the Department assumes that most, if not all, unlicensed persons may be operating as sole proprietors because this new requirement would likely affect persons who have other sources of income and currently view dealing in firearms as a supplemental source of income not subject to a licensing requirement. Besides the initial cost of becoming an FFL, there are recurring costs to maintaining a license. These costs include renewing the license on a Federal Firearms License Renewal Application, ATF Form 8 (5310.11) (''Form 8'') every three years, maintaining acquisition and disposition (''A&D'') records, maintaining ATF Forms 4473, and undergoing periodic compliance inspections.

This rule, which further implements the statutory changes in the BSCA, would affect certain currently unlicensed persons who purchase and resell firearms with the intent to predominantly earn a profit (as defined), not those who are already licensed. Because affected unlicensed persons will need a license to continue to purchase and resell firearms, the Department estimates that the opportunity costs of acquiring a license would be based on their free time or ''leisure time.'' For this final rule, the Department has updated its estimate of the cost for leisure time below, relying on a new HHS methodology for calculating that cost, rather than the DOT methodology it used in the NPRM.[270] The Department considers the HHS methodology to more accurately measure the value of ''leisure time,'' for the purposes of this rule, than the DOT methodology used in the NPRM. Accordingly, consistent with HHS's methodology, the Department used the BLS median weekly income for full-time employees as the base for calculating the pre-tax hourly wage. The Department then used the proportion between Census publications on median household income and median household income after taxes to estimate the percent of State and Federal taxes (14 percent). This percent was deducted from the hourly pre-tax wage to derive the post-tax hourly wage, which becomes the leisure wage under the HHS methodology. Table 1 outlines the leisure wage.

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[270] U.S. Dep't of Health and Human Servs., *Valuing Time in the U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices* 40–41 (June 2017), *https://aspe.hhs.gov/sites/default/files/private/pdf/257746/VOT.pdf.*

Table 1. Leisure Wage Rate for Individuals

Inputs for Leisure Wage Rate	Numerical Inputs	Source
Median Weekly Wage	$1,085	News Release, BLS, *Usual Weekly Earnings for Wage and Salary Workers – Fourth Quarter 2022* (Jan. 19, 2023), https://www.bls.gov/news.release/archives/wkyeng_01192023.pdf
Median Hourly Wage	$27	Median Weekly Wage / 40 hours per week
Real Median Household Income Pre-Tax	$74,580	U.S. Census Bureau, *Median Household Income After Taxes Fell 8.8% in 2022* (Sept. 12, 2023), https://www.census.gov/library/stories/2023/09/median-household-income.html
Real Median Household Income Post-Tax	$64,240	U.S. Census Bureau, *Median Household Income After Taxes Fell 8.8% in 2022* (Sept. 12, 2023), https://www.census.gov/library/stories/2023/09/median-household-income.html
State and Federal Taxation	14 percent	$64,240 post-tax median income / $74,580 pre-tax median income = 86 percent; 14 percent State and Federal Taxes = 100 percent - 86 percent
Leisure Wage	$23.36	$23.36 Post-tax median wage = $27 Median hourly wage * (100 percent - 14 percent State and Federal Taxes)
Rounded Leisure Wage Rate	$23.00	

Based in part on HHS's methodology for leisure time, the Department attributes a rounded value of $23 per hour for time spent buying and reselling (including bartering) firearms on a repetitive basis. The same hourly cost applies to persons who will become licensed as a firearms dealer who would not have become licensed without the clarifications provided by this rule. This could include persons who begin selling firearms after the final rule's effective date and understand from the rule that they qualify as firearms dealers (as defined by the statute and regulations), or persons who were previously selling without a license and now realize they must acquire one to continue selling because their firearms transactions qualify them as dealers.

In addition to the cost of time, there are other costs associated with applying to become an FFL. To become an FFL, persons need to apply on a Form 7 and submit payment to ATF for fees associated with the Form 7 application. Furthermore, these unlicensed persons will need to obtain documentation, including fingerprints and photographs, undergo a background investigation, and submit all paperwork via mail. While not a cost attributed towards their first-year application to become an FFL, an FFL will need to reapply to renew their license every three years on a Form 8 renewal application to ensure that that they can continue to sell firearms thereafter. Table 2 outlines the costs to become an FFL and the costs to maintain a license.

Table 2. Cost Inputs to Become an FFL and Maintain a License

Cost Input	Cost	Source
Form 7 Application Cost	$200	Application for Federal Firearms License, ATF (Oct. 2020), https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download
Fingerprint Cards	$0	Distribution Center Order Form, ATF (Jan. 25, 2024), https://www.atf.gov/distribution-center-order-form
Fingerprint Cards (Commercial)	$24	Various
Average Cost for Fingerprint Cards	$12	See Above
Postage	$1	Mailing and Shipping Prices, USPS, https://www.usps.com/business/prices.htm (last visited Mar. 30, 2024)
Photograph	$17	Passport Photos, CVS, https://www.cvs.com/photo/passport-photos (last visited April 5, 2024)
	$17	Passport Photos, Walgreens, https://photo.walgreens.com/store/passport-photos (last visited April 5, 2024)
FFL Renewal Cost (Form 8)	$90	FFLC

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For purposes of this rule, the Department assumes that unlicensed persons applying for a license as a result of this rule are likely to file for a Type 01 Dealer license.[271] This license costs $200 and requires the submission of a Form 7 application; every three years thereafter, the licensee must pay $90 to renew the license using Form 8. Applicants also need to obtain and submit fingerprints in paper format. The unlicensed person can obtain fingerprint cards for free from the Department and travel to select law enforcement offices that perform fingerprinting services (usually also for free). Or the unlicensed person may pay a fee to various market entities that offer fingerprinting services in paper format. The average cost found for market services for fingerprinting on paper cards is $24 (rounded).

Because it is not clear whether an unlicensed person would choose to obtain fingerprint cards from the Department and go to a local law enforcement office that provides fingerprinting services or use commercial services to obtain cards and fingerprinting services, an average cost of $12 was used. In addition to paper fingerprint cards, the unlicensed person must also submit a photograph appropriate for obtaining a passport. The average cost for a passport photo is $17 (rounded). Once they complete the application and gather the documentation, unlicensed persons must submit the Form 7 package by mail. The Department rounds the first-class stamp rate of $0.63 to $1 for calculating the estimated mailing cost.

In addition to the direct costs associated with compiling documentation for a Form 7 application, the Department estimates the time burdens related to obtaining and maintaining a Federal firearms license. Table 3 outlines the hourly burdens to apply, obtain, and maintain a license.

[271] A Type 01 Dealer license is used to purchase and resell firearms at wholesale or retail.

Table 3. Hourly Burdens to Apply, Obtain, and Maintain a License

Activity Type	Hourly Burden	Source
Form 7 Application	1	Application for Federal Firearms License (atf.gov)
Form 8 Application	0.5	OMB 1140-0019 Justification
Time to Travel to and obtain Fingerprints	1	N/A
Time to Travel to and obtain Photograph	0.5	N/A
A&D Records	0.05	OMB 1140-0032 Justification
Form 4473	0.5	OMB 1140-0020
Qualification Inspection Time	15	Department internal case management system
Compliance Inspection Time	34	Department internal case management system

As stated above, hourly burdens include one hour to complete a Form 7 license application and the time spent to obtain the required documentation. For purposes of this analysis, the Department assumes that vendors that offer passport photograph services are more readily available than places that provide fingerprinting services; therefore, the Department estimates that it may take 30 minutes (0.5 hours) to travel to a vendor and obtain a passport photograph, and up to one hour to travel to and obtain fingerprinting services. Other time burdens may include 0.05 hours (three minutes) to enter and maintain A&D records for each firearm transaction (0.3 hours for 6 transactions); 0.5 hours for maintaining a Form 4473 for each firearm sale (1.5 hours for 3 firearms); and 15 to 34 hours for an inspection (qualification or compliance, respectively).[272]

The Department then multiplied each of these hourly burdens by the $23 hourly leisure wage rate to account for the value of time spent applying for and obtaining a license using a Form 7 (including any other actions related to obtaining a license), then added the cost per item to determine a cost per action taken. Table 4 outlines the first-year costs to apply for an FFL.

Table 4. First-Year Costs to Obtain a Type 01 FFL

Cost Item	Hourly Burden	Hourly Wage Rate	Hourly Cost per Activity	Cost Item	Rounded Cost for Each Activity
Form 7	1	$23	$23	$200	$223
Fingerprints	1	$23	$23	$12	$35
Passport Photo	0.5	$23	$12	$17	$29
Postage	N/A	$23	N/A	$1	$1
Form 4473	1.5	$23	$35		$35
A&D Records	0.3	$23	$7		$7
Qualification Inspection	15	$23	$345	$0	$345
First Year Cost					$675

[272] These inspection times are an average of all currently regulated FFLs, including small and large dealers and manufacturers, and are not necessarily representative of the time involved in inspecting small dealers.

Overall, the Department estimates that it would cost an unlicensed person $675 in terms of time spent and fees paid to apply under a Form 7 to become a Type 01 FFL. The Department considers the $675 to be an unlicensed person's initial cost. In addition to their initial cost, the newly created FFL would need to maintain a Form 4473 and A&D records (two entries per firearm: one entry to purchase and one entry to sell) for every firearms transaction, undergo periodic compliance inspections, and renew their license every three years (ATF Form 8 application). Table 5 outlines the cost per recurring activity to maintain an FFL.

Table 5. Recurring Costs to Maintain an FFL

Cost Item	Number of Entries or Applications	Hourly Burden	Hourly Wage Rate	Hourly Cost	Cost Item	Rounded Cost for Each Activity
Form 8 Renewal Cost	1	0.5	$23	$12	$90	$102
Form 4473	3	0.5	$23	$35		$35
A&D Records	6	0.05	$23	$7		$7
Inspection Time	1	34	$23	$782		$782
Recurring Costs						Varies by Year

While renewing a license under a Form 8 application occurs every three years, there are additional costs associated with Form 4473 and A&D records that may occur more often. There are also costs from compliance inspections that may occur periodically. The Department notes that an FFL's actual number of firearms sales may range from zero sales to more than three per year. Persons engaged in the business of dealing in firearms can sell anywhere from a few firearms to hundreds per year, depending on the size of their operation and other factors. Information on these factors or on the number of sellers who might be at each level is not available. However, the average number of listings per seller on Armslist was three. So, for purposes of this economic analysis only, the Department uses three firearms (six A&D entries) per year to illustrate the potential costs that a person may incur as a result of this rule. Although a person might not resell a given firearm in the same year they purchase it, for the purposes of these estimates the Department includes both ends of the firearm transaction because the person could buy and sell the same firearm, or buy one and sell a different one in a given year.

As for compliance inspections, based on information gathered from ATF's Office of Field Operations, the frequency of such inspections varies depending on the size of the area of operations and the number of FFLs per area of operations. Overall, the Department estimates that it inspects approximately 8 percent of all existing FFLs in any given year. In the chart above, ATF has indicated the cost of an inspection, which would normally not occur more than once in a given year per FFL. ATF performs compliance inspections annually, so while every single FFL does not necessarily undergo a compliance inspection every year, this analysis includes an annual cost for inspections to account for a subset of the total number of affected FFLs that may be inspected in any given year (8 percent). The Department estimates that it would cost $782 for the time an individual will spend on a compliance inspection in a given subsequent year. Therefore, this individual would incur annually recurring costs that could range from a low of $42 a year to complete Forms 4473 and maintain A&D records, to a high of $926 to include that $42, Form 8 renewal costs ($102), and compliance inspection time ($782).[273]

In addition to the cost burdens of becoming licensed at the Federal level, persons who are currently engaged in the business as a dealer without a license under the Federal definition may reside in a State that either defines a dealer at the State level by linking it to the Federal statutory definition, or that requires any Federal dealer licensee to also become licensed as a dealer with the State. While this rule does not impose costs on States and does not directly impact whether persons must be licensed under State requirements, in the case where States have tied their dealer licensing requirements to Federal statutory licensing requirements, this rule indirectly causes new Federal licensees in those States to also incur State dealer licensing costs because they are incurred due to BSCA's amendments to the GCA. The Department accounts for such costs for that segment of the affected population in this final rule.

The Department found that State-level licensing linked to or contingent on Federal firearms licensing was required by State and local laws in ten states and the District of Columbia (DC).[274] Five of

[273] The Department notes that the high $926 estimate may be higher than actual costs because it assumes that an FFL would simultaneously renew their license (which occurs every three years) in the same year that they perform a compliance inspection, which typically occurs only periodically.

[274] Giffords Law Center surveyed all 50 States and the District of Columbia to determine which States have laws regulating firearms dealers. They determined that 26 States and DC have such laws. Of those with laws regulating dealers, Giffords Law Center found that 16 States and DC require persons dealing in firearms to obtain a State dealers license.

Continued

those States and DC required licensing for dealing in any type of firearms, and the other five States required licensing only for dealing in handguns. For the purposes of this analysis, the Department grouped all such States together as imposing additional licensing costs, so that all 11 jurisdictions were included in the cost analysis where data was available. The respective populations of each of these jurisdictions as a percentage of the total U.S. population were aggregated to a total of 29.08 percent. This total was applied to the populations estimated to be EIB under both the primary SME model and the alternative RSF model to estimate how many sellers affected by this rule at the Federal level would incur the additional State licensure costs as well. The respective State populations were also used as weights to their respective licensure costs, which ranged from 50 cents to $300 a year, in order to determine a weighted average cost per seller, which was $73.37 per year, rounded to $73.00 for calculations. The Department estimated a processing time of one hour of leisure time, since the application forms ranged from one to five pages, while maintaining the same dollar postage cost as for FFLs. Both photograph and fingerprint costs were assumed to be accounted for when securing both for FFL applications, as they are frequently secured in pairs. These costs are outlined in Table 6.

Table 6. State dealer licensing costs flowing from this rule

State	12-Year Cost[275]	Annualized 12 year	Percent of US Population	Weighted Average: 12–Year annualized
Alabama	$ 6.00	$0.50	1.499	$0.75
California	$1,380.00	$115.00	11.800	$1,357.00
Connecticut	$400.00	$33.33	1.076	$35.87
Delaware	$1,370.00	$114.17	0.295	$33.68
District of Columbia	$3,600.00	$300.00	0.206	$61.80
Illinois	$750.00	$62.50	3.824	$239.00
New Hampshire	$1,200.00	$100.00	0.411	$41.10
Pennsylvania	$120.00	$10.00	3.881	$38.81
Washington	$1,500.00	$125.00	2.300	$287.50
Indiana	$120.00	$10.00	2.025	$20.25
Wisconsin	$120.00	$10.00	1.759	$17.59
Total		**$880.50**	**29.08**	**$2,133.35**
Average				**$73.37**

The $73.37 average State costs, rounded to $73, were combined with the hour burden and postage cost, resulting in a total per-seller cost of $97. This total per-seller cost was applied to 29.08 percent of the EIB population, resulting in an estimated 6,689 sellers under the SME-derived model and 24,992 sellers under the RSF-derived model. This adds a total of $648,862 and $2,424,237 in annual costs for State dealer licenses, respectively.

4. Costs for FFLs After Termination of License

This rule is also designed to enhance compliance by former FFLs who no longer hold their licenses due to license revocation, denial of license renewal, license expiration, or surrender of license but nonetheless engage in the business of dealing in firearms. Under existing standards, such persons sometimes transfer their inventory to their personal collections instead of selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption. This rule clarifies what dispositions of former licensee inventory former FFLs may make after their license is terminated. The former licensee may transfer their business inventory within 30 days, or occasionally thereafter, to another licensee if they meet the requirements set out in the new provisions under 27 CFR 478.57 or 478.78. Another possibility is that the licensee may transfer their business inventory within 30 days to themselves in a personal capacity—called a ''former licensee inventory'' in the final rule. After that time, the firearms may be sold

See Giffords Law Center to Prevent Gun Violence, *Gun Dealers, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/gun-dealers/* (last accessed Mar. 30, 2024). The Department researched requirements it could access online for those 16 States and DC and determined that 10 of those 16 States, and DC, either link their definition of a dealer at the State level to the Federal definition of dealer or require a person selling firearms with a Federal firearms license for dealers to also obtain a State dealers license. The Department used the information on those 10 States and DC to calculate the costs in this section.

[275] Several States had 3- or 6-year renewal windows/validity periods rather than annual licensing costs. Using a 10-year horizon underestimates the cost burden in those cases, particularly for the States that had a 6-year validity window. The Department therefore calculated the total for 12 years for each State before annualizing them to find the weighted average.

only occasionally to a licensee or the former dealer risks being presumed to be ''engaged in the business'' of dealing without a license. In that case, former FFLs who sell such firearms would potentially be in violation of the statutory prohibitions (18 U.S.C. 922(a)(1)(A) and 923(a), (c)) on unlicensed dealers.

The various means by which a license can be terminated—revocation of a license, denial of license renewal, license expiration, or surrender of license—present two categories of affected populations. Group 1, comprising individuals who have their license revoked or are denied license renewals, could be described as former FFLs who have failed to comply with existing regulations and requirements to a degree that resulted in the revocation or denial of their licenses. This rule is likely to have a qualitative impact on this group because a revocation or denial may not provide ample opportunity for an orderly and planned liquidation or transfer of inventory before losing the license, which may therefore be disruptive. Based on data from the FFLC, such FFL license revocations and non-renewals are rare, with an annual average of 76 licenses revoked or denied renewal over the past five years (with a range between 14 and 180),[276] or a de minimis percentage of 0.093 percent of all active FFLs.[277] Furthermore, the economic impact of transferring inventory to another FFL instead of the former FFL holder retaining the inventory is unclear, as the underlying market value of the inventory is unchanged by this rule's requirements. Additional factors surrounding the potential cost of no longer being able to transfer one's business inventory after the first 30 days post-license termination are also unknown and presumed to be similarly *de minimis.* Therefore, the Department believes there are no quantitative impacts associated with this population. Although ATF requested public comments on the potential impacts on former FFLs with revoked licenses, ATF did not receive any data from which to assess such potential costs.

Group 2, comprising individuals who surrender their license or let it expire, captures those who no longer have a license for discretionary or lawful reasons. This group also comprises former FFLs that choose to close or to sell their business to another party. They are similarly excluded from expected impacts attributable to this rule: because the closure is planned, it is likely that the FFL will include reasonable considerations for orderly, lawful liquidation or inventory transfer as part of closing or selling their enterprise. Such considerations are also likely to occur ahead of, rather than subsequent to, the expiration or surrender of their license. As a result, the Department assumes that the options that exist under current standards—transferring business inventory to the licensee's personal collection or selling business inventory to another FFL—would similarly be freely available to Group 2 FFLs under this rule. As a result, we are excluding both groups from the affected population.

5. Government Costs

In addition to the private costs to unlicensed persons, ATF will incur additional work due to the increase in Form 7 and Form 8 applications for unlicensed persons who become FFLs, which would be offset by the fees received with FFL applications ($200) and renewals ($90). Based on information gathered from the FFLC, which processes and collects the fees for FFL applications, various contractors and Federal Government employees process Form 7 and 8 applications, verify and correct applications, and further process them for background checks and approval.

Based on information provided by the FFLC, the average hourly rate for contracting staff, including benefits, is $13.29.[278] To determine the wage rates for Federal employees, the Department used the wage rates set forth in the General Schedule (''GS''). At any level within the GS, step 5 is used as an average wage rate per activity. Government processing activities range from an entry level Federal employee between a GS–5/7, upwards to a GS–13.[279] To account for fringe benefits such as insurance, the Department estimated a Federal load rate using the methodology outlined in the Congressional Budget Office's report comparing Federal compensation to private sector compensation. It states that total compensation to Federal workers, factoring in both wages and benefits, is 17 percent higher than for similar private sector workers' benefits (or a multiplier factor of 1.17).[280] The Department calculated private sector benefits from the BLS (in 2022) and determined that the overall private sector benefits are 41.9 percent in addition to an hourly wage, or a load rate of 1.419. This makes the Federal load rate 1.66 above the hourly wage rate (after applying the 1.17 multiplier).[281]

Table 7 outlines the Government costs to process a Form 7 application to become an FFL.

[276] Data on FFL revocations and denials of renewal has been updated from the NPRM to cover 2018 through 2023.

[277] The Department did not reduce the estimated number of persons affected by this EIB rule to account for this reduction of FFLs that may have their license revoked, denied, expired, or surrendered because historically, the number of FFLs has been stable over time. This means that the increase and decrease of FFLs have been relatively equal to each other. Because the Department is not calculating an increase of population over time, the Department did not calculate a decrease of population over time. Additionally, for the existing number of FFLs, the number of revoked/denied renewals annually is 0.093 percent of all active FFLs. Therefore, applying this percentage to the estimated EIB population above (23,006) will affect a very small number (21) of the estimated EIB FFL population. For both of these reasons, the Department believes that any change in cost would be *de minimis* and would overestimate a decrease in population where the population has been held as constant in this analysis.

[278] The Department notes that because the contracting salary is a loaded wage rate, a base wage rate (not including benefits) was not included in Table 7 below.

[279] Off. of Pers. Mgmt, *OPM Salary Table 2023 For the Locality Pay Area of Washington-Baltimore-Arlington, DC–MD–VA–WV–PA* (effective Jan. 2023), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf.*

[280] Cong. Budget Off., *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015* (Apr. 2017), *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.*

[281] 1.66 Federal load rate = 1.416 private industry load rate * 1.17 multiplier factor. BLS Series ID CMU2010000000000D,CMU2010000000000P (Private Industry Compensation = $37.15)/BLS Series ID CMU2020000000000D, CMU2020000000000P (Private Industry Wages and Salaries = $26.23) = 1.416. BLS average 2021. U.S. Bureau of Labor Statistics (2021), Database for Employee Compensation, *https://data.bls.gov/cgi-bin/srgate.*

Table 7. Hourly Burden and Costs to Process a New Application for an FFL

Government Costs to Process FFL Applications	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Rounded Cost
Average Contracting Time to Prepare and Enter Application	0.5	Contracting Staff	N/A	$13.29	$7
Processing Time for New Applications	1	GS 10	$38.85	$64.49	$64
Processing Time for Fingerprint Cards	2	GS 12	$51.15	$84.91	$170
Qualification Inspection Time (Includes Travel)	17	GS 5/7 to GS 13	$37.65	$62.50	$1,062
Subtotal					$1,303
Fees Received from New Application					($200)
Total					$1,103

Based on the hourly burdens and the hourly wage rates for various contract and Federal employees, the Department estimates that it would take on average 20.5 hours to process a Form 7 application, at a cost of $1,303 per application. This would be offset by the new $200 application (Form 7) fee paid to the government, for an overall net cost to the government of $1,103 per application as a result of this rule. Form 8 application renewals are estimated to cost $71 every three years (or $1,303 less the $1,062 inspection time and the $170 fingerprint costs). However, the cost to review a Form 8 application ($71) is offset by the renewal fee of $90 (which is set by statute), making the net cost or overall savings to Government for this rule $19 per FFL renewal (subsequently represented in this analysis as −$19).

In addition to processing Form 7 applications, ATF IOIs will need to perform qualification and compliance inspections. The qualification inspection occurs once during the application process and is accounted for in Table 7 above. But, as discussed above, there is a recurring compliance inspection after the person becomes a licensee. For both the qualification and compliance inspections, the Department notes that the respective 17-hour or 36-hour inspection time estimates for the Government are more than the inspection time for the private sector, as discussed above, because the Department is including travel time for an IOI to travel to the person's location. Based on the hourly burdens and wage rates of IOIs, the Department anticipates that it costs ATF $2,250 to perform a compliance inspection.

Table 8 outlines the recurring Government costs to inspect an FFL.

Table 8. Recurring Government Costs to Inspect an FFL

Government Annually Recurring Costs	Hourly Burden	Staffing Level	Hourly Wage	Loaded Hourly Wage	Rounded Cost
Compliance Inspection Time	36	GS 5/7 to GS 13	$37.65	$62.50	$2,250

To summarize the overall Government costs, Table 9 outlines the Government costs to process Form 7 applications, process Form 8 renewal applications, and conduct FFL compliance inspections.

Table 9. Summary of Government Costs per Action

Government Costs per Unlicensed Individual	Cost
Per Application Cost	$1,103
Per Renewal Cost	-$19
Per Compliance Inspection Cost	$2,250

The Department estimates that the Government costs of this rule include the initial application cost that occurs in the first year (including the qualification inspection), renewal costs that typically occur every three years after the first year, and the cost for the Government to conduct a compliance inspection of an FFL in a given year (the Government currently conducts compliance inspections of approximately 8 percent of FFLs per year).

6. Total Cost

The total costs take into account the familiarization burden, State and Federal private licensing costs, and Government costs to process and support the increase in licensing of this rule, as described above in Section VI.A.3 and VI.A.5 of this preamble. The Department estimates that the initial application cost (Form 7 and initial inspection) occurs in the first year, that renewal costs (Form 8 renewals) occur every three years after the first year, and that completion and maintenance of Forms 4473 and A&D records and compliance inspection costs (for a subset of FFLs affected by this rule) occur annually. Tables 10 to 13 illustrate the quantitative 10-year familiarization, Federal, and State licensing costs of this final rule. As discussed above, qualitative costs have been identified but were unable to be quantified for the *de minimis* proportion of FFLs that will have their licenses revoked for failure to comply with existing regulations. Qualitative costs have also been identified but not quantified for the estimated 10 percent of unlicensed sellers currently engaged in the business (or between 2,550 and 9,550 individuals) that are assumed to be unwilling or unable to become licensed as required by this rule. These individuals are expected to cease selling firearms altogether by choice or as a result of State or local restrictions acting as obstacles to their becoming FFLs.

Tables 10 and 11 provide the 10-year costs using the SME-derived estimate.

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Table 10. Total 10-Year Licensing Costs of Rule Based on SME-Derived Estimate

Year	Familiarization	FFL Costs	State FL	Government Cost	Total
1	$470,350	$15,529,219	$648,862	$25,375,894	$42,024,325
2		$2,405,925	$648,862	$4,142,250	$7,197,037
3		$2,405,925	$648,862	$4,142,250	$7,197,037
4		$4,752,562	$648,862	$3,705,131	$9,106,555
5		$2,405,925	$648,862	$4,142,250	$7,197,037
6		$2,405,925	$648,862	$4,142,250	$7,197,037
7		$4,752,562	$648,862	$3,705,131	$9,106,555
8		$2,405,925	$648,862	$4,142,250	$7,197,037
9		$2,405,925	$648,862	$4,142,250	$7,197,037
10		$4,752,562	$648,862	$3,705,131	$9,106,555
Total	**$470,350**	**$44,222,455**	**$6,488,620**	**$61,344,787**	**$112,526,202**

Table 11. Total 10-Year Costs of Rule Based on SME-Derived Estimate[282]

Year	Total Undiscounted	Discount 3%	Discount 7%
1	$42,024,325	$40,800,315	$39,275,070
2	$7,197,037	$6,783,897	$6,286,170
3	$7,197,037	$6,586,308	$5,874,926
4	$9,106,555	$8,091,056	$6,947,347
5	$7,197,037	$6,208,227	$5,131,388
6	$7,197,037	$6,027,405	$4,795,689
7	$9,106,555	$7,404,463	$5,671,105
8	$7,197,037	$5,681,407	$4,188,741
9	$7,197,037	$5,515,929	$3,914,711
10	$9,106,555	$6,776,132	$4,629,311
Total	**$112,526,212**	**$99,875,142**	**$86,714,460**
Annualized		**$11,708,413**	**$12,346,188**

Tables 12 and 13 provide the 10-year licensing costs using the RSF-derived estimate.

Table 12. Total 10-Year Licensing Costs of Rule Based on RSF-Derived Estimate

Year	Familiarization	FFL Costs	State Licensing	Government Cost	Undiscounted
1	$ 1,757,283	$58,019,288	$2,424,237	$94,807,814	$157,008,621
2		$8,987,121	$2,424,237	$4,142,250	$15,553,608
3		$8,987,121	$2,424,237	$4,142,250	$15,553,608
4		$17,754,480	$2,424,237	$2,509,115	$22,687,832
5		$8,987,121	$2,424,237	$4,142,250	$15,553,608
6		$8,987,121	$2,424,237	$4,142,250	$15,553,608
7		$17,754,480	$2,424,237	$2,509,115	$22,687,832
8		$8,987,121	$2,424,237	$4,142,250	$15,553,608
9		$8,987,121	$2,424,237	$4,142,250	$15,553,608
10		$17,754,480	$2,424,237	$2,509,115	$22,687,832
Total	**$1,757,283**	**$165,205,454**	**$24,242,370**	**$127,188,659**	**$318,393,766**

Table 13. Total 10-Year Licensing Costs of Rule Based on RSF-Derived Estimate[283]

Year	Total Undiscounted	Discounted 3%	Discounted 7%
1	$157,008,621	$152,435,554	$146,737,029
2	$15,553,608	$14,660,767	$13,585,124
3	$15,553,608	$14,233,755	$12,696,377
4	$22,687,832	$20,157,844	$17,308,438
5	$15,553,608	$13,416,679	$11,089,508
6	$15,553,608	$13,025,902	$10,364,026
7	$22,687,832	$18,447,283	$14,128,841
8	$15,553,608	$12,278,162	$9,052,341
9	$15,553,608	$11,920,545	$8,460,132
10	$22,687,832	$16,881,877	$11,533,343
Total	**$318,393,766**	**$287,458,372**	**$254,955,161**
Annualized		**$33,698,891**	**$36,299,879**

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Overall, thetotal familiarization, Federal, and State licensing costs of this rule are $112.52 million over 10 years, which are annualized to $11.70 million at three percent discounting and $12.34 million at seven percent discounting under the SME-derived estimate. Meanwhile, under the RSF-derived estimate, the total familiarization, Federal, and State licensing costs of the rule are $318.39 million over 10 years, which are annualized to $33.69 million at three percent discounting and $36.29 million at seven percent discounting.

7. Benefits

By ensuring that ATF's regulatory definitions conform to the BSCA's statutory changes and can be relied upon by the public, this final rule will provide significant public safety benefits. The rule clarifies that persons who intend to predominantly earn a profit from the repetitive purchase and resale of firearms are engaged in the business of dealing in firearms. It also clarifies that such sellers must be licensed in order to continue selling firearms, even if they are conducting

[282] The ''Undiscounted'' column represents totals from the underlying costs. Consistent with guidance provided by OMB in Circular A–4, the ''3 Percent Discount Rate'' and ''7 Percent Discount Rate'' columns result from applying an economic formula to the number in each row of this ''Undiscounted'' column to show how these future costs over time would be valued today; they do not contain totals from other tables.

[283] The ''Undiscounted'' column represents totals from the underlying costs. Consistent with guidance provided by OMB in Circular A–4, the ''3 Percent Discount Rate'' and ''7 Percent Discount Rate'' columns result from applying an economic formula to the number in each row of this ''Undiscounted'' column to show how these future costs over time would be valued today; they do not contain totals from other tables.

such transactions on the internet or through other mediums or forums. As part of the license application, those dealers will undergo a background check, as will those who subsequently purchase a firearm from the licensed dealers.

The background check process for license applicants helps ensure that persons purchasing and selling (including bartering) firearms with the intent to earn a profit are not themselves prohibited from receiving or possessing firearms. It also correspondingly reduces the risk that those sellers engage in selling firearms to persons who are prohibited from receiving or possessing such firearms under Federal, State, local, or Tribal law—including violent criminals—because those prospective purchasers will also be subject to a background check. The NFCTA, a study conducted by ATF and a team of academic and other subject matter experts, concluded that ''[i]ndividuals who are prohibited due to their criminal records or other conditions are unlikely to purchase directly from a licensed federal firearms dealer. Instead, prohibited persons determined to get crime guns acquire them through underground crime gun markets that involve unregulated transactions with acquaintances and illicit 'street' sources.'' [284] By clarifying when a person is engaged in the business of dealing in firearms, the rule helps ensure such persons obtain licenses and comply with the safeguards in the GCA. This thereby promotes public safety by reducing the number of firearms transferred to violent criminals and others whom Congress has determined are prohibited from receiving or possessing firearms. In particular, these safeguards reduce the danger to public safety that results when firearms are trafficked to criminals who are likely to use them to commit violent crimes. Finally, beyond reducing unlicensed dealing of firearms to violent criminals, the safeguards applicable to licensees also help prevent the acquisition of firearms by those who may use a firearm to harm themselves,[285] or who allow children to access them because they cannot make proper decisions concerning the acquisition, use, storage, and disposition of firearms and ammunition.[286]

The rule will also benefit public safety by enhancing ATF's ability to trace firearms recovered in criminal investigations. The GCA requires licensees to maintain records when they transfer a firearm to an unlicensed purchaser, commonly referred to as both the ''first retail purchaser'' and, if they are the only known sale, the ''last known purchaser'' (the tracing process may also identify additional unlicensed purchasers beyond this first retail purchaser, in which case one of these unlicensed purchasers would become the last known purchaser instead). When a firearm is recovered in a criminal investigation and submitted for tracing, ATF is often able to identify the last known purchaser through records maintained by the licensee, providing crucial leads in the underlying criminal investigation. When a firearm is transferred by an unlicensed person, however, such records rarely exist and, if such records do exist, they are not accessible to ATF through the tracing system. By helping increase compliance with the GCA's licensing and recordkeeping requirements, the rule will enhance ATF's capacity to complete crime-gun traces, thereby expanding the evidentiary leads ATF provides to law enforcement investigating crimes involving firearms, particularly violent offenses such as homicide, aggravated assault, armed robbery, and armed drug trafficking.

Moreover, because unlicensed dealers who are engaged in the business of selling firearms often deal in used firearms, the rule will also enhance the tracing of crime guns that have been recovered after an initial retail sale by an FFL. By facilitating licensure of those who engage in the business of dealing firearms through purchasing and reselling used firearms, the rule will enhance the tracing system's capacity to identify ''secondary purchasers'' of crime guns. This capacity will be enhanced because new licensees will be required by the GCA to maintain records on sales of used firearms that are accessible to the Department when conducting a trace on a crime gun. When a used ''firearm re-enters regulated commerce, the tracing process may identify additional unlicensed purchasers beyond the first retail purchaser.'' [287]

Crime-gun tracing is one of the most valuable and effective services ATF provides to law enforcement agencies—nationally and internationally—in investigating crimes involving firearms. As one public commenter noted, law enforcement agencies submitted a total of ''1,922,577 crime guns for the Department to trace between 2017 and 2021.'' Largely as a result of the records the GCA requires licensees to maintain, ''ATF was able to determine the purchaser in 77 percent (1,482,861)'' of those trace requests.[288] By clarifying when a Federal firearms license is required, the rule will promote compliance by increasing licensure of those engaged in the business of dealing in firearms, and correspondingly increase the availability of GCA-required records from those newly licensed dealers. As a result, the rule will enhance the capacity of the Department to successfully complete crime-gun traces for law enforcement partners globally.

The benefits to public safety of crime-gun tracing are substantial. For example, in fiscal year 2022, the Department performed over 623,000 crime-gun traces.[289] Of these, 27,156 were deemed ''urgent,'' which included firearms used in criminal activities such as mass shootings, homicides, bank robberies, and other immediate threats to officer and public safety.[290] Tracing also allows ATF to determine if there are straw purchasing patterns or individuals operating as straw purchasers. Straw purchasers—individuals without a criminal record who purchase firearms for drug dealers, violent criminals, or persons who are prohibited by law from receiving firearms—are the lynchpin of most firearms trafficking operations.[291] Straw purchasers, often acquiring a relatively small number of firearms in each transaction, make it possible for firearms traffickers to effectively circumvent the background check and

[284] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 41 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download*.

[285] For example, in 2021, there were an average of 127.2 suicides per day among U.S. adults, including 17.5 per day among veterans and 109.6 per day among non-veteran adults. Firearms were involved in 73.4% of deaths among veteran men, and 51.7% of veteran women. *See* U.S. Dep't of Veterans Affairs, *2023 National Veteran Suicide Prevention Annual Report* 15, 27 (Nov. 2023).

[286] In *Huddleston,* the Supreme Court examined the legislative history of the GCA and determined that ''[t]he principal purposes of the federal gun control legislation . . . was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them, because of age, criminal background, or incompetency.'' 415 U.S. at 824.

[287] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 23 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download*.

[288] *Id.* at 2.

[289] ATF, *Fact Sheet—eTrace: Internet-Based Firearms Tracing and Analysis* (Apr. 2023), *https://www.atf.gov/resource-center/fact-sheet/fact-sheet-etrace-internet-based-firearms-tracing-and-analysis*.

[290] *Id.* at 1.

[291] The BSCA amended the GCA to expressly prohibit straw purchasing of firearms. *See* 18 U.S.C. 932.

recordkeeping requirements of Federal law to get guns into the hands of criminals. Straw purchasers may acquire firearms directly for prohibited persons or purchase them for other middlemen on behalf of violent criminals.

After a trace is conducted on a recovered crime gun, ATF is able to determine whether the purchaser was also the possessor of the firearm when it was used in a crime, or whether the purchaser is different from the possessor. Traces where the purchaser and possessor are different provide leads to help determine whether the possessor or others in a trafficking distribution network utilized one or more straw purchasers to acquire firearms. Table 14 shows the share of traced guns attributed to these potential purchaser and possessor relationships.

Table 14. Percentage of Traced Crime Guns by Purchaser and Possessor Relationships, 2017 – 2021[292]

Purchaser and Possessor are the same	12.20%
Purchaser and Possessor are different	58.40%
Purchaser known, Possessor unknown	29.40%

In Table 14 above, in most traces, the purchaser of the traced crime gun was different from the possessor or the purchaser of the traced crime gun is known but the possessor is unknown. These two categories amount to a total of 87.8 percent of successfully traced crime guns.

Finally, the Department notes that, when a firearm is recovered in a criminal investigation and submitted for tracing, transactions in which the purchaser of the firearm was subject to a background check tend to have a longer time-to-crime. As stated in the NFCTA, ''a short [time-to-crime] can be an indicator of illegal firearms trafficking.'' [293] A time-to-crime recovery of three years or less is generally considered a ''short'' time-to-crime,[294] indicating that at time the firearm was purchased, the purchase was more likely to be associated with firearm trafficking, straw-purchasing, or other intended criminal use. Again, by clarifying when a Federal firearms license is required, the rule will facilitate increased licensure of those engaged in the business of dealing in firearms. This, in turn, will result in those newly licensed dealers conducting more purchaser background checks, which, the longer time-to-crime data indicates, will deter violent felons, traffickers, and other prohibited persons from obtaining firearms from those dealers.[295] FFLs who have a large number of traced firearms with short time-to-crime statistics may undergo more inspections, because certain FFL practices might be making them more susceptible to straw purchasing activities.

The longer time-to-crime for recovered crime guns in which the purchaser was subject to a background check is demonstrated by a review of state laws and geographic recovery data by city. Table 15 provides time-to-crime statistics by State.

Table 15. Shortest Time-to-Crime States versus Longest Time-to-Crime States

State	Median TTC (Years)	State	Median TTC (Years)
Virginia	1.6	Hawaii	7.5
Michigan	2	Connecticut	5.9
Arizona	2.1	New York	5.7
Missouri	2.2	New Jersey	5.3
Mississippi	2.2	Maryland	5

Table 16 provides time-to-crime statistics by city of recovery.

[292] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 26 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download*.

[293] ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Gun Intelligence and Analysis, Volume Two, Part III: Crime Guns Recovered and Traced Within the United States and Its Territories* 23 (Mar. 27, 2024), *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download*.

[294] *See generally id*. at 35 (A ''[s]hort TTC suggests that traced crime guns were rapidly diverted from lawful firearms commerce into criminal hands and represents a key indicator of firearm trafficking. Between 2017 and 2021, half of traced crime guns were purchased and recovered within three years of the last known sale.'').

[295] *See id*. at 41.

Table 16. Shortest Time-to-Crime Cities versus Longest Time-to-Crime Cities

City	Median TTC (Years)	City	Median TTC (Years)
Richmond, VA	1.5	New York, NY	6.3
Detroit, MI	1.6	Baltimore, MD	5.3
Columbia, SC	1.7	San Jose, CA	4.6
Phoenix, AZ	1.8	San Bernardino, CA	4.2
Memphis, TN	1.9	San Diego, CA	4.2
Saint Louis, MO	1.9	Los Angeles, CA	4.2

As explained by one public commenter, of the States and cities that have shorter time-to-crime statistics, only Virginia and Michigan also currently require background checks for all private party transactions.[296] The commenter further stated that all of the States and cities with longer time-to-crime statistics already require background checks for private party transactions. Consistent with the findings of the NFCTA, this data suggests that background checks tend to inhibit or otherwise deter prohibited persons from purchasing firearms and then subsequently using them in crime. In addition to making more records of transactions occurring on the secondary market readily available for tracing purposes, this rule—by increasing the number of properly licensed dealers who conduct background checks before selling a firearm—also helps ensure that prohibited persons are denied access to firearms, as suggested above. Based on FBI information, there were 131,865 prohibited persons in 2022 and 153,565 prohibited persons in 2021 who were denied the ability to purchase a firearm after a NICS background check.[297] The Department notes that these numbers are under-reported since there are a number of States that do not rely on the FBI to perform their background checks. Nonetheless, this data suggests that requiring firearms to be sold on the regulated market has a preventative effect, as the process to obtain a firearm sold on the regulated market can deter or prevent prohibited persons from acquiring and possessing firearms.

The U.S. Sentencing Commission has reported that ''88.8 percent of firearm offenders sentenced under § 2K2.1 [298] [of the November 2021 United States Sentencing Commission *Guidelines Manual*] were [already] prohibited from possessing a firearm'' under 18 U.S.C. 922(g). These individuals would thus have been flagged in a background check, and therefore would have been prohibited from buying a firearm from a licensed dealer after their first offense. As a result, they would not have been able to commit the subsequent firearms offense(s) with those firearms if the seller had been licensed. In addition, the U.S. Sentencing Commission reported that firearms offenders sentenced under section 2K2.1 ''have criminal histories that are more extensive and more serious than other offenders,'' and that they are ''more than twice as likely to have a prior conviction for a violent offense compared to all other offenders.'' [299]

In another report on ''armed career criminals'' (those who, at the time of sentencing, have three or more prior convictions for violent offenses, serious drug offenses, or both), the Commission found that a substantial share of such ''armed career criminals'' (83 percent in fiscal year 2019) had prior convictions for at least one violent offense, as opposed to solely serious drug offense convictions. This included ''57.7 percent who had three or more [prior violent] convictions.'' [300] In other words, many persons who are prohibited by law from possessing firearms, including the more serious ''armed career criminals,'' were able to obtain guns and continued to commit more violent offenses after they would have been flagged by a background check and denied a firearm if purchasing from a licensed dealer.

Such violence has a significant adverse effect on public safety. By increasing the number of licensed dealers who are required to conduct background checks on unlicensed transferees, this rule helps prevent firearms from being sold to felons or other prohibited persons, who may then use those firearms to commit crimes and acts of violence, or themselves become sources of firearms trafficking. Furthermore, these licensed dealers must also maintain firearms transaction records, which will help with criminal investigations and tracing firearms subsequently used in crimes.

In 2016, ATF distributed and discussed the above-mentioned ''engaged in the business'' guidance at gun shows to ensure that unlicensed dealers operating at gun shows became licensed, and portions of that previous guidance are incorporated in this rule. The 2016 guidance was particularly directed at encouraging unlicensed persons who sell firearms for a supplemental source of income to continue selling firearms, but as licensed dealers. Based on data from the FFLC, ATF found that, within one year after releasing the guidance, there was an increase of approximately 567 Form 7 applications to account for unlicensed persons selling at gun shows. This previous experience demonstrates that, when ATF clarified the licensing requirements, some unlicensed market participants immediately recognized the need to obtain a license to avoid enforcement action. Although the

[296] According to the commenter, which provided information current as of 2022, the following States require background checks for all private party firearms transactions: CA, CO, CT, DC, DE, HI, IL, MA, MD, MI, MN, NE, NJ, NM, NV, NY, OR, PA, RI, VA, VT, WA. *See https://www.regulations.gov/comment/ATF-2023-0002-354412.*

[297] FBI, Crim. Just. Info. Servs. Div., *National Instant Criminal Background Check System 2022 Operational Report* 32 (Nov. 2022), *https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view.*

[298] Section 2K2.1 provides sentencing guidelines for ''Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.''

[299] U.S. Sent'g Comm'n, *What Do Federal Firearms Offenses Really Look Like?* 2 (July 2022), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.*

[300] U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 9 (Mar. 2021), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.*

guidance alone did not achieve the full effects that would result from having these requirements in a regulation, the response illustrated that persons engaged in the business of dealing in firearms will comply with Federal licensing requirements and that there will be an increase in dealers as awareness of those licensing requirements increases. This both enhances public safety by increasing sellers' ability to identify prohibited persons and keep them from purchasing firearms and increases the likelihood that more prohibited persons will be deterred from attempting to purchase firearms.

Finally, providing a clear option for FFLs to transfer their business inventory to another FFL when their license is terminated helps to ensure that these business inventories of firearms are traceable and do not become sources of trafficked firearms.

8. Alternatives

In addition to the requirements outlined in this rule, the Department considered the following alternative approaches:

Alternative 1. A rulemaking that focuses on a bright-line numerical threshold of what constitutes being engaged in the business as a dealer in firearms. As discussed above, in the past, it has been proposed to the Department that a rulemaking should set a specific threshold or number of sales per year to define ''engaged in the business.'' The Department considered this alternative in the past and again as part of developing this rulemaking. However, the Department chose not to adopt this alternative for a number of reasons stated in detail above.[301] In summary: courts have held even before the passage of the BSCA that the sale or attempted sale of even one firearm is sufficient to show that a person is ''engaged in the business'' if that person represents to others that they are willing and able to purchase more firearms for resale; a person could structure their transactions to avoid the minimum threshold by spreading out sales over time; and firearms could be sold by unlicensed persons below the threshold number without records, making those firearms unable to be traced when they are subsequently used in a crime. Finally, at this time, the Department does not believe there is a sufficient evidentiary basis to support setting a specific minimum number of firearms bought or sold that, without consideration of additional factors, would establish that a person is ''engaged in the business.''

The Department believes replacing this rule with a simple numerical threshold would not appropriately address the statutory language regarding the requisite intent predominantly to earn a profit and would have unintended effects, such as those summarized in the previous paragraph, which would impact personal firearms transactions and decrease public safety and law enforcement's ability to trace firearms used in crimes.

Alternative 2. Publishing guidance instead of revising the regulations. Under this alternative, rather than publishing regulations further defining ''engaged in the business,'' the Department would publish only guidance documents to clarify the topics included in this rule. Although the Department has determined that it will also update existing guidance documents to answer any questions that the firearms industry may have, the Department has also determined that issuing only guidance would be insufficient to address the issues discussed above. A regulation is much more effective at achieving compliance with the GCA, as amended by the BSCA, than guidance, which is both voluntary and distributed by ATF at gun shows or other venues when the agency is present, or found online if people search for it. People recognize that a regulation sets the requirements they must follow and affects all those participating in the topic area, and they also know where to look for a regulation. Now that the BSCA has redefined the term ''engaged in the business,'' there is even more of a need to ensure that unlicensed people who meet the definition of that term understand that they are violating the law if they do not obtain a license. And if the Department does not update its regulations, they would not accurately reflect the statutory text and would thus create confusion.

As a result, the Department did not select the alternative to publish only guidance documents in lieu of regulations. Guidance alone would be insufficient as a means to inform the public in general, rather than solely the currently regulated community; it would not have the same reach and attention as a regulation; it would not benefit from the input of public review and comment to aid in accounting for possible unintended impacts or interpretations; and it would not be able to change existing regulatory provisions on the subject of ''engaged in the business'' or impact intersecting regulatory provisions. In addition, the Department can incorporate existing guidance in a rule based on its experience or in response to comments. When an agency establishes or revises requirements that were previously established pursuant to a rulemaking process, it must do so through a regulation issued in compliance with the requirements of the Administrative Procedure Act and certain executive orders. Guidance does not meet these requirements. Therefore, although the Department considered this alternative, it determined it was not in the best interest of the public.

Alternative 3. No action. Rather than promulgating a regulation, the Department could instead take no action to further clarify the BSCA's amendments to the GCA. However, the Department considered this alternative and decided against it for a number of reasons. First, Congress, through the BSCA, determined that there was a need to revise the definition of ''engaged in the business'' for the first time in almost 40 years. While that by itself does not preclude the Department from using its discretion not to promulgate a formal rule, it indicates an important change to the landscape of who must have a license to deal in firearms and warrants consideration of what that means to persons who have been operating under the previous definition. It has potential effects on those who have not considered themselves to fall under the definition before but now would need to obtain a license. The change to the definition removed any consideration of an individual's intent to obtain ''livelihood'' from the ''engaged in the business'' analysis, and it is reasonable to expect that those who transact in firearms have questions about how to interpret and apply this change. This includes how it affects other aspects of existing laws and regulatory provisions that govern such transactions, as well as how other BSCA amendments, such as the new international trafficking provisions, might apply to the dealer requirements. For these reasons, the Department determined that taking no action was not a viable alternative.

Second, as the various enforcement actions and court decisions cited above demonstrate, ATF observed a significant level of noncompliance with the GCA's licensing requirements even prior to the BSCA. And third, on March 14, 2023, President Biden issued Executive Order 14092, requiring the Attorney General to report on agency efforts to implement the BSCA, develop and implement a plan to clarify the definition of who is engaged in the business of dealing in firearms, ''including by considering a

[301] The relevant discussion is set forth in Section II.A, ''Advance Notice of Proposed Rulemaking (1979),'' and in more detail in Section III.D, ''Presumptions that a Person is 'Engaged in the Business,' '' of this preamble.

rulemaking,'' and prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.[302]

The alternative of taking no action would not generate direct monetary costs because it would leave the regulatory situation as it is. Because the costs and benefits of this alternative arise from the statute itself, the Department did not include an assessment of them in this rulemaking.

B. Executive Order 13132 (Federalism)

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988 (Civil Justice Reform)

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') establishes as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. Public Law 96–354, section 2(b), 94 Stat. 1164 (1980).

Under the RFA, the agency is required to consider whether this rule will have a significant economic impact on a substantial number of small entities. Agencies must perform a review to determine whether a rule will have such an impact. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

Pursuant to 5 U.S.C. 604(a), the final regulatory flexibility analysis must contain:

- A statement of the need for, and objectives of, the rule;
- A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;
- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The RFA covers a wide range of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). The Department determined that the rule affects a variety of currently unlicensed persons engaged in the business of selling firearms, and assumed that all of these sellers would become small businesses upon the licensure required by this rule (see the section below titled ''A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available''). Based on the requirements above, the Department prepared the following regulatory flexibility analysis assessing the impact on small entities from the rule.

A statement of the need for, and objectives of, the rule.

See Section VI.A.1 of this preamble for discussion on the need for this regulation and the objectives of this rule.

A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

See Section IV.D.13 of this preamble for public comments regarding the RFA. Responses to those public comments are included with each topic.

The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

There were no comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule. Therefore, no changes were made in the final rule as a result of such comments.

A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

Persons affected by this rule are not currently considered small businesses or small entities but will become small businesses upon implementation of this rule if they obtain licenses and continue selling firearms as dealers. However, the Department assumes that, should an individual be considered ''engaged in the business'' due to factors related to their sale of firearms and not simply to enhance their personal collection, there may be an impact on their revenue. Due to limitations on data, the Department is unable to determine the extent to which the licensing costs will impact their firearms sales revenue. As discussed in the primary analysis (Section VI.A.2 of this preamble), the Department estimated 10 percent of those affected by this rule would cease dealing in firearms for various reasons. To the extent such individuals are currently functioning as small businesses, even though not licensed, this could be deemed to represent an adverse regulatory impact on small businesses and their ability to operate as dealers.

A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

Persons affected by this rule will need to apply for a license using Form 7, undergo an initial inspection, undergo background checks, maintain Form 4473

[302] 88 FR 16528.

records of firearms transactions, and periodically undergo a compliance inspection. No professional skills are required to fulfill these tasks.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

See Sections IV.D.13 and VI.A.8 of this preamble. No separate distinction was made in alternatives for small businesses, specifically, because the Department determined that all unlicensed sellers affected by this rule will become small businesses once they are licensed.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is likely to have a significant economic impact on a substantial number of small entities under SBREFA, 5 U.S.C. 601 *et seq.* Accordingly, the Department prepared an initial regulatory flexibility analysis for the proposed rule and prepared an FRFA for the final rule. 5 U.S.C. 603–04. Furthermore, a small business compliance guide will be published as required by SBREFA.

F. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.,* OMB's Office of Information and Regulatory Affairs has determined this rule does not meet the criteria in 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. While there may be impacts on employment, investment, productivity, or innovation, these impacts will not have a significant impact on the overall economy.

G. Unfunded Mandates Reform Act of 1995

This rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Twenty-two States already require background checks for private party sales, and of the 28 States that do not, only three states (Florida, Tennessee, and Utah) do not rely on Federal law enforcement for their background checks. While these three States may be affected by this rule to the extent they have to conduct increased background checks, the Department did not determine that this rule will have an impact of $100 million or more in any year to any of these States. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

H. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501–21, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The collections of information contained in this rule are collections of information which have been reviewed and approved by OMB in accordance with the requirements of the PRA and have been assigned an OMB Control Number.

As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar requirements. The collections of information in this rule are mandatory. The title and description of each information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: Application for a Federal Firearms License—ATF Form 7(5310.12)/7CR (5310.16).

OMB Control Number: OMB 1140–0018.

Summary of the Collection of Information: 18 U.S.C. 922 specifies a number of unlawful activities involving firearms in interstate and foreign commerce. Some of these activities are not unlawful if the persons taking the actions are licensed under the provisions of section 923. Some examples of activities that are not unlawful if a person has a license include: engaging in the business of dealing, shipping, receiving, and transporting firearms in interstate or foreign commerce, including the acquisition of curio or relic firearms acquired by collectors from out-of-State for personal collections. This collection of information is necessary to ensure that anyone who wishes to be licensed as required by section 923 meets the requirements to obtain the desired license.

Need for Information: Less frequent collection of this information would pose a threat to public safety. Without this information collection, ATF would not be able to issue licenses to persons required by law to have a license to engage in the business of dealing in firearms or shipping or transporting firearms in interstate or foreign commerce in support of that business, or acquire curio and relic firearms from out of State.

Proposed Use of Information: ATF personnel will analyze the submitted application to determine the applicant's eligibility to receive the requested license.

Description of the Respondents: Individuals or entities wishing to engage in the business of dealing, shipping, receiving, and transporting firearms in interstate or foreign commerce, as well as acquiring firearms classified as curios and relics for personal collections.

Number of Respondents: 13,000 existing. New respondents due to the rule: 24,540.

Frequency of Response: one time.

Burden of Response: one hour.

Estimate of Total Annual Burden: 24,540 hours (incremental change).

Title: Application for a Federal Firearms License—Renewal Application ATF Form 8 (5310.11).

OMB Control Number: OMB 1140–0019.

Summary of the Collection of Information: 18 U.S.C. chapter 44 provides that no person may engage in the business of importing, manufacturing, or dealing in either firearms, or ammunition, without first obtaining a license to do so. These activities are licensed for a specific period. The benefit of a collector's license is also provided for in the statute. In order to continue to engage in the aforementioned firearms activities without interruption, licensees must renew their FFL by filing Federal Firearms License (''FFL'') RENEWAL Application-ATF Form 8 (5310.11) Part II, prior to its expiration.

Need for Information: Less frequent use of this information collection would pose a threat to public safety, since the collected information helps ATF to ensure that the applicants remain eligible to renew their licenses.

Proposed Use of Information: ATF Form 8 (5310.11) Part II, is used to identify the applicant and determine their eligibility to retain the license.

Description of the Respondents: Respondents desiring to update the

responsible person (RP) information on an existing license must submit a letter in this regard, along with the completed FFL renewal application to ATF.

Number of Respondents: 34,000 existing. New respondents due to the rule: 24,540.

Frequency of Response: every three years and periodically.

Burden of Response: 0.5 hours.

Estimate of Total Annual Burden: 12,270 hours (incremental change).

Title: Firearms Transaction Record—ATF Form 4473 (5300.9) and Firearms Transaction Record Continuation Sheet.

OMB Control Number: OMB 1140–0020.

Summary of the Collection of Information: The subject form is required under the authority of 18 U.S.C. 922 and 923 and 27 CFR 478.124. These sections of the GCA prohibit certain persons from shipping, transporting, receiving, or possessing firearms. All persons, including FFLs, are prohibited from transferring firearms to such persons. FFLs are also subject to additional restrictions regarding the disposition of a firearm to an unlicensed person under the GCA. For example, age and State of residence also determine whether a person may lawfully receive a firearm. The information and certification on the Form 4473 are designed so that a person licensed under 18 U.S.C. 923 may determine if the licensee may lawfully sell or deliver a firearm to the person identified in section B of the Form 4473, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The Form 4473 should only be used for sales or transfers of firearms where the seller is licensed under 18 U.S.C. 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction.

Need for Information: The consequences of not conducting this collection of information, or conducting it less frequently, are that the licensee might transfer a firearm to a person who is prohibited from possessing firearms under Federal law. The collection of this information is necessary for compliance with the statutory requirements to verify the eligibility of a person receiving or possessing firearms under the GCA. There is no discretionary authority on the part of ATF to waive these requirements. Respondents are required to supply this information as often as necessary to comply with statutory provisions. The form is critical to the prevention of criminal diversion of firearms and enhances law enforcement's ability to trace firearms that are recovered in crimes.

Proposed Use of Information: A person purchasing a firearm from an FFL must complete section B of the Form 4473. The buyer's answers to the questions determine if the potential transferee is eligible to receive the firearm. If those answers indicate that the buyer is not prohibited from receiving a firearm, the licensee completes section C of the Form 4473 and contacts the NICS or the State point of contact to determine if the firearm can legally be transferred to the purchaser.

Description of the Respondents: Unlicensed persons wishing to purchase a firearm.

Number of Respondents: 17,189,101 existing. New respondents due to the rule: 24,540.

Frequency of Response: periodically.

Burden of Response: 0.5 hours.

Estimate of Total Annual Burden: 12,270 hours (incremental change).

Title: Records of Acquisition and Disposition, Dealers of Type 01/02 Firearms, and Collectors of Type 03 Firearms [Records of Acquisition and Disposition, Collectors of Firearms].

OMB Control Number: OMB 1140–0032.

Summary of the Collection of Information: The recordkeeping requirements as authorized by the GCA, 18 U.S.C. 923, are for the purpose of allowing ATF to inquire into the disposition of any firearm received by a licensee in the course of a criminal investigation.

Need for Information: Less frequent collection of this information would pose a threat to public safety as the information is routinely used to assist law enforcement by allowing them to trace firearms in criminal investigations.

Proposed Use of Information: This collection of information grants ATF officers the authority to examine a collector's records for firearms traces or compliance inspections, per 27 CFR 478.23(c)(1), (2).

Description of the Respondents: Federal Firearms Licensees.

Number of Respondents: 60,790 existing. New respondents due to the rule: 24,540.

Frequency of Response: annually recurring.

Burden of Response: three minutes to maintain A&D records and one hour to perform an inspection.

Estimate of Total Annual Burden: 24,540 hours in inspection time (incremental change) and 3,681 hours maintaining A&D records (incremental change).

ATF asks for public comment on the proposed collection of information to help determine how useful the information is; whether the public can help perform ATF's functions better; whether the information is readily available elsewhere; how accurate ATF's estimate of the burden of collection is; how valid the methods for determining burden are; how to improve the quality, usefulness, and clarity of the information; and how to minimize the burden of collection.

If you submit comments on the collection of information, submit them following the ''Public Participation'' section under the **SUPPLEMENTARY INFORMATION** heading. You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, ATF will publish a notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the proposed collection.

Disclosure

Copies of the proposed rule, the comments received in response to it, and this final rule are available through the Federal eRulemaking portal, at *www.regulations.gov* (search for RIN 1140–58), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, the Department amends 27 CFR part 478 as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–931; 44 U.S.C. 3504(h).

■ 2. Amend § 478.11 by:
■ a. Revising the definition of ''Dealer'';
■ b. In the definition of ''Engaged in the business'':
■ i. Redesignating paragraphs (a) through (f) as paragraphs (1) through (6);
■ ii. Revising newly redesignated paragraph (3); and

■ iii. Adding paragraph (7);
■ c. Adding definitions of ''Former licensee inventory'', ''Personal collection (or personal collection of firearms, or personal firearms collection)'', and ''Predominantly earn a profit'' in alphabetical order;
■ d. Revising the definition of ''Principal objective of livelihood and profit''; and
■ e. Adding definitions of ''Responsible person'' and ''Terrorism'' in alphabetical order.

The revisions and additions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Dealer. Any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term shall include any person who engages in such business or occupation on a part-time basis. The term shall include such activities wherever, or through whatever medium, they are conducted, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order; over the internet (*e.g.,* online broker or auction); through the use of other electronic means (*e.g.,* text messaging service, social media raffle, or website); or at any other domestic or international public or private marketplace or premises.

* * * * *

Engaged in the business—* * *

(3) *Dealer in firearms other than a gunsmith or a pawnbroker.* The term ''engaged in the business as a dealer in firearms other than a gunsmith or a pawnbroker'' shall have the same meaning as in § 478.13.

* * * * *

(7) *Related definitions.* For purposes of this definition—

(i) The term ''purchase'' (and derivative terms thereof) means the act of obtaining a firearm in an agreed exchange for something of value;

(ii) The term ''sale'' (and derivative terms thereof) means the act of disposing of a firearm in an agreed exchange for something of value, and the term ''resale'' means selling a firearm, including a stolen firearm, after it was previously sold by the original manufacturer or any other person; and

(iii) The term ''something of value'' includes money, credit, personal property (*e.g.,* another firearm or ammunition), a service, a controlled substance, or any other medium of exchange or valuable consideration, legal or illegal.

* * * * *

Former licensee inventory. Firearms that were in the business inventory of a licensee at the time the license was terminated. Such firearms differ from a personal collection and other personal firearms in that they were purchased repetitively before the license was terminated as part of a licensee's business inventory with the predominant intent to earn a profit.

* * * * *

Personal collection (or personal collection of firearms, or personal firearms collection)—(1) *General definition.* Personal firearms that a person accumulates for study, comparison, exhibition (*e.g.,* collecting curios or relics, or collecting unique firearms to exhibit at gun club events), or for a hobby (*e.g.,* noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction). The term shall not include any firearm purchased for the purpose of resale with the predominant intent to earn a profit (*e.g.,* primarily for a commercial purpose or financial gain, as distinguished from personal firearms a person accumulates for study, comparison, exhibition, or for a hobby, but which the person may also intend to increase in value). In addition, the term shall not include firearms accumulated primarily for personal protection: *Provided,* that nothing in this definition shall be construed as precluding a person from lawfully acquiring firearms for self-protection or other lawful personal use.

(2) *Personal collection of licensee.* In the case of a firearm imported, manufactured, or otherwise acquired by a licensed manufacturer, licensed importer, or licensed dealer, the term shall include only a firearm described in paragraph (1) of this definition that was—

(i) Acquired or transferred without the intent to willfully evade the restrictions placed upon licensees under 18 U.S.C. chapter 44;

(ii) Recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with § 478.122(a), § 478.123(a), or § 478.125(e) (unless acquired prior to licensure and not intended for sale);

(iii) Recorded as a disposition from the licensee's business inventory to the licensee's personal collection or otherwise as a personal firearm in accordance with § 478.122(a), § 478.123(a), or § 478.125(e) (unless acquired prior to licensure and not intended for sale);

(iv) Maintained in such personal collection or otherwise as a personal firearm (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; and

(v) Stored separately from, and not commingled with the business inventory. When stored or displayed on the business premises, the personal collection and other personal firearms shall be appropriately identified as ''not for sale'' (*e.g.,* by attaching a tag).

* * * * *

Predominantly earn a profit. The term ''predominantly earn a profit'' shall have the same meaning as in § 478.13.

Principal objective of livelihood and profit. The intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents such as improving or liquidating a personal firearms collection: *Provided,* That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

* * * * *

Responsible person. Any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a sole proprietorship, corporation, company, partnership, or association, insofar as they pertain to firearms.

* * * * *

Terrorism. For purposes of the definitions ''predominantly earn a profit'' and ''principal objective of livelihood and profit,'' the term ''terrorism'' means activity, directed against United States persons, which—

(1) Is committed by an individual who is not a national or permanent resident alien of the United States;

(2) Involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(3) Is intended—

(i) To intimidate or coerce a civilian population;

(ii) To influence the policy of a government by intimidation or coercion; or

(iii) To affect the conduct of a government by assassination or kidnapping.

* * * * *

■ 3. Add § 478.13 to subpart B to read as follows:

§478.13 Definition of ''engaged in the business as a dealer in firearms other than a gunsmith or a pawnbroker.''

(a) *Definition.* A person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms. The term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of the person's personal collection of firearms. In addition, the term shall not include an auctioneer who provides only auction services on commission to assist in liquidating firearms at an estate-type auction; *provided,* that the auctioneer does not purchase the firearms, or take possession of the firearms for sale on consignment.

(b) *Fact-specific inquiry.* Whether a person is engaged in the business as a dealer under paragraph (a) of this section is a fact-specific inquiry. Selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity. However, there is no minimum threshold number of firearms purchased or sold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is ''engaged in the business'' of dealing in firearms. For example, even a single firearm transaction or offer to engage in a transaction, when combined with other evidence (*e.g.,* where a person represents to others a willingness and ability to purchase more firearms for resale), may require a license; whereas, a single isolated firearm transaction without such evidence would not require a license. At all times, the determination of whether a person is engaged in the business of dealing in firearms is based on the totality of the circumstances.

(c) *Presumptions that a person is engaged in the business as a dealer.* In civil and administrative proceedings, a person shall be presumed to be engaged in the business of dealing in firearms as defined in paragraph (a) of this section, absent reliable evidence to the contrary, when it is shown that the person—

(1) Resells or offers for resale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and resell additional firearms (*i.e.,* to be a source of additional firearms for resale);

(2) Repetitively purchases for the purpose of resale, or repetitively resells or offers for resale, firearms—

(i) Through straw or sham businesses, or individual straw purchasers or sellers; or

(ii) That cannot lawfully be purchased, received, or possessed under Federal, State, local, or Tribal law, including:

(A) Stolen firearms (*e.g.,* 18 U.S.C. 922(j));

(B) Firearms with the licensee's serial number removed, obliterated, or altered, or not identified as required by law (*e.g.,* 18 U.S.C. 922(k) or 26 U.S.C. 5861(i));

(C) Firearms imported in violation of law (*e.g.,* 18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(D) Machineguns or other weapons defined as firearms under 26 U.S.C. 5845(b) that cannot lawfully be possessed (*e.g.,* 18 U.S.C. 922(o); 26 U.S.C. 5861(d));

(3) Repetitively resells or offers for resale firearms—

(i) Within 30 days after the person purchased the firearms; or

(ii) Within one year after the person purchased the firearms if they are—

(A) New, or like new in their original packaging; or

(B) The same make and model, or variants thereof;

(4) As a former licensee (or responsible person acting on behalf of the former licensee), resells or offers for resale to a person (other than a licensee in accordance with § 478.57 or § 478.78) firearms that were in the business inventory of the former licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), whether or not such firearms were transferred to a responsible person of the former licensee after the license was terminated in accordance with § 478.57(b)(2) or § 478.78(b)(2); or

(5) As a former licensee (or responsible person acting on behalf of the former licensee), resells or offers for resale firearms that were transferred to the licensee's personal collection or otherwise as personal firearms in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a(a) prior to the time the license was terminated, unless:

(i) The firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by 18 U.S.C. chapter 44; and

(ii) One year has passed from the date of transfer to the licensee's personal collection or otherwise as personal firearms.

(d) *Predominantly earn a profit*—(1) *Definition.* The intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided,* that proof of profit, including the intent to profit, shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this section, a person may have the intent to profit even if the person does not actually obtain the intended pecuniary gain from the sale or disposition of firearms.

(2) *Presumptions that a person has intent to predominantly earn a profit.* In civil and administrative proceedings, a person shall be presumed to have the intent to predominantly earn a profit through the repetitive purchase and resale of firearms as defined in paragraph (d)(1) of this section, absent reliable evidence to the contrary, when it is shown that the person—

(i) Repetitively or continuously advertises, markets, or otherwise promotes a firearms business (*e.g.,* advertises or posts firearms for resale, including through the internet or other digital means, establishes a website to offer their firearms for resale, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally;

(ii) Repetitively or continuously purchases, rents, or otherwise exchanges (directly or indirectly) something of value to secure permanent or temporary physical space to display firearms they offer for resale, including part or all of a business premises, a table or space at a gun show, or a display case;

(iii) Makes and maintains records to document, track, or calculate profits and losses from firearms repetitively purchased for resale;

(iv) Purchases or otherwise secures merchant services as a business (*e.g.,* credit card transaction services, digital wallet for business) through which the person intends to repetitively accept payments for firearms transactions;

(v) Formally or informally purchases, hires, or otherwise secures business security services (*e.g.,* a central station-monitored security system registered to a business, or guards for security) to protect firearms assets and repetitive firearms transactions;

(vi) Formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes, or offers to make, repetitive firearms transactions; or

(vii) Secures or applies for a State or local business license to purchase for

resale or to resell merchandise that includes firearms.

(e) *Conduct that does not support a presumption.* A person shall not be presumed to be engaged in the business of dealing in firearms when reliable evidence shows that the person is only reselling or otherwise transferring firearms—

(1) As bona fide gifts;

(2) Occasionally to obtain more valuable, desirable, or useful firearms for the person's personal collection;

(3) Occasionally to a licensee or to a family member for lawful purposes;

(4) To liquidate (without restocking) all or part of the person's personal collection; or

(5) To liquidate firearms—

(i) That are inherited; or

(ii) Pursuant to a court order; or

(6) To assist in liquidating firearms as an auctioneer when providing auction services on commission at an estate-type auction.

(f) *Rebuttal evidence.* Reliable evidence of the conduct set forth in paragraph (e) of this section may be used to rebut any presumption in paragraph (c) or (d)(2) of this section that a person is engaged in the business of dealing in firearms, or intends to predominantly earn a profit through the repetitive purchase and resale of firearms.

(g) *Presumptions, conduct, and rebuttal evidence not exhaustive.* The activities set forth in the rebuttable presumptions in paragraphs (c) and (d)(2) of this section, and the activities and rebuttal evidence set forth in paragraphs (e) and (f) of this section, are not exhaustive of the conduct or evidence that may be considered in determining whether a person is engaged in the business of dealing in firearms, or has the intent to predominantly earn a profit through the repetitive purchase and resale of firearms.

(h) *Criminal proceedings.* The rebuttable presumptions in paragraphs (c) and (d)(2) of this section shall not apply to any criminal case, although they may be useful to courts in criminal cases, for example, when instructing juries regarding permissible inferences.

■ 4. Amend § 478.57 by designating the undesignated paragraph as paragraph (a) and adding paragraphs (b) through (d) to read as follows:

§478.57 Discontinuance of business.

* * * * *

(b) Upon termination of a license (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee shall within 30 days, or such additional period approved by the Director for good cause, either:

(1) Liquidate the former licensee inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the former licensee inventory to a responsible person of the former licensee to whom the receipt, possession, sale, or other disposition is not prohibited by law. Any such transfer, however, does not negate the fact that the firearms were repetitively purchased, and were purchased with the predominant intent to earn a profit by repetitive purchase and resale.

(c) Transfers of former licensee inventory to a licensee or responsible person in accordance with paragraph (b)(1) or (2) of this section shall be appropriately recorded as dispositions, in accordance with § 478.122(b), § 478.123(b), or § 478.125(e), prior to delivering the records after discontinuing business consistent with § 478.127. Except for liquidation of former licensee inventory to a licensee within 30 days (or approved period) in accordance with paragraph (b)(1) of this section, or occasional sale of a firearm from such inventory thereafter to a licensee, a former licensee (or responsible person of such licensee) who resells any such inventory, including former licensee inventory transferred in accordance with paragraph (b)(2) of this section, is subject to the presumptions in § 478.13 (definition of ''engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker'') that apply to a person who repetitively purchased those firearms for the purpose of resale.

(d) The former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'').

■ 5. Amend § 478.78 by designating the undesignated paragraph as paragraph (a) and adding paragraphs (b) through (d) to read as follows:

§478.78 Operations by licensee after notice.

* * * * *

(b) Upon final disposition of license proceedings to disapprove or terminate a license (*i.e.,* by revocation or denial of renewal), the former licensee shall within 30 days, or such additional period approved by the Director for good cause, either:

(1) Liquidate the former licensee inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the former licensee inventory to a responsible person of the former licensee to whom the receipt, possession, sale, or other disposition is not prohibited by law. Any such transfer, however, does not negate the fact that the firearms were repetitively purchased, and were purchased with the predominant intent to earn a profit by repetitive purchase and resale.

(c) Transfers of former licensee inventory to a licensee or responsible person in accordance with paragraph (b)(1) or (2) of this section shall be appropriately recorded as dispositions, in accordance with § 478.122(b), § 478.123(b), or § 478.125(e), prior to delivering the records after discontinuing business consistent with § 478.127. Except for the sale of former licensee inventory to a licensee within 30 days (or approved period) in accordance with paragraph (b)(1) of this section, or occasional sale of a firearm from such inventory thereafter to a licensee, a former licensee (or responsible person of such former licensee) who resells any such inventory, including former licensee inventory transferred in accordance with paragraph (b)(2) of this section, is subject to the presumptions in § 478.13 (definition of ''engaged in the business as a dealer in firearms other than a gunsmith or pawnbroker'') that apply to a person who repetitively purchased those firearms for the purpose of resale.

(d) The former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'').

■ 6. Amend § 478.124 by revising paragraph (a) to read as follows:

§478.124 Firearms transaction record.

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearm transaction record, Form 4473: *Provided,* that a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement

firearm is returned to the person from whom received; *provided further,* that a firearms transaction record, Form 4473, shall not be used if the sale or other disposition is being made to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor who transfers a firearm to their personal collection or otherwise as a personal firearm in accordance with § 478.125a. When a licensee transfers a firearm to another licensee, the licensee shall comply with the verification and recordkeeping requirements in § 478.94 and this subpart.

* * * * *

§ 478.125a [Amended]

■ 7. Amend § 478.125a in paragraphs (a)(2) and (3) by removing the citation ''§ 478.125(e)'' and adding in its place ''§ 478.122(a), § 478.123(a), or § 478.125(e)''.

Dated: April 8, 2024.

Merrick B. Garland,

Attorney General.

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Part IV

Equal Employment Opportunity Commission

29 CFR Part 1636
Implementation of the Pregnant Workers Fairness Act; Final Rule

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1636

RIN 3046–AB30

Implementation of the Pregnant Workers Fairness Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule and interpretive guidance.

SUMMARY: The Equal Employment Opportunity Commission is issuing this final rule and interpretive guidance to implement the Pregnant Workers Fairness Act, which requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.

DATES: This final rule and interpretive guidance is effective on June 18, 2024.

FOR FURTHER INFORMATION CONTACT: Sharyn Tejani, Associate Legal Counsel, Office of Legal Counsel at 202–900–8652 (voice), 1–800–669–6820 (TTY), *sharyn.tejani@eeoc.gov.* Requests for this final rule and interpretive guidance in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 921–3191 (voice), 1–800–669–6820 (TTY), or 1–844–234–5122 (ASL video phone).

SUPPLEMENTARY INFORMATION:

Introduction

The Pregnant Workers Fairness Act (PWFA) [1] requires a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. The PWFA at 42 U.S.C. 2000gg–3(a) directs the Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

The Commission issued its notice of proposed rulemaking (NPRM) on August 11, 2023, and invited public comment on this proposal from August 11, 2023, through October 10, 2023.[2] Members of the public submitted approximately 98,600 comments to the EEOC during this 60-day period. Several of those comments were signed by multiple individuals; thus, the total number of comments was over 100,000.[3]

Pursuant to 42 U.S.C. 2000gg–3(a), the Commission is issuing this final regulation and an appendix entitled ''Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act'' (Interpretive Guidance). As explained in the NPRM, the Interpretive Guidance (a proposed version of which was included in the NPRM) will become part of 29 CFR part 1636.[4] The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.[5]

General Information on Terms Used in the Regulation and Interpretive Guidance

The PWFA at 42 U.S.C. 2000gg(3) uses the term ''employee (including an applicant)'' in its definition of ''employee.'' Thus, throughout the statute, this preamble, the final regulation, and the Interpretive Guidance, the term ''employee'' should be understood to include ''applicant'' where relevant. Because the PWFA relies on Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. 2000e *et seq.* for its definition of ''employee,'' that term also includes ''former employee,'' where relevant.[6]

The PWFA defines ''covered entity'' using the definition of ''employer'' from different statutes, including Title VII.[7] Thus ''covered entities'' under the PWFA include public and private employers with 15 or more employees, unions, employment agencies, and the Federal Government.[8] In this preamble, the final regulation, and the Interpretive Guidance, the Commission uses the terms ''covered entity'' and the term ''employer'' interchangeably.

To track the language of the statute more closely and improve readability, the Commission made three global changes from the proposed rule and proposed appendix to the final rule and Interpretive Guidance. First, the Commission removed most instances of the words ''applicant'' and ''former employee'' from the regulation and the Interpretive Guidance; based on the statute and Title VII, the term ''employee'' covers ''applicant'' and ''former employee'' when relevant. Second, the Commission replaced the word ''worker'' with the word ''employee'' throughout the regulation and the Interpretive Guidance. Third, the Commission removed sections of the proposed rule that pertained solely to employees covered by the Congressional Accountability Act of 1995 because the Commission does not have authority to regulate those employees (former §§ 1636.2(c)(2) and 1636.5(b)).

The Interpretive Guidance contains numerous examples to illustrate provisions in the regulation. The Commission received some comments identifying instances where these examples, in an effort to be simple and short, oversimplified situations related to pregnancy, childbirth, or related medical conditions. For example, the Commission used the term ''bed rest'' in some examples; that is a colloquialism for several actions that would be better described as ''rest and reduced activity.'' [9] The Commission agrees that in a real situation, there may or may not be more complexity and that describing a restriction may require different or more facts than are in an example. However, the purpose of these examples is to illustrate legal points, to suggest practical actions for covered entities and employees, and to encourage voluntary compliance with the law. Thus, while

[1] Consolidated Appropriations Act, 2023, Public Law 117–328, Div. II, 136 Stat. 4459, 6084 (2022) (codified at 42 U.S.C. 2000gg to 2000gg–6).

[2] 88 FR 54714–94 (proposed Aug. 11, 2023) (to be codified at 29 CFR part 1636).

[3] The vast majority of the comments were form comments that were identical or slightly altered versions of a few base form comments.

[4] 88 FR 54719.

[5] *Id.*

[6] *Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 346 (1997).

[7] 42 U.S.C. 2000gg(2)(A), (B)(i), (B)(iii), (B)(iv). The other statutes are the Congressional Accountability Act of 1995 and 3 U.S.C. 411(c).

[8] The statute at 42 U.S.C. 2000gg(2) provides that the term ''covered entity'' ''has the meaning given the term 'respondent''' under 42 U.S.C. 2000e(n) and includes employers as defined in 42 U.S.C. 2000e(b), 2000e–16c(a), and 2000e–16(a). The statute at 42 U.S.C. 2000gg–5(b) provides as a rule of construction that ''[t]his chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title [section 702(a) of the Civil Rights Act of 1964].''

[9] Similarly, several examples discuss restrictions on how much an employee can lift. The examples in the Interpretive Guidance generally refer to these restrictions as ''lifting restrictions'' with a specific pound limit. In some situations, the determination of such restrictions can depend on the frequency of lifting, the height to which the object is lifted, the body position of the person, and the distance between the person and the object. *See, e.g.,* Leslie A. MacDonald et al., *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations,* 209 a.m. J. Obstetrics & Gynecology 80–88 (2013), *https://pubmed.ncbi.nlm.nih.gov/23467051/;* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Provisional Recommended Weight Limits for Lifting at Work During Pregnancy* (Infographic), *https://www.cdc.gov/niosh/topics/repro/images/Lifting_guidelines_during_pregnancy_-_NIOSH.jpg* (last visited Mar. 18, 2024).

the Commission has made some changes to the examples in response to these comments, it also has retained simple language in many examples to allow for ease of reading and to keep the focus of the examples on the PWFA's legal interpretation. The Commission notes that, depending on the facts in the examples, the same facts could lead to claims also being brought under other statutes that the Commission enforces, such as Title VII and the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101 *et seq.*[10] Moreover, the situations in specific examples could implicate other Federal laws, including, but not limited to, the Family and Medical Leave Act of 1993, as amended (FMLA), 29 U.S.C. 2601 *et seq.;* the Occupational Safety and Health Act of 1970, as amended (OSH Act), 29 U.S.C. 651 *et seq.;* and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.,* as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), Public Law 117–328, Div. KK, 136 Stat. 4459, 6093 (2022).[11] Additionally, although some examples state that the described actions ''would violate'' the PWFA, additional facts not described in the examples could change that determination.

Finally, the Commission notes that the examples are illustrative. They do not and are not intended to cover every limitation or possible accommodation under the PWFA.[12]

[10] References to the ADA throughout the preamble, the regulation, and the Interpretive Guidance are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under Title I of the ADA also apply to Federal agencies under section 501 of the Rehabilitation Act. *See* 29 U.S.C. 791(f).

[11] To the extent that an accommodation in an example is required under another law, like the OSH Act, the example should not be read to suggest that such a requirement is not applicable.

[12] In the examples, the preamble, the regulation, and the Interpretive Guidance, the Commission uses the terms ''leave'' or ''time off'' and intends those terms to cover leave however it is identified by the specific employer. As stated in the proposed rule, the Commission recognizes that different types of employers use different terms for time away from work, including leave, paid time off (PTO), time off, sick time, vacation, and administrative leave, among others. 88 FR 54715 n.19. Similarly, in the examples, the preamble, the regulation and the Interpretive Guidance, the Commission uses the term ''light duty.'' The Commission recognizes that ''light duty'' programs, or other programs providing modified duties, can vary depending on the covered entity. As stated in the proposed rule, the Commission intends ''light duty'' to include the types of programs included in Questions 27 and 28 of the EEOC's *Enforcement Guidance: Workers' Compensation and the ADA* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused. EEOC, *Enforcement Guidance: Workers' Compensation and the ADA* (1996), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada;* 88 FR 54715 n.20.

[13] For example, the phrase ''Prohibits a covered entity from retaliating'' was replaced with ''Prohibits discrimination'' in the discussion of retaliation, and the phrase ''Prohibits a covered entity from interfering with any individual's rights'' was replaced with ''Prohibits coercion of individuals in the exercise of their rights'' in the discussion of coercion.

[14] 88 FR 54714–16 (discussing the purpose of the PWFA, including that it helps workers with uncomplicated pregnancies and minor limitations), 54719–20 (explaining that allowing employees to

Continued

1636.1 Purpose

The Commission made several minor changes to the *Purpose* section of the regulation to follow the language in the statute more closely. Specifically, the phrase ''related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions'' was added after ''known limitations'' throughout this paragraph, and the descriptions of the retaliation and coercion provisions were slightly modified.[13]

1636.2 Definitions—General

The Commission received numerous comments regarding the proposed general definitions. For example, many comments encouraged the Commission to clarify that restaurant workers are covered by the PWFA. Several comments also suggested the Commission clarify that the requirements for protection under the FMLA (in terms of how long an employee must work for an employer and the number of hours) do not apply under the PWFA and suggested the Commission clarify that employees need not work for an employer for any specific period of time in order to be covered by the PWFA.

The PWFA relies on definitions from Title VII to describe when an employer is covered and who is protected by the law. Employers are covered by the PWFA if they have 15 or more employees, regardless of the industry. Thus, restaurant workers who work for restaurants with 15 or more employees are covered. Because the PWFA's approach to coverage and protection follows Title VII, rather than the FMLA, employees are covered even if they have not worked for a specific employer for a specific length of time.

In the general definitions section of the rule, the Commission added ''or the employee of a political subdivision of a State'' in § 1636.2(b)(3) and (c)(4) to better describe the employees covered by the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. 2000e–16c(a).

1636.3 Definitions—Specific to the PWFA

1636.3(a) Known Limitation

The rule reiterates the definition of ''known limitation'' from 42 U.S.C. 2000gg(4) and then provides definitions for the operative terms.

1636.3(a)(1) Known

The Commission did not change the definition of ''known'' from the proposed rule. Under that definition a limitation is ''known'' to a covered entity if the employee, or the employee's representative, has communicated the limitation to the covered entity.

1636.3(a)(2) Limitation

The proposed rule restated the definition of limitation from the statute and added that the physical or mental condition may be a modest or minor and/or episodic impediment or problem, that it included when an employee affected by pregnancy, childbirth, or related medical conditions had a need or a problem related to maintaining their health or the health of the pregnancy, and that it included when an employee affected by pregnancy, childbirth, or related medical conditions sought health care related to pregnancy, childbirth, or a related medical condition itself.

The Commission received several comments supporting the definition of ''limitation'' and suggesting that the word ''need'' be added to the second sentence (in addition to ''impediment'' or ''problem'') so that it would read: ''Physical or mental condition is an impediment, problem, or need that may be modest, minor, and/or episodic.'' The Commission declines to make this change because this sentence as it exists (which uses the term ''impediment'' or ''problem'') is sufficiently broad, and the third sentence of the definition of ''limitation'' covers when the employee has a ''need or a problem related to maintaining their health or the health of the pregnancy.''

The Commission received a few comments asserting that this definition was too broad and that it should be more restrictive. The Commission disagrees. As discussed in the NPRM, the PWFA was intended to cover all types of limitations, including those that are minor and those that are needed to maintain the employee's health or the health of the pregnancy.[14] Thus,

creating a higher threshold would not be in keeping with this rationale, would be contrary to congressional intent, and would impede a qualified employee's ability to stay on the job.

A handful of comments asked for clarification as to whether the language in the NPRM required employers to provide reasonable accommodations to an employee when an employee's partner, spouse, or family member—and not the employee themselves—has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. It does not. To respond to these comments, the Commission has included in the final rule's definition of ''limitation'' that the limitation must be of the specific employee in question. This is essentially the same language that was in the NPRM with regard to related medical conditions in § 1636.3(b).[15]

The Commission has made one minor change in the language of this provision in the regulation. To track the language of the statute in 42 U.S.C. 2000gg(4), the Commission has changed the last sentence of the definition of ''limitation'' regarding the ADA so that it now mirrors the language in the statute (''whether or not such condition meets the definition of disability'').

In the Interpretive Guidance, the Commission has added information in section *1636.3(a)(2) Limitation* calling attention to the possible overlap between the PWFA and the ADA and noting that in these situations the qualified employee may be entitled to an accommodation under either statute, as the protections of both may apply. The Commission has added information consistent with the changes in the regulation described above to state that the limitation must be of the specific employee in question and that the PWFA does not create a right to reasonable accommodation based on an individual's association with someone else with a PWFA-covered limitation or provide accommodations for bonding or childcare. To make the language in the Interpretive Guidance consistent with the regulation, the Commission has modified language in the Interpretive Guidance regarding accommodations for health care to clarify that accommodations may be needed to attend health care appointments for a variety of reasons.[16] Finally, the Commission has modified language from the proposed appendix regarding the PWFA and the lack of a ''severity'' requirement to avoid giving the mistaken impression that the ADA has such a requirement.

Comments and Response to Comments Regarding the Commission's Proposed Description of ''Related to, Affected by, or Arising Out of''

Some comments supported the Commission's reading of the language ''related to, affected by, or arising out of,'' stating that the Commission's reading was textually accurate in that nothing in the statutory language requires that the pregnancy, childbirth, or related medical conditions be the sole or original cause of the limitation. Other comments stated that the language in the NPRM explaining ''related to, affected by, or arising out of,'' especially when combined with the definition of ''related medical conditions,'' could require accommodations for known limitations caused by any physical or mental condition that has any real, perceived, or potential connection to—or impact on—an individual's pregnancy, fertility, or reproductive system. These comments asked the Commission to alter the NPRM language to counter this interpretation. Some comments asked for additional clarification regarding the language ''related to, affected by, or arising out of.''

The PWFA uses the language ''related to, affected by, or arising out of'' to explain the connection between the physical or mental condition and pregnancy, childbirth, or related medical conditions.[17] As such, the statute does not require that pregnancy, childbirth, or related medical conditions be the sole, the original, or a substantial reason for the physical or mental condition, and the Commission does not have the authority to change this term.

To help respond to these comments, in the Interpretive Guidance in section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of,* the Commission has added that ''related to, affected by, or arising out of'' are inclusive terms and that a pregnancy, childbirth, or related medical condition does not need to be the sole, the original, or a substantial cause of the physical or mental condition at issue for the physical or mental condition to be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions. This is in keeping with the dictionary definition of ''related to,'' which is generally defined as ''connected with'' or ''about'' something.[18] It also is consistent with the meaning of ''affected by,'' as the dictionary definition of the word ''affect'' is ''to cause,'' ''to produce,'' or ''to influence'' something.[19] Finally, it aligns with the meaning of ''arising out of,'' because the dictionary definition of ''arise'' includes ''to begin to occur or exist'' or ''to originate from a source.'' [20]

The Interpretive Guidance in section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of* further explains that determining whether a physical or mental condition is ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions should typically be straightforward, particularly in cases where an individual is currently pregnant, is experiencing childbirth, or has just experienced childbirth. Pregnancy and childbirth cause systemic changes that not only create new physical and mental conditions but also can exacerbate preexisting conditions and can cause additional pain or risk.[21] Thus, a connection between an employee's physical or mental condition and their pregnancy, childbirth, or related medical conditions will be readily ascertained when an employee is currently pregnant or is experiencing or has just experienced childbirth.

The Commission has maintained the list of situations in the Interpretive

seek health care related to pregnancy, childbirth, or a related medical condition itself is consistent with the ADA).

[15] 88 FR 54767 (providing that related medical conditions are ''as applied to the specific employee or applicant in question'').

[16] The proposed appendix stated: ''The definition also includes when the worker is seeking health care related to the pregnancy, childbirth, or a related medical condition itself . . . and recognizes that for pregnancy, childbirth, or related medical conditions the proper course of care can include regular appointments and monitoring by a health care professional.'' 88 FR 54773. The new language in the Interpretive Guidance in section *1636.3(a)(2) Limitation* states: ''Similarly, under the PWFA, an employee may require a reasonable accommodation of leave to attend health care appointments or receive treatment for or recover from their pregnancy, childbirth, or related medical conditions.'' The new language more accurately reflects that accommodations are not limited to ''regular appointments'' or ''monitoring,'' which is consistent with how leave for health care appointments is described in the regulation and elsewhere in the Interpretive Guidance.

[17] 42 U.S.C. 2000gg(4).

[18] *Relate To, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/related%20to* (last visited Mar. 9, 2024).

[19] *Affect, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/affect* (last visited Mar. 18, 2024).

[20] *Arise, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/arising* (last visited Mar. 14, 2024).

[21] *See, e.g.,* Danforth's Obstetrics & Gynecology 286 (Ronald S. Gibbs et al. eds., 10th ed. 2008) (''Normal pregnancy entails many physiologic changes . . . .''); Clinical Anesthesia 1138 (Paul G. Barash et al. eds., 6th ed. 2009) (''During pregnancy, there are major alterations in nearly every maternal organ system.'').

Guidance in section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of* that show the connection between pregnancy, childbirth, or related medical conditions and the limitation with some minor changes.[22] The Interpretive Guidance also maintains the discussion that some conditions (like lifting restrictions) can occur whether or not an employee is affected by pregnancy, childbirth, or related medical conditions and that the Commission anticipates that confirming that a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will usually be straightforward and can be accomplished through the interactive process. The Commission has added information to the Interpretive Guidance explaining that there may be situations where a physical or mental condition may no longer be related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and that in those situations, an employee may seek an accommodation under the ADA. The Commission also has added that there may be situations where the physical or mental condition exacerbates an existing condition that is a disability under the ADA, and in those situations, an employee may be entitled to an accommodation under either the ADA or the PWFA.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

The NPRM explained that the phrase ''pregnancy, childbirth, or related medical conditions'' appears in Title VII's definition of ''sex,'' as amended in 1978 by the PDA.[23] Because Congress chose to write the PWFA using the same phrase as in Title VII, as amended by the PDA, and is presumed to have known the meaning given that phrase by the courts and the Commission for over 40 years, the Commission gave the phrase ''pregnancy, childbirth, or related medical conditions'' the same meaning under the PWFA as under Title VII.[24] When Congress chooses to ''use[ ] the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.'' [25]

The PWFA's legislative history supports the Commission's reading of the phrase ''pregnancy, childbirth, or related medical conditions'' to have the same meaning as the phrase in Title VII. The U.S. House of Representatives Report accompanying the PWFA recounts the legislative steps Congress has taken to protect workers affected by pregnancy, childbirth, or related medical conditions. In 1964, Congress passed Title VII, which included protection from discrimination based on sex. In 1972, the EEOC interpreted the prohibition on sex discrimination to include pregnancy, childbirth, or related medical conditions.[26] In 1976, the Supreme Court determined that pregnancy discrimination was not covered by Title VII.[27] In 1978, responding to that decision, Congress passed the PDA ''to codify the EEOC's original interpretation of Title VII.'' [28] Courts' subsequent interpretations of the disparate treatment standard in the PDA, however, left ''[n]umerous [g]aps'' in protections, and the Supreme Court's 2015 decision in *Young* v. *United Parcel Service, Inc.,* 575 U.S. 206 (2015), created a standard that did not adequately protect the workers that the PDA covered, according to the PWFA House Report.[29] The House concluded that, ''[t]o remedy the shortcomings of the PDA, Congress must step in and act.'' [30] Congress' discussion of the PDA and identification of shortcomings in the PDA as a reason for enacting the PWFA show that in the PWFA, Congress sought to protect the same workers who are protected by the PDA. By using Title VII's longstanding definition of ''pregnancy, childbirth, or related medical conditions'' for the PWFA, the Commission is following both the text of the statute and its legislative history.

Comments Regarding Temporal Proximity to a Current or Recent Pregnancy

Some comments requested that the Commission limit the definition of ''pregnancy, childbirth, or related medical conditions'' under the PWFA to situations that met their definition of close temporal proximity to a current or recent pregnancy. These comments also

[22] For example, in the proposed appendix, many of the examples in this paragraph said that the physical or mental condition was ''related to'' pregnancy. This has been changed to ''related to, affected by, or arising out of'' to match the language in the statute. The Commission has added that a lifting restriction may be due to lower back pain that may be exacerbated by physical changes associated with pregnancy to connect the lifting restriction to pregnancy in that example. The Commission has added in this paragraph that: ''A lactating employee who seeks an accommodation to take breaks to eat has a related medical condition (lactation) and a physical condition related to, affected by, or arising out of it (increased nutritional needs),'' in order to include an example about a ''related medical condition.'' The Commission has changed the language in the proposed appendix from ''determining whether'' to ''confirming whether,'' where relevant, in order to match the language used in § 1636.3(l)(2).

[23] 88 FR 54721.

[24] *See, e.g., Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 536 (2015) (''If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'') (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)); *Bragdon* v. *Abbott,* 524 U.S. 624, 645 (1998) (''When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.''); *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978) (''[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.''); *Hall* v. *U.S. Dep't of Agric.,* 984 F.3d 825, 840 (9th Cir. 2020) (''Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.'') (internal citations and quotation marks omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012) [hereinafter Scalia & Garner, *Reading Law*] (''[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.''); H.R. Rep. No. 117–27, pt. 1, at 11–17 (discussing the history of the passage of the PDA; explaining that, due to court decisions, the PDA did not fulfill its promise to protect pregnant employees; and that the PWFA was intended to rectify this problem and protect the same employees covered by the PDA).

[25] *Smith* v. *City of Jackson,* 544 U.S. 228, 233 (2005); *see Northcross* v. *Bd. of Ed. of the Memphis City Schs.,* 412 U.S. 427, 428 (1973) (per curiam) (observing that ''similarity of language'' between statutes is ''a strong indication that the two statutes should be interpreted pari passu'').

[26] H.R. Rep. No. 117–27, pt. 1, at 12 (2021); 29 CFR 1604.10(b) (1972); 37 FR 6835, 6837 (1972) (addressing Title VII coverage of ''[d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom'').

[27] *Gen. Elec. Co.* v. *Gilbert,* 429 U.S. 125, 135–36 (1976).

[28] H.R. Rep. No. 117–27, pt. 1, at 13; *see also* H.R. Rep. No. 95–948, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 (providing that the U.S. House of Representatives' version of the PDA ''will amend Title VII to clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment'' and stating that the EEOC's 1972 guidelines—which ''state that excluding applicants or employees from employment because of pregnancy or related medical conditions is a violation of Title VII'' and ''require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities''—''rightly implemented the Title VII prohibition of sex discrimination in the 1964 [Civil Rights A]ct''); S. Rep. No. 95–331, at 2 (1977) (explaining that, in implementing Congress' intent in amending Title VII in 1972, the EEOC issued guidelines that ''made clear that excluding applicants or employees from employment because of pregnancy or related medical conditions was a violation of [T]itle VII,'' and ''these guidelines rightly implemented the Congress' intent in barring sex discrimination in the 1964 [Civil Rights A]ct'').

[29] H.R. Rep. No. 117–27, pt. 1, at 14–16.

[30] *Id.* at 17.

noted that many of the conditions listed in the NPRM as conditions that could qualify as ''pregnancy, childbirth, or related medical conditions'' also could impact individuals who have never been pregnant or could first arise years before or after pregnancy. Relatedly, several comments suggested that only conditions related to a current or recent pregnancy (which the comments defined as one occurring 6 or fewer months earlier) could be ''related medical conditions.''

Response to Comments Regarding Temporal Proximity to a Current or Recent Pregnancy

The Commission declines to adopt the changes suggested by these comments, as they seek to create a definition of ''pregnancy, childbirth, or related medical conditions'' that is not supported by Title VII case law or the Commission's *Enforcement Guidance on Pregnancy Discrimination and Related Issues.*[31] Further, adopting such a bright-line temporal rule would improperly exclude many employees, such as employees with postpartum limitations, who may require pregnancy-related accommodations.[32] That said, ''related medical conditions'' must be related to the pregnancy or childbirth of the specific employee in question, and whether a specific condition is related to pregnancy or childbirth is a fact-specific determination that will be guided by existing Title VII precedent and prior relevant Commission guidance.

Comments Regarding the List of Conditions Included in the Regulation as Examples of ''Pregnancy, Childbirth, or Related Medical Conditions''

Multiple comments supported the Commission's definition of ''pregnancy, childbirth, or related medical conditions'' and supported the inclusion of the list of numerous possible ''related medical conditions'' in the regulation. Comments argued that the Commission's reading of ''related medical conditions'' best effectuates the purpose and goals of the PWFA; is consistent with longstanding law, legislative history, agency interpretation, medical understanding, and common sense; and appropriately supplements the protections currently afforded under the PDA.

By contrast, several comments stated that the language in the NPRM explaining the term ''related medical conditions'' could require accommodations for any physical or mental condition that has any real, perceived, or potential connection to—or impact on—an individual's pregnancy, fertility, or reproductive system. These comments asked the Commission to alter the language in the proposed rule to counter this interpretation.

Other comments stated that the broad, non-exhaustive list of ''related medical conditions'' exceeded the Commission's delegated authority as intended by Congress and that such a list would, based on sex, improperly privilege employees with gynecological conditions, or disadvantage other employees with analogous conditions, and thus potentially illegally discriminate under Title VII or the Equal Protection Clause.

Response to Comments Regarding the List of Conditions Included in the Regulation as Examples of ''Pregnancy, Childbirth, or Related Medical Conditions''

Generally, the question of whether a condition constitutes ''pregnancy, childbirth, or related medical conditions'' in a particular case will be fact-specific and guided by existing Title VII precedent and relevant prior Commission guidance. To assist in making that determination, the Commission made clarifying changes and additions to the language in this section of the regulation and has added more information in the Interpretive Guidance in section *1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions.*

First, the Commission removed the phrase ''relate to, are affected by, or arise out of'' with regard to ''related medical conditions'' in the proposed § 1636.3(b) in order to track the language of the statute and reflect more closely language in the Commission's prior enforcement guidance that explains the extent of the PDA and the definition of ''pregnancy, childbirth, or related medical conditions.'' [33] This sentence now says ''[r]elated medical conditions are medical conditions relating to the pregnancy or childbirth of the specific employee in question.''

Second, the Commission reorganized the list of conditions in § 1636.3(b) to follow more closely the organization of the Commission's *Enforcement Guidance on Pregnancy Discrimination* explaining the definition of ''pregnancy, childbirth, or related medical conditions,'' so that the two resources are consistent.[34]

Third, the Commission addressed concerns raised in the comments that conditions in the list of ''related medical conditions'' would ''always'' be ''related medical conditions'' and thus limitations related to, affected by, or arising out of those conditions would automatically be entitled to coverage under the PWFA. The Commission responded to these concerns and requests by changing the language in § 1636.3(b) so that the list is now explained as conditions that ''are, or may be,'' ''related medical conditions.''

Fourth, the Commission added that the pregnancy or childbirth must be ''of the specific employee in question.'' This language was already in the NPRM—in that the NPRM made clear that related medical conditions must be related to the pregnancy or childbirth of the specific employee in question—and has been added to the definition of ''limitation'' as well.[35]

In the Interpretive Guidance in section *1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions,* the Commission has added information

[31] EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues,* (I)(A) (2015) [hereinafter *Enforcement Guidance on Pregnancy Discrimination*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues* (providing that the term ''pregnancy, childbirth, or related medical conditions'' includes current pregnancy, past pregnancy, potential or intended pregnancy, and related medical conditions).

[32] *See, e.g.,* Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Postpartum Care* (reaff'd 2021), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care* (discussing the importance of postpartum health care, including treatment for disorders arising during pregnancy and chronic medical conditions); Susanna Trost et al., U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019* (2022), *https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html* (30% of pregnancy-related deaths occurred one- and one-half months to one year postpartum).

[33] 42 U.S.C. 2000gg(4); *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(a) (''[A]n employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth.'').

[34] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A).

[35] Additionally, for consistency, the Commission replaced ''menstrual cycles'' with ''menstruation'' because menstruation is the term used elsewhere in the NPRM and also replaced ''birth control'' with ''contraception'' because that is the term used in *Enforcement Guidance on Pregnancy Discrimination* cited throughout the NPRM. *Compare* 88 FR 54767 (listing ''menstrual cycles'' in the list of ''related medical conditions''), *with* 88 FR 54721, 54774 (explaining that the list in the regulation for the definition of ''pregnancy, childbirth, or related medical conditions'' includes ''menstruation''); *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(3).

regarding the Commission's expectation that it will be readily apparent that certain medical conditions (*e.g.,* lactation, miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, and HELLP (hemolysis, elevated liver enzymes and low platelets syndrome)) have a relation to pregnancy or childbirth; and that, similarly, a connection between a medical condition and pregnancy or childbirth will often be evident when a new medical condition occurs or an existing medical condition is exacerbated or poses a new risk during a current pregnancy, childbirth, or postpartum period.

The Commission disagrees that creating a list of potential ''related medical conditions'' that are or may be related to pregnancy or childbirth exceeds the Commission's authority. The list includes related medical conditions that courts and the Commission, in its *Enforcement Guidance on Pregnancy Discrimination,* have determined can, but are not always required to be, related medical conditions, as well as a non-exhaustive list of other conditions that, depending on the situation, can be related to pregnancy or childbirth.[36] The list clearly states that it consists of examples that ''are or may be'' related medical conditions in a specific case. In each case, a determination that a medical condition is related to pregnancy or childbirth is fact-specific and contingent on whether the medical condition at issue is related to the pregnancy or childbirth of the specific employee in question. The Commission notes that regardless of whether pregnancy, childbirth, or related medical conditions are at issue, the provision of 42 U.S.C. 2000gg–5(a)(2) stating that nothing in the PWFA shall be construed ''by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment'' applies.

The Commission also disagrees that accommodations under the PWFA will potentially discriminate based on sex. The PWFA only provides accommodations to qualified employees with limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. This is in keeping with courts that have found that laws and other policies that provide leave for workers affected by pregnancy do not discriminate based on sex.[37] Additionally, in *Young* v. *United Parcel Service,*[38] the Supreme Court found that an employer could be required by the PDA to provide an accommodation for pregnant workers even if the employer's general policy did not provide for accommodations for workers except in certain situations. The accommodations provided under the PWFA are similar in purpose and effect to those that could have been obtained in *Young.* And, just as the accommodations contemplated by the Court in *Young* did not violate Title VII, neither do accommodations under the PWFA.

Moreover, Congress expressly intended that in some cases, the PWFA would require accommodations for a qualified employee's limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, even if such accommodations are not available to other employees. In fact, Congress observed that the PDA's comparator requirement ''is a burdensome and often impossible standard to meet'' and thus is ''insufficient to ensure that pregnant workers receive the accommodations they need.'' [39]

Comments and Response to Comments Requesting Deletions, Additions, or Other Modifications to the List of Examples of ''Pregnancy, Childbirth, or Related Medical Conditions''

Many comments requested deletions, additions, or other modifications to the list of examples of ''pregnancy, childbirth, or related medical conditions'' provided in the proposed definition at § 1636.3(b). The Commission declines to modify the provided list. As previously explained, the list of examples of ''pregnancy, childbirth, or related medical conditions'' is non-exhaustive and includes conditions that are commonly—but not always—associated with pregnancy or childbirth. The list neither requires blanket accommodation for every condition listed nor precludes accommodations for conditions that are not listed. Additionally, because ''pregnancy, childbirth, or related medical conditions'' has the same definition as in Title VII, as amended by the PDA, this phrase's use in the PWFA necessarily will continue to reflect Title VII case law regarding that phrase.

Comments and Response to Comments Regarding Coverage of Specific Conditions—Menstruation

A number of comments argued for or against the inclusion of menstruation in the list of ''related medical conditions.'' While the limited number of Federal courts that have addressed the issue of whether menstruation falls within the Title VII definition of ''related medical conditions'' have not always held that it does, read together, the majority of these cases illustrate that, at a minimum, menstruation is covered under Title VII when it has a nexus to a current or prior pregnancy or childbirth. Accordingly, as with many conditions that can be ''related medical conditions,'' this determination will be made on a case-by-case basis.[40]

[36] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31.

[37] *See Cal. Fed. Sav. & Loan Ass'n* v. *Guerra,* 479 U.S. 272, 290 (1987) (holding that, without violating Title VII, the State could require employers to provide up to four months of medical leave to pregnant women where ''[t]he statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions'') (emphasis in original); *Johnson* v. *Univ. of Iowa,* 431 F.3d 325, 328 (8th Cir. 2005) (''If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.'').

[38] 575 U.S. 206 (2015).

[39] *See* H.R. Rep. No. 117–27, pt. 1, at 11–12.

[40] *See EEOC* v. *Houston Funding II, Ltd.,* 717 F.3d 425, 429–30 (5th Cir. 2013) (observing, in a case about whether lactation was a ''related medical condition,'' that ''as both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of 'pregnancy, childbirth, or related medical conditions' ''); *Flores* v. *Va. Dep't of Corr.,* No. 5:20–CV–00087, 2021 WL 668802, at *4 (W.D. Va. Feb. 22, 2021) (declining to decide whether heavy menstruation due to perimenopause was a ''related medical condition,'' but observing that ''there is a strong argument that menstruation is a 'related medical condition' to pregnancy and childbirth under the PDA''); *but see Jirak* v. *Fed. Express Corp.,* 805 F. Supp. 193, 195 (S.D.N.Y. 1992) (stating that menstrual cramps alone were not a medical condition related to pregnancy or childbirth); *Coleman* v. *Bobby Dodd Inst., Inc.,* No. 4:17–CV–00029, 2017 WL 2486080, at *2 (M.D. Ga. June 8, 2017) (stating that the employee's excessive menstruation was ''related to pre-menopause, not pregnancy or childbirth'').

However, these and other cases suggest that, even if menstruation (or another condition) is not found to be ''pregnancy, childbirth, or related medical conditions'' in a particular case, discrimination based on that condition could nevertheless violate Title VII's prohibition on sex discrimination. *See, e.g., Harper* v. *Thiokol Chem. Corp.,* 619 F.2d 489, 492 (5th Cir. 1980) (concluding that a policy requiring individuals returning from pregnancy leave to have a normal menstrual cycle violated Title VII because it denied ''persons of like qualifications equal employment opportunities because of their sex,'' as ''company rules which single out certain subclasses of women for disparate treatment constitute unlawful sex discrimination''); *Flores,* 2021 WL 668802, at *4 (allowing a Title VII claim to proceed ''regardless of applying an expanded definition of 'because of sex' or 'on the basis of sex' under the PDA'' where the plaintiff was fired for suspicion of contraband due to her use of tampons while menstruating); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.,* 499 U.S. 187, 198–99 (1991) (providing that a policy excluding women with childbearing capacity from certain jobs was discrimination based on gender under Title VII; this conclusion was ''bolstered'' by the PDA, which prohibits discrimination ''because of or on the basis of pregnancy, childbirth, or related medical conditions''); *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 544 (1971) (per curiam) (opining that an

Continued

Comments and Response to Comments Regarding Coverage of Specific Conditions—Lactation

One comment claimed there was a split between courts on the issue of whether lactation falls within the scope of the PDA, stating that some courts, including the Fourth and Sixth Circuits, found that it does not, while other courts have found that it does. One case cited by the comment, however, does not address coverage of lactation as a related medical condition under Title VII. The case of *Derungs* v. *Wal-Mart Stores, Inc.,* 374 F.3d 428 (6th Cir. 2004), involved a question of whether a store's ban on public breastfeeding was discriminatory under a State public accommodation statute where that statute did not include protection on the basis of ''pregnancy, childbirth, or related medical conditions.'' [41] Another case cited by the comment, *Barrash* v. *Bowen,* 846 F.2d 927 (4th Cir. 1988) (per curiam), is similarly inapposite. In *Barrash,* the Fourth Circuit held that a Federal Government employee who challenged her termination of employment on grounds of unauthorized absence as violative of her constitutional and contractual rights was not entitled to 6 months of leave in order to breastfeed her baby. That court's statement, that ''[u]nder the [PDA] . . . , pregnancy and related conditions must be treated as illnesses only when incapacitating,'' [42] was subsequently recognized by the same court as ''*dicta* without any citation of authority.'' [43] By contrast, *EEOC* v. *Houston Funding II, Ltd.,* held that lactation is a related medical condition of pregnancy for purposes of the PDA because it is the ''physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth'' and is ''a physiological result of being pregnant and bearing a child.'' [44] *Hicks* v. *City of Tuscaloosa* agrees with *Houston Funding* that lactation is a related medical condition and therefore covered under the PDA.[45] Thus, *Derungs* and *Barrash* do not foreclose a finding that lactation can be a ''related medical condition'' under Title VII and do not undercut the Commission's conclusion that lactation can be a related medical condition under the PWFA.

Comments and Response to Comments Regarding Coverage of Specific Conditions—Infertility and Fertility Treatments

Some comments agreed with the Commission's inclusion of infertility and fertility treatments in the list of covered conditions in the regulation. By contrast, other comments stated that the Title VII case law on infertility is inconsistent and thus infertility and fertility treatments should not be included in the list of potentially covered conditions in the regulation. The Commission concludes that, as with other conditions, and consistent with case law and its prior policy, whether infertility and fertility treatments are covered by the PWFA will be based on the particular circumstances of the situation, thus potentially allowing for reasonable accommodations for treatment for infertility when an employee with the capacity to become pregnant is trying to get pregnant.

In *Johnson Controls,* the Supreme Court struck down an employer policy that discriminated between workers based on childbearing capacity and held that the PDA prohibits discrimination based on potential pregnancy.[46] In accordance with *Johnson Controls,* discrimination based on the potential to be pregnant, not only current pregnancy, is covered by Title VII and the PDA. Because Title VII, as amended by the PDA, can cover potential pregnancy, several courts have found that it protects against discrimination for those undergoing in vitro fertilization (IVF) or infertility treatments related to becoming pregnant because these actions are related to the capacity to become pregnant.[47] By contrast, notably in the insurance context where the challenged restriction excluded all types of infertility treatments from coverage, regardless of the insured employee's capacity to become pregnant, courts have found such policies did not violate the PDA.[48] Those cases do not stand for the proposition that fertility treatments are never covered by the statutory phrase ''pregnancy, childbirth, or related medical conditions,'' but instead hold that the particular claims in those cases fail based on the lack of differential treatment based on sex. The Commission's *Enforcement Guidance on Pregnancy Discrimination* summarizes the law in this regard:

> Employment decisions related to infertility treatments implicate Title VII under limited circumstances. Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure. In contrast, with respect to the exclusion of infertility from employer-provided health insurance, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and does not violate Title VII. Title VII may be implicated by exclusions of particular treatments that apply only to one gender.[49]

Thus, depending upon the facts of the case, including whether the infertility treatments are sought by an employee with the capacity to become pregnant

employer who refused to take applications from women with preschool-age children but hired men with preschool-age children and other women would violate Title VII, absent a defense).

[41] In its analysis, *Derungs* also discussed Title VII coverage for breastfeeding under a comparator analysis and found that breastfeeding would not be covered because of an absence of comparators (*i.e.,* men who could breastfeed). *Derungs,* 374 F.3d at 438–39. Independent of the soundness of that analysis, the case did not address whether lactation was or could be a ''related medical condition'' to pregnancy and noted in its description of the Ohio statute regarding employment that parallels Title VII that ''[t]he Legislature made a conscious choice to extend the definition of discrimination to include pregnancy even though there cannot be a class of similarly situated males.'' *Id.* at 436.

[42] *Barrash,* 846 F.2d at 931.

[43] *Notter* v. *North Hand Protection,* 89 F.3d 829, at *5 (4th Cir. 1996) (per curiam) (table) (explaining that ''[t]he text of the [PDA] contains no requirement that 'related medical conditions' be 'incapacitating' '').

[44] 717 F.3d at 428.

[45] 870 F.3d 1253, 1259 (11th Cir. 2017).

[46] 499 U.S. at 204–06; *see also Kocak* v. *Cmty. Health Partners of Ohio,* 400 F.3d 466, 470 (6th Cir. 2005) (reasoning that the plaintiff ''cannot be refused employment on the basis of her potential pregnancy'').

[47] *Hall* v. *Nalco Co.,* 534 F.3d 644, 649 (7th Cir. 2008) (finding an employer's practice of terminating employees who took leave for IVF treatment violated the PDA because only women undergo IVF); *Erickson* v. *Bd. of Governors of State Colls. & Univs.,* 911 F. Supp. 316, 320 (N.D. Ill. 1995) (finding that a plaintiff who underwent infertility treatment, ''although infertile, may have been viewed by her employer as potentially pregnant,'' and distinguishing between ''infertility [that] does not relate to [the] capacity to become pregnant'' and that which does relate to the capacity to become pregnant); *Pacourek* v. *Inland Steel Co.,* 858 F. Supp. 1393, 1397, 1403–04 (N.D. Ill. 1994) (finding that infertility or its treatment were conditions that fell under the umbrella of pregnancy (including potential pregnancy), childbirth, or related medical conditions).

[48] *Saks* v. *Franklin Covey, Inc.,* 316 F.3d 337, 346 (2d Cir. 2003) (finding that generally, ''[i]nfertility is a medical condition that afflicts men and women with equal frequency,'' but leaving open the question of whether an individual ''would be able to state a claim under the PDA or Title VII for adverse employment action taken against her because she has taken numerous sick days in order to undergo surgical implantation procedures''); *Krauel* v. *Iowa Methodist Med. Ctr.,* 95 F.3d 674, 679–680 (8th Cir. 1996) (finding the benefits policy at issue did not violate Title VII, reasoning that ''the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral''), *abrogated on other grounds by Bragdon* v. *Abbott,* 524 U.S. 624 (1998). Notably, because of 42 U.S.C. 2000gg–5(a)(2), nothing in the PWFA can require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment. Thus, PWFA accommodation claims will not involve coverage by health care plans.

[49] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(3)(c) (footnotes omitted).

for the purpose of becoming pregnant, accommodations for an employee due to physical or mental conditions related to, affected by, or arising out of infertility or fertility treatments may be provided under the PWFA, absent undue hardship.

Comments and Response to Comments Regarding Coverage of Specific Conditions—Contraception

Some comments agreed with the Commission's inclusion of contraception in the regulation. By contrast, some comments stated that the Commission had not properly interpreted Federal case law related to the coverage of contraception and that the Eighth Circuit's holding in *In re Union Pacific Railroad Employment Practices Litigation* [50] forecloses accommodations related to contraception under all circumstances.

The Commission disagrees that reasonable accommodations regarding contraception for an employee who has the capacity to become pregnant are foreclosed in all cases by *In re Union Pacific.* As stated above, the Supreme Court has held that Title VII ''prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant.'' [51] Consistent with this holding, the Eighth Circuit and other courts, like the Commission, have long recognized that the protections of Title VII extend to employees based on the employees' potential or intent to become pregnant.[52]

As stated in the *Enforcement Guidance on Pregnancy Discrimination,* interpreting *In re Union Pacific* as holding that contraception is never related to pregnancy for purposes of the PDA because it is used prior to pregnancy would be inconsistent with *Johnson Controls* and many other cases.

In the Commission's view, *In re Union Pacific* is best understood as a case about a specific health insurance policy that excluded coverage of both prescription and non-prescription contraceptive methods that were used to prevent pregnancy, regardless of the sex of the employee who used them.[53] The gender-neutral nature of the insurance exclusion was central to *In re Union Pacific*'s holding that the insurance policy did not constitute disparate treatment under Title VII. This is similar to the reasoning of courts that have found that denial of insurance coverage for infertility generally, which can affect employees regardless of their capacity to become pregnant, does not violate the PDA, while still leaving open the possibility that the PDA could be violated if an employee was penalized for using leave for IVF treatments.[54] As with infertility, the failure of particular Title VII claims related to contraception based on the lack of gender-based differential treatment does not mean that contraception can never be covered by the statutory phrase ''pregnancy, childbirth, or related medical conditions.''

As stated in the *Commission Decision on Coverage of Contraception,* the PDA can cover discrimination regarding contraception when, unlike the facts in *In re Union Pacific,* the challenged restriction regarding contraception coverage is limited to those who have the capacity to become pregnant.[55] Thus, in the *Commission Decision on Coverage of Contraception,* the exclusion of prescription contraception violated the PDA's prohibition on sex discrimination because prescription contraception could only be used by those who have the capacity to become pregnant.[56] Other courts similarly have concluded that an insurance policy's exclusion of contraception coverage that only can be used by those with the capacity to become pregnant violates the PDA.[57]

[50] 479 F.3d 936, 939, 942 (8th Cir. 2007) (concluding that Union Pacific's insurance policy—which excluded ''all types of contraception, whether prescription, non-prescription or surgical and whether for men or women''—did not discriminate against women and therefore did not violate the PDA and distinguishing *Johnson Controls* on the ground that, unlike ''potential pregnancy,'' ''contraception is not a gender-specific term'').

[51] *Johnson Controls,* 499 U.S. at 206.

[52] *See Walsh* v. *Nat'l Computer Sys., Inc.,* 332 F.3d 1150, 1154, 1160 (8th Cir. 2003) (upholding a judgment and award for a plaintiff claiming pregnancy discrimination where the plaintiff provided evidence that her supervisor's discriminatory behavior was based on the supervisor's belief that she was, or was intending to become, pregnant a second time); *see also Kocak,* 400 F.3d at 470 (reasoning that the plaintiff ''cannot be refused employment on the basis of her potential pregnancy''); *Batchelor* v. *Merck & Co.,* 651 F. Supp. 2d 818, 830–31 (N.D. Ind. 2008) (holding that the plaintiff was protected under the PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); *Cleese* v. *Hewlett-Packard Co.,* 911 F. Supp. 1312, 1317–18 (D. Or. 1995) (concluding that the plaintiff, who claimed that the defendant employer discriminated against her because it knew she planned to become pregnant, fell within the PDA's protections and noting that the court agreed with ''*Pacourek* that the purpose of the PDA is best served by extending its coverage to women who are trying to become pregnant'').

[53] *See also Newport News Shipbuilding & Dry Dock Co.* v. *EEOC,* 462 U.S. 669, 678–79 & n.17, 683–84 (1983) (noting that the legislative history of the PDA demonstrates Congress' intent that it would be facially discriminatory for an employer to discriminate in insurance coverage between persons who face a risk of pregnancy and those who do not, and concluding that the employer unlawfully gave married male employees a benefit package for their dependents that was less inclusive than the dependency coverage provided to married female employees). In *Newport News,* the Court found that the benefits that a male employee and his dependents could receive were less than what a female employee and her dependents could receive, and thus the plan violated the PDA. This rationale further explains the decisions in *In re Union Pacific* and *Krauel.* In those cases, both of which involved insurance benefits, the benefits received by employees and their dependents were the same; thus, there was not a PDA violation. *See Saks,* 316 F.3d at 344–345 (describing *Newport News* as ''focused on whether male and female employees received equal coverage under their health benefits package'' and finding that *Newport News* would not allow exclusions based on pregnancy); *id.* at 345 n.2 (describing the decision in *Saks* as looking at ''whether the exclusion of surgical impregnation procedures result in [a] less comprehensive benefits package for female employees'').

[54] *See Saks,* 316 F.3d at 346 & n.4 (concluding that the insurance coverage plan at issue, which did not cover treatments for infertility regardless of capacity to become pregnant, would not violate the PDA, but stating that ''[w]e expressly decline to consider whether an infertile female employee would be able to state a claim under the PDA or Title VII for adverse employment action taken against her because she has taken numerous sick days in order to undergo surgical impregnation procedures'').

[55] EEOC, *Commission Decision on Coverage of Contraception* (Dec. 14, 2000), *https://www.eeoc.gov/commission-decision-coverage-contraception.*

[56] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(3)(d) nn.37–38.

[57] *See Cooley* v. *DaimlerChrysler Corp.,* 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (determining that, although the defendant employer's policy was facially neutral, denying a prescription medication that allows an employee to control their potential to become pregnant is ''necessarily a sex-based exclusion'' that violates Title VII, as amended by the PDA, because only people who have the capacity to become pregnant use prescription contraceptives, and the exclusion of prescription contraceptives may treat medication needed for a sex-specific condition less favorably than medication necessary for other medical conditions); *Erickson* v. *Bartell Drug Co.,* 141 F. Supp. 2d 1266, 1271–72 (W.D. Wash. 2001) (determining that the selective exclusion of prescription contraceptives from an employer's generally comprehensive prescription drug plan violated the PDA because only people who have the capacity to become pregnant use prescription contraceptives). Additionally, the Commission notes that those who can and cannot get pregnant face different risks in not having access to contraception in that the individual who may actually become pregnant bears the exclusive risk of experiencing pregnancy-related complications, including a variety of life-threatening conditions. U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Urgent Maternal Warning Signs* (Nov. 17, 2022), *https://www.cdc.gov/hearher/maternal-warning-signs/index.html* (explaining urgent warning signs and symptoms ''during pregnancy and in the year after delivery'' that ''could indicate a life-threating situation''); U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Maternal Mortality Rates in the United States, 2021* (March 2023), *https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm* (discussing the high rates of maternal mortality); Am. Coll. of Obstetricians & Gynecologists and Physicians for Reproductive Health, *Abortion Can Be Medically Necessary* (Joint Statement) (Sept. 25, 2019), *https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary* (''Pregnancy imposes significant physiological changes on a person's

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Finally, Congress chose to write the PWFA using the same phrase as in Title VII, as amended by the PDA, and directed the Commission to issue regulations. Congress is presumed to have known the meaning previously given to ''pregnancy, childbirth, or related medical conditions'' by courts and the Commission, as well as the established principles of statutory construction.[58] This includes the Commission's interpretation in its 2000 *Commission Decision on Coverage of Contraception* and in its 2015 *Enforcement Guidance on Pregnancy Discrimination.* Therefore, it is reasonable to conclude that Congress expected the Commission to interpret the language in the PWFA consistently with its interpretation of the same language in the PDA.

Thus, under the PWFA, depending on the facts, a limitation related to contraception that affects the individual employee's potential pregnancy can be the basis for a request for an accommodation.[59] Whether a particular set of facts will support the necessary nexus between contraception and an individual employee's potential pregnancy is a determination that will be made on a case-by-case basis.

Comments and Response to Comments Regarding Coverage of Specific Conditions—Other Conditions

Some comments requested that specific conditions be added to the list in the regulation. However, inclusion on the list does not make it more or less likely that a specific condition in a specific situation will be considered pregnancy, childbirth or a related medical condition—it is a fact-specific determination. Some comments requested that the Commission opine on whether specific conditions (including ones on which neither the courts nor the Commission have yet opined) would be covered under ''related medical conditions'' under the PWFA. Especially in the situations where the courts and the Commission have not yet spoken, the Commission believes that this is something best left to development on a case-by-case basis within specific factual contexts.

Inclusion of Abortion in the Definition of ''Pregnancy, Childbirth, or Related Medical Conditions''

Preliminary Considerations

The Commission received approximately 54,000 comments (most of which were form or slightly altered form comments from individuals) urging the Commission to exclude abortion from the definition of ''pregnancy, childbirth, or related medical conditions.'' The Commission also received approximately 40,000 comments (most of which were form or slightly altered form comments from individuals or sign-on letters) supporting the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions.'' [60]

Many of the comments urging the Commission to exclude abortion from the definition of ''pregnancy, childbirth, or related medical conditions'' expressed the view that abortion is the destruction of a human life, that it is objectionable for moral or religious reasons, and that it is not health care.[61] The Commission recognizes these are sincere, deeply held convictions and are often part of an individual's religious beliefs. The Commission also received many comments that expressed deeply held beliefs, including religious beliefs, that abortion is a necessary part of health care and that an employer's religious beliefs should not dictate an employee's ability to receive a reasonable accommodation under the PWFA.

In the final regulation, the Commission includes abortion in its definition of ''pregnancy, childbirth, or related medical conditions,'' as proposed in the NPRM and consistent with the Commission's and courts' longstanding interpretation of the same phrase in Title VII. The Commission responds to comments regarding this issue below. Preliminarily, the Commission provides the following context to clarify the limits of the PWFA.

First, the PWFA is a workplace anti-discrimination law. It does not regulate the provision of abortion services or affect whether and under what circumstances an abortion should be permitted. The PWFA does not require any employee to have—or not to have—an abortion, does not require taxpayers to pay for any abortions, and does not compel health care providers to provide any abortions. The PWFA also cannot be used to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment, including an abortion.[62] The PWFA does not require reasonable accommodations that would cause an employer to pay any travel-related expenses for an employee to obtain an abortion.[63] Given these limitations, the type of accommodation that most likely will be sought under the PWFA regarding an abortion is time off to attend a medical appointment or for recovery. The PWFA, like the ADA, does not require that leave as an accommodation be paid leave, so leave will be unpaid unless the employer's policies provide otherwise.[64]

Second, the PWFA provides a mechanism for a qualified employee with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions to receive workplace accommodations. The term ''abortion'' is included in the regulation's definition of ''pregnancy, childbirth, or related medical conditions'' for the limited purpose of determining whether an employee qualifies for a workplace accommodation under the PWFA. As shown in the public comments, beliefs about when an abortion may be morally or religiously permissible, even within religious traditions, are not monolithic.

Third, despite the large number of comments that the Commission received, the Commission's historical experience, in more than four decades of enforcing Title VII, is that very few employers have actually faced a situation where an employee is expressly requesting leave for an

body. These changes can exacerbate underlying or preexisting conditions, like renal or cardiac disease, and can severely compromise health or even cause death.'').

[58] *See supra* note 24.

[59] *See* H.R. Rep. No. 117–27, pt. 1, at 27 (''Throughout the bill's text, the PWFA ensures that workers have access to reasonable accommodations for conditions connected with a pregnancy, not just a pregnancy itself.'').

[60] The number of comments does not require the EEOC to adopt a specific view. *U.S. Cellular Corp. vs. FCC*, 254 F.3d 78,87 (D.C. Cir. 2001) (''[T]he Commission has no obligation to take the approach advocated by the largest number of commenters . . . ; indeed, the Commission may adopt a course endorsed by no commenter. The Commission's only responsibilities are to respond to comments, 5 U.S.C. 553, and to choose a reasonable approach backed up by record evidence.'') (internal citations omitted).

[61] Some comments also expressed religious and conscience objections to other conditions included in the definition of ''pregnancy, childbirth, or related medical conditions,'' such as infertility treatments and contraception. The Commission has addressed these other issues, *supra,* in the preamble in section *1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions.* Responses to comments that object to these procedures for religious reasons are addressed *infra* in the preamble in section *1636.7(b) Rule of Construction* and in the preamble in section *1636.7* under *Religious Freedom Restoration Act.*

[62] 42 U.S.C. 2000gg–5(a)(2) provides that nothing in the PWFA shall be construed ''by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment.''

[63] The PWFA does not prohibit an employer from taking these actions, either.

[64] *See infra* in the preamble in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation.*

abortion and the employer declines to grant the leave on religious or moral grounds. Since 1978, Title VII has required that employers who provide sick leave provide that leave in a non-discriminatory manner to women affected by pregnancy, childbirth, or related medical conditions. This includes, and has included since 1978, allowing employees affected by pregnancy, childbirth, or related medical conditions to use employer-provided leave in order to have time off to have an abortion.[65] Yet the public comments the Commission received did not cite any Title VII cases that ruled against the employer where a request for leave for an abortion was at issue, and the comments did not provide evidence that the Title VII requirement has caused problems for employers in the past. Nonetheless, under the framework of this final rule, accommodations related to abortion—like all accommodations—remain subject to applicable exceptions and defenses, including both those based on religion and undue hardship.

With this background, the Commission responds to the comments it received.

[65] *See* 42 U.S.C. 2000e(k); 124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978) (statement of Sen. Harrison A. Williams, Jr.) (''The House-passed bill included a provision which would have excluded health insurance benefits, sick leave benefits, and disability leave benefits for abortions altogether, except where the life of the mother would be endangered if the fetus were carried to term, or in case of complications. The legislation which passed this body included no such provision. After lengthy debate, and discussion of this difficult issue, the conferees have adopted a compromise which requires the provision of sick leave and disability benefits in connection with an abortion on the same basis as for any other illness or disabling condition.''); *see also* H.R. Rep. No. 95–1786, at 3–4 (Conf. Rep.) (explaining the differences between the Senate bill, the House amendment, and the substitute agreed to in conference).

Since 1979, the Commission's guidelines have provided that ''[a]ll fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions.'' 29 CFR part 1604, appendix, Question 35 (1979). This has been the EEOC's consistent interpretation for over 40 years.

In 2015, the EEOC reaffirmed that ''pregnancy, childbirth, or related medical conditions'' includes abortions. *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(c); *see, e.g., Doe* v. *C.A.R.S. Prot. Plus, Inc.,* 527 F.3d 358, 364 (3d Cir. 2008) (''Clearly, the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion. We now hold that the term 'related medical conditions' includes an abortion.''); *DeJesus* v. *Fla. Cent. Credit Union,* No. 8:17–CV–2502, 2018 WL 4931817, at *1 (M.D. Fla. Oct. 11, 2018) (denying the employer's motion to dismiss in a Title VII case where an employee used approved leave to have an abortion and was fired shortly thereafter when her supervisor stated that the abortion was not an appropriate excuse for her absence).

Interpretation of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Consistent With Its Meaning in Title VII

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Reflected in Statutory Text

Comments regarding the Commission's decision to include ''abortion'' in the definition of ''pregnancy, childbirth, or related medical conditions'' made several arguments related to the statutory text of the PWFA and Title VII.

Many comments in favor of the Commission's inclusion of abortion in the proposed definition of ''pregnancy, childbirth, or related medical conditions'' asserted that its inclusion accurately reflects the statutory text of the PWFA; that the phrase ''pregnancy, childbirth, or related medical conditions'' is taken directly from Title VII and uses identical language; that the identical language in the PWFA and Title VII must be interpreted consistently; that Congress' drafting the PWFA against the backdrop of Title VII strongly suggests that its use of Title VII's language would require the language to have the same meaning in the PWFA, absent a clear indication to the contrary; and that in enacting the PDA, Congress expressly stated that the statute applied to employees who obtained abortions, confirming its statutory intent to prohibit discrimination against employees for obtaining abortion care, and that Congress' use of the term in the PWFA is consistent with that underlying interpretation.

Other comments favoring the Commission's inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' stated that its inclusion is important for consistency and clarity, noting that both employers and employees have relied on the Commission's longstanding inclusion of this interpretation in guidance to understand what constitutes ''pregnancy, childbirth, or related medical conditions''; that applying the same definition under the PWFA provides important consistency when litigation is brought under Title VII and the PWFA simultaneously; and that the PWFA's drafters intentionally drew specific terms from Title VII and the ADA to ensure employees and employers would have a clear understanding of the meaning of those terms.

By contrast, many comments opposing the Commission's proposed definition stated that abortion could not be included in the definition of ''pregnancy, childbirth, or related medical conditions'' because the PWFA's text does not mention abortion; that Congress' intent to include abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' cannot be inferred simply because the PWFA uses the same language as Title VII; that the PWFA does not direct the Commission to construct a broad definition of ''related medical conditions''; and that the inclusion of ''pregnant workers'' in the statute's title should exclude employees who end their pregnancies via an abortion. Comments also stated that, under canons of statutory interpretation, the general term ''or related medical conditions'' is best read to cover only those concepts akin to the specific terms it follows—and that abortion is not related to ''pregnancy'' or ''childbirth.''

Comments opposed to the Commission's inclusion of abortion in the proposed definition of ''pregnancy, childbirth, or related medical conditions'' also asserted that under the text of the PWFA, employers should be required only to accommodate employees who are currently pregnant or who give birth. For instance, comments asserting that under the PWFA a ''related medical condition'' must be related to a current or recent pregnancy or childbirth analogized the PWFA's accommodation provision to the accommodation provisions under Title VII and the ADA, which apply when an employee has a sincerely held religious belief or practice, or a disability, respectively.

Comments also asserted that abortion is the opposite of pregnancy and childbirth. For instance, comments stated that an abortion is unlike pregnancy because it is a procedure that ends a pregnancy and the possibility of childbirth from that pregnancy; and that pregnancy is not a medical condition to be treated with an abortion.

Comments opposed to the Commission's inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' also maintained that ''related medical conditions'' should be construed narrowly under the PWFA. For instance, some comments stated that Congress' inclusion of the term ''childbirth'' meant that abortion could not be included in the regulation; that a broad definition of ''related medical conditions'' would render the term ''childbirth'' superfluous; and that the PWFA's definition should only refer to involuntary, detrimental impacts of pregnancy, childbirth, or related

medical conditions. Comments stated that, in including contraception and abortion, the Commission's definition goes beyond medical conditions to cover medical interventions; these comments argued, for example, that the act of obtaining reproductive health care—including contraception and abortion—is not, by definition, a medical, physical, or mental condition, and thus it cannot be a PWFA limitation.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Reflected in Statutory Text

The Commission agrees with comments expressing support for inclusion of abortion in the proposed definition of ''pregnancy, childbirth, or related medical conditions'' for which a qualified employee could receive an accommodation, absent undue hardship.

In interpreting a statute, an agency must start with its text. The PWFA does not define the phrase ''pregnancy, childbirth, or related medical conditions.'' For nearly 45 years, however, consistent with the plain language of the statute, congressional intent, and Federal courts' interpretation of the statutory text, the Commission has interpreted ''pregnancy, childbirth, or related medical conditions'' in Title VII to include the decision to have—or not to have—an abortion and to prohibit discrimination in employment practices because an employee had or did not have an abortion.[66] Based on well-established rules of statutory interpretation, the Commission properly interprets ''pregnancy, childbirth, or related medical conditions'' to have the same meaning in the PWFA as it does under Title VII.[67] As the Supreme Court has stated, ''When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.'' [68] The Commission concludes that it would not be consistent with Congress' intent, as expressed in its choice of this statutory language for the PWFA, to construct a broader or narrower definition of ''pregnancy, childbirth, or related medical conditions'' than under Title VII. Rather, following the canons of statutory interpretation, the Commission is using the definition that already exists for this identical phrase under Title VII. Indeed, it is likely that defining this phrase differently than it has been defined in a parallel statute would exceed the Commission's congressionally delegated authority.

As set out in the NPRM, Congress previously used the phrase ''pregnancy, childbirth, or related medical conditions'' when, in enacting the PDA, it amended Title VII to explicitly state that Title VII's prohibition against sex discrimination includes a prohibition against discrimination on the basis of ''pregnancy, childbirth, or related medical conditions.'' [69] The legislative history of the PDA expressly stated that the PDA's protections applied to situations involving abortions, and indeed, the statutory text enacted by Congress explicitly excluded certain abortion procedures from health insurance requirements, since the statute would otherwise have been read to require their coverage, while still requiring coverage in certain limited circumstances.[70]

Congress' express purpose in enacting the PWFA was to supplement Title VII's protections for qualified employees affected by pregnancy, childbirth, or related medical conditions; in other words, the same employees protected by Title VII, as amended by the PDA.[71] To that end, Congress' approach in both laws was to ensure that employers are not required to pay for abortions for their employees but that employees are not discriminated against in the workplace for having them. Further, the Commission agrees with the comments that using the same definition that the Commission and courts have used for the same phrase in Title VII provides important clarity and consistency for employers and employees.

Using the same definition also provides clarity and consistency for courts and harmonizes the two statutory schemes. Title VII and the PWFA cover the same employers and employees. Having two definitions of the same term would cause confusion for courts and potentially require them to reach conflicting decisions. Moreover, as cases under the PWFA may, depending on the circumstances, also be brought under Title VII, courts could be asked to decide cases involving both Title VII's prohibition of discrimination based on ''pregnancy, childbirth, or related medical conditions'' and the PWFA's reasonable accommodation provision.

Even if the Commission were authorized to ignore the courts' and its own prior longstanding, consistent interpretation of ''pregnancy, childbirth, or related medical conditions,'' the Commission would reach the same conclusion that the 1978 Congress did—that the phrase ''pregnancy, childbirth, or related medical conditions'' includes choosing to have or not to have an abortion, based on the plain meaning of the phrase ''pregnancy, childbirth, or related medical conditions.'' By definition, individuals who are choosing whether or not to have an abortion are pregnant. And the

[66] *See* 29 CFR part 1604, appendix, Questions 34 & 35 (1979); *see also Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(c).

[67] These rules include: (1) the Prior-Construction Canon, which states that when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation; *Tex. Dep't of Hous. & Cmty. Affs.,* 576 U.S. at 536–37 (''If a word or phrase has been . . . given a uniform interpretation by inferior courts . . ., a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'') (omissions in original) (quoting Scalia & Garner, *Reading Law,* at 322); *Lorillard,* 434 U.S. at 581 (''[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.''); *Hall* v. *U.S. Dep't of Agric.,* 984 F.3d at 840 (''Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.'') (internal citations and quotation marks omitted); Scalia & Garner, *Reading Law* at 323 (''[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.''); (2) the Related Statutes Canon (*In Pari Materia*), which states that courts do not interpret statutes in isolation, but rather in the context of the body of law of which they are a part, including later-enacted statutes, so statutes addressing the same subject matter generally should be read as if they were one law; *see, e.g., Wachovia Bank* v. *Schmidt,* 546 U.S. 303, 305 (2006); (''[U]nder the *in pari materia* canon, statutes addressing the same subject matter generally should be read as if they were one law . . . .'') (internal citations and quotation marks omitted); and (3) the Presumption of Legislative Acquiescence Canon, which states that statutes adopted after certain prior judicial or administrative interpretations may acquiesce in those interpretations; *see, e.g., Johnson* v. *Transp. Agency, Santa Clara Cnty.,* 480 U.S. 616, 629 n.7 (1987) (''Congress has not amended the statute to reject [the Court's] construction [of Title VII], nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.'').

[68] *Bragdon,* 524 U.S. at 645.

[69] 42 U.S.C. 2000e(k).

[70] *See id.* (''This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . .''); H.R. Rep. No. 95–1786, at 4 (1978) (Conf. Rep.).

[71] *See supra,* preamble section *1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions.*

condition of being pregnant does not depend on the ultimate outcome of the pregnancy, as highlighted by Congress extending coverage to ''childbirth'' separate from ''pregnancy.'' Thus, the term ''pregnancy'' naturally includes all of those limitations arising out of the pregnancy itself, regardless of whether any particular pregnancy ends in miscarriage, live birth, an abortion, or any other potential outcome. If an employee is denied an accommodation because they are seeking an abortion, or not seeking an abortion, that employee has necessarily been denied an accommodation on account of their current pregnancy. Accordingly, the decision to have or not to have an abortion falls squarely within the ordinary meaning of the phrase ''pregnancy, childbirth, or related medical conditions.''

Given how courts and the Commission have defined ''pregnancy, childbirth, or related medical conditions'' in Title VII, the Commission disagrees that the PWFA and its implementing regulation only would apply to qualified employees who are currently pregnant or who recently gave birth, thus implicitly excluding abortion. First, such an interpretation would exclude qualified employees who have had miscarriages or are otherwise no longer pregnant, which appears to be inconsistent with the text of, and does not appear to be the intent of, either the PWFA or the PDA.[72] As stated above, by definition, qualified employees who seek an abortion are either currently or recently pregnant. Finally, the Commission sees no evidence that the inclusion of ''childbirth'' evinces congressional intent to construct a narrower definition of ''related medical conditions'' under the PWFA than under Title VII, as both statutes contain this identical language. As stated above, both the legislative history and the explicit exclusion of certain abortion procedures from health insurance requirements under the PDA evince Congress' intent to include abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' under Title VII.

[72] *See, e.g.,* H.R. Rep. No. 117–27, pt. 1, at 20 (discussing the need for the PWFA, citing to a case in which an employee's miscarriage was not covered by the ADA, and noting that ''[t]here are many cases where courts have found that even severe complications related to pregnancy do not constitute disabilities triggering [ADA] protection'').

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Reflected in the Statutory Intent and Structure of the PWFA

Many comments regarding the Commission's proposed inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' made arguments related to the statutory intent and structure of the PWFA.

Comments in favor of the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions,'' including from Members of Congress, asserted that the Commission's inclusion of abortion in the definition is consistent with the PWFA's statutory intent and structure; that Congress' express purpose in enacting the PWFA was to supplement Title VII's protections; that Congress adopted the PWFA to remedy gaps in existing legal protections, including in Title VII, and it understood how ''pregnancy, childbirth, or related medical conditions'' is interpreted by the courts; that Congress understood that the PWFA could include possible accommodations related to an abortion, as evidenced by the statements of legislators who opposed the PWFA, showing that they understood it could require accommodations related to an abortion; that Congress recognized the PWFA as an opportunity for Congress to finally fulfill a promise of Title VII; and that Congress intentionally included ''related medical conditions'' in the PWFA to encompass conditions beyond simply pregnancy and childbirth.

Many comments in favor of the inclusion of abortion expressed that including abortion furthers Congress' policy goal of protecting pregnant workers from harm; that it accurately reflects the range of needs and conditions that workers may experience that require reasonable workplace accommodations in relation to pregnancy; that abortion care is a safe, common, and essential component of reproductive health care; that decisions regarding abortion are private medical matters and should be made by patients in consultation with their clinicians and without undue interference by outside parties; and that providing accommodations for abortion would mean that employees would not have to risk their health, lives, or livelihoods to access care. Many such comments focused on specific positive health and social outcomes that employees would enjoy if they had access to accommodations for abortion, such as the ability to maintain personal bodily autonomy; to choose when to have or not have children; to receive necessary health care in the event of intimate partner violence, rape, incest, fetal anomalies, and exposure to teratogenic medications; and to receive necessary health care in the event of pregnancy complications that may be so severe that abortion is the only measure that will preserve a pregnant employee's health or save their life—including placental abruption, bleeding from placenta previa, preeclampsia or eclampsia, and cardiac or renal conditions.

Comments opposed to the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' asserted that including abortion does not reflect Congress' generally expressed intent for the PWFA. For instance, comments stated that the PWFA's intent only is to ensure that pregnant and postpartum women can receive reasonable accommodations to safely work; that the PWFA's intent only is to support mothers during pregnancy and childbirth and only to protect and benefit the health of mothers and their fetuses, as well as to provide accommodations for miscarriage, stillbirth, treatment of an ectopic pregnancy, or emergency treatment intended to preserve the life of the pregnant employee, but not an abortion; that the Commission's interpretation turns the PWFA into a general reproductive health care statute, defying Congress' intent; that the PWFA was intended by its supporters to be like the ADA, which the comments construed not to require accommodations for abortion; that Congress did not intend to make forays into controversial social policy by enacting the PWFA; that including abortion ignores that Congress cited statistics about working mothers in support of the PWFA and talked about the health of the mother and baby; and that Congress does not hide ''elephants in mouseholes,'' and abortion is an elephant in the mousehole of ''pregnancy, childbirth, or related medical conditions.''

Some comments opposed to the inclusion of abortion also asserted that the definition does not reflect congressional intent as expressed by the PWFA's structure. These comments noted that Congress chose not to amend Title VII by incorporating the PWFA. Such comments inferred from this choice that Congress implicitly declined to import Title VII's definition of ''pregnancy, childbirth, or related medical conditions'' and its abortion-related requirements into the PWFA. These comments stated that the PWFA

does not specifically require the same definition of ''pregnancy, childbirth, or related medical conditions'' as Title VII, as it does with other terms from the ADA and Title VII, and if Congress wanted the Commission to provide examples of ''related medical conditions'' it would have expressly said so.

Finally, some comments opposed to the proposed definition stated that Title VII's insurance exclusion provision, which addresses abortion and has been used to suggest that Title VII otherwise covers abortion, is different from the PWFA's similar exclusion provision.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Reflected in the Statutory Intent and Structure of the PWFA

As stated above, the Commission's inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' is supported by the plain text of the statute and by statutory intent and structure and is in keeping with the well-established rules of statutory construction.[73] Congress chose to write the PWFA using an identical phrase, ''pregnancy, childbirth, or related medical conditions,'' from Title VII and did not define the phrase in the PWFA. Nor did it place any limitations or rules of construction on the definition of the phrase in the PWFA. Accordingly, the Commission gives the phrase the same meaning under the PWFA as it has under Title VII for nearly 45 years. The Commission agrees that the PWFA's focus is accommodation, but, as the text of the PWFA and the ADA state and the Supreme Court has reiterated, accommodations are a form of nondiscrimination.[74] Thus, the fact that the PWFA provides accommodations does not make it a different type of statute from Title VII. Additionally, although Congress specifically incorporated certain definitions into the PWFA from the ADA and Title VII, such as those for ''reasonable accommodation,'' ''undue hardship,'' ''employer,'' and ''employee,'' in those situations, the terms appear in more than one other statute enforced by the Commission, and some of their definitions vary across statutes.[75] In incorporating certain terms, the Commission understands Congress' intent as specifying which definition it chose to adopt in the PWFA to avoid confusion. By contrast, there is only one other statute that the Commission enforces that uses the phrase ''pregnancy, childbirth, or related medical conditions,'' and that is Title VII, as amended by the PDA. Therefore, Congress' intent to use the Title VII definition in the PWFA is clear.

Further supporting the Commission's interpretation of the phrase ''pregnancy, childbirth, or related medical conditions'' is the fact that the PWFA passed as part of the Consolidated Appropriations Act, 2023 (CAA), in which Congress included several provisions explicitly limiting the use of Federal funds for abortion.[76] Where Congress includes particular language in one section of a law but omits it in another, it is generally presumed that Congress acts intentionally and purposely in including or excluding certain language.[77] Given that Congress explicitly included exclusions regarding abortion in certain sections of the CAA but omitted any such exclusion in the PWFA, the Commission concludes that the omission was an intentional act.

The Commission's interpretation also is consistent with the legislative history of the PDA, the statute that is the source of the phrase, ''pregnancy, childbirth, or related medical conditions.'' The Congressional Conference Report accompanying the PDA provides: ''Because [the PDA] applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.'' [78] By including the same key phrase in the PWFA and not articulating a different meaning than in the PDA, Congress is presumed to know and intend that the same definition will be applied.[79] And given the longstanding and public interpretation of this phrase, by both the Commission and the courts, the Commission disagrees that adopting the same interpretation as Title VII amounts to Congress ''hiding'' an elephant in a mousehole.

Furthermore, the second sentence of the PDA states that employers do not have to pay for health insurance benefits for abortion, except where necessary to preserve the life of the mother or where medical complications have arisen from an abortion.[80] The inclusion of this limited language regarding abortion coverage, coupled with clear statements in the legislative history, supports the conclusion that Congress intended for Title VII, as amended by the PDA, to protect employees against discrimination based on abortion and that Congress provided an exception, largely motivated by religious freedom concerns, for employers to opt out of providing health benefits to cover the procedure itself.[81] Of note, the PWFA has a similar structure—it requires employers not to discriminate against protected qualified employees by failing to provide them reasonable accommodations, but it does not require, or permit the Commission to

[73] *See supra* note 67.

[74] 42 U.S.C. 2000gg–1 (titled ''Nondiscrimination with regard to reasonable accommodations related to pregnancy''); 42 U.S.C. 12112(b)(5)(A) (''[T]he term 'discriminate against a qualified individual on the basis of disability' includes . . . not making reasonable accommodations . . . .''); *see also* 29 CFR part 1630, appendix, 1630.9 (''The obligation to make reasonable accommodation is a form of non-discrimination.''); *US Airways, Inc.* v. *Barnett,* 535 U.S. 391, 396 (2002) (''[T]he ADA says that 'discrimination' includes an employer's *not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, *unless* [the employer] can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business.' '') (citing 42 U.S.C. 12112(b)(5)(A)) (emphasis in original) (omission in original).

[75] 42 U.S.C. 2000e(b) (defining ''employer'' under Title VII), (f) (defining ''employee'' under Title VII), (j) (defining ''religion'' with regard to an employer's obligation to ''reasonably accommodate'' an employee's religious observance or practice absent ''undue hardship'' under Title VII); 42 U.S.C. 12111(4) (defining ''employee'' under the ADA), (5) (defining ''employer'' under the ADA), (9) (defining ''reasonable accommodation'' under the ADA), (10) (defining ''undue hardship'' under the ADA).

[76] *See, e.g.,* sec. 613, Public Law 117–328, 136 Stat. 4459, 4699 (2022) (providing that: ''No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions.'').

[77] *Keene Corp.* v. *United States,* 508 U.S. 200, 208 (1993) (quoting *Russello* v. *United States,* 464 U.S. 16, 23 (1983)). Of note, in the debate surrounding the PWFA before its passage in the Senate, the Senators discussed abortion. *See* 168 Cong. Rec. S7,049–50 (daily ed. Dec. 8, 2022); 168 Cong. Rec. S10,071, S10,081 (daily ed. Dec. 22, 2022). The House Report also discusses abortion. *See* H.R. Rep. No. 117–27, pt. 1, at 60. Thus, both chambers were seemingly aware of this issue, but the law does not include the type of abortion exclusion found in other parts of the CAA.

[78] *See* H.R. Rep. No. 95–1786, at 4 (1978) (Conf. Rep.).

[79] *See supra* note 67.

[80] *See* 42 U.S.C. 2000e(k).

[81] *See* H.R. Rep. No. 95–948, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4755 (''Many members of the committee were troubled . . . by any implication that an employer would have to *pay* for abortions not necessary to preserve the life of the mother through medical benefits or other fringe benefit programs, even if that employer—a church organization for example—harbored religious or moral objections to abortion; such a requirement, it was felt, could compromise the religious freedom of such employers. The committee, therefore, amended the language of the bill to deal with the problem, by making clear that such employers will not be required to pay for abortions except where the life of the mother would be endangered if the fetus was carried to term.'' (emphasis in original)).

require, ''an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment.'' [82]

As a matter of the PWFA's plain text, therefore, the Commission determines that the decision to have, or not to have, an abortion is encompassed within the phrase ''pregnancy, childbirth, or related medical conditions.'' Because this conclusion follows from the statutory text, the Commission does not believe that other concerns raised by commenters are relevant. The Commission's determination is not based on the potential health or social outcomes related to abortion; rather, the Commission's determination is based on the statutory text. Moreover, it bears emphasizing that this rulemaking does not require abortions or affect the availability of abortion; it simply ensures that employees who choose to have (or not to have) an abortion are able to continue participating in the workforce, by seeking reasonable accommodations from covered employers, as needed and absent undue hardship.

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Statements From Members of Congress and the White House About the PWFA

Some comments pointed to statements made by Members of Congress to either support or dispute the idea that the definition of ''pregnancy, childbirth, or related medical conditions'' in the PWFA includes abortion. Comments also noted the absence of certain statements from Members of Congress and the White House.

First, comments that supported the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' pointed to statements by opponents of the bill, whose opposition was based on the lawmakers' views that abortion would be covered.[83] Some comments also pointed to an amendment proposed by Senator James Lankford that the Senate rejected, which stated that ''[t]his division shall not be construed to require a religious entity described in Section 702(a) of the Civil Rights Act of 1964 to make an accommodation that would violate the entity's religion'' [84] as evidence that Senators knew that abortion would be covered.

Comments that did not support the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' pointed to statements made during floor debate by two of the co-sponsors of the PWFA in the Senate, Senator Robert P. Casey, Jr.[85] and Senator William Cassidy.[86] These comments also mentioned that, in a statement on the House floor, Representative Jerrold Nadler, lead sponsor of the PWFA, explained that the PWFA should be interpreted consistently with Title VII, stating: ''The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for 'pregnancy, childbirth, and related medical conditions,' like lactation.'' [87]

Second, comments that disagreed with the Commission's proposed inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' pointed to statements made by Senator Steven Daines and Senator Cassidy after the Senate voted to add the PWFA to the CAA, both of which stated that accommodations related to abortion should not be covered. In addition, comments that disagreed with the Commission's position pointed to the lack of statements by supporters of the bill in Congress and the White House, and by advocacy groups, regarding its coverage of abortion. Comments stated that the PWFA would not have enjoyed bipartisan support, if the intent of the law were to include abortion, and including abortion as a related medical condition in the rule would make the political parties less likely to work together.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Statements From Members of Congress and the White House About the PWFA

The PWFA's text, structure, and intent support the Commission's proposed definition. Even if the Commission's interpretation were inconsistent with the cited statements of individual Members of Congress during the PWFA's passage, statements made by individual Members of Congress during floor debate do not justify a departure from an interpretation that Congress, courts, and the Commission have consistently adhered to since the PDA was enacted more than four decades ago. Again, the Commission's interpretation must start with the text of the statute. Relying on the text, rather than the individual statements of Members of Congress, follows the Supreme Court's requirements when interpreting a statute; as the Court has noted, ''[p]assing a law often requires compromise, where even the most firm public demands bend to competing interests. What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators.'' [88]

In addition, the Commission does not agree that the PWFA's legislative history counsels for a different interpretation of ''pregnancy, childbirth, or related medical conditions'' than in the PDA. For example, according to the House PWFA Committee Report, Members knew that abortion would be covered as a pregnancy-related condition for which some employers would need to provide accommodation.[89] Additionally, the Commission's definition is consistent with the full floor statement of Senator Casey and the comment that the Senator submitted during the public comment period.[90] Consistent with the statutory text and Congress' intent, the PWFA does not impose a categorical mandate on an employer to provide leave for an abortion. Leave, like any accommodation, is subject to applicable exceptions and defenses, including both those based on religion and on undue hardship. Nothing in the PWFA requires an employer to pay for an abortion or provide health care benefits for abortion in violation of State law.[91]

Finally, numerous legislators submitted comments during the public

[82] 42 U.S.C. 2000gg–5(a)(2).

[83] *See, e.g.,* 168 Cong. Rec. S7049 (daily ed. Dec. 8, 2022) (statement of Sen. Thomas (Thom) Tillis); 167 Cong. Rec. H2325, H2330, H2332 (daily ed. May 14, 2021) (statements of Rep. Julia Letlow, Rep. Robert George (Bob) Good, and Rep. Mary Miller).

[84] 168 Cong. Rec. S10,069–70 (daily ed. Dec. 22, 2022).

[85] 168 Cong. Rec. S7,050 (daily ed. Dec. 8, 2022).

[86] *See, e.g., id.* at S7,049–50.

[87] 168 Cong. Rec. H10,527–28 (daily ed. Dec. 23, 2022).

[88] *NLRB* v. *SW Gen., Inc.,* 580 U.S. 288, 306 (2017) (citations omitted); *see also March* v. *United States,* 506 F.2d 1306, 1314 n.31 (D.C. Cir. 1974) (citing *NLRB* v. *Plasterers' Loc. Union,* 404 U.S. 116, 129–30 n.24 (1971) (providing that, where congressional debates ''reflect individual interpretations that are contradictory and ambiguous, they carry no probative weight'')).

[89] H.R. Rep. No. 117–27, pt. 1, at 60 (stating under minority views that ''if an employee working for a religious organization requests time off to have an abortion procedure, H.R. 1065 could require the organization to comply with this request as a reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions'').

[90] 168 Cong. Rec. S7,050 (daily ed. Dec. 8, 2022); Comment EEOC–2023–0004–98384, Sen. Robert P. Casey, Jr. (Oct. 10, 2023) (stating that in drafting the PWFA, legislators intentionally used terms from other laws, including ''pregnancy, childbirth, or related medical conditions,'' and supporting the definition in the proposed rule).

[91] *See* 42 U.S.C. 2000gg–5(a)(2); 88 FR 54745 (stating that ''nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion''). Covered entities, however, may separately be subject to the PDA's provisions regarding abortion coverage in certain circumstances. *See* 42 U.S.C. 2000e(k).

comment period that supported or opposed the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions.'' As these were statements made by Members of Congress after the passage of a bill, the Commission gave them due consideration as statements of the views of each particular Member who signed them.[92]

In response to the comments regarding the political process, the Commission cannot speculate on counterfactual scenarios such as what might have triggered a filibuster of the PWFA in Congress, nor what would diminish bipartisan support for future legislation. And the Commission cannot reinterpret the definition of ''pregnancy, childbirth, or related medical conditions'' based on the purported absence of certain statements by Members of Congress, advocates, or the executive branch during the bill's passage.

As explained above, the Commission must rely on the plain text of the statute. Given the meaning of the words that Congress chose to use in the PWFA, and the Commission's and courts' long history of interpreting those identical words to include abortion, the Commission will interpret those words the same way in the PWFA.

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Administrative and Judicial Interpretation

Many comments in favor of the Commission's inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' asserted that the Commission's inclusion of abortion in the definition accurately reflects longstanding judicial and administrative interpretations under Title VII. Comments stated that the Commission's interpretation is correct and consistent with decades of authority under Title VII, including legislative history, Federal case law, and Commission guidance; that existing case law supports the Commission's interpretation that Title VII protects employees from discrimination for contemplating or obtaining an abortion or refusing to submit to an employer's demand that they obtain an abortion; and that the Commission's *Enforcement Guidance on Pregnancy Discrimination* reaffirmed that choosing whether to have or not to have an abortion is covered under the PDA.

Some comments opposed to the Commission's proposed inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' asserted that the Commission's definition is contrary to judicial and administrative interpretations under Title VII.

Some comments disputed the Commission's statement that existing case law under Title VII supports the Commission's definition, claiming that the decisions do not apply to the PWFA and are distinguishable; that there is not a widespread judicial consensus about the meaning of ''related medical conditions''; and that the Commission should not rely on lower court decisions.

Some comments took issue with the Commission's reliance on its 2015 *Enforcement Guidance on Pregnancy Discrimination* to interpret the phrase ''pregnancy, childbirth, or related medical conditions'' under the PWFA, as the *Enforcement Guidance on Pregnancy Discrimination* does not receive binding judicial deference; only addresses pregnancy discrimination, not accommodation; and was issued many years after the PDA's enactment.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Administrative and Judicial Interpretation

The Commission disagrees with the comments that dispute the case law it cited and its reliance on its *Enforcement Guidance on Pregnancy Discrimination.* The Title VII decisions the Commission cited involve situations where employers discriminated against employees because they contemplated having, or chose to have, an abortion. These decisions include *Doe* v. *C.A.R.S. Protection Plus,* a Third Circuit decision relating to leave holding that an employer may not discriminate against an employee because she had an abortion.[93] As stated above, refusal to provide reasonable accommodation is a form of discrimination.[94] Finally, the Commission's reliance on its *Enforcement Guidance on Pregnancy Discrimination* is appropriate because it represents and demonstrates the consistent position of the Commission. It is immaterial that the guidance was voted on and approved by the Commission years after the passage of the PDA, especially given that the year after the PDA was enacted, the Commission issued its Questions & Answers about the PDA stating that abortion is covered under the PDA and prohibiting discrimination in employment practices because an employee had or did not have an abortion.[95] Thus, the *Enforcement Guidance on Pregnancy Discrimination* reconfirmed and still reflects the Commission's decades-long position.

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Other Laws

Some comments pointed to other laws to dispute the Commission's definition of ''pregnancy, childbirth, or related medical conditions.'' The comments pointed to the provisions in annual appropriations legislation, for example, the Hyde and Weldon Amendments, limiting the use of Federal funds for abortion except in certain circumstances. The comments also stated that Congress has never passed a law explicitly promoting the right to abortion. Similar comments noted that

[92] *Cf. Nat'l Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 639 n.34 (1967) (observing that statements inserted into the record after passage of a bill are regarded as ''represent[ing] only the personal views of the[ ] legislators'' involved). Senator Patricia Murray, joined by 24 Senators, endorsed the Commission's interpretation regarding the definition of ''pregnancy, childbirth, or related medical conditions,'' Comment EEOC–2023–0004–98257, Sen. Patricia (Patty) Murray and 24 U.S. Senators (Oct. 10, 2023); as did Representative Jerrold Nadler, joined by 82 House Representatives, Comment EEOC–2023–0004–98470, Rep. Jerrold (Jerry) Nadler and 82 Members of Congress (Oct. 10, 2023); and Representative Robert Scott, Comment EEOC–2023–0004–98339, Rep. Robert C. (Bobby) Scott, Ranking Member of the House Committee on Education and the Workforce (Oct. 10, 2023). By contrast, Senator James Lankford's comment, which was joined by 19 Senators, including Senator Bill Cassidy, and 41 House Representatives, disagreed with the Commission's interpretation. Comment EEOC–2023–0004–98436, Sen. James Lankford, 19 U.S. Senators, and 41 Members of Congress (Oct. 10, 2023). Similarly, Senator Michael Braun's comment disagreed with the Commission's interpretation. Comment EEOC–2023–0004–98486, Sen. Michael (Mike) Braun (Oct. 10, 2023).

[93] 527 F.3d at 363–64 (citing, *inter alia, Turic* v. *Holland Hosp., Inc.,* 85 F.3d 1211, 1214 (6th Cir. 1996)); *see also DeJesus,* 2018 WL 4931817, at *1 (denying the employer's motion to dismiss in a Title VII case where an employee used approved leave to have an abortion and was fired shortly thereafter when her supervisor stated that the medical procedure was not an appropriate excuse for her absence).

[94] *See supra* note 74.

[95] 29 CFR part 1604, appendix, Question 34 (''Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had an abortion?/A. No. An employer cannot discriminate in its employment practices against a woman who has had an abortion.''), Question 35 (''Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?/A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.''); *see also supra* note 28 (noting that in the PWFA Congress was seeking to protect the same employees who are protected by the PDA).

some States such as West Virginia and Louisiana have adopted their own versions of the PWFA, and no court appears to have interpreted State or local PWFAs to include abortion. Comments also stated that the Commission should clarify whether its regulation supersedes abortion funding restrictions in the Hyde Amendment and similar amendments, and how the Federal Government will ensure that Federal agencies do not pay for abortion accommodations and ensure that the same rules that apply to the ADA regarding taxpayer funding for abortion apply to the PWFA.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Other Laws

In interpreting the identical language from Title VII in the context of the PWFA, the Commission cannot infer congressional intent in a manner contrary to the plain text interpretation, particularly not based on what Congress could have said, but chose not to say. There is no evidence to suggest that the other Federal statutes cited by the comments should be considered by the Commission as interpreting the PWFA, nor is there any persuasive reason to give controlling weight to these statutes (instead of interpreting the PWFA consistently with Title VII, as Congress intended). Rather, the fact that Congress chose to provide express exclusions related to abortion in the cited statutes, including in the CAA, but did not choose to do so in the PWFA, suggests that if Congress wanted to exclude abortion from the definition of ''pregnancy, childbirth, or related medical conditions'' in the PWFA, it would have done so expressly.

Moreover, the PWFA, as interpreted by the Commission in this rule, does not in any way promote abortion; it simply provides for the possibility of an accommodation related to a qualified employee seeking an abortion, absent undue hardship, and there is only a narrow context in which this protection would likely apply—when an employee is seeking leave—given the prohibitions of 42 U.S.C. 2000gg–5(a)(2).[96] The PWFA also provides for accommodations for employees who choose not to have an abortion, absent undue hardship.

Further, the interpretation of State laws is not as persuasive as the interpretation of Title VII when Congress used the same words in both Federal statutes. Comments addressing State laws did not address whether cases regarding abortion arose under these PWFA-analogous laws. As stated above, despite the large number of comments on this issue, the Commission's practical experience under Title VII shows that litigation regarding this issue is not common. Finally, as stated previously, the Commission's rule does not require any employer to pay for an abortion.

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Dobbs Decision

Some comments stated that the Supreme Court's decision in *Dobbs* v. *Jackson Women's Health Org.,* 597 U.S. 215 (2022), which concluded that there is no Federal constitutional right to abortion and overruled *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey,* 505 U.S. 833 (1992), affects the Commission's rulemaking.

First, some comments said that, because the PWFA was enacted soon after the Court issued its *Dobbs* decision, Congress should have stated more clearly in the PWFA any protection for an employee seeking an accommodation related to an abortion, if that was its intent. Second, some comments asserted that, because of the *Dobbs* decision, abortion is a State issue, not a Federal issue, that there is no Federal right to abortion, that including abortion accommodations in the PWFA would circumvent *Dobbs,* and that under *Dobbs,* abortion is not health care. Comments also stated that the Title VII case law cited by the Commission involved substantial reliance on the constitutional right to abortion now undone by *Dobbs.*

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Dobbs Decision

Given the language that Congress used in the PWFA and the use and interpretation of that same language in Title VII, the *Dobbs* decision does not suggest a different definition of the phrase ''pregnancy, childbirth, or related medical conditions.'' First, Congress is not required to speak directly to a specific issue when it legislates. ''In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.'' [97] Congress' choice to use the same phrase in the PWFA as in Title VII, coupled with Congress' decision to enact limitations with respect to abortion in other portions of the CAA but not in the PWFA, supports the Commission's interpretation that ''pregnancy, childbirth, or related medical conditions'' has the same meaning in the PWFA that it does in Title VII, and it includes abortion. Thus, the conclusion the Commission draws from Congress' lack of an explicit mention of abortion in the PWFA is that Congress did not express its intent for the phrase to have any different meaning than it has under Title VII.

As stated at the beginning of this discussion, the Commission's rule does not regulate abortion or abortion procedures, nor does it require an employer to pay for, promote, or endorse abortion. Additionally, although *Dobbs* held that the U.S. Constitution's Due Process Clause does not provide a right to abortion, that interpretation of the Constitution does not address Congress' authority to regulate potential employment discrimination by providing for reasonable accommodations for pregnancy, childbirth, or related medical conditions absent undue hardship, as Congress has done in the PWFA. *Dobbs* did not involve, and the Court did not discuss, employment protections under Title VII, and *Dobbs* did not purport to interpret the meaning of the phrase ''pregnancy, childbirth, or related medical conditions'' in Title VII. Ultimately, *Dobbs* concerned a matter of constitutional interpretation and not one of statutory interpretation, and the cases cited by the Commission in support of the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' may still be relied on. Indeed, Congress enacted the PWFA after the *Dobbs* decision and chose to retain the phrase ''pregnancy, childbirth, or related medical conditions'' that it had used in Title VII without any modification or instruction. Thus, even if *Dobbs* could be construed as an invitation for Congress to reevaluate that language from Title VII, Congress did not do so.

[96] 42 U.S.C. 2000gg–5(a)(2) provides that ''[n]othing in this chapter shall be construed . . . by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.''

[97] *Burns* v. *United States,* 501 U.S. 129, 136 (1991), *abrogated on other grounds as recognized by Dillon* v. *United States,* 560 U.S. 817 (2010).

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Policy Arguments Regarding Abortion

Many comments supported the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' for various policy reasons. As discussed at length above, such reasons included, for example, stating that it would help employees access essential health care and have autonomy about their reproductive decisions.

By contrast, other comments stated that, as a policy matter, the Commission should not include abortion in the definition of ''pregnancy, childbirth, or related medical conditions.'' First, some comments speculated that including abortion in the definition will result in employers encouraging their pregnant workers to have abortions. Some of these comments suggested that employers might even require pregnant workers to take leave to have an abortion instead of another available accommodation. Second, some comments stated that there should be no accommodations for abortion because, according to the comments, abortion causes mental health issues for women.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Policy Arguments Regarding Abortion

As explained above, the Commission must rely on the plain text of the statute. Given the words that Congress chose to use in the PWFA, and the Commission's and courts' long history of interpreting those identical words to include abortion, the Commission will interpret those words the same way in the PWFA. The Commission disagrees with commenters who argued that excluding abortion from the definition serves the policy goals expressed by Congress in the PWFA. On the contrary, as discussed above, the Commission concludes that including abortion in the definition best serves the policy goals expressed by Congress in the PWFA in that it will allow qualified employees with known limitations related to pregnancy, childbirth, or related medical conditions to obtain accommodations to address their needs, absent undue hardship. While the comments make policy arguments opposed to the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions,'' these policy objections are not a reason for the Commission to change its interpretation and deviate from the text of the statute and established rules of statutory construction. Additionally, the Commission notes that some of the claims in the comments that argued against abortion for policy reasons have been disputed by health care professionals.[98]

With regard to concerns that employers will force their employees to have abortions, Title VII prohibits covered entities from taking adverse employment actions against an employee based on their decisions to have, or not to have, an abortion.[99] Consistent with this interpretation, the Commission's definition of ''pregnancy, childbirth, or related medical conditions'' includes both having an abortion and choosing not to have an abortion, thus protecting pregnant employees who decide to continue their pregnancies.[100]

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Interaction Between State Laws Regarding Abortion and the PWFA

Some comments asserted that covered entities cannot be required to provide accommodations relating to an abortion because some State laws prohibit abortion under certain circumstances. Some comments also noted that some State laws provide that an individual may sue another individual for conduct that aids in the performance of an abortion in violation of State law. A few comments stated that the rule will compel State and local governments to provide accommodations contrary to State law, and that doing so transgresses limits of federalism; one comment asserted that certain Senators were concerned about litigation against the States and voted to remove the PWFA's text that waives State immunity to lawsuits.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Interaction Between State Laws Regarding Abortion and the PWFA

The Commission does not agree with comments that the inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' requires covered entities, including State and local governments, to violate State laws that limit access to abortion, nor does the rule transgress limits of federalism. The rule does not prescribe when, where, or under what circumstances an abortion can be obtained or what procedures may be used. If the issue of a PWFA accommodation regarding abortion arises, it will likely concern only a request by a qualified employee for leave from work.[101] Accordingly, State laws that regulate the provision of abortions in certain circumstances do not conflict with covered entities' obligations under the PWFA.

Any potential interaction or conflict between PWFA and State laws, including State laws that allow civil suits to challenge actions that private individuals claim aid in the provision of an abortion, will be addressed on a case-by-case basis. Of note, the PWFA does not require an employer to pay for an abortion, and neither does the regulation.[102]

[98] For example, the contention that abortion causes mental health issues for women is refuted by major mental health organizations. Am. Psych. Ass'n, *Abortion* (2024), *https://www.apa.org/topics/abortion; see also* Healthline, *Understanding the Relationship Between Abortion and Mental Health* (July 6, 2023), *https://www.healthline.com/health/abortion-and-mental-health;* M. Antonia Biggs et al., *Women's Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA Psychiatry 169 (Feb. 2017), *https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2592320.*

[99] *See, e.g., EEOC* v. *Ryan's Pointe Houston, LLC,* No. 19–20656, 2022 WL 4494148, at *7 (5th Cir. Sept. 27, 2022); *Velez* v. *Novartis Pharms. Corp.,* 244 FRD. 243, 267 (S.D.N.Y. 2007) (including a declaration by a female employee that she was encouraged by a manager to get an abortion as anecdotal evidence supporting a class claim of pregnancy discrimination); *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(c).

[100] *See, e.g., Ryan's Pointe Houston,* 2022 WL 4494148, at *7; Press Release, EEOC, *Best Western Hotels in Tacoma and Federal Way To Pay $365,000 To Settle EEOC Suit for Harassment* (July 5, 2012) (announcing settlement of a harassment case by the EEOC that included allegations that the harasser belittled the religious beliefs of employees, including telling a pregnant employee she should have an abortion even though she said it was against her religious beliefs).

[101] 42 U.S.C. 2000gg–5(a)(2) provides that ''[n]othing in this chapter shall be construed . . . by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.'' Some comments speculated that employers, including State and local governments, could violate State laws restricting abortion access if they provided leave to employees who then traveled across State lines to obtain abortion care. The Commission notes that employees can currently use their leave to do so, and the comments did not explain why the leave being a reasonable accommodation under the PWFA would create a different set of circumstances or a different result.

[102] *See* 42 U.S.C. 2000gg–5(a)(2); 88 FR 54745 (stating that ''nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion''). Covered entities may, however, be subject to Title VII's provisions regarding abortion coverage in certain circumstances. *See* 42 U.S.C. 2000e(k).

The Commission agrees that State and local governments are covered employers and are required to provide accommodations under the PWFA, absent undue hardship. As stated above, any potential interaction or conflict between a State law and the PWFA will be addressed on a case-by-case basis. Further, States and local governments that are covered by the PWFA are covered by Title VII, which has protected employees' rights to be free from discrimination in employment for having, or for not having, an abortion for nearly 45 years, and yet comments on this topic did not point to a situation where a State was forced to violate its own laws. Finally, Congress did not vote to remove the section of the PWFA that waives State sovereign immunity; that provision is in 42 U.S.C. 2000gg–4.

Ultimately, whether any particular action taken by an employer pursuant to the PWFA could potentially implicate State law is dependent on the content of each individual State's laws, including how those laws are interpreted by each State's courts. As noted above, commenters did not identify any real-world scenarios in which Title VII's protections for employees' rights with regard to abortion have led to employer concerns about liability under State law. To the extent any such issues arise in connection with the PWFA, the Commission believes they are best addressed on a case-by-case basis, particularly given the State- and fact-specific nature of these issues.

Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Major Questions Doctrine

Some comments argued that to include abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' implicates the major questions doctrine.[103]

In claiming that the major questions doctrine applies, comments stated that abortion has been a heated political topic or a source of moral controversy; that the *Dobbs* majority and dissent both found abortion to have important economic consequences; and that the possibility of reasonable accommodations for an abortion meets the threshold of deep political significance, implicating the major questions doctrine. Comments also stated that the Commission must show that the decision to allow for possible reasonable accommodations for an abortion, absent undue hardship, was clear in the text of the PWFA at the time of enactment; that if Congress wanted to put paid abortion leave into the PWFA, it would have done so explicitly; and that the Commission may not issue regulations with vast political significance unless clearly directed by Congress.

By contrast, other comments disputed whether the major questions doctrine applies to the PWFA and the Commission's definition of ''pregnancy, childbirth, or related medical conditions.'' For instance, one detailed comment noted that the Supreme Court has limited the major questions doctrine to a narrow category of extraordinary paradigm cases that are very different from the posture of the PWFA rulemaking.[104] The comment stated that none of the indicia of a major question exist in this rulemaking—the Commission is merely interpreting a phrase the same way it did in Title VII, with no change to the prevailing interpretation of this longstanding statutory text. Additionally, the comment asserted the rule does not address questions of such vast economic and political significance as to raise a presumption against congressional delegation of authority and the comment supported the rule as an exercise of agency authority to interpret and implement a statute, using the same long-established textual interpretation as in a related statute.

Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and the Major Questions Doctrine

The Commission disagrees that inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' implicates the major questions doctrine. The inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' is for the limited purpose of qualifying for a workplace accommodation under the PWFA, which is subject to defenses and case-by-case assessment. Moreover, the Commission anticipates that any requests for accommodations related to abortion will typically involve the provision of unpaid leave. Thus, including abortion in the definition of ''pregnancy, childbirth, or related medical conditions'' is not the type of ''extraordinary case[ ]'' that implicates the major questions doctrine.[105] The Commission is simply implementing Congress' intent by confirming that the term ''related medical conditions'' has the same meaning given to the term in Title VII for over four decades. Thus, the Commission is effectuating a policy decision made by Congress itself, not claiming a ''newfound power'' that would ''represent[ ] a transformative expansion in its regulatory authority'' or ''make a radical or fundamental change to a statutory scheme.'' [106] And no court has applied the major questions doctrine to the Commission's identical interpretation of Title VII's identical text.

The provision of possible reasonable accommodations for known limitations related to an abortion does not have the type of economic impact found in other cases that successfully invoked the major questions doctrine. Because the PWFA prohibits any requirement ''by regulation or otherwise . . . [for] an employer-sponsored health plan to pay for or cover a particular item, procedure, or treatment,'' the Commission anticipates that most requests for accommodations related to an abortion will involve only the provision of leave, which will likely be unpaid.[107] Thus, any economic impact will be minimal.

Further, the Commission's use of the term does not ''effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind'';[108] rather, it implements a new statute by harmonizing the meaning of ''pregnancy, childbirth, or related medical conditions'' in Title VII and the PWFA. The ''consistency of [an agency's] prior position is significant'' when it comes to the major questions doctrine, because ''[i]t provides important context'' about what Congress ''understood'' the statute to permit.[109]

[103] The major questions doctrine applies to ''extraordinary cases that call for a different approach—cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022) (internal quotation marks omitted). Under this doctrine, the Court has rejected agency claims of statutory authority when: (1) the underlying claim of authority concerns an issue of ''vast economic and political significance,'' and (2) Congress has not clearly empowered the agency with authority over the issue. *Util. Air Regul. Grp.* v. *EPA,* 573 U.S. 302, 324 (2014) (internal quotation marks omitted).

[104] *See* Comment EEOC–2023–0004–98328, Professors Greer Donley, David S. Cohen, Rachel Rebouche, Kate Shaw, Melissa Murray, and Leah Litman (Oct. 10, 2023).

[105] *See West Virginia,* 597 U.S. at 721.

[106] *Id.* at 723–24 (internal quotation marks omitted).

[107] *See* 42 U.S.C. 2000gg–5(a)(2).

[108] *Biden* v. *Nebraska,* 600 U.S. __, 143 S. Ct. 2355, 2373 (2023) (quoting *West Virginia,* 597 U.S. at 728).

[109] *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 157 (2000).

''Congress must be taken to have been familiar with the existing administrative interpretation.'' [110] The relevant statutory language—''pregnancy, childbirth, or related medical conditions''—has a well-documented, consistent, and historical definition, and the Commission is within its authority to use that definition in implementing a new statute.

By contrast, were the Commission to stray from Title VII's interpretation of ''pregnancy, childbirth, or related medical conditions'' for the purpose of adopting a definition that excluded abortion, the Commission would be taking a novel stance, contrary to the language of the PWFA and the intent expressed by Congress in using the language of Title VII.

Comment Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Separation of Powers Concerns

One comment raised a constitutional objection to the Commission's structure, asserting that the President can remove Commissioners ''only for cause.''

Response to Comment Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' and Separation of Powers Concerns

The Commission disagrees that there is any constitutional defect in the agency's structure, and, in any event, the comment provides no basis to believe that anything about the rule or its implementation would be different if the Commission had a different structure.

1636.3(c) Employee's Representative

Several comments suggested additions to the definition of ''employee's representative,'' including ''union representative,'' ''co-worker,'' and ''manager.'' The Commission has added ''union representative'' to the list, which is further illustrated in Example #31. The addition reflects an important kind of representative and differs from the other illustrative third parties listed. The Commission has not made further changes to the list. The list in the proposed regulation mirrors that set out in ADA [111] policy and is not exhaustive. Further, the Commission believes that the addition of ''manager'' would not add clarity to the definition and would risk confusing management officials about their roles and obligations under the PWFA.

Other comments proposed changing ''other representative'' to what they believe to be more descriptive language, such as ''any other person who communicates.'' The Commission is maintaining ''representative'' because it is the language used in the statute.

Several comments recommended that the rule require the employee's representative to have the employee's permission to communicate the employee's limitation. The Commission expects that normally the representative will have the employee's permission but notes that there may be situations, for example when the employee is incapacitated, where that may not be possible. The Commission has added this information in the Interpretive Guidance in section *1636.3(c) Employee's Representative.* The Commission declines to delineate a specific form or manner for an individual to be considered a representative because this would unnecessarily increase the burden on employees and potentially delay the processing of an accommodation request. The PWFA intends to make seeking and obtaining an accommodation efficient and effective. Requiring an employee to submit evidence of their authorization to enable a third party to request an accommodation on their behalf would thwart the PWFA's efforts to make such communication a simple task.

Several comments proposed that once the employee's representative has made the need for an accommodation known, the employer must then engage in the interactive process directly with the employee. Again, the Commission expects that this will be the normal situation but notes, for example, that when the employee is incapacitated or the representative is the employee's attorney, the employer may need to continue to engage with the representative rather than the employee. The Commission has added information to this effect in the Interpretive Guidance in *1636.3(c) Employee's Representative.* Finally, the Commission has removed the word ''known'' before ''limitation'' in the Interpretive Guidance for this section because the limitation is not ''known'' until it has been communicated.

1636.3(d) Communicated to the Employer

The Commission received numerous comments regarding the definition of ''communicated to the employer,'' what information the employee should have to provide to the employer, with whom the employee should communicate, and what the employer can or cannot require the employee to do after the initial request.

Several comments correctly pointed out that the statutory definition of ''communicated to the employer'' in the PWFA does not include a description or requirement of how the employee must request a reasonable accommodation. Thus, the Commission has moved the information regarding how an employee requests a reasonable accommodation (formerly in proposed § 1636.3(d)(3)) to the section of the rule regarding reasonable accommodations (§ 1636.3(h)(2)). Although these sections are now separate and therefore follow the statutory text more closely, they have many important commonalities. Specifically, both communicating to the employer regarding the limitation and requesting a reasonable accommodation should be simple processes that do not require any specific language; both can be made to the same people at the covered entity at the same time; and for both there are limitations as to the information the covered entity can require. In practice, the Commission recognizes that in most cases these communications will occur simultaneously: an employee will communicate about their limitation in the process of informing the employer that they need an adjustment or change at work for reasons related to the limitation.

Thus, the final regulation's definition of ''communicated to the employer'' consists only of § 1636.3(d) introductory text and (d)(1) and (2) from the NPRM. Paragraph (d)(3), with some modifications, has been moved to § 1636.3(h)(2).

Section 1636.3(d) of the proposed regulation stated that ''communicated to the employer'' means to make known to the covered entity either by communicating with a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity's policy to request an accommodation. Several comments suggested that this list include someone ''who directs the employee's tasks'' in order to better reflect circumstances where a workplace may not use a supervisory structure or specific job titles. The Commission agrees that this additional language will help employees and covered entities better understand that such communication also is appropriately directed to those

[110] *McFeely* v. *Comm'r of Internal Revenue,* 296 U.S. 102, 110 (1935).

[111] *See* EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,* Question 2 (2002) [hereinafter *Enforcement Guidance on Reasonable Accommodation*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.*

individuals whom an employee would normally consult if they had a question or concern. Thus, the final rule includes the addition of ''or who regularly directs the employee's tasks.'' Some comments also suggested that the Commission clarify that the entity with whom the employee may communicate could include any agents of the employer such as a search firm, staffing agency, or third-party benefits administrator. The Commission has included that information in the Interpretive Guidance in section *1636.3(d) Communicated to the Employer and 1636.3(h)(2) How To Request a Reasonable Accommodation* and has covered these entities in the regulation by adding ''another appropriate official,'' a term that also serves to cover other entities with authority for the employee who may not have one of the titles used in the rest of this portion of the regulation.

Paragraph (d)(1) has not changed from the NPRM. In paragraph (d)(2), the Commission has added that the communication regarding the limitation need not use specific words in order for it to be considered ''communicated to the employer.'' The Commission also has changed the structure of this sentence so that it matches that of paragraph (d)(1) and refers to the communication, rather than what a covered entity may or may not require and has slightly changed the wording of the prohibitions. For example, the proposed rule said, ''any specific format'' and the final rule says, ''in a specific format''; and the proposed rule said, ''any particular form'' and the final rule says, ''on a specific form.''

In the Interpretive Guidance in section *1636.3(d) Communicated to the Employer and 1636.3(h)(2) How To Request a Reasonable Accommodation,* the Commission has combined the information for § 1636.3(d) and (h)(2) to emphasize that the communication of the limitation and the request for an accommodation will usually happen at the same time, that both should be simple tasks, and that both are governed by the same rules regarding with whom the employee may communicate, and the lack of a requirement for any specific words or forms (§ 1636.3(d)). The Commission also has added information explaining that, because many situations that may qualify for coverage under the PWFA could be classified as either a ''limitation'' (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) or ''pregnancy, childbirth, or related medical conditions,'' employees do not need to identify a specific part of the regulation under which they believe they are entitled to coverage in order to make a request. Employers should not decide that an employee is not covered by the PWFA or otherwise restrict an employee's rights under the PWFA because the employer thinks the employee has improperly labeled something a ''limitation'' when it is better characterized as a ''related medical condition,'' or the reverse. For example, if an employee needs bed rest because they are pregnant and have placenta previa, the placenta previa could be the ''physical or mental condition'' related to, affected by, or arising out of pregnancy, or the placenta previa could be a ''related medical condition'' to pregnancy and the physical or mental condition could be the need to limit walking or standing. In either instance, the employee is covered by the PWFA and can request an accommodation.

The Interpretive Guidance in section *1636.3(d) Communicated to the Employer and 1636.3(h)(2) How To Request a Reasonable Accommodation* also has been modified to explain that an employee is not required to identify the statute under which they are requesting a reasonable accommodation (*e.g.,* the ADA, the PWFA, or Title VII). Doing so would require that employees seeking accommodations use specific words or phrases, which the regulation prohibits.

Finally, the Commission has added information to the Interpretive Guidance that explains the types of people with whom the employee may communicate as set out in the final rule. The Commission has moved the examples that were in § 1636.3(d) in the NPRM to section *1636.3(h)(2) How To Request a Reasonable Accommodation* in the Interpretive Guidance and has added an explanation at the start of the list of examples regarding the communications, rather than having an explanation after each example.

1636.3(e) Consideration of Mitigating Measures

The Commission received very few comments concerning mitigating measures. The language in the final rule is unchanged from the proposed rule and is the same as the language in the ADA regulation, except that the Commission made a minor edit for accuracy to remove the word ''known'' from § 1636.3(e)(1). This edit is necessary because the consideration of mitigating measures would only affect the determination of whether an employee has a limitation and not whether that limitation is ''known.'' The Commission further changed language in the Interpretive Guidance in section *1636.3(e) Consideration of Mitigating Measures* slightly to point out that the ameliorative effects of mitigating measures can be considered when determining the appropriate reasonable accommodation.[112]

1636.3(f) Qualified Employee

1636.3(f)(1) With or Without Reasonable Accommodation

The Commission received very few comments concerning the definition of ''qualified employee'' as an employee who, with or without reasonable accommodation, can perform the essential functions of the job. The final rule maintains the language from the proposed rule, which uses the language from the ADA.

The Commission also did not receive many comments regarding the definition of ''qualified'' for the reasonable accommodation of leave and has maintained that definition and the language in § 1636.3(f)(1) and in the Interpretive Guidance in section *1636.3(f)(1)* under ''*Qualified*'' *for the Reasonable Accommodation of Leave.* The Commission addresses other comments it received regarding leave as a reasonable accommodation in the preamble in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation.*

1636.3(f)(2) Temporary Suspension of an Essential Function(s)

The Commission received numerous comments regarding the definition of ''qualified'' with regard to the temporary suspension of essential function(s), the definition of ''temporary,'' the definition of ''in the near future,'' how different periods of temporary suspension of essential function(s) should be considered, whether more than one essential function can be suspended, and the meaning of ''can be reasonably accommodated.''

Preliminarily, it is important to emphasize that the definition of ''qualified'' that includes the temporary suspension of an essential function is taken directly from the text of the statute. It is not a creation of the Commission, and the Commission could not ignore it or read it out of the statute, as some comments suggested. Second,

[112] The Commission notes that ''mitigating measures'' for the purposes of the PWFA are not the same as ''mitigation measures'' taken as part of occupational safety and health which refer to actions taken by employers. *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Hierarchy of Controls* (Jan. 17, 2023), *https://www.cdc.gov/niosh/topics/hierarchy/default.html.*

as noted in the NPRM, this definition of ''qualified'' is relevant only when an employee cannot perform one or more essential functions of the job in question, with or without a reasonable accommodation, due to a known limitation. It is not relevant in any other circumstance. If the employee can perform the essential functions of the position with or without a reasonable accommodation, the first definition of ''qualified'' applies (*i.e.,* able to do the job with or without a reasonable accommodation). Third, this definition is relevant solely to determining whether an employee is ''qualified.'' An employer may still defend the failure to provide a reasonable accommodation based on undue hardship. Thus, the Commission responds to concerns regarding the possible disruption of production or scheduling or difficulties in accommodating the temporary suspension of an essential function(s) that a certain employer may face in the discussion of undue hardship (in the preamble in section *1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s)*) rather than in the discussion of the definition of ''qualified.''

1636.3(f)(2)(i) Temporary

The Commission received several comments regarding the definition of ''temporary.'' Some asserted that the Commission's definition was subsumed by the definition of ''in the near future,'' while others argued that the definitions of ''temporary'' and ''in the near future'' should be the same. The Commission has not changed the definition of ''temporary.'' As Congress set out two terms (''temporary'' and ''in the near future''), the Commission should define both and not assume that they are the same. The definition that the Commission proposed in the NPRM for ''temporary'' is consistent with the dictionary definition of this term and the legislative history of the provision.[113]

1636.3(f)(2)(ii) In the Near Future

The Commission's proposed definition of ''in the near future'' had four parts: (1) how long this would be for a current pregnancy (generally 40 weeks); (2) how long this should be for conditions other than a current pregnancy (generally 40 weeks); (3) how leave should not count in the determination of the time for which an essential function(s) is temporarily suspended; and (4) how to address successive periods of suspension of essential function(s). As discussed below, the Commission is maintaining the provisions in the NPRM for issues 1, 3, and 4.

Comments and Response to Comments Regarding the Definition of ''In the Near Future''

The NPRM proposed that for both a current pregnancy and conditions other than a current pregnancy it would be presumed that the employee could perform the essential functions of the position ''in the near future'' if they could do so within generally 40 weeks.

Many comments supported the idea that for a current pregnancy, an employee would be considered qualified if they could perform the essential function(s) generally within 40 weeks of the suspension of the essential function(s). As these comments pointed out, this would allow a pregnant employee the ability to continue working and earning a paycheck during their pregnancy, even if due to a known limitation they had to temporarily suspend an essential function(s). As one comment noted, a shorter time could lead to ''dangerous and perverse consequences'' such as employees ''saving up'' their ability to request the temporary suspension of essential function(s), leading to potential risks to their health or the health of their pregnancy early in the pregnancy, or employees being temporarily excused from essential function(s) early in their pregnancy only to have to resume them later in their pregnancy in order to keep earning a paycheck.[114]

Several comments argued against the definition of ''generally 40 weeks'' for a current pregnancy, stating that such a long time was not within the intent of Congress, was outside the scope of the Commission's regulatory authority, and was not in keeping with how courts have defined this term in cases regarding leave and the ADA.

For conditions other than a current pregnancy, including post-pregnancy, the NPRM also proposed ''in the near future'' to mean generally 40 weeks. Several comments, based on the health care studies cited in the NPRM, recommended that for post-pregnancy reasons the definition of ''in the near future'' should be 1 year. These comments also recommended that the definition of ''in the near future'' for lactation-related accommodations that require the temporary suspension of an essential function(s) be 2 years, based on the recommendation of the American Academy of Pediatrics.

Other comments pointed out that although pregnancy has a generally accepted length, other conditions do not. As a result, these comments asserted, an individualized assessment, akin to when a person with a disability is having surgery and then must go on leave, is more appropriate. Other comments suggested that the definition should be less than 6 months, based on an ADA case cited in the House Report on the PWFA.[115]

In the final rule, the Commission has changed the provision in the regulation defining ''in the near future'' at § 1636.3(f)(2)(ii) so that the determination will be made on a case-by-case basis. This determination, however, includes the concept from the NPRM's definition of ''in the near future,'' which explained that, if the employee is pregnant, it is assumed that the employee could perform the essential function(s) in the near future because they could perform the essential function(s) within generally 40 weeks of their suspension.

The Commission is retaining ''generally 40 weeks'' [116] in the final regulation's definition of ''in the near future'' for pregnant employees for several reasons. First, one of the purposes of the PWFA is to provide pregnant employees with the ability to keep working while they are pregnant in order to protect their economic security as well as their health and the health of their pregnancy. Given the established length of pregnancy, this goal cannot be met if the employee is not considered qualified simply because they have to suspend an essential function(s) for generally 40 weeks. Second, Congress did not provide a definition for ''in the near future'' but did give the Commission rulemaking authority for the statute.[117] Defining terms within a statute that have not been defined by Congress is well within the rulemaking authority of the agency directed by the law to write rules for it.[118] Furthermore,

[113] 88 FR 54777.

[114] Comment EEOC–2023–0004–98298, A Better Balance 29–30 (Oct. 10, 2023).

[115] H.R. Rep. No. 117–27, pt. 1, at 28 (citing *Robert* v. *Bd. of Cnty. Comm'rs of Brown Cnty.,* 691 F.3d 1211, 1218 (10th Cir. 2012)). However, the Commission notes that the House Report does not assign a definition to ''in the near future.'' Although *Robert* notes an Eighth Circuit case that found that a 6-month leave request ''was too long to be a reasonable accommodation,'' it stated that with respect to the durational element of in the ''near future,'' ''this court has not specified how near that future must be'' and declined to address whether a more than 6-month accommodation ''exceeded reasonable durational bounds.'' *Robert,* 691 F.3d at 1218.

[116] One comment noted that pregnancy can last 42 weeks or longer. To account for this, the EEOC is using the phrase ''generally 40 weeks.''

[117] 42 U.S.C. 2000gg–3(a).

[118] *See AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366, 397 (1999) (''Congress is well aware that the

as explained below, courts have generally determined that indefinite amounts of time cannot be ''in the near future.'' Because pregnancy by definition is not indefinite, defining ''in the near future'' to be the length of a pregnancy is consistent with the views of courts and with the purpose of the PWFA.

Those who opposed generally 40 weeks as the definition of ''in the near future'' for pregnant employees did not explain how a shorter definition would impact pregnant employees or why the definition should change from workplace to workplace, given the established length of pregnancy. Given that there is a history of employers failing to provide pregnant employees light duty positions to the severe detriment of those employees, even after the Supreme Court's decision in *Young* v. *United Parcel Service,*[119] and Congress' awareness of this problem,[120] the Commission believes it is necessary to define ''in the near future'' for the PWFA's second definition of ''qualified'' as the full length of a pregnancy. The Commission agrees with comments stating that a shorter period of time could create situations where an employee continues to perform an essential function(s) in order to save time when they are not required to perform the essential function(s) for later in their pregnancy or following childbirth, thus imperiling their health or the health of the pregnancy, or where an employee is forced to return to the performance of an essential function(s) later in their pregnancy, despite the health risks. The Commission reiterates that this rule does not mean that a pregnant employee is automatically entitled to the temporary suspension of one or more essential functions for 40 weeks, or that the employee will need the suspension of one or more essential functions for 40 weeks. The temporary suspension must be able to be reasonably accommodated, and the employer retains the ability to establish that the reasonable accommodation causes an undue hardship.

The Commission agrees that there should not be a presumptively consistent measure of the term ''in the near future'' for issues other than current pregnancy. The physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions faced by employees other than those who are currently pregnant certainly may be serious and may, in some cases, mean that an employee may seek to have one or more essential functions of the job temporarily suspended. Unlike a current pregnancy, however, there is not a consistent measure of how long these diverse conditions generally will last or, thus, of what ''in the near future'' might mean in these instances.

In explaining the inclusion of this additional definition of ''qualified,'' the House Report analogized the suspension of an essential function under the PWFA to cases under the ADA regarding leave.[121] Thus, ADA leave cases provide some helpful guideposts for employers and employees to understand this term in the context of whether an employee is ''qualified'' under the PWFA in situations not involving a current pregnancy. First, an employee who needs indefinite leave (that is, leave for a period of time that they cannot reasonably estimate under the circumstances) cannot perform essential job functions ''in the near future.'' [122] Similarly, a request to indefinitely suspend an essential function(s) cannot reasonably be considered to meet the standard of an employee who could perform the essential function(s) ''in the near future.'' However, the Commission notes that the temporary suspension of an essential function(s) is not ''indefinite'' simply because the employee cannot pinpoint the exact date when they expect to be able to perform the essential function(s) or can provide only an estimated range of dates.[123] Nor do these circumstances mean that the employee cannot perform the job's essential functions ''in the near future.'' [124]

Beyond an agreement that an indefinite amount of time does not meet the standard of ''in the near future,'' courts' definitions of how long a period of leave may be under the ADA and still be a reasonable accommodation (thus, allowing the individual to remain qualified) vary.[125] The Commission

ambiguities it chooses to produce in a statute will be resolved by the implementing agency.''); *Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735, 740–41 (1996) (''[T]hat Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.''); *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984) (''The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'') (omission in original) (citation omitted).

[119] 575 U.S. 206; *see, e.g., EEOC* v. *Wal-Mart Stores E., L.P.,* 46 F.4th 587 (7th Cir. 2022); *Legg* v. *Ulster Cnty.,* 820 F.3d 67 (2d Cir. 2016).

[120] H.R. Rep. No. 117–27, pt. 1, at 14–17.

[121] *Id.* at 27–28.

[122] *Id.; see also, e.g., Herrmann* v. *Salt Lake City Corp.,* 21 F.4th 666, 676–77 (10th Cir. 2021); *Cisneros* v. *Wilson,* 226 F.3d 1113, 1129 (10th Cir. 2000), *overruled on other grounds by Bd. of Trs. of Univ. of Ala.* v. *Garrett,* 531 U.S. 356 (2001).

[123] *See, e.g., Randall* v. *Smith & Edwards Co.,* 1:20–CV–00183, 2023 WL 3742818, at *33–*34 (D. Utah May 31, 2023) (determining that the employee, who requested leave to undergo liver transplant surgery, presented enough evidence to allow a reasonable jury to conclude that his leave request was not indefinite where evidence indicated that the employer understood that he could undergo the transplant ''any day'' and ''would return to work within, at most, 12 weeks of his surgery''); *Ellis* v. *Salt Lake City Corp.,* 2:17–CV–00245, 2023 WL 2742756, at *11–*12 (D. Utah Mar. 31, 2023) (concluding that the employee's request to remain on leave until the appeal of her demotion was resolved was not a request for indefinite leave, as she ''provided a general timeframe for her return in the near future''), *appeal filed* (10th Cir. May 2, 2023); *Johnson* v. *Del. Cnty. Cmty. Coll.,* 2:15–CV–01310, 2015 WL 8316624, at *1, *5 (E.D. Pa. Dec. 9, 2015) (determining that a custodian, who was on medical leave for nearly 5 months due to a knee injury and requested ''a brief extension of medical leave'' to undergo surgery and physical therapy, ''did not request an indefinite leave''); *Criado* v. *IBM Corp.,* 145 F.3d 437, 443–44 (1st Cir. 1998) (concluding that an employee's request for additional leave to ''allow her physician to design an effective treatment program'' with no specific return date given could be a reasonable accommodation); *Graves* v. *Finch Pryun & Co.,* 457 F.3d 181, 185–86 (2d Cir. 2006) (reasoning that an employee's request ''for 'more time' to get a doctor's appointment'' that would take ''maybe a couple weeks'' was not a request for indefinite leave).

[124] The fact that an exact date is not necessary is supported by the definition in the statute, which requires that the essential function(s) ''could'' be performed in the near future. 42 U.S.C. 2000gg(6)(B).

[125] *See, e.g., Robert,* 691 F.3d at 1218 (citing a case in which a 6-month leave request was too long to be a reasonable accommodation but declining to address whether, in the instant case, a further exemption following the 6-month temporary accommodation at issue would exceed ''reasonable durational bounds'') (citing *Epps* v. *City of Pine Lawn,* 353 F.3d 588, 593 (8th Cir. 2003)); *see also Blanchet* v. *Charter Commc'ns, LLC,* 27 F.4th 1221, 1225–26, 1230–31 (6th Cir. 2022) (determining that a pregnant employee who developed postpartum depression and requested a 5-month leave after her initial return date and was fired after requesting an additional 60 days of leave could still be ''qualified,'' as additional leave could have been a reasonable accommodation); *Cleveland* v. *Fed. Express Corp.,* 83 F. App'x 74, 76–81 (6th Cir. 2003) (declining ''to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation'' and determining that a 6-month medical leave for a pregnant employee with systemic lupus could be a reasonable accommodation); *Garcia-Ayala* v. *Lederle Parenterals, Inc.,* 212 F.3d 638, 641–42, 646–49 (1st Cir. 2000) (reversing the district court's finding that a secretary was not a ''qualified individual'' under the ADA because additional months of unpaid leave could be a reasonable accommodation, even though she had already taken over year of medical leave for breast cancer treatment, and rejecting per se rules as to when additional medical leave is unreasonable); *Nunes* v. *Wal-Mart Stores, Inc.,* 164 F.3d 1243, 1245–1247 (9th Cir. 1999) (holding that, because extending leave to 9 months to treat a fainting disorder could be a reasonable accommodation, an employee's inability to work during that period of leave did not automatically render her unqualified); *Cayetano* v. *Fed. Express Corp.,* No. 1:19–CV–10619, 2022 WL 2467735, at *1–*2, *4–*7 (S.D.N.Y. July 6, 2022) (determining that an employee who underwent shoulder surgery

Continued

believes, however, that depending on the facts of a case ''in the near future'' may extend beyond the 6-month limit suggested by some comments under the PWFA for three reasons.

First, what constitutes ''in the near future'' may differ depending on factors including, but not limited to, the known limitation and the employee's position. For example, an employee whose essential job functions require lifting during only the summer months would remain qualified even if unable to lift during a 7-month period over the fall, winter, and spring months because the employee could perform the essential function ''in the near future'' (in this case, as soon as the employee was required to perform that function). Second, the determination of whether the employee could resume the essential function(s) of their position in the near future is only one aspect of establishing that an employee is qualified despite not being able to perform an essential function(s). If the temporary suspension cannot be reasonably accommodated or if the temporary suspension causes an undue hardship, the employer is not required to provide a reasonable accommodation. Third, as detailed in the NPRM, especially in the first year after giving birth, employees may experience serious health issues related to pregnancy, childbirth, or related medical conditions that may prevent them from performing the essential function(s) of their positions.[126] Accommodating these situations and allowing employees to stay employed is one of the key purposes of the PWFA. To assist employers and employees in making this determination, the Commission has added several examples in the Interpretive Guidance in section *1636.3(f)(2) Qualified Employee—Temporary Suspension of an Essential Function(s)* regarding ''in the near future'' and non-pregnancy conditions.

Additionally, the Commission disagrees that the terms ''temporary'' and ''in the near future'' should be defined using the definition of ''transitory'' under the ADA.[127] Congress knew of this definition but decided not to incorporate it into the PWFA and used different terms (''temporary'' and ''in the near future,'' not ''transitory'').

Comments and Response to Comments Regarding Leave Not Being Part of the Calculation of the Temporary Suspension of an Essential Function(s)

The Commission did not receive many comments regarding whether leave should be counted as part of the definition of ''qualified'' for the suspension of an essential function(s). Those comments it did receive supported the Commission's view that it should not be counted; the Commission has maintained that position.

Comments and Response to Comments Regarding Resetting the Clock for the Temporary Suspension of an Essential Function(s)

The Commission received several comments regarding the proposal that the clock for determining ''in the near future'' should reset after childbirth. Some comments supported this for the reasons set out in the NPRM, specifically, that a pregnant employee cannot know whether or for how long they will need the temporary suspension of an essential function(s) after they give birth. Further, not resetting the clock could create the same issues discussed above of creating dangerous or perverse incentives for employees to ''save'' the temporary suspension of an essential function(s) for later in their pregnancy or post-pregnancy, even when it could lead to potential risks to their health or the health of their pregnancy. Conversely, several comments argued that allowing the clock to reset would permit employees to ''stack'' the temporary suspension of essential functions to get more than 40 weeks of an essential function(s) suspended. Given that the definition of ''in the near future'' for non-pregnancy issues has changed, this is less of a concern for the final rule. Additionally, as stated above, employees are not automatically granted 40 weeks of suspension of an essential function(s) during pregnancy under the regulation. Rather, they are merely considered ''qualified.'' Many employees will need less than 40 weeks of a temporary suspension of an essential function(s).

The Commission also received comments recommending that resetting the clock be added to the regulation itself. Because this general rule—that the determination of ''qualified'' is made at the time of the employment decision [128]—applies to all accommodations, the Commission has not added it to this part of the regulation. The Commission has included this general rule in the Interpretive Guidance in section *1636.3(f) Qualified Employee* and has added a specific reference to when essential functions are being temporarily suspended to state that determining ''in the near future'' should start at the time of the employment decision in the Interpretive Guidance in section *1636.3(f)(2)(ii) In the Near Future.*

The Commission also received comments interpreting the statute to say that only one essential function could be temporarily suspended in a given pregnancy. The Commission disagrees. First, the Commission notes that in interpreting acts of Congress, ''words importing the singular apply to several persons, parties, or things'' unless the context indicates otherwise.[129] Further, such a rule would undercut the purpose of the PWFA and lead to lengthy delays for litigation about what specific essential function was being suspended and whether it was the same or a different function. Such a rule also does not reflect that a pregnant employee may need more than one essential function suspended or different essential functions suspended at different times.

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

The Commission received a few comments on its proposed definition of ''can be reasonably accommodated'' that claimed that the NPRM had conflated this provision with undue hardship. Other comments suggested that this provision required a new definition, with a lower standard than ''undue hardship,'' that a covered entity could meet to show that the temporary suspension of the essential function(s) could not be reasonably accommodated. The Commission disagrees with these comments and is retaining the definition of this section set forth in the NPRM. The Commission expects that the language that the temporary suspension of an essential function(s)

could be ''qualified'' because 6 months of leave is not per se unreasonable as a matter of law); *Durrant* v. *Chemical/Chase Bank/Manhattan Bank, N.A.,* 81 F. Supp. 2d 518, 519, 521–22 (S.D.N.Y. 2000) (concluding that an employee who was on leave for nearly 1 year due to a leg injury and extended her leave to treat a psychiatric condition could be ''qualified'' under the ADA with the accommodation of additional leave of reasonable duration).The Commission is aware of and disagrees with ADA cases that held, for example, that 2 to 3 months of leave following a 12-week FMLA period was presumptively unreasonable as an accommodation. *See, e.g., Severson* v. *Heartland Woodcraft, Inc.,* 872 F.3d 476, 481 (7th Cir. 2017).

[126] *See* Susanna Trost et al., U.S. Dep't of Health & Hum. Servs., Ctrs. For Disease Control & Prevention, *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019* (2022), *https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html* (stating that 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one- and one-half months to one year postpartum).

[127] 42 U.S.C. 12102(3)(B).

[128] *See* 29 CFR part 1630, appendix, 1630.2(m).

[129] 1 U.S.C. 1.

''can be reasonably accommodated'' will be interpreted similarly to the idea that an individual is ''qualified'' if they can do the job with or without a reasonable accommodation. If, under the first definition of ''qualified,'' an employee cannot perform the essential functions of the position without a reasonable accommodation, and there is no reasonable accommodation, the employee is not qualified. Similarly, if the temporary suspension of the essential function(s) cannot be ''reasonably accommodated,'' the employee is not qualified. Thus, the definition of ''can be reasonably accommodated'' provides suggested means by which the temporary suspension of an essential function(s) can be reasonably accommodated. Whether granting the accommodation would impose undue hardship on the operation of the business of the covered entity is a separate analysis.[130] The Commission has removed the reference to undue hardship from this section in the Interpretive Guidance in order to avoid any confusion.

The Commission made a few changes to the examples in this section in the Interpretive Guidance. The Commission deleted former Example #7 from this section. In former Examples #8 and #9 (now Examples #1 and #2), the Commission added: facts to clarify that there is work for the employees to accomplish; the phrase ''affected by, or arising out of'' after ''related to''; and that the employees need an accommodation ''due to'' their limitation. The Commission removed the sentences regarding undue hardship in order to focus the examples on the issue of ''qualified.'' The Commission also added three additional examples to this section.

1636.3(g) Essential Functions

The NPRM adopted the definition of ''essential functions'' contained in the ADA regulation and sought comment on whether there were additional factors that should be considered in determining whether a function is ''essential'' for the purposes of the PWFA. Several comments suggested clarifications or departures from the definition of ''essential functions'' set forth in the ADA. These suggestions included proposed additions to the overall definition of ''essential functions''; a request to add a factor to § 1636.3(g)(1) to further explain when a particular function is ''essential''; and requests to delete, add, combine, or reorganize the factors in § 1636.3(g)(2) that can establish whether a particular function is ''essential.''

First, a few comments suggested adding language to § 1636.3(g) that would define essential functions as discrete tasks and clarify that essential functions are not conditions of employment regarding when, where, and how discrete tasks are performed. The Commission declines to adopt this proposal. The term ''essential functions'' in the PWFA is the same term used in the ADA, and therefore the definition of ''essential functions'' in the ADA regulation is instructive.[131] The Commission concludes that the suggested departure from the language and definition used in the ADA regulation is not appropriate. Although in the Commission's view, conditions of employment that are completely divorced from any job duties (*e.g.,* a requirement of ''regular attendance'' or ''in-person work'') are not essential functions in and of themselves, certain essential functions may need to be performed in a particular manner, time, or location.[132] For example, a neurosurgeon hired to perform surgeries may have to perform those surgeries in a sterile operating room; a receptionist hired to greet clients and answer calls during business hours may need to be available at certain times of day; and a truck driver responsible for transporting hazardous materials may need to use a specific type of vehicle. The final regulation, therefore, maintains the ADA regulatory language from 29 CFR 1630.2(n)(1).[133]

Second, the Commission received comments requesting that it add a factor to those listed in § 1636.3(g)(1) examining whether the function was essential during the limited time for which the accommodation is needed. As described in the next paragraph, the Commission has added this consideration to § 1636.3(g)(2). Because the list of factors in § 1636.3(g)(1) is non-exhaustive, the Commission has retained the factors in § 1636.3(g)(1).

Third, the Commission received comments requesting modification, addition, reorganization, or deletion of factors in § 1636.3(g)(2) that can be used to show a function is ''essential.'' Because the factors in § 1636.3(g)(2) are not exhaustive, the Commission declines to delete any factors, as this could incorrectly suggest that those factors are not relevant to PWFA accommodations. Additionally, the Commission declines to reorder any factors to emphasize their importance, as the factors in § 1636.3(g)(2) are not set forth in order of importance and the significance of any particular factor will vary by case. However, in response to comments that essential functions may change over time (or even by season), and that variations in essential functions are particularly important where the need for accommodation is temporary (as is the case for most known limitations), the Commission has made changes to § 1636.3(g)(2)(iii) to clarify that seasonal or other temporal variations in essential functions should be considered.

Some comments asked for clarification on whether the employer's judgment on essential functions is given priority and whether an employer's framing of the essential job functions can undermine or limit an individual's right to accommodation under the PWFA. First, as in the ADA, an employer's judgment as to which functions are ''essential'' is given due consideration among various types of relevant evidence but is not dispositive.[134] Therefore, evidence that is contrary to the employer's judgment may be presented and used to demonstrate the employer's judgment is incorrect. To this point, the Commission also has revised the language in the Interpretive Guidance in section *1636.3(g) Essential Functions* to reinforce that the listed factors in § 1636.3(g)(2) are non-exhaustive and fact-specific, which further underscores that no single factor is dispositive, that not all factors apply in each case, and that additional factors may be considered.

Finally, some comments questioned the effect of a temporary suspension of an essential function(s) as a reasonable accommodation on future determinations of whether the function was essential. Temporary suspension of an essential function(s) as a reasonable accommodation pursuant to the PWFA does not mean that the function(s) is no longer essential. Whether something is an essential function(s) remains a fact-specific determination, and the employer's temporary suspension of a job function(s) does not bar the employer from contending that the function(s) is essential for other accommodation requests in the future.

[130] *See, e.g., Barnett,* 535 U.S. at 401–02 (describing ADA accommodations cases where, to defeat summary judgment, a worker must show that the accommodation ''seems reasonable on its face''; after such a showing, the employer must show specific circumstances to prove an undue hardship).

[131] H.R. Rep. No. 117–27, pt. 1, at 28.

[132] *See Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Questions 22 & 34.

[133] For completeness, the Commission has added ''with a known limitation under the PWFA'' after the word ''employee'' in the regulation.

[134] *See* 29 CFR part 1630, appendix 1630.2(n).

1636.3(h) Reasonable Accommodation—Generally

1636.3(h)(1) Definition of Reasonable Accommodation

The Commission received very few comments regarding the definition of reasonable accommodation, which uses the language from the ADA with certain changes to account for the differences in statutes. The Commission is retaining the definition of reasonable accommodation from the NPRM, with the following technical edits to § 1636.3(h)(1): insertion of the term ''qualified'' in the definition of reasonable accommodation relating to applicants; [135] and removal of the term ''qualified'' and addition of the phrase ''as are enjoyed by its other similarly situated employees without known limitations'' in the definition of reasonable accommodation related to benefits and privileges of employment.[136] These technical edits are necessary so that the definition of reasonable accommodation parallels the ADA definition, as required by the PWFA.

The Commission also has moved the explanation of how to request a reasonable accommodation, which was formerly part of § 1636.3(d), to § 1636.3(h)(2). As a result, the parts of § 1636.3(h) have been renumbered so that the definition of reasonable accommodation is at § 1636.3(h)(1)(i) through (iv), and information regarding the interactive process is located at § 1636.3(h)(3).[137]

1636.3(h)(2) How To Request a Reasonable Accommodation

The final rule contains a new section, § 1636.3(h)(2), that explains how an employee may request a reasonable accommodation. This information was proposed to appear at § 1636.3(d).

The Commission received several comments regarding this section when it was part of the ''Communicated to the Employer'' definition in the NPRM. First, comments expressed concern that the Commission's original language (that this was the process to ''request'' a reasonable accommodation) would add a requirement that employees phrase this as a ''request'' and that employees may not know that they have the right to make such a request. The Commission declines to change this provision. The examples in the NPRM (now Examples #6 to #11 in the Interpretive Guidance in section *1636.3(h)(2) How To Request a Reasonable Accommodation*) do not require that the communication be phrased as a request. Additionally, ''request for accommodation'' is the language the Commission uses in its ADA guidance,[138] and the Commission believes that changing the language on this point would create confusion. However, to respond to the comments, the Commission has added in the Interpretive Guidance in section *1636.3(h)(2) How To Request a Reasonable Accommodation* that a request for a reasonable accommodation need not be formulated as a ''request.''

Second, many comments suggested alternative language to proposed § 1636.3(d)(3)(i) and (ii) (§ 1636.3(h)(2)(i) and (ii) in the final rule), stating that the emphasis should be that the limitation necessitates a change (rather than the employee needing a change), that the rule should require a limitation ''or'' needing a change (rather than ''and''), or that communicating the limitation was sufficient. The Commission declines to make these changes. First, the Commission does not think it is appropriate or accurate to require that the limitation ''necessitates'' a change; this may increase the burden on what an employee would have to show and would complicate what should be simple communication. Second, while the Commission agrees that the statute provides for accommodations for known limitations, having the process start simply because the employee communicated a known limitation could lead to situations where the accommodation process begins when it was not the employee's intention, or it could lead to covered entities assuming that an accommodation is necessary which could result in violations of 42 U.S.C. 2000gg–1(2).

Finally, some comments recommended including that the employee must connect the need for the change with the limitation. The Commission agrees with this change and has added that idea to § 1636.3(h)(2) (''needs an adjustment or change at work due to the limitation''). As with the ADA and as shown in Examples #6 to #11, this is a simple communication that does not require specific words.

The Commission also has moved the point that was in § 1636.3(b) in the proposed regulation—that the employee need not mention a specific medical condition from the list in § 1636.3(b), or indeed any medical condition, or use medical terms—to § 1636.3(h)(2)(ii) so that all of the information about requesting an accommodation is in one place.

Many comments addressed with whom the employee must communicate in order to start the process. As with the definition of ''Communicated to the Employer'' (§ 1636.3(d)), the employer should permit an employee to request an accommodation through multiple avenues and means. Thus, the individuals at the covered entity to whom an employee may communicate to start the reasonable accommodation process are the same as those in § 1636.3(d), and the Interpretive Guidance language for that provision applies to requesting a reasonable accommodation as well. Some comments recommended against allowing for a broad range of individuals at the covered entity who could receive such requests because those who receive such requests require training; other comments stated that an employer should be able through its policy to limit the individuals who can receive such a request. The Commission did not make changes to support these views because the steps to request a reasonable accommodation should not be made more difficult and the individuals identified in § 1636.3(d) should be able to receive and direct the requests if they are not able to grant them independently.

Several comments also addressed whether the employer could require the process to start by the employee filling in a form and whether, if the employer had a process, the employee was required to follow it so that a request would be considered only when made to the entity identified in the employer's policy. The Commission did not adopt either of these views. First, requiring an employee to create a written request or to follow a specific provision to begin the reasonable accommodation process is contrary to the idea that this should not be a difficult or burdensome task for employees. Second, as one comment pointed out, some employees, such as those facing intimate partner violence, may be cautious or afraid of putting into

[135] As under the ADA, the term ''qualified'' in relation to applicants that are entitled to reasonable accommodation under the PWFA refers to whether the applicant meets the initial requirements for the job in order to be considered and not whether the applicant is able to perform the essential functions of the position with or without an accommodation. *See Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Question 13, Example A and B.

[136] As under the ADA, reasonable accommodation to enable employees to enjoy equal benefits and privileges under the PWFA does not turn on whether an employee is qualified but on whether the benefit or privilege is available to those who are similarly situated. *See* 29 CFR 1630.2(o)(1)(iii).

[137] The Commission has not included the section from the proposed appendix ''Additions to the Definition of Reasonable Accommodation'' in the Interpretive Guidance because its explanation of the PWFA and ADA rule regarding the definition of reasonable accommodation is not necessary for the final Interpretive Guidance.

[138] *See Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Question 1.

writing their need for an accommodation.[139] Third, many of the limitations and accommodations under the PWFA will be small or minor; the Commission expects that most accommodations will be provided following nothing more than a conversation or email between the employee and their supervisor, and there will not be any other forms or processes. If an employer does have a process to confirm what was stated in the initial request and that process uses a form, the form should be a simple one that does not deter the employee from making the request and does not delay the provision of an accommodation.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

First, the Commission received numerous comments recommending that the amelioration of pain or risk be added to the list in § 1636.3(h) for the definition of the term ''reasonable accommodation.'' The Commission is not making this change. The statute at 42 U.S.C. 2000gg(7) states that the term ''reasonable accommodation'' shall have the same meaning under the PWFA as it has in the ADA and the regulation under the PWFA. Section 1636.3(h) uses the same definition as in the ADA and adds one paragraph regarding the temporary suspension of essential functions, which is necessary pursuant to 42 U.S.C. 2000gg(6). As explained in the NPRM and in the Interpretive Guidance in section *1636.3(h)* under *Alleviating Increased Pain or Risk to Health Due to the Known Limitation,* accommodations to alleviate increased pain or risk fit under the current paragraphs in § 1636.3(h)(1)(i) through (iv).[140] This includes situations where an employee can do the essential functions of the position, and the accommodation is to alleviate increased pain or risk due to the known limitation.[141] This is because the reasonable accommodations operate to ''remove[ ] or alleviate[ ]'' a covered individual's ''barriers to the equal employment opportunity,'' which may include making reasonable accommodations that mitigate the increased pain or a health risk a qualified employee experiences related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions when performing their job.[142]

Second, the Commission received several comments suggesting an edit to § 1636.3(i)(2) in the proposed regulation, which listed examples of possible reasonable accommodations. The comments pointed out that ''adjustments to allow an employee or applicant to work without increased pain or risk to the employee's or applicant's health or the health of the employee's or applicant's pregnancy'' are the only accommodations listed that are expressly required to be ''due to the employee's or applicant's known limitation,'' even though that is obviously true for any of the other listed accommodations. The Commission agrees and has made this edit.

Third, the Commission received numerous suggestions of additional examples to include in this section to illustrate modifications to alleviate increased pain or risk. The Commission has added additional examples and information in the Interpretive Guidance in section *1636.3(h)* under *Alleviating Increased Pain or Risk to Health Due to the Known Limitation,* including, as suggested by some comments, examples involving exposure to chemicals, commuting, excessive heat, and contagious diseases. The Commission also has deleted one example.

Finally, the Commission received some comments expressing concern that the proposed appendix examples' focus on what was and what was not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions would lead to employers focusing on this issue, requiring documentation regarding this issue, and denying accommodations. These comments also pointed out that, given pregnancy's effect on the whole body, the situations set out in the examples, especially former Examples #10 and #13 (now Examples #12 and #15 in the Interpretive Guidance in section *1636.3(h)* under *Alleviating Increased Pain or Risk to Health Due to the Known Limitation*), were unrealistic and could cause covered entities and employees to waste time trying to determine whether a limitation was related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission appreciates the concerns raised regarding these examples. At the same time, it is important that covered entities and employees understand the principles illustrated in the examples so that voluntary compliance with the PWFA is maximized. The Commission has edited these examples to account for these concerns by, for example, changing or deleting language regarding the limitations that in the example may not have been related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Finally, in order to highlight different reasons for accommodations, the Commission has changed one of the examples to include lactation.

[139] Am. Coll. Of Obstetricians & Gynecologists, Comm. Opinion No. 518, *Intimate Partner Violence* (Feb. 2012; reaff'd 2022), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner-violence* (''Approximately 324,000 pregnant women are abused each year in the United States. . . . [T]he severity of violence may sometimes escalate during pregnancy or the postpartum period.'').

[140] 88 FR 54727 n.85 (''Depending on the facts of the case, the accommodation sought will allow the employee to apply for the position, to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or allow the temporary suspension of an essential function of the job.'').

[141] Many Federal circuit courts to have considered this issue have agreed that under the ADA, an accommodation needed to enable an employee to work without pain or risk to health may be required, even if the employee can perform the essential job functions without the accommodation. *See Burnett* v. *Ocean Props., Ltd.,* 987 F.3d 57, 68–69 (1st Cir. 2021) (observing that the plaintiff's ability to perform the essential functions of his job, albeit at the risk of bodily injury, ''does not necessarily mean he did not require an accommodation or that his requested accommodation was unreasonable''); *Bell* v. *O'Reilly Auto Enters., LLC,* 972 F.3d 21, 24 (1st Cir. 2020) (''An employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation.''); *Hill* v. *Ass'n for Renewal in Educ.,* 897 F.3d 232, 239 (D.C. Cir. 2018) (rejecting the argument that no accommodation was required because the plaintiff ''could perform the essential functions of his job without accommodation, 'but not without pain'''); *Gleed* v. *AT&T Mobility Servs.,* 613 F. App'x 535, 538–39 (6th Cir. 2015) (rejecting the argument that ''if Gleed was physically capable of doing his job—no matter the pain or risk to his health—then it had no obligation to provide him with any accommodation, reasonable or not''); *Feist* v. *La. Dep't of Justice,* 730 F.3d 450, 453 (5th Cir. 2013) (''[T]he language of the ADA, and all available interpretive authority, indicate[s] that'' ''reasonable accommodations are not restricted to modifications that enable performance of essential job functions.''); *Sanchez* v. *Vilsack,* 695 F.3d 1174, 1182 (10th Cir. 2012) (rejecting the argument that the Rehabilitation Act requires accommodation ''only if an employee cannot perform the essential functions of her job''); *Buckingham* v. *United States,* 998 F.2d 735, 740 (9th Cir. 1993) (stating that, under the Rehabilitation Act, ''employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job''). Even cases that have rejected this idea have done so on a very limited basis. *See Hopman* v. *Union Pac. R.R.,* 68 F.4th 394, 402 (8th Cir. 2023) (refusing to endorse the employer's argument that the ADA ''requires employers to provide reasonable accommodations only when necessary to enable employees to perform the essential functions of their jobs'' in all cases and observing that the requirement to accommodate will be fact-specific); *Brumfield* v. *City of Chicago,* 735 F.3d 619, 632 (7th Cir. 2013) (holding that ''an employer need not accommodate a disability that is irrelevant to an employee's ability to perform the essential functions of her job,'' but not addressing whether alleviating pain is ''irrelevant'' to essential job functions).

[142] *See* 29 CFR part 1630, appendix, 1630.9 (''The reasonable accommodation requirement [under the ADA] is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.'').

Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations

The Commission received many comments agreeing with the general principle that covered entities must ensure that their workplace policies or practices do not operate to penalize employees for utilizing accommodations under the PWFA. Many of these comments also asked for additional clarification and examples.

First, numerous comments suggested that the Commission explicitly state that the general rule that a covered entity does not have to waive a production standard as a reasonable accommodation does not apply when an employee has received the temporary suspension of an essential function(s) as a reasonable accommodation and the production standard would normally apply to the performance of that function. Applying such a production standard when the essential function(s) is temporarily suspended would penalize the employee for using the reasonable accommodation. The Commission agrees and has made this clarification in the Interpretive Guidance in section *1636.3(h)* under *Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations.*

One comment recommended clarifying that the definition of ''production standards'' includes not penalizing an employee for lower ''productivity,'' ''focus,'' ''availability,'' or ''contributions'' if the employee's lower production in those areas is due to the employee's reasonable accommodation. The Commission agrees. For example, if, as a reasonable accommodation, an employee is not working overtime, and ''availability'' or ''contribution'' is measured by an employee's working overtime, an employee should not be penalized in these categories. This concept has been added to the Interpretive Guidance in section *1636.3(h)* under *Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations.*

A few comments noted that in addition to potentially violating 42 U.S.C. 2000gg–1(5) and 2000gg–2(f), penalizing an employee for using a reasonable accommodation could violate 42 U.S.C. 2000gg–1(1), because by doing so the covered entity would not be providing an effective accommodation. The Commission agrees and has made this change in the Interpretive Guidance in section *1636.3(h)* under *Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations.*

Several comments suggested examples for this section focusing on no-fault attendance policies and electronic productivity monitoring. The Commission added two examples to this section and moved Example #30 from the NPRM (now Example #22) to this section with some edits. The Commission also added language to the Interpretive Guidance in section *1636.3(h)* under *Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations* about the types of rules that may need to be considered.

One comment stated that allowing employers to not pay for break time was, in effect, penalizing employees for taking those breaks. For the reasons explained in the section on leave, the Commission is adhering to the approach under the ADA that whether or not leave or breaks are paid depends on how the employer normally treats such time away from work and the requirements of other laws.

A final set of comments on this issue requested clarification regarding whether specific situations would be seen as penalizing an employee for using a reasonable accommodation. Specifically, comments asked whether pay could be lowered or whether merit-based incentives tied to the performance of the essential function(s) could be omitted if the employee was not performing an essential function(s). One comment asked whether an employee could be required to work extra time to make up for time spent on breaks.

Whether these situations regarding the temporary suspension of an essential function(s) would be viewed as penalizing a qualified employee in violation of the PWFA depends on certain factors. As stated in § 1636.4(a)(4), if a covered entity is choosing between accommodations, it must select the one that provides the qualified employee with equal employment opportunity, which includes no reduction in pay, advancement, or bonuses. If the only accommodation available for the temporary suspension of the essential function(s) requires the temporary reassignment of the qualified employee to a job that pays less, and the employer's practice in these situations is to lower the pay of employees temporarily assigned to such a position, the employer may make the temporary reassignment and the PWFA does not prohibit the employer from reducing the qualified employee's pay. Both conditions must be true: (1) that there is no other reasonable accommodation that does not pose an undue hardship and (2) that this is the employer's normal practice in these situations. Similarly, an employer could limit bonuses related to the performance of an essential function(s) that has been temporarily suspended if there is not another accommodation that provides equal employment opportunity, and this is the employer's normal practice in these situations.

For situations where the reasonable accommodation is additional breaks, a qualified employee may be given the opportunity to make up the additional time and may choose to do so. However, if making up the time renders the accommodation ineffective (for example, because the breaks are due to fatigue), the employer may not require the qualified employee to do so.

Personal Use

The Commission received very limited comments on this section. The Commission has made one minor change to the language in the Interpretive Guidance for this section (removing reference to a ''white noise machine'').

Particular Matters Regarding Leave as a Reasonable Accommodation

The Commission received numerous comments on its discussion of leave as a reasonable accommodation, including requests for clarification regarding the purpose and length of leave as a reasonable accommodation, as well as the application of the undue hardship standard to leave. Other comments recommended changes to the rules for paid leave and the continuation of health insurance while on leave. Some suggested that the PWFA explicitly provide coverage for ''extended leave.''

As set out in the NPRM, the Commission has long recognized the use of leave as a potential reasonable accommodation under the ADA.[143] Leave as a reasonable accommodation under the PWFA can be for any known limitation and includes leave for health care and treatment of pregnancy, childbirth, and related medical conditions and recovery from pregnancy, childbirth, and related medical conditions. The Commission declines to include the term ''extended leave'' in the regulation or Interpretive Guidance. The amount of leave under the PWFA depends on the employee and the known limitation and thus the term ''extended'' in this context does not have a uniform definition. In response to a few comments, the Commission has changed the language in § 1636.3(i)(3)(i) slightly to specifically provide that leave is available to recover

[143] 88 FR 54728.

from any related medical condition. This was implied by the language in the NPRM, which stated that leave for recovery was available and described an explicitly non-exhaustive list of specific conditions. The Commission has also removed the word ''receive'' before ''unpaid leave'' in § 1636.3(i)(3)(i) to be consistent with how it refers to unpaid leave.

Two groups of comments sought clarifications regarding leave and undue hardship. First, some comments agreed with proposed § 1636.3(i)(3)(iv), which states that concerns about the length, frequency, or unpredictable nature of leave are questions of undue hardship. However, the comments also suggested that the Commission make clear that it is not merely the fact that leave is long, frequent, or unpredictable that makes it an undue hardship. Rather, those factors may be considered to the extent that they impact the established undue hardship considerations. Thus, the fact that leave is unpredictable is not sufficient—standing alone—to make it an undue hardship; rather, the employer would have to show the unpredictable leave caused significant difficulty or expense on the operation of the business. The Commission agrees with these comments. Because this concept sets out how undue hardship and leave should interact, the Commission has determined that it is more appropriately discussed in the Interpretive Guidance rather than the regulation itself. Section 1636.3(i)(3)(iv) has, therefore, been removed from the regulation and the issue is instead discussed in the Interpretive Guidance in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation.*

The other set of comments regarding undue hardship stated that the mere fact that an employee has taken leave should not be determinative in assessing undue hardship, but rather the impact of that leave should be determined by using the undue hardship factors in § 1636.3(j)(2). The Commission agrees and has added this information to the Interpretive Guidance in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation* because proposed § 1636.3(i)(3)(iv) has been removed from the regulation.

Many comments recommended that, instead of looking to an employer's policies for individuals in similar situations, paid leave and continuation of health insurance should be designated as possible accommodations under the PWFA. The Commission declines to make this change. The current language in the Interpretive Guidance in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation* is the same as under the ADA. The PWFA at 42 U.S.C. 2000gg(7) provides that the term ''reasonable accommodation'' should have the same meaning as in the ADA and the PWFA regulations. Thus, the Commission is maintaining this definition.

Finally, a few comments recommended that a short amount of leave (*e.g.,* 2 days) could be a reasonable accommodation while the covered entity determines what other reasonable accommodations are possible or during the interactive process. The response to this suggestion is discussed in the preamble in section *1636.3(h)* under *Interim Reasonable Accommodations.*

All Services and Programs

The Commission received very limited comments on this section. The Commission has added language in the Interpretive Guidance in section *1636.3(h)* under *All Services and Programs* to clarify that the term ''all services and programs'' includes situations where a qualified employee is traveling for work and may need, for example, accommodations at a different work site.

Interim Reasonable Accommodations

The Commission received numerous comments regarding interim reasonable accommodations, including requests to provide examples of when interim reasonable accommodations are needed, recommendations that the provision be strengthened or made mandatory, discussion of the provision of leave as an interim reasonable accommodation, and suggestions of alternative definitions for ''interim reasonable accommodations.''

Some comments provided helpful real-world examples of when interim reasonable accommodations are needed. For example, one comment stated that after asking for an accommodation, some pregnant employees are required to ''continue to lift, push, and pull heavy objects'' and ''drive when not fit to do so'' in violation of the recommendations of their health care providers as they wait for the decision about their reasonable accommodation from their employer.[144] The same comment noted that some employees have been fired while waiting to hear whether they can receive a reasonable accommodation because the employee cannot do the job without one.[145] Another comment described a situation where an employee was put on leave after asking for a reasonable accommodation because the request occurred on a Friday afternoon, the employee was scheduled to work on Sunday, and the staff to address the provision of reasonable accommodations were not available until the beginning of the next week.[146] A comment from an organization noted that employees call their hotline after weeks of waiting for a response on a request for an accommodation, and during that time ''they must continue to perform duties that put their health or the health of their pregnancy at risk so they can earn a paycheck and maintain their health insurance.'' [147]

The Commission understands the dilemma facing both employers and employees in circumstances where the accommodation is needed immediately but cannot be provided immediately. Requiring an employee to take leave (whether paid or unpaid) in this situation can be harmful to the employee, either because it will require the employee to exhaust their paid leave or because it will require an employee to go without income. In the face of these reasonable reactions to what is, based on comments received, a common situation, the Commission has added information regarding interim reasonable accommodations to the Interpretive Guidance in section *1636.3(h)* under *Interim Reasonable Accommodations.*

An interim reasonable accommodation can be used when there is a delay in providing the reasonable accommodation. For example, an interim reasonable accommodation may be needed when there is a sudden onset of a known limitation under the PWFA, including one that makes it unsafe, risky, or dangerous to perform the normal tasks of the job, when the interactive process is ongoing, when the parties are waiting for a piece of equipment, or when the employee is waiting for the employer's decision on the accommodation request.

Interim reasonable accommodations are not required. However, providing an interim reasonable accommodation is a best practice under the PWFA and may help limit a covered entity's exposure to liability under 42 U.S.C. 2000gg–1(1) and § 1636.4(a)(1) (''An unnecessary delay in providing a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions

[144] Comment EEOC–2023–0004–98479, The Center for WorkLife Law, at 11 (Oct. 10, 2023).

[145] *Id.* at 2.

[146] Comment EEOC–2023–0004–34728, Cloquet Area Fire District (Sept. 12, 2023).

[147] Comment EEOC–2023–0004–98479, The Center for WorkLife Law, at 2 (Oct. 10, 2023).

of a qualified employee may result in a violation of the PWFA if the delay constitutes a failure to provide a reasonable accommodation.''). Furthermore, depending on the circumstances, requiring an employee to take leave as an interim reasonable accommodation may violate 42 U.S.C. 2000gg–2(f). To help illustrate these principles, the Commission has added additional examples regarding this issue to the Interpretive Guidance in section *1636.3(h)* under *Interim Reasonable Accommodations.*

Finally, in response to several comments, the Commission declines to define ''interim reasonable accommodation'' differently than ''reasonable accommodation.'' The term ''reasonable accommodation'' is already defined under the ADA and the PWFA.[148] The Commission declines to create a new definition for such a similar term because it will create confusion.

1636.3(i) Reasonable Accommodation—Examples

The Commission received numerous requests for additional examples and suggested edits for existing examples in this section. In response, the Commission has added a few examples to explain specific points, using a variety of employees to illustrate that the PWFA applies to all types of occupations and professions. Further, the Commission has made minor edits to the language in the examples from the NPRM to standardize the language and format used in these examples. For example, the Commission added ''affected by, or arising out of'' after ''related to,'' added ''pregnancy, childbirth, or related medical conditions,'' and added that the adjustment or change at work is ''due to'' the limitation.

The Commission did not receive comments related to § 1636.3(i)(1) from the NPRM. Comments the Commission received regarding § 1636.3(i)(2) and (4) from the NPRM are discussed below. Comments regarding § 1636.3(i)(3) from the NPRM (addressing leave as a reasonable accommodation) are discussed *supra* in the preamble in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation.* Comments received regarding § 1636.3(i)(5) from the NPRM (regarding the suspension of an essential function(s) as a reasonable accommodation) are discussed *supra* in the preamble in section *1636.3(f)(2) Temporary Suspension of an Essential Function(s)* and *infra* in the preamble in section *1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s).*

1636.3(i)(2) List of Possible Accommodations

The Commission received a few comments recommending that in addition to listing telework in § 1636.3(i)(2), the Commission include ''remote work'' and the ability to change work sites and add that telework is a possible accommodation to avoid heightened health risks, such as from communicable diseases. The Commission has added remote work and change in worksites to the non-exhaustive list of possible accommodations in § 1636.3(i)(2) and to the Interpretive Guidance. The Commission also deleted the word ''additional'' before ''unpaid leave'' in § 1636.3(i)(2) because unpaid leave can be an accommodation whether or not it is additional.[149]

In the Interpretive Guidance in section *1636.3(i) Reasonable Accommodation—Examples,* the Commission added within the possible accommodation of ''frequent breaks'' the situation where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is within close proximity. This concept has also been added to the regulation in § 1636.3(i)(4)(iii). It also is described, in more detail, *infra* in the preamble in section *1636.3(i)(4) Examples of Reasonable Accommodations Related to Lactation* in the Commission's response to the comments for § 1636.3(i)(4).

1636.3(i)(4) Examples of Reasonable Accommodations Related to Lactation

As an initial matter, some comments suggested the Commission include additional conditions related to lactation, such as ''difficulty with attachment'' or ''inability to pump milk,'' in the illustrative, non-exhaustive list of related medical conditions in § 1636.3(b). As explained elsewhere, the Commission has not added or deleted any terms from its non-exhaustive list. The fact that these terms have not been added to the non-exhaustive list in § 1636.3(b) should not be interpreted to deny coverage for those conditions.

With regard to § 1636.3(i)(4), many comments expressed concern over the wording used in proposed § 1636.3(i)(4) which, in describing examples of accommodations related to lactation, referenced the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093). Specifically, comments cautioned that the existing language could inadvertently create the impression that the PUMP Act does not require certain measures to ensure an adequate lactation space. To clarify this matter, the Commission has incorporated the suggested edits, both removing the introductory phrase in § 1636.3(i)(4)(ii) (''Whether the space for lactation is provided under the PUMP Act or paragraph (i)(4)(i) of this section'') and adding the phrase ''shielded from view and free from intrusion,'' which is utilized in the PUMP Act, in an effort to emphasize the PUMP Act's requirements and what can be a reasonable accommodation under the PWFA. For the same reason, the Commission has added the phrase ''a place other than a bathroom,'' also from the PUMP Act, to § 1636.3(i)(4)(ii).

Also related to the PUMP Act, some comments asserted that leave and breaks under the PWFA could improperly exceed those provided under the PUMP Act. The Commission does not agree. The PUMP Act provides covered employees with a reasonable break each time the employee has a need to express milk, for up to 1 year after giving birth.[150] There is not a maximum number of breaks.[151] The frequency, duration, and timing of breaks can vary;[152] thus, there is no defined number of breaks under the PUMP Act.

Another comment suggested that the Commission should not include accommodations related to lactation because the PUMP Act provides for breaks to pump at work and should be the exclusive mechanism for accommodations related to lactation. The Commission declines to make this change. The PUMP Act applies to almost all employees covered under the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 201 *et seq.,* with exemptions created for specifically identified transportation-related jobs, and allows for employers with 50 or fewer employees to seek an exemption based on undue hardship.[153] The PWFA applies to all employers with 15 or more

[148] 29 CFR 1630.2(o) (ADA); § 1636.3(h) (PWFA).

[149] These changes are in addition to the change noted in the preamble in section *1636.3(h)* under *Alleviating Increased Pain or Risk to Health Due to the Known Limitation.*

[150] 29 U.S.C. 218d; U.S. Dep't of Lab., *Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work* (Jan. 2023), *https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers;* U.S. Dep't of Lab., *Field Assistance Bulletin No. 2023–02: Enforcement Protections for Employees to Pump Breast Milk at Wor*k (May 17, 2023), *https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf.*

[151] *See supra* note 150.

[152] *Id.*

[153] *Id.*

employees.[154] Congress passed both laws at the same time and decided which entities would be covered; the Commission has a responsibility to follow the text of the statute it has been charged with enforcing. Furthermore, an employer that is covered under the PWFA but not under the PUMP Act does not automatically have to provide a reasonable accommodation related to pumping; under the PWFA, the covered entity, regardless of size or industry, does not have to provide the accommodation if it causes an undue hardship in the specific situation. Additionally, while the PWFA provides that it does not ''invalidate or limit the powers, remedies, or procedures under any Federal law . . . that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions,'' [155] nothing in the PWFA prohibits it from providing more or additional protections.

Other comments suggested adding a new subsection, § 1636.3(i)(4)(iii), to specify additional examples of reasonable accommodations related to lactation such as modifications that would remove barriers to breastfeeding or pumping and avoid or alleviate lactation-related health complications. The Commission does not find the proposed additions, which reiterate the broader goals of the law, necessary in the list of accommodations. However, the Commission has added language in a new paragraph (i)(4)(iv) to § 1636.3 to clarify that the types of accommodations listed in this section are not the only ones available for lactation.

Some comments urged the Commission to make clear that it could be a violation of the PWFA to ''prohibit an employee from pumping milk in a space where they otherwise have permission to work or to be present'' unless it creates an undue hardship, and that coworker discomfort about being in the same room while an employee is pumping is not a valid ground for failing to provide an accommodation. The Commission is not making this addition. While it may be that the situation described in this comment could be a reasonable accommodation, as set out in § 1636.4(a)(4), an employer has the ultimate discretion in choosing between effective accommodations. The Commission agrees that generally coworker discomfort does not establish undue hardship and has added that point in the Interpretive Guidance in section *1636.3(j)(1) Undue Hardship—In General.*[156]

Another comment suggested that the Commission explicitly state that certain accommodations, such as telework, are not available for lactation. The Commission declines to add which accommodations may cause an undue hardship in a specific situation, as such a determination is fact-specific. Under the PWFA, as under the ADA, employers should conduct an individualized assessment in response to each request for a reasonable accommodation.

Some comments recommended that the Commission also include nursing at work for those circumstances where the employee works in close proximity to their child and can easily nurse during the workday. The Commission agrees that in situations where the regular location of the qualified employee's workplace makes nursing during work hours a possibility because the child is in close proximity, allowing breaks for nursing would be a possible reasonable accommodation (*e.g.,* an employee who regularly works from home and has their child at home or an employee whose child is at a nearby or onsite daycare center). The Commission has added this to the regulation in § 1636.3(i)(4)(iii). The Commission cautions that this provision is intended to address situations where the qualified employee and child are in close proximity in the normal course of business. It is not intended to indicate that there is a right to create proximity to nurse because of an employee's preference. Of course, there may be known limitations that would entitle a qualified employee to the creation of proximity as a reasonable accommodation, absent undue hardship (*e.g.,* a limitation that made pumping difficult or unworkable).

Some comments sought reassurances that lactation accommodations also may include not only breaks to pump, but also refrigeration to store milk. Section 1636.3(i)(4)(ii) specifically references refrigeration for storing milk.

1636.3(j) Undue Hardship and 1636.3(j)(1) Undue Hardship—In General

The Commission did not receive comments regarding § 1636.3(j)(1), which defines ''undue hardship'' using the language from the ADA. The Commission has not made changes to the regulation on this point. Because undue hardship under the PWFA is defined as in the ADA, the Commission has added information from the appendix to 29 CFR part 1630 (Interpretive Guidance on Title I of the Americans With Disabilities Act) regarding undue hardship generally to the PWFA Interpretive Guidance in section *1636.3(j)(1) Undue Hardship—In General* so that information is easily available to covered entities and employees.

1636.3(j)(2) Undue Hardship Factors

The Commission did not receive comments that disagreed with the Commission's use of the ADA's undue hardship factors in the PWFA and has maintained the proposed language in the final regulation.

The Commission received many comments regarding what facts should and should not be considered when an employer is determining undue hardship.

First, the Commission received many comments discussing how previously granted accommodations should affect the undue hardship analysis. Undue hardship is a broad concept in terms of what may go into determining whether a particular reasonable accommodation imposes a significant difficulty or expense. An employer may consider the current impact of cumulative costs or burdens of accommodations that have already been granted to other employees or the same employee when considering whether a new request for the same or similar accommodation imposes an undue hardship. However, as the comments emphasized, and the Commission has stated, ''[g]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' [157] Additionally, in some circumstances, rather than supporting a possible contention of an undue hardship based on cumulative burden, the fact that an employer has provided the same or similar accommodations in the past can weigh against an argument that granting it will impose an undue hardship. Ultimately, whether a particular accommodation will impose an undue hardship for an employer is determined on a case-by-case basis. This information has been added to the Interpretive Guidance in section *1636.3(j)* under *Undue Hardship—Consideration of Prior or Future Accommodations.*

Second, several comments stated that an employer should not be able to rely

[154] 42 U.S.C. 2000gg(2)(A), (B)(1).

[155] 42 U.S.C. 2000gg–5(a)(1).

[156] *See* 29 CFR part 1630, appendix, 1630.15(d).

[157] *Enforcement Guidance on Reasonable Accommodation, supra* note 111, text at n.113.

solely on the fact that an employee previously received an accommodation to assert undue hardship. The Commission agrees and reiterates that although an employer may consider the impact of prior accommodations granted to the employee currently seeking an accommodation, the mere fact that an employee previously received an accommodation or, indeed, several accommodations, does not establish that it would impose an undue hardship on the employer to grant a new accommodation. This information has been added to the Interpretive Guidance in section *1636.3(j)* under *Undue Hardship—Consideration of Prior or Future Accommodations.*

The Commission received several comments regarding whether or how other employees should play a role in the undue hardship determination. The factors considered in the undue hardship analysis under the PWFA mirror those under the ADA. Accordingly, an employer cannot assert undue hardship based on employees' fears or prejudices toward the individual's pregnancy, childbirth, or related medical condition, nor can an undue hardship defense be based on the possibility that granting an accommodation would negatively impact the morale of other employees. Employers, however, may be able to show undue hardship where the provision of an accommodation would be unduly disruptive to other employees' ability to work.[158] This information has been added to the Interpretive Guidance in section *1636.3(j)(1) Undue Hardship—In General.*

A few comments requested more examples of when an employer does meet the burden of showing undue hardship. An additional example has been added in the Interpretive Guidance in section *1636.3(j)(2) Undue Hardship Factors* and the examples from the proposed appendix have been edited to include additional facts to help better explain why the situation creates an undue hardship.

Undue Hardship and Safety

A few comments asked for clarification on which standard applies when an employee requests an accommodation that the covered entity asserts would cause a safety risk to co-workers or clients and whether there is a ''direct threat'' affirmative defense as in the ADA.[159] Congress did not include a ''direct threat'' defense in the PWFA. Thus, as explained in the NPRM, the undue hardship analysis is the controlling framework for evaluating accommodation requests by employees with limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, including with regard to considerations of safety.[160] Additionally, as stated in the NPRM, Title VII's bona fide occupational qualification (BFOQ) standard, rather than the PWFA's undue hardship standard, applies to assertions by employers that employees create a safety risk merely by being pregnant.[161] The Commission has included this information in the Interpretive Guidance in section *1636.3(j)* under *Undue Hardship and Safety.*

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s)

The Commission received numerous comments describing the potential difficulties that employers may face in providing accommodations to employees who temporarily cannot perform one or more essential functions, pointing to specialized functions in certain industries and the burden of training employees. The Commission understands that in certain situations, providing the accommodation of the temporary suspension of an essential function(s) may cause an undue hardship. The difficulties addressed in the comments can be raised under the undue hardship defense and are all part of the individualized assessment under the PWFA. The Commission notes that employees seeking accommodations under the PWFA are not unlike other employees who are temporarily unable to perform one or more essential functions for various reasons and have received job modifications without a significant difficulty imposed on business operations under similar circumstances.

The Commission received a comment suggesting the deletion of § 1636.3(j)(3)(iv) (''Whether the covered entity has provided other employees in similar positions who are unable to perform the essential function(s) of their position with temporary suspensions of essential functions'') because, the comment asserted, it inappropriately imports a ''comparative'' approach into the PWFA, which was enacted in part to address similar challenges experienced under Title VII. In the Interpretive Guidance in section *1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s),* the Commission clarifies that under § 1636.3(j)(3)(iv) an employer not having provided an accommodation previously does not tend to demonstrate that doing so now, for the qualified employee with a known limitation, would cause an undue hardship because making a change to a workplace procedure or rule can itself be a reasonable accommodation. Instead, if this factor is relevant, it will tend to demonstrate the lack of an undue hardship. For example, if an employer has consistently provided light duty assignments to those who are temporarily unable to perform a certain essential function(s) for reasons other than pregnancy, it will be difficult for the employer to prove that it is an undue hardship to provide a light duty assignment to a qualified pregnant employee who is similarly unable to perform such an essential function(s).

Finally, the Commission also has added to the Interpretive Guidance in section *1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s)* that for the undue hardship factor laid out in § 1636.3(j)(3)(ii) (whether there is work for the employee to accomplish), the employer is not required to invent work for an employee.

1636.3(j)(4) Undue Hardship—Predictable Assessments

In response to the Commission's directed question regarding the adoption of the predictable assessment approach and whether the list of accommodations should be modified, a large number of comments agreed with the method, and many suggested expanding the list. Several comments specifically requested the addition of: modifications to uniforms or dress codes; minor physical modifications to a workstation (*e.g.,* a fan or a chair); permitting the use of a workstation closer to a bathroom or lactation space, or farther away from environmental hazards (*e.g.,* heat, fumes, or toxins); use of a closer parking space in an employer-provided parking facility; permitting eating or drinking at a workstation or nearby location where food or drink is not usually permitted; rest breaks as needed; and providing personal protective equipment (*e.g.,* gloves, goggles, earplugs, hardhats, or

[158] *See* 29 CFR part 1630, appendix, 1630.15(d); *Enforcement Guidance on Reasonable Accommodation, supra* note 111, at text after n.117; *cf. Groff* v. *DeJoy,* 600 U.S. 447, 472–73 (2023) (opining that, under the Title VII undue hardship standard, the employer may not justify refusal to accommodate based on other employees' bias or hostility).

[159] *See* 42 U.S.C. 12111(3) (defining ''direct threat''), 12113(b) (providing that the qualification standard can include a condition that a person not pose a direct threat); 29 CFR 1630.2(r)(1) through (4) (outlining factors to be considered in whether an employee poses a direct threat).

[160] 88 FR 54733.

[161] *Id.*

masks). The Commission acknowledges that several of the recommended additions also are common and simple, and employers should be able to provide these, and, in fact, many accommodations under the PWFA, with little difficulty. However, the Commission declines to make these additions to the list of predictable assessments, because they are not the accommodations frequently mentioned in the legislative history, some may not be easily applied across a broad category of jobs or workplaces, others also are provided under other laws and employee protections,[162] and certain modifications are not so commonly needed. This is not to say that such accommodations should not be granted when requested, but simply that the Commission will not categorize them as the type of change that in ''virtually all cases'' is a reasonable accommodation that does not create an undue hardship.

In seeking the inclusion of these accommodations as predictable assessments, some comments asserted that other States and localities do not allow employers to assert undue hardship for some of these specific modifications. The Commission acknowledges the similarities between the PWFA and certain State laws, having referenced them in support of the predictable assessment approach.[163] However, given the differences in State laws on this issue, with some having a version of predictable assessments and others having none, the Commission declines to expand the list of predictable assessments.

Some comments recommended that predictable assessments include, specifically, 16 health care appointments. The comments reasoned that this number represents the typical recommended number of prenatal and postnatal care visits for an uncomplicated pregnancy. The Commission is not adding this to the list of predictable assessments because the Commission acknowledges that the timing of an appointment and the length of an appointment may differ for each employee. The Commission also is concerned that setting a number of appointments could erroneously imply that additional appointments would necessarily create an undue hardship. However, the Commission emphasizes that employers should expect such requests, that such requests are covered by the PWFA, and that granting such requests should be a straightforward process, absent undue hardship.

Another comment suggested that 8 weeks of leave to recover from childbirth be added as a predictable assessment, noting that despite the regularity of such a request, it is routinely rejected by employers. The Commission recognizes it is predictable that pregnant employees will need leave to recover from childbirth. However, given the differences in workplaces and the possibility that the employee has access to leave through the FMLA, State law, or an employer's program, the Commission is not making this change.

Citing the number of pregnancies affected by gestational diabetes, one comment recommended the addition of short breaks to monitor blood glucose levels. As with breaks to hydrate, eat, or use the restroom, the Commission recognizes that these types of breaks should be simple for employers to provide. However, because this is a less universal need and was not repeatedly mentioned in the legislative history of the PWFA, the Commission does not believe it is appropriate to include it in the list of predictable assessments.

The Commission also received numerous comments claiming that the identification of predictable assessments violates the statutory text of the PWFA and is beyond the Commission's authority because, according to these comments, ''predictable assessments'' create a category of ''per se'' reasonable accommodations. Comments also stated that predictable assessments undercut the individualized assessment principles of the ADA, that there are differences among various jobs and workplaces, and that Congress intended for individualized assessments to be used. The Commission disagrees with these comments as they are misreading the NPRM. As stated in the NPRM, ''the adoption of predictable assessments . . . does not change the requirement that, as under the regulation implementing the ADA, employers must conduct an individualized assessment'' and ''[t]he identification of certain modifications as 'predictable assessments' does not alter the definition of undue hardship or deprive a covered entity of the opportunity to bring forward facts to demonstrate a proposed accommodation imposes an undue hardship for its business under its own particular circumstances.'' [164]

In a similar vein, the Commission received comments stating that certain industries would have a more difficult time providing the accommodations that the Commission has identified as predictable assessments. As the Commission has stated, in those industries (as in any others), an employer may assert that the requested accommodation causes an undue hardship.

Some comments suggested the Commission include additional language in § 1636.3(j)(4)(i) to encompass circumstances where it may not be reasonable for the employee to ''carry'' water. The Commission agrees and has added ''keep water near'' to § 1636.3(j)(4)(i). In explaining the predictable assessments in the Interpretive Guidance, the Commission also has clarified that, depending on the worksite, the employee may be able to eat or drink at their workstation without taking a break.

In the regulation, the Commission has removed the following language from the proposed rule (§ 1636.3(j)(4)): ''Although a covered entity must assess on a case-by-case basis whether a requested modification is a reasonable accommodation that would cause an undue hardship . . .''; ''[g]iven the simple and straightforward nature of these modifications, they will, as a factual matter, virtually always be found to be reasonable accommodations that do not impose significant difficulty or expense (*i.e.,* undue hardship)''; and ''[i]t should easily be concluded that the following modifications will virtually always be reasonable accommodations that do not impose an undue hardship.'' While all of these sentences remain true, including this information in the regulation is repetitive and unnecessary. These concepts have been moved to the Interpretive Guidance in section *1636.3(j)(4) Undue Hardship—Predictable Assessments.*

Finally, the Commission made a few minor changes to the language in § 1636.3(j)(4).[165]

Formerly Proposed 1636.3(j)(5) Undue Hardship—Future Accommodations

Several comments recommended that the Commission clarify that the potential for future accommodation requests from other employees cannot serve as a basis for failing to provide an accommodation. The Commission agrees and has added language in the Interpretive Guidance to the effect that an employer may not fail to provide an accommodation based on the

[162] *See, e.g.,* 29 CFR 1910.132(a); U.S. Dep't of Lab., *OSHA Personal Protective Equipment, https://www.osha.gov/personal-protective-equipment/standards* (last visited Mar. 18, 2024); U.S. Dep't of Lab., *OSHA Factsheet—Personal Protective Equipment, https://www.osha.gov/sites/default/files/publications/ppe-factsheet.pdf* (last visited Mar. 18, 2024).

[163] 88 FR 54785–86.

[164] *Id.*

[165] For example, for consistency the Commission added ''as needed'' to § 1636.3(j)(4)(ii) and (iii); removed ''through the workday'' from § 1636.3(j)(4)(i); and added ''to take'' in § 1636.3(j)(4)(ii) and (iv).

possibility—whether speculative or nearly certain—that it will have to provide the accommodation to other employees in the future. Because this point is relevant to how a covered entity should consider other accommodations, it has been added in the Interpretive Guidance in section *1636.3(j)* under *Undue Hardship—Consideration of Prior or Future Accommodations,* which also includes more information about the consideration of prior and future accommodations. Accordingly, § 1636.3(j)(5) of the NPRM has been removed from the regulation.

1636.3(k) Interactive Process

The NPRM largely adopted the explanation of the interactive process in the regulation implementing the ADA.

The Commission has made one change in the regulatory language of § 1636.3(k). The final rule states that the adjustment or change at work must be ''due to the limitation.'' This is intended to clarify that there is a connection between the limitation and the requested adjustment or change at work.

Numerous comments suggested that the Commission highlight that in many instances the interactive process may occur in a very abbreviated form, given that most accommodations employees are likely to seek under the PWFA are simple and easy to provide and have little to no cost to covered entities, and because the temporary nature of pregnancy, childbirth, and related medical conditions makes expediency in responding to and providing requested accommodations crucial.

The Commission, in enforcing the ADA, has acknowledged that in many instances both the need for an accommodation and the accommodation required will be obvious, leaving ''little or no need to engage in any discussion.'' [166] In advising Federal agencies on creating their disability reasonable accommodation procedures, the Commission recommends that they process requests ''in a manner that imposes the fewest burdens on the individuals . . . and permits the most expeditious consideration and delivery of the reasonable accommodation.'' [167] The same is true for the PWFA. Where an employee has requested a simple and easy accommodation under the PWFA, such as using a portable fan in the office, engaging in a lengthy back-and-forth would be unwarranted.

Some comments recommended that the Commission modify its guidance for the interactive process. The modifications, these comments explained, will better ensure that covered entities recognize the differences in the interactive process under the PWFA and the ADA. According to these comments, during the short time the PWFA has been in effect, covered entities have used their ADA policies to process pregnancy-related accommodation requests. Some employers have purportedly required their employees to fill out lengthy forms and medical certifications, which seek unnecessary information, leading to lengthy delays and denials.[168]

The Commission agrees with the suggestions to emphasize that most requests for accommodations under the PWFA can be provided quickly and typically will consist of nothing more than brief conversations or email exchanges and has added language to this effect in the Interpretive Guidance in section *1636.3(k) Interactive Process.* However, the Commission disagrees that this is meaningfully different than the ADA; under both statutes, the interactive process should focus on finding an appropriate reasonable accommodation.

In order to further highlight the flexible, individualized nature of the interactive process, in the Interpretive Guidance in section *1636.3(k) Interactive Process* the Commission has added information about how the process does not have to follow specific steps and has changed the title of the possible steps in the interactive process in the Interpretive Guidance in section *1636.3(k)* to *Recommendations for an Interactive Process,* while maintaining the substance from the ADA guidance. The Commission also has added that information provided by the employee in the interactive process does not need to be in any specific format, include specific words, or be on a specific form.

The Commission received a few comments regarding the omission of the word ''precise'' from the description of the interactive process in the proposed appendix. As set out in § 1636.3(a)(2), limitations may be modest, minor, and/or episodic. A limitation also may be a need or a problem related to maintaining the health of the employee or the health of the pregnancy. A process that tries to determine the ''precise'' limitation is in tension with the idea that limitations can be minor impediments.

Another comment questioned whether the absence of the word ''precise'' limited whether the covered entity could, for example, require information about how many breaks an employee needs and for how long. It does not. The Commission's view is that under such circumstances, the employer could ask such follow-up questions in order to craft an effective accommodation that is not an undue hardship.

One comment suggested that the Commission clarify that to initiate the interactive process the employee does not need to identify what the specific limitation is, but only that they have such a limitation and need an adjustment or change at work. Section 1636.3(h)(2) describes how an employee begins the reasonable accommodation process.

To ensure that employees and covered entities understand that any medical information obtained during the interactive process under the PWFA is subject to the ADA's confidentiality rules and restrictions on disability-related inquiries, the Interpretive Guidance in section *1636.3(k) Interactive Process* includes a brief overview of these topics, with further information provided in the Interpretive Guidance in section *1636.7(a)(1)* under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.* Of particular relevance to the PWFA, that an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information.[169] The ADA requires that employers keep such information confidential and only disclose it within the confines of the ADA's limited disclosure rules.[170]

[166] *Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Question 5.

[167] EEOC, *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation,* Question 7 (2000), *https://www.eeoc.gov/laws/guidance/policy-guidance-executive-order-13164-establishing-procedures-facilitate-provision.*

[168] *See* Comment EEOC–2023–0004–98479, The Center for WorkLife Law, at 23 (Oct. 10, 2023).

[169] 88 FR 54744.

[170] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), (d)(4); EEOC, *Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees Under the ADA,* at text accompanying nn.9–10 (2000) [hereinafter *Enforcement Guidance on Disability-Related Inquiries*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees* (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.''); EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,* at text accompanying n.6 (1995) [hereinafter *Enforcement Guidance: Preemployment Disability-Related Questions*], *https://www.eeoc.gov/laws/*

Similarly, disclosing that an employee is receiving or has requested a reasonable accommodation under the PWFA usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition.[171]

Many comments described the difficulty pregnant employees may experience obtaining appointments with health care providers, especially early in pregnancy. To help address this concern, the Commission has added language to the Interpretive Guidance in section *1636.3(k)* under *Engaging in the Interactive Process*[172] to the effect that when a covered entity is permitted to seek supporting documentation from a health care provider under the parameters outlined in § 1636.3(l), the covered entity should be aware that it may take time for the employee to find a health care provider and provide the documentation. Delay caused by the difficulty faced by an employee in obtaining information from a health care provider in these circumstances should not be considered a withdrawal from or refusal to participate in the interactive process. If there is such a delay, an employer should consider providing an interim reasonable accommodation.

Several comments requested that the Commission specifically address the need for reasonable accommodations in unforeseen, urgent, emergency situations when the employee has not already requested a reasonable accommodation. One comment described instances where employees experienced bleeding or passed out due to their pregnancies and had to immediately leave their worksites to obtain emergency care, only to return to work and find they were charged with violating the covered entities' attendance policy. In response, the Commission has added information and an example in the Interpretive Guidance in section *1636.3(k)* under *Engaging in the Interactive Process.* This example involves a situation where the employee, who has not asked for an accommodation or informed their employer that they are pregnant, experiences an emergency that is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The example explains that by informing the employer that they are experiencing an emergency related to pregnancy, childbirth, or related medical conditions and need leave immediately, the employee has made a request for a reasonable accommodation. The example goes on to explain that, if it is later determined that the employee is entitled to a reasonable accommodation, the employer should not penalize the employee because the emergency required a pause in the interactive process.

In the Interpretive Guidance, the information regarding delay and emergencies explained in the preceding paragraphs has been added to section *1636.3(k)* under the heading formerly titled *Failure to Engage in the Interactive Process.* To reflect these additions, the title of that heading has been changed to *Engaging in the Interactive Process.*

One comment asked that the Commission clarify whether the ''interactive process'' requirements can be met by using software. There are no required steps or methodology for the interactive process; thus, the Commission has not taken a position on whether such a system will meet the requirements of the interactive process. The Commission does remind covered entities that they are responsible for their part of the interactive process, regardless of how they meet that obligation.

A comment requested that the Commission oversee the interactive process between covered entities and employees, suggesting a system of monitoring and evaluation. While the Commission issues guidance, provides technical assistance, and engages in litigation, the Commission is unable to offer the level of monitoring proposed. Generally, the employee and employer are in the best position to understand the limitations, affected job functions, and possible accommodations involved in the interactive process.

Finally, the Commission has included additional examples in the Interpretive Guidance in section *1636.3(k) Interactive Process* to illustrate how accommodations may be granted through the interactive process.

1636.3(l) Limits on Supporting Documentation

The Commission received numerous comments about the NPRM's approach to supporting documentation and the extent to which the final regulation should permit covered entities to seek such documentation in support of an employee's request for a reasonable accommodation under the PWFA. The proposed rule provided that a covered entity could require supporting documentation that is reasonable under the circumstances for the covered entity to determine whether to grant the accommodation. Further, the rule provided that when it was reasonable under the circumstances, the employer could only require reasonable documentation.

1636.3(l)(1) Seeking Supporting Documentation Only When Reasonable Under the Circumstances

Comments and Response to Comments That Were Generally Supportive or Generally Unsupportive of the Commission's Approach

The Commission received many comments that were generally supportive of the approach to documentation set forth in the proposed rule, although most had suggestions for further limiting the ability of employers to seek supporting documentation.

Many comments agreed with the Commission that employees who are pregnant may experience limitations and, therefore, require accommodations before they have had any medical appointments, and that it may be difficult for a pregnant employee to obtain an immediate appointment with a health care provider early in a pregnancy, especially for those living in certain regions of the country where there are limited resources for maternal health. These and other comments also provided numerous additional reasons for limiting the amount of documentation that covered entities may seek under the PWFA, including: the burden and corresponding reduction in quality of care that administrative duties (such as paperwork) place on health care professionals; the possibility that the notes doctors provide are ''overprotective'' and result in a person who wants to work being placed on leave; the costs in time and money employees face when they must obtain medical documentation;[173] the concern that a doctor may feel uncomfortable certifying that a condition is completely due to pregnancy;[174] the fact that these

guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical (''Medical information must be kept confidential.'').

[171] 88 FR 54744.

[172] In the proposed appendix, this heading was entitled ''Failure to Engage in Interactive Process.'' 88 FR 54787.

[173] Some comments that were generally sympathetic to the idea that it is difficult for pregnant employees to obtain supporting documentation in some circumstances argued that rather than limiting employers' ability to seek supporting documentation in those circumstances, employers could provide interim accommodations while waiting for supporting documentation. The Commission agrees providing interim reasonable accommodations is a possibility and has expanded the section regarding interim reasonable accommodations in the Interpretive Guidance in section *1636.3(h)* under *Interim Reasonable Accommodations,* although providing an interim reasonable accommodation is not required.

[174] This concern is misplaced, as the PWFA requires accommodation for physical or mental

Continued

burdens may deter employees who need accommodations from asking for them; and the possibility that employers will not maintain the confidentiality of medical documentation they obtain, among other reasons. These comments agreed with the overall structure of the proposed rule's documentation provision but also offered suggestions for further limiting the circumstances in which documentation could be sought, as explained in more detail below. Some comments, generally supportive of the proposed rule's approach, urged the Commission to ensure that there is a broad understanding among covered entities and employees of the PWFA's rules limiting the ability of covered entities to seek supporting documentation.

Other comments, however, were generally unsupportive of the proposed rule's approach, arguing that before deciding whether to grant requests for reasonable accommodations, employers need to be able to seek supporting documentation beyond what the proposed rule would allow. Such comments expressed concern about employee fraud, including employees who might seek accommodations with no relation to a PWFA-covered limitation.[175] Others said that the proposed rule did not allow employers to request sufficient justification for a requested accommodation and that this aspect of the proposal violated the spirit of mutually beneficial cooperation that the PWFA represents. Concerns about vague requests, employees who did not know what sort of accommodation they needed, and the absence of a concrete rule also were mentioned in these comments.

In drafting the final rule on supporting documentation, the Commission took these comments into consideration, as well as the more specific suggestions discussed below.

Comments and Response to Comments Suggesting That the PWFA's Rule on Supporting Documentation Should Follow the ADA

Some comments that generally were unsupportive of the proposed rule's approach to supporting documentation argued that the PWFA regulation should follow the approach employers use under the ADA. Some argued that this approach should be followed because it provides a familiar bright line that is more useful to employers than a general ''reasonableness'' standard. These comments also asserted that difficulties pregnant employees have obtaining documentation are faced equally by those with disabilities and, therefore, should not be a factor in the drafting of a final rule.

The Commission disagrees with the comments that argued that it automatically can or should apply the ADA's approach to supporting documentation under the PWFA in all circumstances. The ADA's statutory restrictions on disability-related inquiries apply to all disability-related inquiries, whether or not an employee has a disability,[176] including when such inquiries are made in response to a request for an accommodation under the PWFA, as discussed in detail in the Interpretive Guidance in section *1636.7(a)(1)* under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.* These restrictions limit an employer's ability to ask employees questions that are likely to elicit information about a disability to situations when doing so is job-related and consistent with business necessity.[177]

The PWFA does not have a similar statutory provision regarding pregnancy-related inquiries.[178] However, the PWFA does make it unlawful for a covered entity not to make reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship.[179] Adopting a reasonableness standard for when employers can seek supporting documentation to determine coverage and the need for an accommodation ensures that covered entities can meet the statute's requirements without overly broad documentation requests that could result in the failure to provide accommodations that should be granted or could lead to claims of retaliation. Additionally, the Commission concludes that it is critical to limit inquiries and the supporting documentation that a covered entity can seek when an employee requests an accommodation under the PWFA so that covered entities do not obtain sensitive information that they do not need when making employment decisions and employees are not dissuaded from asking for accommodations out of concern that such requests will lead to probing questions unrelated to their ability to do the job. Thus, the Commission has retained the reasonableness standard from the proposed rule.

The Commission notes that the rule it is adopting about seeking supporting documentation for the PWFA is similar to the Commission's guidance regarding the ADA in some ways. The most important similarity is that a covered entity is not required to seek supporting documentation from an employee who requests an accommodation under the PWFA, as is true under the ADA. For example, if an employee, early in their pregnancy, informs the employer that they are pregnant, have morning sickness, and need a later start time, the employer and the employee can discuss what type of schedule changes are needed and implement them. Because of the difficulty employees may face in finding care, the fact that many health care providers will not see employees until later in their pregnancies,[180] and the fact that many accommodations under the PWFA will be simple and temporary, the Commission encourages employers to engage in this simple type of interactive process to determine appropriate accommodations under the PWFA.

The final PWFA rule contains five examples of when it is not reasonable under the circumstances to seek supporting documentation. Two of these examples build on the Commission's ADA policy guidance (§ 1636.3(l)(1)(i) (obvious) and (ii) (known)); and a third example is based on disparate treatment principles that apply equally under the ADA (§ 1636.3(l)(1)(v)) (it would not be reasonable under the circumstances to seek documentation when the requested

conditions ''related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions'' and not that the physical or mental condition solely be due to pregnancy, childbirth, or related medical conditions. 42 U.S.C. 2000gg(4); *see also* section *1636.3(a)(2)* under *Related to, Affected by, or Arising Out of* in the Interpretive Guidance.

[175] Another comment noted, however, that the fact that covered entities are permitted to request supporting documentation ''when necessary'' to determine if a limitation is ''related to, affected by, or arising out of'' pregnancy overcame any concerns that the employer will have to provide an accommodation for a condition not related to a PWFA limitation.

[176] 42 U.S.C. 12112(d). *See also Enforcement Guidance on Disability-Related Inquiries, supra* note 170 (''The ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.'').

[177] 42 U.S.C. 12112(d).

[178] However, in the context of Title VII, the Commission has stated, ''Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.'' *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(3)(b). And, as stated, *supra,* the ADA's restrictions on disability-related inquiries apply to individuals seeking accommodations under the PWFA.

[179] 42 U.S.C. 2000gg–1(1).

[180] 88 FR 54736, 54787.

accommodation is available to employees without PWFA limitations pursuant to a covered entity's policies or practices without submitting supporting documentation.). The two other examples involve pregnancy and predictable assessments, and lactation, nursing, and pumping. They are described in detail below.

Reorganization of § 1636.3(l) and Changes in the Language Describing the Reasonableness Standard

The Commission has made several changes in the regulation for § 1636.3(l).

First, the Commission has changed the language in § 1636.3(l)(1) regarding when it is reasonable under the circumstances from ''reasonable under the circumstances for the covered entity to determine whether to grant the accommodation'' to ''reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.'' The Commission believes that, given the context, ''to determine whether to grant the accommodation'' would be understood to mean ''to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.'' However, the Commission also recognizes that there may be other factors involved in an effort ''to determine whether to grant the accommodation'' that do not involve supporting documentation. Thus, the Commission has changed the language to be more precise.

Second, throughout the regulation and the Interpretive Guidance, references to an employer ''requiring'' documentation in the proposed rule have been changed to an employer ''seeking'' documentation. This change was made to account for situations where an employer's request for supporting documentation is effectively a requirement even if it does not contain the word ''requirement.''

Third, the Commission has moved the information regarding confidentiality from § 1636.3(l)(4) of the proposed regulation to section *1636.7(a)(1)* under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information* in the Interpretive Guidance. The Commission has made this change because the prohibition on disability-related inquiries and the confidentiality provisions that apply to medical information obtained under the PWFA arise from the ADA, not the PWFA, and therefore are enforceable under the ADA, not the PWFA. Accordingly, they are more appropriately addressed in the Interpretive Guidance's discussion of the application of the ADA's rules and exceptions regarding the confidentiality of medical information than in the PWFA regulation itself.

Fourth, the Commission has moved information regarding how documentation requests that violate § 1636.3(l) also may be a violation of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f) (prohibition on retaliation and coercion)) to the Interpretive Guidance in section *1636.5(f)* under *Possible Violations of 42 U.S.C. 2000gg–2(f) (1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information.*

Fifth, the final rule contains a new paragraph (new paragraph (l)(4) of § 1636.3) regarding self-confirmation for the purposes of § 1636.3(l)(1)(i), (iii), and (iv). The NPRM stated that, in certain circumstances, an employer could not request documentation to confirm pregnancy when an employee ''states or confirms'' that they are pregnant.[181] Some comments discussed the question of what kind of confirmation should be allowed and, in particular, when covered entities should be permitted to seek documentation to confirm that an employee is pregnant. Some argued that self-attestation should always suffice, others argued that covered entities should be allowed to seek supporting documentation confirming pregnancy unless the pregnancy is ''obvious,'' while still others discussed the types of tests that should or should not be allowed to confirm pregnancy. As explained in detail below, the final rule provides two circumstances in which covered entities must accept self-confirmation of pregnancy: when the pregnancy is obvious, or when the request for a change at work involves one of the modifications listed under § 1636.3(j)(4) due to pregnancy. As explained in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation,* when the covered entity is permitted to seek confirmation of pregnancy other than through self-confirmation, it may not require a specific test or method.

Additionally, the Commission has included new subsections in the Interpretive Guidance: in section *1636.3(l)* under *Interaction Between the PWFA and the ADA;* and in section *1636.7(a)(1)* under *The PWFA and the ADA.*

Comments and Response to Comments Regarding Examples of When It Is Not Reasonable To Seek Supporting Documentation

As noted above, the NPRM explained that if an employer decided to seek supporting documentation, it was only permitted to do so if it was reasonable under the circumstances in order for the employer to determine whether to grant the accommodation. The NPRM provided four examples of when it is not reasonable under the circumstances.

The Commission received comments seeking additional factual scenarios illustrating circumstances when it would, as well as when it would not, be reasonable under the circumstances to seek documentation. Some of these comments provided suggestions for desired examples. The Commission agrees that further illustrations would be useful and therefore has added further illustrations to the Interpretive Guidance in section *1636.3(l)(1) Seeking Supporting Documentation Only When Reasonable Under the Circumstances.*

Other comments suggested that the final rule should state that covered entities that seek documentation must provide paid leave for the employee to obtain the documentation, as well as cover any costs incurred to obtain it. To the extent that these comments intended to suggest that it would not be reasonable under the circumstances to seek documentation unless the covered entity provides paid leave for the employee to obtain the documentation and covers any costs incurred, the Commission disagrees and declines to adopt this suggestion.

Not Reasonable To Seek Supporting Documentation—Obvious

The first example in the proposed rule of when it would not be reasonable under the circumstances to seek supporting documentation is when: (1) the known limitation and need for reasonable accommodation are obvious; and (2) the employee confirms the obvious limitation and need for reasonable accommodation through self-attestation. This example is retained in the final rule, although the language has been modified to reflect changes in the description of what documentation may be sought.

Thus, the language in the final rule regarding this example has been changed from ''when the known limitation and the need for reasonable accommodation are obvious and the

[181] 88 FR 54737, 54788 (''For example, when an obviously pregnant worker states or confirms they are pregnant and asks for a different size uniform . . . the employer may not require supporting documentation.'').

employee confirms the obvious limitation and need for reasonable accommodation through self-attestation'' to ''[w]hen the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and the adjustment or change at work needed due to the limitation are obvious, and the employee provides self-confirmation as defined in paragraph (l)(4) of this section.'' The Interpretive Guidance for this section, in section *1636.3(l)(1)(i)—Obvious,* has generally remained the same with some minor language edits.

Many comments expressed concerns with the meaning of the word ''obvious.'' Comments noted, among other things, that a rule that envisions employers making decisions based on whether someone is ''obviously'' pregnant will lead employers to subject employees' bodies to invasive scrutiny. This, in turn, might lead employers to unilaterally impose restrictions based on gendered and racialized stereotypes about what pregnant and postpartum people need. Other comments argued that it is irrelevant whether a pregnancy is ''obvious'' because if the individual in question is seeking an accommodation for which the employer is permitted to seek documentation, that documentation will automatically include a confirmation that the person is pregnant. Another comment pointed out that it will be very difficult for covered entities to determine if a pregnancy is ''obvious,'' and that attempting to do so might expose employers to liability if a manager judges incorrectly.

In response to these comments, the Commission first notes that the idea of prohibiting requests for supporting documentation when the condition is ''obvious'' is similar to the Commission's guidance regarding the ADA although, unlike the ADA, the PWFA regulation includes a self-confirmation requirement. The Commission also has used the concept of ''obvious'' previously regarding pregnancy discrimination.[182] An ''obvious'' pregnancy is one where the pregnancy is showing, and onlookers easily notice by observation. Importantly, as several comments noted, not everyone who is pregnant looks the same.

Moreover, the Commission concludes that concerns about this provision encouraging employers to force employees to accept unnecessary accommodations based on stereotypes are misplaced. Whether a pregnancy is obvious will only be relevant after an employee requests a reasonable accommodation. Other parts of the PWFA prohibit employers from requiring employees to accept reasonable accommodations.[183]

The requirement that obviously pregnant employees must self-confirm that they are pregnant (new § 1636.3(l)(4)) is intended to address the concerns expressed by comments about managers being uncertain whether someone is pregnant. Although there may be circumstances in which a pregnant employee asks for an accommodation and considers themselves to be ''obviously'' pregnant, but the employer disagrees and requests supporting documentation, the Commission believes such cases will be rare. Finally, although the Commission understands concerns about an employer's possible scrutiny of an employee's body, it is impractical to suggest that an employer in such circumstances should not consider the obvious physical condition of the employee requesting accommodation and instead seek documentation.

Some comments also requested more details about and examples of what would be considered an ''obvious'' limitation and/or an ''obvious'' need for accommodation (for example, asking when a limitation would be obvious based on something other than physical appearance). These comments suggested, for instance, that if someone self-attested to pregnancy and then was seen frequently vomiting, the limitation (vomiting due to pregnancy) should be considered obvious, and no documentation would be needed because vomiting is a common symptom of pregnancy.

Under these circumstances, the comments suggested, the need for an accommodation of a temporary relocation of a workstation closer to the bathroom also would be obvious. These comments recommended that the Commission, in the final rule, identify the following conditions as ''obvious'': morning sickness, edema, fatigue, back pain, medical visits, lifting restrictions, and time to recover from childbirth, among others. Comments additionally recommended that the final rule make clear that the need for accommodation is obvious when a pregnant employee requests removal from exposure to certain harmful chemicals or infectious diseases.

Under the final rule, the first example of when it is not reasonable under the circumstances for an employer to seek supporting documentation is when the employee's limitation (physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) and the adjustment or change at work that is needed due to the limitation are obvious and the employee confirms the limitation and the adjustment or change at work needed due to the limitation. As stated in the Interpretive Guidance in section *1636.3(l)(1)(i)—Obvious,* the Commission expects this example will usually apply when the employee is obviously pregnant. ''Obvious'' means that the condition is apparent without being mentioned. In terms of pregnancy itself, this may depend on physical appearance, *i.e.,* whether the pregnancy is ''showing.''

In response to comments suggesting that additional circumstances will always fall within the parameters of ''obvious'' limitations and/or ''obvious'' accommodations, the Commission does not have enough information to agree with those comments maintaining, for example, that there should be a nationwide standard establishing that it always is obvious that all pregnant employees need accommodations due to lifting restrictions, avoiding certain chemicals, or back pain, such that it would never be reasonable for employers to seek supporting documentation when someone requests accommodation due to these limitations. Although there may be circumstances under which these and other limitations or accommodations are obvious, when accompanied by self-confirmation, the Commission does not view these sorts of limitations or types of accommodations as ''obvious'' in the way that it is obvious that a pregnant employee late in pregnancy needs a larger uniform or properly fitting safety equipment. Thus, the Commission did not make any changes to the proposed rule based on comments concerning limitations or accommodations that should be considered ''obvious.''

Not Reasonable To Seek Supporting Documentation—Known

Although fewer comments mentioned the proposed rule's second example of when it would not be reasonable for a covered entity to seek documentation in support of a request for PWFA accommodation, some did suggest that the term ''sufficient information'' was too vague and asked if ''information'' was intended to encompass something broader than ''documentation.''

[182] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(1)(a) (discussing the ''obviousness'' of pregnancy and how that can play into a discrimination claim).

[183] 42 U.S.C. 2000gg–1(2); 29 CFR 1636.4(b).

This example is intended to prevent covered entities from seeking supporting documentation unnecessarily. In the NPRM, the Commission explained that information is sufficient if it substantiates that the employee has a known PWFA limitation and needs a change or adjustment at work. The word ''information'' was intentionally used to make clear that it does not have to be documentation from a health care provider but can be information provided by the employee or their representative, such as a self-confirmation of pregnancy, when permitted, or confirmation from the employee that the need, explained by previously submitted documentation, has occurred again. The example provided in one of the comments illustrates the need for this provision—in this example, an employee who had already provided documentation from her health care provider was required to provide a new doctor's note for each absence due to morning sickness, an impossible requirement given that no one would be able to see a doctor every time they were too nauseous to go to work. If an employee already has provided documentation that because of morning sickness they need to use intermittent leave as necessary for the next 2 months, the covered entity may not seek new documentation from a health care provider every time the employee needs to use leave due to morning sickness.

To ensure that this example is not misunderstood to be broader than intended, the Interpretive Guidance makes clear in section *1636.3(l)(1)(ii)—Known* that when it is otherwise reasonable under the circumstances to seek supporting documentation, an employer is not prohibited from doing so simply because the employee has stated that they have a PWFA limitation and need an adjustment or change at work.

The language in the final rule about this example has been changed to follow the language in the final rule regarding the supporting documentation that may be sought and to clarify that the example applies whenever the employer has sufficient information to determine that the employee has a PWFA limitation and needs an adjustment or change at work, regardless of how the employer obtains that information. Thus, the Commission changed ''When the employee or applicant already has provided the covered entity with sufficient information to substantiate that the employee or applicant has a known limitation and that a change or adjustment at work is needed;'' to ''When the employer already has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.'' Additionally in the Interpretive Guidance for this section, the Commission has added how this provision may apply to episodic conditions.

Not Reasonable To Seek Supporting Documentation—Predictable Assessments

The proposed rule provided a third example of when it is not reasonable for an employer to seek supporting documentation: when an employee at any time during their pregnancy states or confirms that they are pregnant and seeks one of the modifications described as ''predictable assessments'' under § 1636.3(j)(4)(i) through (iv).

Many comments suggested that this example be expanded to include modifications beyond those recognized as ''predictable assessments'' under § 1636.3(j)(4)(i) through (iv). Some of these comments argued that the list should be expanded because the principles underlying whether a particular accommodation warrants medical certification differ from concerns related to undue hardship. The Commission declines to expand this example. The recognized ''predictable assessments'' reflect a small set of simple, inexpensive, commonly sought accommodations that are widely known to be needed during an uncomplicated pregnancy, and where documentation would not be easily obtained or necessary. In the Commission's view, the examples suggested for the possible expansion of the rule do not fall within this same category, although the Commission agrees that in some situations the modifications offered in the comments would not require supporting documentation and reminds employers that they are not obligated to seek supporting documentation.[184] Moreover, because the proposed list of accommodations that fit within this example are limited to modifications already singled out in § 1636.3(j)(4), the example is clear and easy to apply.

One comment, focused more on the proposed regulation's discussion of predictable assessments in an undue hardship context, noted that employers should be able to seek documentation to confirm that the requested ''predictable assessments'' modifications are needed due to pregnancy, as opposed to some other reason. The Commission agrees that this example is limited to pregnancy. Thus, under the final rule, the employer is not permitted to seek supporting documentation if the employee asks for one of these modifications due to a physical or mental condition related to, affected by, or arising out of pregnancy (a limitation) and provides self-confirmation as defined in § 1636.3(l)(4).[185]

Not Reasonable To Seek Supporting Documentation—Lactation

The fourth example in the proposed rule regarding when it is not reasonable under the circumstances to seek documentation concerns lactation and pumping. A few comments noted that, as written, the example suggests it is not reasonable to seek additional supporting documentation, as opposed to making clear that no supporting documentation may be requested. The Commission has reworded this example for purposes of clarification, in the final rule, as explained below.

Another comment noted that the example as written was overly broad because it prohibits an employer from asking for documentation anytime the requested accommodation relates to lactation. The comment noted that if, for example, an individual requests to work from home while breastfeeding or requests accommodations due to anxiety over a child's difficulties learning to bottle feed, the employer would be prohibited from seeking supporting documentation regarding such requested accommodations.

The Commission agrees that the language in the proposed rule could be interpreted too broadly. The final rule makes clear that it is not reasonable under the circumstances for a covered entity to seek supporting documentation in response to a request for reasonable accommodations involving lactation and a time and/or place to pump at work or any other modification related to pumping at work. In response to comments raising questions regarding nursing during work hours, the final

[184] The comments suggested the following additions: time off, up to 8 weeks (or 12 weeks in some comments) to recover from childbirth; time off to attend up to 16 health care appointments while pregnant; flexible scheduling or remote work for nausea or bleeding; modifications to uniforms or dress codes; minor physical modifications to the workstation; relocation of the workstation; reprieve from lifting over 20 pounds; and access to a closer parking space, among others.

[185] A minor edit has been made to the final rule to correctly identify the items listed in § 1636.3(j)(4) as ''modifications'' and not ''reasonable accommodations.'' As noted in the rule, these modifications will virtually always be determined to be reasonable accommodations that do not impose an undue hardship.

rule also explains that when the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity, it would not be reasonable to seek supporting documentation in response to a request for reasonable accommodations involving a time to nurse during work hours.[186] This example does not extend, however, to accommodations involving lactation beyond these modifications. Thus, for example, if a lactating employee requests full-time remote work due to a condition that makes pumping difficult, it may be reasonable for the covered entity to seek reasonable documentation about the limitation and need for remote work, although it is not required to do so.

The final rule is, therefore, modified to clarify that when the reasonable accommodation is related to a time and/or place to pump, or any other modification related to pumping at work, and the employee has provided self-confirmation as defined in paragraph (l)(4), it is not reasonable to request supporting documentation. Likewise, it would not be reasonable to seek documentation when the accommodation is related to a time to nurse when the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity and the employee has provided self-confirmation of the fact, as defined in paragraph (l)(4). The Commission has added information regarding nursing during work hours in the Interpretive Guidance in section *1636.3(l)(1)(iv)—Lactation* and made other minor modifications.

Not Reasonable To Seek Supporting Documentation—Employer's Own Policies or Practices (New § 1636.3(l)(1)(v))

The final rule contains a new example of when it is not reasonable under the circumstances for the employer to seek supporting documentation. New § 1636.3(l)(1)(v) states that seeking supporting documentation is not reasonable under the circumstances when the requested modification is one that employees without known limitations under the PWFA would receive pursuant to the employer's policy or practice without submitting supporting documentation. For example, if an employer has a policy or practice of only seeking supporting documentation for the use of leave if the leave is for 3 or more consecutive days, it would not be reasonable for the employer to seek supporting documentation from someone who needs leave due to a known limitation under the PWFA when they request leave for 2 or fewer days.[187] The Commission has added information from this paragraph in the Interpretive Guidance in section *1636.3(l)(1)(v)—Employer's Own Policies or Practices.*

Comments and Response to Comments Regarding Self-Confirmation and Concerns About Fraudulent Requests

Several comments requested that the Commission provide a definition of ''self-attestation.'' Others argued that, when it comes to pregnancy itself, self-attestation should always be sufficient to avoid deterring requests for accommodations, stigmatizing those who need accommodations due to pregnancy, or violating rights to privacy. Yet other comments agreed that self-attestation of pregnancy should usually be sufficient but suggested that the final rule allow requests for documentation when the employer has reason to believe that there is ''abuse.'' Some argued that self-attestation of pregnancy should only be adequate when the pregnancy is obvious and, in all other circumstances, documentation of pregnancy should be required. Still others suggested that, while self-attestation was sufficient to establish pregnancy, employers should develop policies to address situations where they have reason to believe an employee who claimed to be pregnant is not being honest.

The Commission agrees that a definition of ''self-attestation'' is necessary and also has determined that the word ''attestation'' suggests too formal a requirement. Instead, the final rule uses the term ''self-confirmation'' and provides a definition at § 1636.3(l)(4). As explained above, the final rule permits self-confirmation of pregnancy when the pregnancy is obvious and at any stage in a pregnancy when the employee is requesting one of the modifications outlined in § 1636.3(j)(4)(i) through (iv) due to pregnancy. When the reasonable accommodation is related to a time and/or place to pump at work, a time to nurse during work hours (where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity), or any other modification related to pumping at work, the final rule permits self-confirmation of the fact that the employee is pumping at work or nursing during work hours.

In addition to comments arguing that self-confirmation of pregnancy should not be allowed when an employer has ''reason to believe'' there is abuse, several comments expressed fear that limiting an employer's ability to seek supporting documentation will lead to fraudulent requests and prevent employers from punishing those who lie about limitations or the need for accommodations.

In response, the Commission notes that the final regulation permits employers to seek supporting documentation when it is reasonable under the circumstances to determine that the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. Moreover, the PWFA itself does not prohibit employers from taking disciplinary action against those who make false claims about limitations or the need for accommodations. The Commission urges covered entities to follow the advice of the comment proposing that employers should have clear policies in place regarding how to address fraud, dishonesty, and abuse. It is, of course, also the case that an employee may not be punished for seeking an accommodation even if it is ultimately determined that they are not entitled to one under the law.

The Commission declines to implement the suggestion that the final rule include a provision stating it would not violate the PWFA's anti-retaliation and anti-coercion provisions if a covered entity punished someone who falsely claimed to need a reasonable accommodation. The final rule, like the proposed rule, explains the requirements for establishing that a covered entity has retaliated against or coerced someone in violation of the PWFA. Moreover, it would not violate the PWFA to fail to provide an accommodation to an individual who failed to establish they were entitled to one, assuming the covered entity abided by the requirements and prohibitions of the PWFA. Of course, the Commission cautions that neither those seeking

[186] ''Nursing during work hours'' is where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity and could include, for example, when an employee who always teleworks from home has their child at home and takes a break to nurse the child, or when an employee takes a break to travel to a nearby or onsite daycare center to nurse.

[187] Conversely, if regular employer practices would require documentation when the PWFA would not, or would require more documentation than the PWFA would allow, in a situation where the employee is requesting an accommodation under the PWFA, the PWFA restrictions on supporting documentation would apply.

accommodations under the PWFA nor those charged with responding to such requests may lie during their interactions.

Comments and Response to Comments Suggesting Other Frameworks for the Final Rule on Supporting Documentation

Another documentation framework suggested by comments was that covered entities may seek supporting documentation except when: (1) the need for accommodation is obvious; and (2) the covered entity's requirement conflicts with their stated policy on non-pregnancy-related requests for accommodations. Another comment argued that while covered entities should not typically be able to seek supporting documentation, they should be able to do so if someone claims to be pregnant but never gives birth or supplies a birth certificate or is requesting accommodations for fertility treatments.

The Commission declines to adopt either of these suggestions. The first suggestion appears to be a combination of the proposed rule's example of ''obvious'' conditions and an acknowledgment that employers already provide accommodations to employees in certain situations without seeking supporting documentation. The Commission declines to make this change, although the first example of when it would not be reasonable under the circumstances to seek documentation in the final rule is based on the ''obvious'' conditions and accommodations, as explained above.

The Commission declines to make the changes in the other comment because it does not account for many situations, such as where an employer may need details about a lifting restriction or need for remote work during pregnancy or any type of limitation post-partum.

1636.3(l)(2) Reasonable Documentation

The proposed rule explained that when it is reasonable under the circumstances to require supporting documentation to determine whether to grant the accommodation, the covered entity is permitted only to require ''reasonable documentation.'' The proposed rule defined ''reasonable documentation'' as documentation that is sufficient to describe or confirm: (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that an adjustment or change at work is needed.

Many comments argued that the definition of ''reasonable documentation'' should be revised to state that the documentation does not need to identify the nature of, or provide a detailed description of, the physical or mental condition that is the known limitation. These comments suggested that reasonable documentation be limited to documentation that: (1) confirms the individual has a limitation that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and (2) explains that a change at work is needed due to the limitation. Some comments expressed concern about protecting the privacy of employees and urged that ''reasonable documentation'' be limited to the ''minimum information'' necessary to assess the condition's nexus to pregnancy, childbirth, or a related medical condition. The comments noted, for example, that supporting documentation need not state that an employee has to attend a medical appointment related to a miscarriage, but can simply state that the employee needs to attend a medical appointment during work hours due to pregnancy, childbirth, or a related medical condition and thus needs a modified start time on a particular day; or the employee has a prohibition on lifting more than 50 pounds in connection with a condition related to pregnancy and thus needs an accommodation that eliminates the need to lift more than 50 pounds. In support of this suggestion, the comments explained that asking employees to disclose detailed medical information to their employers, especially information related to reproductive and mental health, which can be particularly sensitive or stigmatizing, may deter employees from seeking accommodations.[188] Comments also noted that limiting reasonable documentation to confirming the related medical condition would help protect patient privacy, which the comments said could be especially important for employees obtaining abortions or facing intimate partner violence.

The Commission agrees that protecting patient privacy is an important goal and that covered entities should be limited to seeking the minimum documentation needed to determine if an employee is entitled to a reasonable accommodation under the PWFA. However, the Commission also recognizes that there may be situations when an employer needs documentation to determine whether the employee has a PWFA limitation and the adjustment or change at work is needed due to the limitation.

To take account of these interests, the Commission made several changes to the definition of ''reasonable documentation.''

First, the Commission modified the proposed definition of ''reasonable documentation'' to clarify that reasonable documentation means ''the minimum that is sufficient,'' rather than merely stating that reasonable documentation means documentation that is ''sufficient.''

Second, because all that is required is the minimum documentation that is sufficient, the Commission has changed the language in the regulation to specify that the supporting documentation need only confirm (rather than ''describe or confirm'') the physical or mental condition. The Commission has included the language from § 1636.3(a)(2) in § 1636.3(l)(2)(i) defining a physical or mental condition (*i.e.,* an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself). Finally, in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation,* the Commission has explained that this confirmation can be accomplished through a simple statement and that it does not need to include a diagnosis.

Third, again because all that is required is the minimum documentation that is sufficient, the Commission has changed the language in the regulation to specify that the supporting documentation need only confirm (rather than ''describe or confirm'') that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and has explained in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation* that pregnancy, childbirth, or related medical conditions

[188] Although not directly on point, one comment suggested that allowing employers to request supporting documentation about an employee's anticipated or actual abortion, *i.e.,* information about the specific condition that is the known limitation or the specific related medical condition, would potentially conflict with a proposed rule currently under consideration by the U.S. Department of Health and Human Services concerning the Health Insurance Portability and Accountability Act (HIPAA) and heightened confidentiality requirements for information related to reproductive health care. In response, the Commission notes that HIPAA applies to health care providers, employers are not required to obtain supporting documentation under the PWFA, and any such documentation must be kept confidential, as explained in the Interpretive Guidance in section *1636.7(a)(1)* under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.*

need not be the sole, the original, or a substantial cause of the physical or mental condition given that the statutory language only requires that physical or mental condition be ''related to, affected by, or arising out of'' ''pregnancy, childbirth, or related medical conditions.''

Fourth, the final rule provides that the supporting documentation should describe (rather than ''describe or confirm'') the adjustment or change needed at work and has added that the adjustment or change needed at work must be ''due to the limitation'' in order to ensure that the documentation connects the physical or mental condition with the adjustment or change at work.

In the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation,* the Commission has added information explaining how seeking more documentation than is set out in § 1636.3(l) can violate 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(3)) (if the employer fails to provide the accommodation based on lack of documentation) and how seeking additional documentation or information beyond what is permitted in § 1636.3(l) when an employee requests a reasonable accommodation may violate the PWFA's prohibitions on retaliation in 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).[189]

The Commission also has added examples in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation* to illustrate when documentation from a health care provider is sufficient.

Generally, as explained in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation,* confirming the physical or mental condition requires only a simple statement that the physical or mental condition meets the first part of the definition of ''limitation'' at § 1636.3(a)(2) (*i.e.,* the physical or mental condition is: an impediment or problem, including ones that are modest, minor, or episodic; a need or a problem related to maintaining the health of the employee or the pregnancy; or that the employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself). Because the physical or mental condition can be something like fatigue or vomiting, there is no need for the statement to contain a medical diagnosis. Thus, as set out in the Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation,* documentation is sufficient under § 1636.3(l)(2) even if it does not contain a medical diagnosis, as long as it has a simple statement of the physical or mental condition.

The physical or mental condition must be related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The supporting documentation need not state that the pregnancy, childbirth, or related medical conditions are the sole, the original, or a substantial cause of the physical or mental condition at issue, because the statute only requires that the physical or mental condition be ''related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.'' If relevant, the documentation should include confirmation that the ''related medical condition'' is related to pregnancy or childbirth.

The documentation should describe what adjustment or change at work is needed due to the limitation. The Interpretive Guidance in section *1636.3(l)(2) Reasonable Documentation* provides examples of these.

Other comments pointed out that reasonable documentation should include information about the duration of the limitation. These comments observed that while some limitations may continue for the entire length of a pregnancy, the duration of other limitations, such as a postpartum limitation that requires leave, may be less definite. The comments also noted that the expected duration of the limitation and corresponding accommodation can be a key factor in determining whether the accommodation would impose an undue hardship, or whether an essential function(s) could be performed ''in the near future.'' The Commission generally agrees with this point but concludes that it would be more useful for covered entities to have information about the expected duration of the needed modification, rather than the duration of the limitation itself. The Commission also believes including information about the duration of the modification could address concerns other comments raised about the need for periodic updates of documentation. If, for example, supporting documentation indicates that a pregnant employee would need an hour of leave every morning due to morning sickness for the first 3 months of the pregnancy, the employer would be permitted to request updated documentation at the end of those 3 months if the employee requested that the accommodation continue. Thus, the Interpretive Guidance states that an estimate of the expected duration of the modification may be part of the supporting documentation sought by the employer, if necessary.[190]

Numerous comments argued that covered entities may not require employees to use a specific form for supporting documentation, as long as the necessary information is provided. These and other comments also expressed concern about employers who require employees seeking accommodations under the PWFA to submit specific forms that call for extensive medical information. One comment submitted, as attachments, several examples of forms that employees requesting accommodations under the PWFA have been required to use. These forms require information beyond the description of ''reasonable documentation'' presented in the proposed rule and adopted by this final rule. The forms submitted sought extensive information, including: whether the individual had previously requested an accommodation; validation that the individual could perform a long list of essential functions, irrespective of the accommodation being requested; identification of any diagnoses, impairments, or conditions that might affect the individual's ability to perform essential job functions or major life activities; description of side effects of any treatment received; the length of time the impairment or condition had been treated; the expected duration of each impairment or condition; and whether the health care practitioner considered the condition in question to be a disability. The comments also noted that some covered entities reject supporting documentation based on

[189] The Commission has moved the examples that were in the proposed appendix (formerly Examples #36 and #37) to § 1636.5(f).

[190] The Commission is aware of case law under the ADA indicating that, when determining whether the reasonable accommodation of leave will enable an employee to perform the essential functions of a position ''in the near future,'' the focus should be on the expected duration of the impairment, as opposed to the expected duration of the needed leave. *See, e.g., Punt* v. *Kelly Servs.,* 862 F.3d 1040, 1051 (10th Cir. 2017); *Aubrey* v. *Koppes,* 975 F.3d 995, 1010–11 (10th Cir. 2020); *Herrmann,* 21 F.4th at 676–77. In those cases, courts appear to be concerned about situations where the end of the leave and the ability to return to work are not coterminous. Because many accommodations under the PWFA will be for temporary conditions, the Commission expects that this issue will not arise with frequency. For example, if an employee needs an essential function temporarily suspended until the end of their pregnancy, the end of the suspension and the end of their pregnancy are the same time. The Commission also is concerned that using the duration of the limitation could lead to inaccurate information. An employee may, for example, have a limitation that will last for an entire pregnancy, such as an inability to be around certain chemicals, but only needs a change at work for the 2-month period during which the job in question involves proximity to those chemicals.

technical issues, such as use of the wrong form.

Other comments argued that instead of prohibiting the use of specific forms to request documentation, the final rule should create a PWFA certification form, similar to the FMLA certification form, that covered entities could use to request documentation and that would provide what comments called a ''safe harbor.''

The final rule provides that when a covered entity is permitted to seek supporting documentation under this rule, it may not require that supporting documentation be submitted on a specific form. This is consistent with similar rules under the FMLA [191] and the ADA [192] and recognizes that although employers may seek supporting documentation, they should not burden employees or health care providers with unnecessary technical requirements in their efforts to obtain the information.

Finally, the final rule does not include a ''PWFA certification form.'' Covered entities should comply with the PWFA's rule on supporting documentation by only seeking supporting documentation when it is reasonable under the circumstances and, in those cases, requesting only reasonable documentation, as defined in the final rule. The Commission fears that designing a PWFA certification form will create an assumption that supporting documentation is necessary in every case. It is not, and indeed it is barred in many circumstances. Employers are not required to obtain documentation for any reasonable accommodation under the PWFA and are encouraged to minimize documentation burdens on employees seeking accommodation under the PWFA whenever possible.

The final rule therefore states, at new § 1636.3(l)(2)(i), that when it is reasonable under the circumstances, as established in paragraph (l)(1), to seek supporting documentation, the covered entity is limited to seeking reasonable documentation. Reasonable documentation means the minimum that is sufficient to: (A) confirm the physical or mental condition (*i.e.,* an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself) whether or not such condition meets the definition of disability specified in the ADA; (B) confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together with paragraph (l)(2)(i)(A), ''a limitation''); and (C) describe the adjustment or change at work that is needed due to the limitation.

Furthermore, new § 1636.3(l)(2)(ii) states that covered entities may not require that supporting documentation be submitted on a specific form.

1636.3(l)(3) Limitations on a Covered Entity Seeking Supporting Documentation From a Health Care Provider

The proposed rule explained that if a covered entity decides to seek supporting documentation and meets the requirements set forth in the rule, the covered entity may require that the reasonable documentation come from a health care provider. Comments suggested one additional type of health care provider, an industrial hygienist, and also questioned whether ''doula'' should be included. The Commission has added ''industrial hygienist'' to the list and has moved the reference to ''doula'' to a place on the list closer to health care providers who offer similar services. Many comments also recommended that the Commission affirmatively state that the health care provider could be one that provides services through telehealth; the Commission has made that addition in the regulation. The final rule also slightly reorders the listed health care providers so that those focused on mental health care are listed together, adds ''psychiatrist,'' which was unintentionally left out of the proposed list, and changes the term ''providers'' in ''mental health care providers'' to ''professionals,'' to parallel the term used in the Commission's ADA policy guidance.[193]

Some comments focused on the first part of the proposed rule's list of health care providers, *i.e.,* ''A covered entity may require documentation comes from an appropriate health care provider, in a particular situation,'' and suggested that the words ''appropriate'' and ''in a particular situation'' be removed in the final rule. The comments argued that these words give covered entities unnecessary power over the type of health care provider an employee should visit. The Commission concludes that these qualifiers are unnecessary and that it should be up to the employee seeking care and the health care provider providing care to determine what type of health care provider can best serve the person's needs. The final rule therefore removes these words.

Other comments suggested that the final rule make clear that the treating physician does not need to be the one to provide the reasonable documentation, pointing to privacy concerns in relation to certain kinds of medical care; these comments cited the example of abortion care. The comments stated that a health care provider familiar with the employee's circumstances should be allowed to provide the necessary information even if they are not the person treating the condition in question. As noted above, when an employer is permitted to seek supporting documentation, they are only permitted to seek reasonable documentation, which means the minimum that is sufficient to: (A) confirm the physical or mental condition (*i.e.,* an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself) whether or not such condition meets the definition of disability specified in the ADA; (B) confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together with paragraph (l)(2)(i)(A), ''a limitation''); and (C) describe the adjustment or change at work that is needed due to the limitation. Any health care provider familiar enough with the individual's circumstances to provide the described information may do so under the final rule, whether or not they are treating the individual for the condition at issue.

Comments and Response to Comments Regarding Prohibition on Examinations by Employer's Health Care Provider

The NPRM stated that it is not practical or necessary for a covered entity to request or require that an employee be examined by a health care provider of the covered entity's choosing.

[191] *See* U.S. Dep't of Lab., Wage & Hour Division, *The Employer's Guide to the Family and Medical Leave Act* 32, *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf* (last visited Mar. 18, 2024) (''The employer must accept a complete and sufficient medical certification, regardless of the format. The employer cannot reject a medical certification that contains all the information needed to determine if the leave is FMLA-qualifying.'').

[192] *See Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Question 6 (explaining that employers may only request reasonable documentation).

[193] *See id.*

Most of the comments on this proposal agreed that covered entities should never be able to require individuals requesting accommodation under the PWFA to be examined by a health care provider of the covered entity's choosing. Comments explained that this would cause an unnecessary invasion of privacy, have a chilling effect, burden employees unnecessarily, and cause delay. Some comments noted that such a requirement would have a particularly negative effect on individuals seeking abortion care and women of color who face racism in health care and may be particularly reluctant to go to a new provider selected by their employer. A few comments disagreed with the proposed rule, noting that second opinions should be permitted since they are permitted under the FMLA, that some employees may not have a doctor, and/or that employers who do not want to provide the accommodation supported by the employee's doctor will need to seek the opinion of their own doctor.

The final rule prohibits covered entities from requiring that an employee be examined by a health care provider of the covered entity's choosing. Although such a practice is allowed in certain cases under the ADA and the FMLA, even under those laws the practice is limited.[194] The PWFA covers many common physical or mental conditions for which there will never be a need for a medical diagnosis, and accommodations under the PWFA will usually be temporary. This supports a final rule under the PWFA that prohibits examinations by the employer's health care provider, even in the limited situations in which the practice is permitted under the ADA.

The final rule, for these reasons and to avoid the chilling effect, burdens, and potential delays outlined in the comments, states that a covered entity may not require that the employee seeking the accommodation be examined by a health care provider selected by the covered entity.

1636.3(l)(4) Formerly Proposed Confidentiality/New Final Self-Confirmation of Pregnancy or Lactation

As explained *supra* in the preamble in section *1636.3(l)(1) Seeking Supporting Documentation Only When Reasonable Under the Circumstances,* the final rule at § 1636.3(l)(4) provides a definition for self-confirmation of pregnancy or lactation. The corresponding section in the Interpretive Guidance, *1636.3(l)(4) Self-Confirmation of Pregnancy or Lactation,* explains how this is a simple procedure that can occur in the same conversation where the employee requests an accommodation.

The proposed rule, § 1636.3(l)(4), and the corresponding discussion in the proposed appendix, described the ADA's prohibition on disclosure of confidential medical information, including medical information obtained under the PWFA. Because these legal protections arise from the ADA and not the PWFA, the Commission removed reference to them in the PWFA regulation itself. The relevant protections are now described in the Interpretive Guidance in section *1636.7(a)(1)* under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.* This section explains, as did the NPRM, that while the PWFA does not have its own provision requiring the protection of medical information, employees covered by the PWFA also are covered by the ADA, and, under the ADA, covered entities are required to keep medical information confidential, with limited exceptions.[195] The NPRM also stated that intentional disclosure of medical information obtained through the PWFA's reasonable accommodation process may violate the PWFA's prohibition on retaliation and/or coercion.[196] Information regarding how the disclosure of medical information also may violate the retaliation provision of the PWFA is in the Interpretive Guidance in section *1636.5(f)* under *Possible Violations of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information.*

1636.4 Formerly Proposed Prohibited Practices/New Final Nondiscrimination With Regard to Reasonable Accommodations Related to Pregnancy

The Commission changed the title of § 1636.4 in the regulation and the corresponding section of the Interpretive Guidance to match the title of this section in the statute.

1636.4(a) Failing To Provide Reasonable Accommodation

The Commission did not receive comments suggesting changes to § 1636.4(a). The Commission made only one minor change to that part of the regulation, to change the terminology used there (and throughout the preamble, regulation, and Interpretive Guidance) from ''denial'' of reasonable accommodation to ''failure to provide'' reasonable accommodation. This better reflects the language in 42 U.S.C. 2000gg–1(1), which makes it ''an unlawful employment practice for a covered entity to'' ''not make reasonable accommodations.'' Throughout the preamble, regulation, and the Interpretive Guidance, the Commission uses ''failure to provide a reasonable accommodation'' and ''not make reasonable accommodation'' interchangeably. In § 1636.4(a)(1) through (4) in the regulation, in addition to the changes described below, the Commission has added language to the effect that these sections apply to ''qualified employees'' with ''known limitations related to pregnancy, childbirth, or related medical conditions'' so that they use the same language as 42 U.S.C. 2000gg–1(1) and § 1636.4(a).

1636.4(a)(1) Formerly Proposed Unnecessary Delay in Responding to a Request for Reasonable Accommodation/New Final Unnecessary Delay in Providing a Reasonable Accommodation

The Commission received several comments regarding the importance of making delay in the provision of a reasonable accommodation actionable.

First, numerous comments recommended that the Commission clarify that ''unnecessary delay in responding to the request for a reasonable accommodation'' (the language in § 1636.4(a)(1) in the proposed rule) would cover delay in all parts of the reasonable accommodation process, including delay in responding to the initial request, engaging in the interactive process, or providing the reasonable accommodation. The Commission agrees that the intent of the phrase ''delay in responding to the

[194] Under the FMLA, an employer can only require a second opinion (at the employer's expense) if it has ''reason to doubt the validity of a medical certification.'' 29 CFR 825.307(b). The employer can choose the health care provider to provide the second opinion but generally may not select a health care provider that it employs or contracts with on a regular basis. For the third opinion (also at the employer's expense), if one is sought, the health care provider must be jointly designated or approved by the employer and the employee. 29 CFR 825.307(c). Under the ADA, the practice is allowed only if the individual provides insufficient information from their own health care provider and, even in those circumstances, ADA guidance explains that the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. The ADA also requires the employer to pay all costs associated with the visit and requires that the examination be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. *See Enforcement Guidance on Reasonable Accommodation, supra* note 111, at Question 7.

[195] 88 FR 54738, 54789.

[196] *Id.* at 54744, 54789, 54793.

request for a reasonable accommodation'' encompasses delay in any part of the reasonable accommodation process. To clarify this point, the Commission has changed the language in the rule to ''unnecessary delay in providing a reasonable accommodation,'' has changed the title of this provision in the Interpretive Guidance in section to *1636.4(a)(1) Unnecessary Delay in Providing a Reasonable Accommodation* and has added examples of the different ways this could manifest in the Interpretive Guidance for this section.

Second, one comment recommended clarifying that a delay by a third-party administrator acting for the covered entity is attributable to the covered entity. The Commission agrees and has added that information in the Interpretive Guidance in section *1636.4(a)(1) Unnecessary Delay in Providing a Reasonable Accommodation.*

Third, numerous comments suggested adding that the ''urgency'' of the need for the accommodation be included as a factor, to account for situations where the need for the accommodation is an emergency. The Commission declines to add this as a factor because defining ''urgency'' would be difficult and could lead to unnecessary litigation regarding whether or not something was ''urgent.'' However, the Commission has added information regarding emergencies in the Interpretive Guidance in section *1636.3(k)* under *Engaging in the Interactive Process.*

Numerous comments also suggested removing the factor in paragraph (a)(1)(vi) of the proposed rule (the factor in paragraph (a)(1)(vii) of the final rule), which provides that delay in providing a reasonable accommodation is more likely to be excused where an interim reasonable accommodation is offered and that the interim reasonable accommodation cannot be leave, unless certain circumstances apply. Comments argued that the factor in paragraph (a)(1)(vi) of the proposed rule could encourage covered entities to rely on interim accommodations and engage in delay. The Commission recognizes this risk, but, given the numerous comments that argued in favor of requiring employers to provide interim reasonable accommodations, the Commission believes that creating an incentive for the provision of interim reasonable accommodations is important. Responding to the comments, the Commission has limited the use of leave to excuse an unnecessary delay to the situations where an employee requests or selects leave as an interim reasonable accommodation. The Commission also has removed the sentence, ''[i]f an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused'' from proposed § 1636.4(a)(1)(vi) (now § 1636.4(a)(1)(vii)). The language in § 1636.4(a)(1) stating that these are factors to be considered in determining whether there has been unnecessary delay already explains this concept.

The Commission has included an additional factor for determining whether delay is unnecessary—how long the accommodation may be required. This factor accounts for situations where the accommodation is a short-term matter, and, by unnecessarily delaying the response, the covered entity, in effect, fails to provide the accommodation. This factor is in keeping with the discussion of delay in the NPRM, which noted that ''[g]iven that pregnancy-related limitations are frequently temporary, a delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.'' [197]

1636.4(a)(2) Refusing an Accommodation

The Commission received a few comments regarding § 1636.4(a)(2), which provides that a qualified employee does not have to accept an accommodation. If the employee cannot perform the essential functions of the position without the accommodation, the employee is not qualified. The proposed rule required employers also to consider whether the employee could be qualified with the temporary suspension of an essential function(s). The comments stated that the proposed rule created a situation where the employee could refuse the reasonable accommodation that allowed them to perform the essential functions of the position because the employee would prefer an accommodation that allowed them to suspend an essential function(s) and this, in effect, would remove the employer's ''ultimate discretion'' in choosing between effective accommodations. In order to address this issue, the Commission changed this paragraph in the final regulation so that it does not give the impression that an employee can reject a reasonable accommodation that allows them to do the essential function(s) of their position in order to have an essential function(s) of the position temporarily suspended.

[197] 88 FR 54739, 54789.

1636.4(a)(3) Covered Entity Failing To Provide a Reasonable Accommodation Due to Lack of Supporting Documentation

The Commission has made four changes to this section of the regulation in order to make it align with § 1636.3(l), the provision regarding the limits on supporting documentation, and has reflected these changes in the Interpretive Guidance in section *1636.4(a)(3) Covered Entity Failing To Provide a Reasonable Accommodation Due to Lack of Supporting Documentation.* First, the Commission has added as § 1636.4(a)(3)(i) that the covered entity must have sought the supporting documentation. The Commission has maintained as § 1636.4(a)(3)(ii) that seeking supporting documentation must be reasonable under the circumstances as set out in § 1636.3(l)(1). Second, the Commission has added at § 1636.4(a)(3)(iii) that the supporting documentation sought must be ''reasonable documentation'' as defined by § 1636.3(l)(2). Third, the Commission has added at § 1636.4(a)(3)(iv) that the employer must provide the employee sufficient time to obtain and provide the supporting documentation. Fourth, the Commission has added the word ''unnecessary'' before the word ''delay'' because an employer only has to justify unnecessary delay.

Finally, the Commission has reformatted this section to indicate the different requirements.

1636.4(a)(4) Choosing Among Possible Accommodations

The Commission received several comments about this provision. These comments pointed out that ''similarly situated'' is a term that courts have narrowly construed and that its use here could impede ensuring that employees receive the accommodations that provide equal opportunity. Some comments suggested adding that equal employment opportunity can be determined based on evidence of the opportunities that would have been available to the employee had they not identified a known limitation or sought an accommodation.

The Commission agrees that modifications should be made in this section to protect qualified employees and to minimize the need for litigation. Thus, the regulation provides that the ''average employee'' who is ''similarly situated'' without a known limitation can include the qualified employee themselves, and the Interpretive Guidance in section *1636.4(a)(4) Choosing Among Possible*

Accommodations contains additional information regarding evidence about possible comparators. Other comments suggested adding that the similarly situated employees should be similar in material respects, not all respects; the Commission agrees that this is true for similarly situated employees in general but did not add this concept to the regulation.

The Commission also received some comments recommending the addition of another standard, requiring employers to choose an option that most effectively meets the employee's needs and provides the employee with equal employment opportunity. The Commission declines to make this change. Employers must provide an accommodation that is effective. The employer does not have to provide the ''most effective'' accommodation or the accommodation that is the choice of the qualified employee. The Commission also received a comment recommending that the Commission add a provision to the rule stating that employers may not select any accommodation that negatively affects an employee's terms or conditions of employment at any time. The Commission did not add this because adopting a requirement that employers may not select an accommodation that ''negatively affects'' terms or conditions would be a new standard, and the general concept of this comment is covered by the provision requiring equal employment opportunity.

One comment suggested an employer should provide the employee with a choice of options that are responsive to the employee's needs and allow the employee to choose from the options. This comment asserted that doing so would decrease litigation for the employer. While the Commission agrees that this is a best practice and may help the covered entity avoid litigation, the Commission did not add this idea to the regulation or the Interpretive Guidance.

Finally, the Commission reordered the sentences in this provision in the regulation and removed the phrase ''that do not cause an undue hardship'' from this section of the regulation because it is redundant. The covered entity does not have to provide an accommodation that causes an undue hardship.

1636.4(b) Requiring a Qualified Employee To Accept an Accommodation

The Commission received a few comments regarding this provision. One comment argued that the interactive process is not always necessary. The Commission agrees that for some simple accommodations, the interactive process can be a very quick conversation where the employee provides information to the covered entity and the covered entity provides the accommodation. However, covered entities may not require a qualified employee to accept an accommodation other than one arrived at through the interactive process under 42 U.S.C. 2000gg–1(2). Thus, employers should not provide employees with an accommodation because the covered entity thinks the accommodation is ''obvious.'' Rather, the covered entity should engage the employee in the interactive process, even if it is very abbreviated.

The Commission received a few comments suggesting changes to the description of damages that could be available in Example #39 in the proposed rule. The Commission agrees that the damages suggested by the comments could be available and has made changes to the example, which is now Example #57 in the Interpretive Guidance in section *1636.4(b) Requiring a Qualified Employee To Accept an Accommodation.*

1636.4(c) Denying Opportunities to Qualified Employees

The Commission did not receive comments regarding this provision. The Commission maintained the language from the proposed rule for this provision. The Commission also has made minor changes in the Interpretive Guidance in section *1636.4(c) Denying Opportunities to Qualified Employees* for this provision.

1636.4(d) Requiring a Qualified Employee To Take Leave

The Commission maintained the language from the proposed rule for this provision. The Commission also has made minor changes in the Interpretive Guidance in section *1636.4(d) Requiring a Qualified Employee To Take Leave* for this provision.

Some comments involving this section raised questions about whether an employer may temporarily require the employee to take leave in situations when the employee cannot work without an accommodation. The Commission has responded to these comments in the preamble in section *1636.3(h)* under *Interim Reasonable Accommodations.* Other comments expressed concerns that this provision would prohibit an employee from requesting leave as a reasonable accommodation. As explained in the proposed rule, the proposed appendix, and the Interpretive Guidance in section *1636.4(d) Requiring a Qualified Employee To Take Leave,* this is incorrect—the prohibition on requiring a qualified employee to take leave does not prohibit an employee from requesting leave as a reasonable accommodation.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

The Commission received a few comments regarding the definition of ''adverse action,'' including comments that disagreed with the Commission's definition and instead recommended using the definition of ''adverse employment action''; comments that suggested that the Commission include its proposed definition in the regulation itself; and a few comments agreeing with its definition of ''terms, conditions, or privileges of employment.''

The Commission disagrees that ''adverse action in terms, conditions, or privileges of employment'' should have the same meaning as courts have given the term ''adverse employment action.'' Given the divergent views of the circuits at the time of this writing, adopting the definition of ''adverse employment action'' in interpreting 42 U.S.C. 2000gg–1(5) would lead to different outcomes in different circuits and could reduce protections for employees covered by the PWFA.[198]

The Commission has retained the language in the proposed regulation, as well as the language from the proposed appendix, with minor changes. Specifically, the Commission has removed language from the proposed appendix about this standard not appearing in Title VII or the ADA, and the reference to the basic dictionary definition ''adverse,'' because it has determined that this information is not necessary to the explanation of this provision. The Commission also has reorganized the paragraphs in the Interpretive Guidance in section *1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation* and made a few minor edits to the examples for this section. The Commission has added language to Example #58 in section *1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation* (proposed Example #40) to clarify that when an employee receives leave as a reasonable accommodation, production standards such as sales quotas may need to be

[198] *Compare, e.g., Muldrow* v. *City of St. Louis,* 30 F.4th 680 (8th Cir. 2022) (concluding that a transfer is not an adverse employment action absent materially significant disadvantage), *cert. granted in part,* 143 S. Ct. 2686 (2023), *with Threat* v. *City of Cleveland,* 6 F.4th 672, 678–79 (6th Cir. 2021) (concluding that an ''adverse employment action'' may include shift changes and reassignments).

prorated to ensure that leave is an effective accommodation, as discussed *infra* in the Interpretive Guidance in section *1636.3(h)* under *Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations.*

1636.5 Remedies and Enforcement

Some comments expressed general concerns regarding enforcement, including a concern that employees would find it too difficult to enforce their rights under the law, a suggestion that the Commission find a way to enforce the law quickly, and a recommendation that the Commission create a safe harbor for small businesses that would allow businesses with 15 to 50 employees the opportunity to fix a violation once it was brought to their attention and that would permit a finding of liability only following repeated or willful violations.

The Commission agrees that it is important that employees be able to enforce their rights; to that end, the Commission conducts outreach with employees on a regular basis. The Commission shares the desire for expeditious compliance; this regulation is one step in furtherance of that goal. The Commission conducts significant outreach to small businesses to help them with compliance; employers can obtain more information about these opportunities at: *https://www.eeoc.gov/employers/small-business.* Finally, the Commission does not have the authority to create an exemption for small employers; however, the Commission notes that damages in cases regarding the provision of a reasonable accommodation can be limited by the employer's good-faith efforts.[199]

In the final rule, the Commission has removed section § 1636.5(b) because it applies to employees protected by the Congressional Accountability Act. Throughout this section of this regulation, the Commission has replaced references to ''this section'' with ''the PWFA'' to clarify that the powers, remedies, and procedures referenced in this section are provided by the statute itself.

1636.5(a) Remedies and Enforcement Under Title VII

The final rule at § 1636.5(a) is the same as the proposed rule. The Commission has added information in the Interpretive Guidance in section *1636.5(a) Remedies and Enforcement Under Title VII* to inform employees and covered entities regarding the time limit for filing charges under the PWFA, based on how the Commission enforces other statutes for which it is responsible.

1636.5(e) Remedies and Enforcement Under Section 717 of the Civil Rights Act of 1964

In the Interpretive Guidance in section *1636.5(e) Remedies and Enforcement Under Section 717 of the Civil Rights Act of 1964,* the Commission has added information from the NPRM regarding the application of § 1636.5(e).[200]

Damages

In the Interpretive Guidance in section *1636.5* under *Damages,* the Commission has added information regarding the damages available under the PWFA pursuant to 1977A of the Revised Statutes of the United States, 42 U.S.C. 1981a.

1636.5(f)(1) and (2) Prohibition Against Retaliation

The Commission received some comments regarding the prohibitions on retaliation and coercion.

First, one comment questioned whether the regulation's prohibition of an employer seeking documentation when it is not reasonable to do so would create a new standard for retaliation that does not require intent; it does not. To minimize any misunderstanding and provide a fuller explanation of when going beyond the regulatory limits on seeking supporting documentation set out in § 1636.3(l) may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)), the Commission removed proposed rule § 1636.5(f)(1)(iv) and (v) and proposed rule § 1636.5(f)(2)(iv) and (v) and, instead, explained the interaction between the limitations on supporting documentation and the PWFA's retaliation provision in detail in the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation.*

Second, as part of these changes, the Commission has created a new section in the Interpretive Guidance in section *1636.5(f)* entitled *Possible Violations of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information* and has moved the explanation of how seeking supporting documentation or disclosing medical information may violate 42 U.S.C. 2000gg–2(f) to this section. The Commission also has added an additional example regarding the unauthorized disclosure of medical information to the examples of retaliation in the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation.*

Third, the Commission removed language that a request for a reasonable accommodation constitutes ''protected activity'' in the coercion section of the regulation, at proposed rule § 1636.5(f)(2)(ii), because ''protected activity'' is not a phrase used in the analysis of coercion claims.

The Commission received several comments requesting additional examples involving the prohibition on retaliation. The Commission agrees that more examples could be helpful and has included a few more in the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation,* including some related to requests for supporting documentation. Other comments suggested edits to certain examples in the proposal, and the Commission incorporated some of those modifications. For example, in addition to adding descriptive titles to the examples in this section, the Commission has added facts to certain examples to strengthen the connection between the covered entity's actions and the protected activity. The Commission added explanations to clarify how certain actions that may violate this provision of the PWFA, also may violate 42 U.S.C. 2000gg–1(1) (because these actions may make the accommodation ineffective) and 2000gg–1(5) (prohibiting adverse actions), rather than merely including the relevant statutory citation.

The Commission also has included in the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation* additional information about retaliation and coercion from its *Enforcement Guidance on Retaliation and Related Issues* so that this information is more easily accessible.

One comment requested that information regarding neutral work rules, such as fixed leave policies, be moved from the Interpretive Guidance to the regulation. The Commission declines to make this change but has added examples regarding this type of policy to the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation.*

The Commission received a few comments expressing concern that mission statements, statements regarding religious beliefs of an employer, or statements in employee handbooks would be seen as violating § 1636.5(f)(2). Whether a statement violates 42 U.S.C. 2000gg–2(f)(2) will depend on the language of the statement, but, as the examples provided in the NPRM and the final rule

[199] 42 U.S.C. 2000gg–2(g).

[200] 88 FR 54742.

for this provision show, the making of general statements regarding an employer's mission or religious beliefs is not the type of conduct that the Commission previously has determined would be prohibited by this provision.[201]

Additionally, the Commission made minor changes to § 1636.5(f). The proposed rule at § 1636.5(f)(1) referred to ''employee, applicant, or former employee'' and ''individual'' to refer to this group; the final rule uses only ''employee'' as that is the language in the statute. The removal of the words ''applicant'' and ''former employee'' and ''individual'' is a minor change. The statute at 42 U.S.C. 2000gg(3) provides that ''employee'' in the statute includes ''applicant''; the same is true for the regulation and the Interpretive Guidance. The statute at 42 U.S.C. 2000gg(3)(A) refers to the Title VII definition of employee; that definition includes former employees when relevant.[202] Finally, the proposed rule in § 1636.5(f)(2) used the word ''because''; this has been changed to ''on account of'' to match the statute.

1636.5(g) Limitation on Monetary Damages

Several comments recommended that the Commission clarify that the good faith defense to money damages is limited to damages for a covered entity's failure to make reasonable accommodations under 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)) only. The Commission agrees that this clarification would be helpful and has added it to the Interpretive Guidance in section *1636.5(g) Limitation on Monetary Damages.*

1636.6 Waiver of State Immunity

A few comments recommended that the Commission either exempt State employers from the PWFA or create exceptions in the PWFA for certain State laws to provide States greater protection from the PWFA. The Commission declines to make these changes. The statute at 42 U.S.C. 2000gg–4 provides that ''A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of [the PWFA].'' A decision by the Commission to modify this waiver would be in violation of the statute.[203]

1636.7 Relationship to Other Laws

1636.7(a)(1) Relationship to Other Laws in General

Many comments addressed the PWFA and its relationship to other laws, some suggesting the inclusion of additional laws in the discussion in the Interpretive Guidance and others asking whether accommodations under the PWFA would lead to violations of other laws. The Commission has maintained the rule language from the NPRM and has made changes and additions to the Interpretive Guidance in section *1636.7(a)(1) Relationship to Other Laws in General* in response to the comments. These changes and the Commission's responses to specific comments are discussed below.

Some comments recommended that collective bargaining agreements (CBAs) and workplace safety laws be added to the list of laws in § 1636.7(a)(1), to clarify that the PWFA does not invalidate CBAs or workplace safety laws that provide greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions. The Commission agrees with this suggestion and has added language to this effect in the Interpretive Guidance in section *1636.7(a)(1) Relationship to Other Laws in General.*

Other comments asked how the PWFA will interact with the FMLA. The FMLA provides job-protected unpaid leave for serious health conditions, including pregnancy. As set out in 2000gg–5(a)(1), nothing in the PWFA invalidates or limits the powers, remedies, and procedures under other Federal laws that provide greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions. Thus, the PWFA does not invalidate or limit the rights of employees covered by the FMLA or State versions of it. The Department of Labor's regulations set out how the FMLA interacts with other civil rights laws, including leave as a reasonable accommodation under the ADA.[204]

Some comments asked the Commission whether breaks under the PWFA must be paid, either under the PUMP Act or the FLSA.[205] As the Commission explained in the discussion of reasonable accommodations in the NPRM, ''Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.'' [206]

One comment suggested that the Commission create a safe harbor provision for covered entities similar to one created by the Department of Labor for wage deductions. The PWFA does not provide the Commission with this authority.

The Commission received some comments regarding the requirements for Federal agencies under Executive Order 13164. The Commission will respond to those through its work with Federal agencies.

Comments and Response to Comments Regarding the Relationship With Title VII

The Commission did not receive many comments regarding the discussion in the proposed appendix concerning § 1636.7(a)(1), about the relationship between the PWFA and Title VII. The Commission has maintained the discussion from the proposed appendix with some edits for style and clarity and added it in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and Title VII.*

A few comments questioned whether providing an accommodation under the PWFA would violate Title VII's prohibition on sex discrimination. This issue is discussed in more detail above.[207] The employees covered by the

[201] Certain types of employer statements or policies, of course, may violate 42 U.S.C. 2000gg–2(f). *Cf. EEOC* v. *Morgan Stanley & Co., Inc.,* No. 01–CIV–8421–RMBRLE, 2002 WL 31108179, at *2 (S.D.N.Y. Sept. 20, 2002) (finding that the portion of the employer's code of conduct that required employees to notify the employer before contacting a governmental or regulatory body violated public policy because it chilled employee communications with the EEOC).

[202] *See supra* note 6.

[203] An amendment was introduced and defeated in the Senate that would have eliminated the PWFA's waiver of State immunity. *See Roll Call 415, Bill Number: H.R. 2617,* U.S. Senate (Dec. 22, 2022), *https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00415.htm* (setting out the Senate vote tally for S. Amend. 6569 to S. Amend. 6558 to S. Amend. 6552 to H.R. 2617, Consolidated Appropriations Act, 2023) (40 yeas, 57 nays, 3 not voting); 168 Cong. Rec. S10,070 (daily ed. Dec. 22, 2022) (setting out the Senate vote tally for S. Amend. 6569 to the Pregnant Workers Fairness Act).

[204] *See* 29 CFR 825.702.

[205] *See* U.S. Dep't of Lab., *Field Assistance Bulletin No. 2023–02: Enforcement of Protections for Employees to Pump Breast Milk at Work* (May 17, 2023), *https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf* (discussing compensability of breaks under the FLSA).

[206] 88 FR 54730 n.102, 54781 n.60.

[207] *See supra, Response to Comments Regarding the Commission's Proposed Definition of ''Pregnancy, Childbirth, or Related Medical Conditions'' as Reflected in Statutory Text; see, e.g., Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(C)(3); *Cal. Fed. Sav. & Loan Ass'n,* 479 U.S. at 290 (concluding that the State could require employers to provide up to four months of medical leave to pregnant women where ''[t]he statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical

PWFA also are covered by Title VII. Title VII, as amended by the PDA, provides for accommodations for employees affected by pregnancy, childbirth, or related medical conditions under certain circumstances, even when all employees do not receive the same accommodations.[208] Providing these accommodations under Title VII does not violate Title VII even if they are not provided to all employees; the same is true under the PWFA.

Comments and Response to Comments Regarding the Relationship With the ADA

The Commission received some comments with questions regarding the interaction between the ADA and the PWFA. One comment recommended that the Commission state that if an employee might be covered by both the ADA and the PWFA, an employer should consider the ADA first. The Commission disagrees that it should make this determination or that employers should necessarily consider the ADA first. While it will depend on the specific facts of the situation, generally, when an employee might be covered by both the ADA and the PWFA, an employer's analysis should begin with the PWFA because the definition of ''known limitation'' means that under the PWFA an employer is required to provide reasonable accommodations in situations in which it may not be required to do so under the ADA. This is consistent with 42 U.S.C. 2000gg–5(a)(1), which states that when multiple State or Federal laws provide protection, a covered entity should consider all applicable laws and follow the principles that provide the broadest protections and impose the smallest burden on the employee. This has been added in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA.*

A few comments questioned whether providing an accommodation under the PWFA would result in violations of the ADA if doing so made granting the accommodation to an individual covered by the ADA an undue hardship or because the PWFA provides for accommodations in situations that may not be covered by other laws. As an initial matter, the Commission disagrees that accommodations should be viewed as a zero-sum game. Under both the ADA and the PWFA, an individualized assessment occurs; there is no guarantee that an accommodation for one employee will result in another employee receiving or not receiving one. As data from the Job Accommodation Network show, most accommodations under the ADA are no-cost or low-cost.[209] If there is truly a situation where there are limits—for example, if there are only 10 parking spaces—the employer can provide the accommodation until the limit is reached on a first-come, first-served or another neutral basis. Further, the fact that an employee is able to receive an accommodation under the PWFA that an employee cannot receive under the ADA does not violate the ADA because in that case, the employer is not refusing the accommodation to the person because of their disability. Rather, the employer is complying with its obligations under a different Federal law.

The Commission has provided additional information and examples regarding the interaction between the PWFA and the ADA, in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA,* including examples of that relationship.

Within section *1636.7(a)(1)* of the Interpretive Guidance, as set out below, the Commission has included information about two critical ADA protections that apply to employees covered by the PWFA: the rules that limit covered entities from making disability-related inquiries and requiring medical exams and the rules protecting confidential medical information.[210] The information explains how the ADA's provisions that restrict the ability of employers to make disability-related inquiries interact with the PWFA and how the ADA's rules regarding confidential medical information and restrictions on sharing confidential medical information apply to medical information collected under the PWFA.

Comments and Response to Comments Regarding the Confidentiality of Medical Information

As explained in the NPRM, the PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests under the PWFA. However, applicants, employees, and former employees covered by the PWFA also are covered by the ADA.[211] Under the ADA, covered entities are required to keep medical information of all applicants, employees, and former employees (whether or not those individuals have disabilities) confidential, with limited exceptions.[212] The Commission has long held that these ADA rules on confidentiality apply to all medical information, whether obtained through the ADA process or otherwise; thus this protection applies to medical information obtained under the PWFA, including medical information voluntarily provided and medical information provided as part of the reasonable accommodation process.[213] Moreover, as a practical matter, in many circumstances under the PWFA the medical information obtained by an employer may involve a condition that could be a disability; rather than an employer attempting to parse out whether to keep certain information confidential or not, all medical information should be kept confidential.[214] Additionally, an employer's disclosure of medical information obtained through the PWFA's reasonable accommodation process beyond what is permitted under the ADA may violate the PWFA's prohibition on retaliation.

Many comments expressed support for the proposed rule's position that the ADA rules regarding medical confidentiality apply to medical information obtained by covered entities under the PWFA. Some of these

conditions.''); *Johnson,* 431 F.3d at 328 (''If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.'').

[208] *See, e.g., Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(C)(3); *Young,* 595 U.S. 206.

[209] Job Accommodation Network, *Costs and Benefits of Accommodation* (May 4, 2023) [hereinafter *Costs and Benefits of Accommodation*], *https://askjan.org/topics/costs.cfm.*

[210] The ADA confidentiality rule was included in the NPRM in § 1636.3(l)(4).

[211] *See* 42 U.S.C. 12111(4), (5) (ADA); 42 U.S.C. 2000gg(2)(B)(i), (3) (PWFA).

[212] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), (d)(4); *Enforcement Guidance on Disability-Related Inquiries, supra* note 170, at text accompanying nn.9–10 (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.''); *Enforcement Guidance: Preemployment Disability-Related Questions,* supra note 170, at text accompanying n.6 (''Medical information must be kept confidential.'').

[213] *See supra* note 212. This policy also appears in numerous EEOC technical assistance documents. *See, e.g.,* EEOC, *Visual Disabilities in the Workplace and the Americans with Disabilities Act,* text preceding n.43 (2023), *https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act#q8* (''With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee.'').

[214] Requests for accommodation under the PWFA also may overlap with FMLA issues, and the FMLA requires medical information to be kept confidential as well. 29 CFR 825.500(g).

comments urged the Commission to specifically state in the final rule that employers must store an employee's medical information separate from personnel files and may not share it with anyone other than the supervisor implementing the accommodation. Another comment suggested that the final rule require employers to obtain an employee's written consent before disclosing medical information received under the PWFA in all circumstances. Finally, some comments expressed concern that State law enforcement agencies may seek medical information from covered entities regarding abortion care and requested that the final rule address this issue.

Because these confidentiality provisions arise from a statute other than the PWFA, and the violation of these provisions, if one occurred, would be of the ADA and not the PWFA, the Commission has decided not to include them in the regulation itself. Rather, this information has been included in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA* and under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.*

In response to concerns about State law enforcement agencies seeking medical information related to abortion care from PWFA-covered entities, the Commission reminds employers that the PWFA rules do not require employers to seek supporting documentation regarding requested reasonable accommodations. The Commission further reminds employers that when the employer is permitted to seek supporting documentation, it is limited to the minimum that is sufficient to confirm that the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and describe the adjustment or change at work that is needed due to the limitation. Moreover, as noted above, the ADA's confidentiality provisions and limits on disclosure of medical information, reiterated in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA* and under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information,* apply to medical information, including medical information collected by the employer under the PWFA, and thus the ADA prohibits an employer from releasing medical information except in five specified circumstances.

Further, the Commission has reorganized section *1636.5(f)* in the Interpretive Guidance to highlight the potential retaliation claims that could arise regarding a covered entity seeking or releasing supporting documentation in situations where it would not be permissible under the regulation. These situations are now addressed in the Interpretive Guidance in section *1636.5(f)* under *Possible Violations of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information.*

1636.7(a)(2) Limitations Related to Employer-Sponsored Health Plans

The Commission has not changed the regulation for this provision.

1636.7(b) Rule of Construction

The Commission received thousands of comments supporting the Commission's case-by-case approach to considering employer defenses asserting religious or constitutional considerations. The Commission also received tens of thousands of comments asserting that giving certain accommodations for pregnancy, childbirth, or related medical conditions, such as providing leave for abortion, infertility treatments, or contraception, would infringe upon the employer's religious freedom and therefore the employer should not be required to provide such accommodations. As explained below, employers who assert that the provision of such accommodations infringes upon their religious exercise may assert numerous statutory and constitutional defenses. Because the facts of each case will differ, the Commission will apply these defenses using a case-by-case analysis,[215] using the framework provided here and consistent with the Commission's approach to other statutes that the Commission enforces.[216]

Section 107(b) of the PWFA, codified at 42 U.S.C. 2000gg–5(b), provides a ''rule of construction'' stating that the law is ''subject to the applicability to religious employment'' set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a). The relevant portion of section 702(a) provides that ''[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.'' [217] The final rule reiterates this PWFA statutory language and adds that nothing in the regulation limits the rights of a covered entity under the U.S. Constitution, and nothing in 42 U.S.C. 2000gg–5(b) or the regulation limits the rights of an employee under other civil rights statutes.

Comments Regarding the Rule of Construction

The Commission received comments that expressed a broad range of interpretations of the PWFA's ''rule of construction'' provision in section 107(b). Numerous comments agreed with the Commission's proposed rule to consider the provision's application to employers on a case-by-case basis. Many such comments reasoned that the provision should be interpreted consistent with section 702(a) of the Civil Rights Act of 1964 to avoid confusion regarding its application, especially because the same facts may underlie Title VII and PWFA claims. Those comments further observed that section 702(a) strikes the correct balance between the rights of employees and the rights of employers. Other comments focused on one or more of three of section 107(b)'s components: (1) which entities qualify under the provision; (2) the scope of employment decisions to which the provision applies; and (3) the extent to which the provision limits the application of the PWFA's requirements as to qualifying religious entities. The Commission describes the range of comments received as to each component in turn.

Many comments asserted that section 107(b) covers religious entities only if they are qualifying entities under section 702(a). Conversely, many other comments asserted that section 107(b) should apply more broadly to entities owned and operated by religious employers. A few such comments stated that the provision should assess whether entities qualify under section 702(a) using the definition of a ''religious'' organization articulated in a 2017 Memorandum issued by the U.S. Attorney General.[218] Other comments

[215] *See* EEOC, *Compliance Manual on Religious Discrimination,* (12–I)(C) (2021) [hereinafter *Compliance Manual on Religious Discrimination*], *https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.*

[216] In accordance with the Commission's *Compliance Manual on Religious Discrimination* and the Commission's long-standing polices, the Commission will consider these defenses, when asserted, in all parts of its investigation and enforcement process.

[217] 42 U.S.C. 2000e–1(a).

[218] Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), 82 FR 49668, 49670, 49677 (Oct. 26, 2017) [hereinafter *Attorney General Religious Liberty*

said that the provision should be redefined to include employers that object to accommodations on conscience, moral, ethical, scientific, health or medical, or any other secular grounds.

Comments varied regarding their view of the scope of employment decisions to which section 107(b) applies. Some comments asserted that section 107(b) applies only to hiring and firing coreligionists, and other comments asserted that it applies only to providing PWFA accommodations. By contrast, some comments asserted that the provision broadly covers all aspects of the employment relationship.

Furthermore, comments varied regarding the extent to which section 107(b) limits the application of the PWFA's requirements as to qualifying religious entities. Some comments stated that the provision allows qualifying entities to prefer coreligionists only in providing accommodation but does not otherwise exempt qualifying religious organizations from providing accommodations or permit them not to provide accommodations based on religious beliefs. Such comments noted that Congress demonstrated its intent not to broadly exempt religious employers from PWFA compliance when, prior to the law's passage, it rejected an amendment that would have done so.[219] A few such comments maintained that an overly broad religious exemption would permit employers to impede employees' autonomy over decision-making regarding pregnancy, freedom of religion, and freedom from the religious beliefs of others. Further, some comments asserted that the provision, like section 702(a), does not allow a qualifying entity to discriminate on other protected bases, such as sex. Some comments stated that, in their view, when an employer is a qualifying entity under section 702(a), the employer is exempt from all of Title VII's requirements, and the same rule should apply to the PWFA.

Other comments argued that section 107(b) exempts religious organizations more broadly than section 702(a). Some of these comments stated that limiting the exemption only to allow qualifying organizations to prefer coreligionists is at odds with Title VII's text and *Bostock* v. *Clayton County;*[220] that this reasoning does not follow given that the PWFA does not prohibit religious discrimination; that it ignores the Supreme Court's expressed concerns about such an interpretation; and that it ignores the PWFA's legislative history indicating that Members of Congress were concerned about religious organizations' rights. Such comments therefore concluded that a qualifying organization should be able both to prefer coreligionists and to abstain from making an accommodation that would violate the organization's religion under section 107(b).

Comments urging the Commission to interpret section 107(b) more broadly than section 702(a) recommended that the provision be interpreted consistent with the religious entities provision in Title I of the ADA;[221] those comments asserted that an employer should be permitted to require conformity to its religious tenets but acknowledged that the ADA provision does not allow employers to discriminate on other grounds.

The Commission also received comments that either directly or indirectly responded to five directed questions about how the rule of construction would apply in concrete factual scenarios. These comments offered a few fact patterns and expressed concerns that employers may be required to provide leave for medical procedures to which they have religious objections, and that employers may be liable under the PWFA's retaliation and coercion provisions for objecting to medical procedures for religious reasons. Comments expressed concern that employers would violate the law's coercion provision if they informed their employees of their religious objections to certain medical procedures, or that they would violate the law's retaliation provision if they terminated the employment of an employee who requested or received an accommodation for such a medical procedure.

Response to Comments Regarding the Rule of Construction

The Commission will interpret the applicability of the PWFA's rule of construction provision on a case-by-case basis as it does with section 702(a) of the Civil Rights Act of 1964. The Commission's decision is based on several considerations. First, section 107(b) of the PWFA expressly states that the PWFA is ''subject to the applicability to religious employment'' set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a). Courts and the Commission always have considered defenses raised under section 702(a) on a case-by-case basis.[222] Second, comments suggesting a different approach provided conflicting recommendations and few concrete factual scenarios as to how the provision would apply under these different rules, thereby creating ambiguity and, as detailed below, failing to provide sufficient justification for deviating from the established case-by-case approach. Third, this case-by-case approach will enable employers, employees, the Commission, and courts to consider the circumstances of each case to the fullest extent under both Title VII—should accommodation claims for pregnancy, childbirth, or related medical conditions be raised under that statute—and the PWFA.[223]

The Commission declines to adopt the religious entities provision set forth in Title I of the ADA because the ADA's provision contains an additional clause not found in section 702(a) of the Civil Rights Act, and Congress explicitly referenced section 702(a)—not the ADA religious entities provision—in enacting the PWFA. As stated above, the Commission must rely on the text of the law that Congress enacted.

In support of the idea that the Commission should adopt a broader interpretation of section 107(b) than section 702(a), many comments cited to the legislative history of the PWFA. Although the Commission's interpretation is driven by the statute's text,[224] given the many comments that cited to the legislative history and the comments submitted by legislators, the Commission reviews the legislative

Memorandum], *https://www.justice.gov/opa/press-release/file/1001891/download.*

[219] *See* 168 Cong. Rec. S10,069–70 (daily ed. Dec. 22, 2022) (S. Amend. 6577).

[220] 590 U.S. 644, 682 (2020) (describing section 702(a) of the Civil Rights Act of 1964).

[221] *See* 42 U.S.C. 12113(d).

[222] *See, e.g., Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(1) (stating that whether an organization is covered by section 702 ''depend[s] on the facts''; ''Where the religious organization exemption is asserted by a respondent employer, the Commission will consider the facts on a case-by-case basis; no one factor is dispositive in determining if a covered entity is a religious organization under Title VII's exemption.''); *id.* at n.60 (discussing court decisions when a defendant has asserted section 702(a) as a defense); *Newsome* v. *EEOC,* 301 F.3d 227, 229–30 (5th Cir. 2002) (per curiam) (addressing a case in which EEOC dismissed a charge where the employer offered evidence that it fell under the religious organization exception).

[223] For example, an employee can bring a failure to accommodate claim under 42 U.S.C. 2000gg–1(1); the same facts could be the subject of a discrimination claim under Title VII. *See generally Young,* 575 U.S. 206 (concerning the Title VII claim of a pregnant employee who was denied a light duty position). Likewise, depending on the facts, an employee who was terminated after requesting or using a reasonable accommodation under the PWFA could have a claim under both the PWFA (42 U.S.C. 2000gg–1(5), 2000gg–2(f)) and Title VII for pregnancy discrimination or retaliation.

[224] *See supra* note 67.

history of section 107(b) and responds to these comments.

The PWFA, as it passed the U.S. House of Representatives, did not include the language now contained in section 107(b). The House also had voted against including similar language in section 107(b) in the definition of ''employer.'' [225] In the U.S. Senate, the language now contained in section 107(b) was first offered as an amendment by one of the bill's principal sponsors, Senator William Cassidy.[226] Senator James Lankford then offered a different amendment that would have provided even broader protection for religious organizations using language that differed from both the ultimately enacted language of section 107(b) and Title VII's section 702(a).[227] Senator Cassidy spoke against that broader amendment, stating that language referring to section 702(a) would be broad enough—he noted the initial section 107(b) language ''was drafted by House Republican Virginia Foxx. . . . [and] addresses the issue,'' and asserted that Senator Lankford's amendment ''would increase the likelihood of changing previous [Title VII] jurisprudence.'' [228] Ultimately, the section 107(b) language offered by Senator Cassidy and adopted in the final bill was added to a rule of construction, rather than to the definition of ''employer.'' [229] Prior to the House vote on the final omnibus bill, Representative Jerrold Nadler, the principal sponsor of the PWFA in the House, and Representative Robert Scott, the Chair of the House committee that had jurisdiction over the PWFA, issued statements regarding the interpretation of section 107(b); both statements interpreted the provision's protections differently than Senator Cassidy had interpreted them.[230]

The Commission also reviewed the post-enactment statements of legislators.[231] After enactment, and during this proposed rule's public comment period, Senator Lankford submitted a comment that included a legal analysis of why he believed the language in section 702(a) applied more broadly than hiring and firing.[232] Senator Patricia Murray and Senator Robert Casey both submitted comments that agreed with the Commission's proposed case-by-case approach.[233] Representatives Nadler and Scott also submitted comments; Representative Nadler's comment endorsed the Commission's proposed case-by-case approach and restated the views he had expressed earlier about section 107(b)—namely, that section 107(b) allows religious employers to prefer people who practice their religion in hiring and firing, and in making comparable pregnancy accommodations, but it does not otherwise exempt employers from their obligations under the PWFA to provide reasonable accommodations that do not pose an undue hardship; [234] Representative Scott also endorsed the case-by-case approach.[235]

Taken together, the statements prior to the enactment of the PWFA show that some Members of Congress disagreed about the extent of the protection they were conferring on religious organizations. This does not contradict the Commission's decision to apply section 107(b) on a case-by-case basis; in fact, a case-by-case approach will allow employers, employees, the Commission, and courts to evaluate in concrete situations the way in which section 107(b) should apply.

The Commission has made minor changes to the regulation to clarify the rights of covered entities and employees by providing parallel language in each subsection of § 1636.7(b). Specifically, § 1636.7(b)(1) previously stated: ''Nothing in this provision limits the rights under the U.S. Constitution of a covered entity''; in the final regulation, it states: ''Nothing in 42 U.S.C. 2000gg–5(b) or this part should be interpreted to limit a covered entity's rights under the U.S. Constitution.'' This language now parallels the language in § 1636.7(b)(2) regarding employees' rights.

The Commission's Interpretation of Section 107(b) of the PWFA Applied

Under the Commission's interpretation of section 107(b) of the PWFA, analogous to the Commission's interpretation of section 702(a) of the Civil Rights Act of 1964, an employer meets the definition of a ''religious corporation, association, educational institution, or society'' [236] if its ''purpose and character are primarily religious.'' [237] When a respondent employer asserts that it qualifies as a religious organization under section 107(b), the Commission will use the same factors it uses to make the determination under section 702(a). These factors include, but are not limited to: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with, or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists.[238] No one factor is dispositive in making this determination.

Under the Commission's interpretation of section 107(b), the PWFA does not fully exempt qualifying religious organizations from making reasonable accommodations. This is analogous to section 702(a), which likewise does not operate as a total exemption from Title VII's requirements.

Under section 702(a), for example, qualifying religious organizations are exempt from Title VII's prohibition against discrimination on the basis of religion, but, as U.S. courts of appeals have recognized, qualifying religious organizations are still subject to the law's prohibitions against discrimination on the basis of race, color, sex, and national origin, and they

[225] H.R. Rep. No. 117–27, pt. 1, at 11.

[226] *See* 168 Cong. Rec. S10,063, 10,070–71 (daily ed. Dec. 22, 2022) (S. Amend. 6558).

[227] *See* 168 Cong. Rec. S10,069–70 (daily ed. Dec. 22, 2022) (statement of Sen. James Lankford on S. Amend. 6577).

[228] *Id.* (statement of Sen. William (Bill) Cassidy).

[229] *See* 42 U.S.C. 2000gg–5(b).

[230] *See* 168 Cong. Rec. H10,527–28 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold (Jerry) Nadler); 168 Cong. Rec. E1361–62 (daily ed. Dec. 27, 2022) (statement of Rep. Robert C. (Bobby) Scott).

[231] The post-enactment statements of legislators reflect the personal views of the legislators, not the legislative history of the bill. *See supra* note 92.

[232] Comment EEOC–2023–0004–98436, Sen. James Lankford, 19 U.S. Senators, and 41 Members of Congress (Oct. 10, 2023).

[233] Comment EEOC–2023–0004–98257, Sen. Patricia (Patty) Murray and 24 U.S. Senators (Oct. 10, 2023); Comment EEOC 2023–0004–98384, Sen. Robert P. (Bob) Casey, Jr. (Oct. 10, 2023).

[234] Comment EEOC–2023–0004–98470, Rep. Jerrold (Jerry) Nadler and 82 Members of Congress (Oct. 10, 2023).

[235] Comment EEOC–2023–0004–98339, Rep. Robert C. (Bobby) Scott, Ranking Member of the House Committee on Education and the Workforce (Oct. 10, 2023).

[236] *See* 42 U.S.C. 2000e–1(a).

[237] *See Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(1) & n.58. Because the Commission has already defined the type of employer that is covered by section 702(a), and the PWFA references section 702(a), the Commission is maintaining this definition rather than adopting the language in the *Attorney General Religious Liberty Memorandum, supra* note 218, which does not have the force of law.

[238] *LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217, 226 (3d Cir. 2007); *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(1).

may not engage in related retaliation.[239] If a qualifying religious organization asserts as a defense to a claim under the PWFA that it took the challenged action on the basis of religion and that section 107(b) should apply, the merits of any such asserted defense will therefore be determined on a case-by-case basis consistent with the facts presented and applicable law.

In response to comments that discussed potential religious defenses to the PWFA's requirements, the Commission notes that its statutory authority to investigate alleged unlawful employment practices under the statutes it enforces, including the PWFA, starts only after an aggrieved individual (or a Commissioner) files a charge of discrimination against a specific covered entity.[240] The PWFA does not provide a mechanism for the Commission to provide legally binding responses to employer inquiries about the potential applicability of religious or other defenses before this point. Moreover, the Commission does not believe it is capable of providing such responses in the abstract, in the absence of a concrete factual context presented by a specific charge of discrimination.

In the event that a charge alleging one or more violations of the PWFA [241] is filed against a particular employer, the employer can raise religious and other defenses at any time during the Commission's administrative process [242]—from as early as when the employer first receives a Notice of Charge of Discrimination, pursuant to 42 U.S.C. 2000e–5(b), or even after the EEOC has found reasonable cause and attempted to resolve the matter through conciliation, and is considering potential litigation.[243] Although defenses can be asserted at any time during the EEOC's administrative process, the Commission encourages employers to raise defenses as early as possible after receiving a notice of a charge of discrimination. This will allow the EEOC to promptly consider asserted defense(s) that, if applicable, would result in dismissal of the charge. The Commission will ''take great care'' in evaluating the asserted religious or other defense(s) based on the facts presented and applicable law, regardless of when in the administrative process it is raised.[244]

To further assist employers with potential religious defenses in the context of individual charge investigations, the Commission is enhancing its administrative procedures to provide additional information to facilitate the submission of information regarding potential religious defenses.[245] Specifically, the Commission will revise materials accompanying the Notice of Charge of Discrimination letter and related web pages to identify how employers can raise defenses, including religious defenses, in response to the charge. These updates will be public and viewable by any employer with questions or concerns about how to raise a defense, including a religious defense, in the event that one of its employees files a charge of discrimination. In addition, as it is currently the case, the Notice of Charge will continue to direct employers to the EEOC Respondent Portal, where the employer can view and download the underlying charge of discrimination and submit documents to the EEOC

[239] *See Kennedy* v. *St. Joseph's Ministries, Inc.,* 657 F.3d 189, 192 (4th Cir. 2011) (observing that the exemption ''does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin''); *Boyd* v. *Harding Acad. of Memphis, Inc.,* 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption ''does not . . . exempt religious educational institutions with respect to all discrimination''); *DeMarco* v. *Holy Cross High Sch.,* 4 F.3d 166, 173 (2d Cir. 1993) (''[R]eligious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin.''); *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1166 (4th Cir. 1985) (''While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin. . . .'') (citations omitted); *cf. Garcia* v. *Salvation Army,* 918 F.3d 997, 1004–05, 1011 (9th Cir. 2019) (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by the religious organization exception but adjudicating the disability discrimination claim on the merits). The Commission recognizes that a few judges have recently suggested otherwise. *See Starkey* v. *Roman Catholic Archdiocese of Indianapolis, Inc.,* 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring); *Bear Creek Bible Church* v. *EEOC,* 571 F. Supp. 3d 571, 590–91 (N.D. Tex. 2021). However, this is not a common understanding of Title VII's religious exemption. *See* 88 FR 12852–54.

Typically, courts have accepted an employer's defense under this provision with regard to hiring or firing claims, rather than terms or conditions of employment. *Compare EEOC* v. *Miss. Coll.,* 626 F.2d 477, 485–86 (5th Cir. 1980) (holding that the college may prefer a Baptist to a non-Baptist in hiring), *with EEOC* v. *Fremont Christian Sch.,* 781 F.2d 1362, 1365–66 (9th Cir. 1986) (holding that the section 702(a) exemption did not apply where a religious school provided ''head of household'' health insurance benefits only to single persons and married men).

[240] *See* 42 U.S.C. 2000e–5(b).

[241] The procedures described in this paragraph apply to charges filed under any of the statutes that the Commission enforces.

[242] The Commission's administrative process typically begins when an individual, referred to as the charging party, files a charge of employment discrimination with the Commission. *See* 42 U.S.C. 2000e–5(b). The statute requires that within 10 days of the date a charge is filed, the Commission inform the employer, also referred to as the respondent, that a charge has been filed, *see id.,* and, if appropriate, the parties are invited to participate in the Commission's robust voluntary mediation program. This is an opportunity for the parties to resolve the charge early and before the Commission completes its investigation.

If there is no mediated resolution of the charge, the Commission requests a position statement from the employer and proceeds with the investigation. An employer may raise any applicable defenses in the position statement, including religious defenses. If the Commission determines that further investigation is not warranted, the agency will dismiss the charge and the employee may file suit in Federal court.

Otherwise, the Commission may request additional information from the employer during the investigation. At any point during the investigation, the employer may assert any religious defenses, including under section 107(b). The Commission generally relies on voluntary compliance with its investigation requests, although it does have statutory authority to examine or copy evidence relevant to its investigation. 42 U.S.C. 2000e–8(a); 42 U.S.C. 2000e–9; 29 U.S.C. 161(1)–(2).

Based on the evidence obtained during its investigation, the Commission makes a determination. The agency may dismiss the charge and the employee may file suit in Federal court.

If, however, the Commission makes a determination that there is ''reasonable cause'' to believe discrimination occurred, it endeavors to resolve the charge through conciliation, which is an informal process through which the Commission works with the parties in an attempt to develop an appropriate remedy for the discrimination and reach a final resolution administratively. *See* 42 U.S.C. 2000e–5(b). Participation in conciliation is voluntary, and it is another step in the statutorily-required administrative procedure where an employer may raise section 107(b) defenses. A finding of ''reasonable cause'' does not lead to any fines or penalties for the employer. If conciliation is not successful, the Commission either files a lawsuit or issues the charging party a notice of conciliation failure and closes the charge; under the Commission's current procedure, the notice of conciliation failure includes a notice informing the employee of their right to file suit in Federal court. *See generally* 29 CFR part 1601 (Procedural Regulations).

[243] Indeed, the Commission will consider religious defenses even when they are raised for the first time in the context of an EEOC enforcement action in court. *See, e.g., EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F. Supp. 3d 837, 846 (E.D. Mich. 2016) (noting that the defendant raised its RFRA defense for the first time in answer to the EEOC's amended complaint, which simply corrected a typographical error in the spelling of the aggrieved employee's first name), *rev'd and remanded sub nom. EEOC* v. *R.G. &. G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock* v. *Clayton Cnty., Ga.,* 590 U.S. 644 (2020).

[244] *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(3) (counseling EEOC investigators to ''take great care'' in situations involving the First Amendment and RFRA); *see also Newsome,* 301 F.3d at 229–30 (addressing a case in which the EEOC dismissed a charge where the employer offered evidence that it fell under the religious organization exception).

[245] These enhancements will apply to charges filed under any of the statutes that the EEOC enforces. Covered entities will be able to learn about the PWFA, this rule, and the enhancements outlined in this section at EEOC public outreach events and through the EEOC's website and publications. *See, e.g.,* EEOC, *Outreach, Education & Technical Assistance, https://www.eeoc.gov/outreach-education-technical-assistance* (last visited Mar. 23, 2024).

electronically. The Commission will update the Respondent Portal to encourage an employer to raise in its position statement (or as soon as possible after a charge is filed) any factual or legal defenses it believes apply, including ones based on religion. The Portal also will direct employers to the Commission's website, which provides detailed instructions with examples on what a position statement should include, which will allow the employer to easily inform the Commission of a potential defense, including a religious defense. The Commission will update other resources to provide additional, clear instructions about how the employer should submit factual or legal support for any asserted defenses, including religious ones.

As appropriate, the Commission will resolve the charge based on the information submitted in support of asserted defenses, including religious defenses, in order to minimize the burden on the employer and the charging party. The Commission may contact the employer and/or the charging party if it needs additional information to evaluate the applicability of any asserted defenses. The employer or charging party may also voluntarily submit additional information regarding the applicability of any asserted defenses and may request that the EEOC prioritize the consideration of a particular defense that could be dispositive and obviate the need to investigate the merits of a charge. As with the EEOC's reasonable cause determinations, the EEOC's decision to close or continue investigating a particular charge is not entitled to deference in any subsequent litigation, where a religious or other defense will receive *de novo* review if raised by the employer.[246] Thus, regardless of whether the Commission agrees with the employer's asserted defenses, those defenses are entitled to *de novo* review by a court in any subsequent litigation.

Application of Section 107(b) of the PWFA to Retaliation and Coercion Claims

Some comments specifically raised the application of section 107(b) of the PWFA to claims regarding retaliation and coercion. The Commission's application of section 107(b) in this context will be informed by its application of section 702(a) of the Civil Rights Act of 1964 in analogous circumstances.

The Commission notes that the operative language in the PWFA's retaliation provision is the same as the language in Title VII's retaliation provision, and the Commission will interpret it accordingly.[247]

The coercion provision in the PWFA, 42 U.S.C. 2000gg–2(f)(2), is not in Title VII, but similar language is in the ADA's interference provision, and the Commission will interpret it accordingly.[248] As set out in the Interpretive Guidance in section *1636.5(f)(2)* under *Prohibition Against Coercion,* the purpose of this provision is to ensure that employees are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulation for the essentially identical provision, the rule adds ''harass'' to the list of prohibitions; the inclusion of the term ''harass'' in the regulation is intended to characterize the type of adverse treatment that may in some circumstances violate the interference provision.[249] As with the ADA, the provision does not apply to any and all conduct or statements that an individual finds intimidating; it prohibits only conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights.[250] As the Commission stated in the preamble in section *1636.5(f)* regarding the coercion provision, the Commission received a few comments expressing concern that mission statements, statements regarding religious beliefs of an employer, or statements in employee handbooks would be seen as violating § 1636.5(f)(2). Whether a statement violates 42 U.S.C. 2000gg–2 (§ 1636.5(f)(2)) will depend on the language of the statement, but, as the examples provided in the NPRM and in the Interpretive Guidance in section *1636.5(f)(2) Prohibition Against Coercion* show, the making of general statements regarding an employer's mission or religious beliefs is not the type of conduct that the Commission previously has determined would be prohibited by this provision.

If a claim is raised regarding retaliation or coercion against a religious employer, the Commission will apply the same type of case-by-case analysis it applies to other PWFA and Title VII claims.

Additional Potential Defenses to the PWFA for Covered Entities

Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) provides that the ''[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,'' except when application of the burden to the person ''is in furtherance of a compelling governmental interest'' and ''is the least restrictive means of furthering that compelling governmental interest.'' [251] Nondiscrimination laws and policies have been found to serve a compelling governmental interest, including where the Commission has sought to enforce Title VII.[252] As stated in the NPRM, the Commission will carefully consider these matters, analyzing RFRA defenses to claims of discrimination on a case-by-case basis.[253]

[246] *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 60 (1974) (providing that private-sector employees have a right to a trial *de novo* for consideration of their Title VII claims).

[247] 42 U.S.C. 2000gg–2(f)(1) (PWFA); 42 U.S.C. 2000e–3(a) (Title VII).

[248] 42 U.S.C. 2000gg–2(f)(2) (PWFA); 42 U.S.C. 12203(b) (ADA).

[249] *See* 29 CFR 1630.12(b); *Enforcement Guidance on Retaliation and Related Issues,* at (III) (stating, with regard to the ADA, that ''[t]he statute, regulations, and court decisions have not separately defined the terms 'coerce,' 'intimidate,' 'threaten,' and 'interfere.' Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.'') (2016) [hereinafter *Enforcement Guidance on Retaliation*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.*

[250] *See Enforcement Guidance on Retaliation, supra* note 249, at (III).

[251] 42 U.S.C. 2000bb–1(a), (b). If an employer raises RFRA as a defense to the Government's enforcement of a law and meets its burden of showing that the law substantially burdens its religious exercise, the burden then shifts to the Government to show that the challenged law furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, as applied to ''the particular claimant whose sincere exercise of religion is being substantially burdened.'' *See Holt* v. *Hobbs,* 574 U.S. 352, 362–63 (2015) (quoting *Burwell* v. *Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726 (2014)) (internal citations and quotation marks omitted).

[252] *See, e.g., Harris Funeral Homes,* 884 F.3d at 581 (''EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest.''); *Hsu* v. *Roslyn Union Free Sch. Dist. No. 3,* 876 F. Supp. 445, 463 (E.D.N.Y. 1995) (concluding that a school district's policy was justified by its ''compelling interest in eliminating and preventing discrimination''), *aff'd in part, rev'd in part on other grounds,* 85 F.3d 839 (2d Cir. 1996). *But cf. Braidwood Mgmt., Inc.* v. *EEOC,* 70 F.4th 914, 939–40 (5th Cir. 2023) (''Even if there is a compelling interest as a categorical matter, there may not be a compelling interest in prohibiting all instances of discrimination. . . . [EEOC] does not show a compelling interest in denying Braidwood, individually, an exemption.'').

[253] *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(3) (counseling EEOC investigators to ''take great care'' in situations involving the First Amendment and RFRA); *see also Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 591 U.S. __, 140 S. Ct. 2367, 2383 (2020) (''[T]he [government] must accept the sincerely held complicity-based objections of religious entities.'').

Comments Related to RFRA

Some comments agreed with the Commission that RFRA may be a defense to PWFA claims brought by the Commission. Some comments asserted that being required to provide accommodations, absent undue hardship, for certain health care services to which employers may object for religious reasons—such as abortion, IVF, surrogacy, contraception, and sterilization—violates RFRA. These comments argued that being required to provide a workplace accommodation to receive these services would substantially burden some employers' ability to exercise their religious beliefs.

The Commission received several comments stating that the PWFA proposed regulation would impose a substantial burden on employers' religious exercise and that the Commission lacks a compelling governmental interest in enforcing the statute, as implemented by the regulation. In support, comments asserted that: in the Title VII context, the Federal Government must demonstrate a very specific compelling interest when requiring a religious organization to act contrary to its understanding of sex; strict scrutiny applies when there is a threat to religious freedom by the Federal Government; the Commission should acknowledge that the PWFA regulation would substantially burden employers' religious exercise; the Commission should offer its analysis of existing case law and state whether it believes it could ever have a compelling interest in requiring an objecting religious employer to violate its religious convictions regarding abortion; the Commission's case-by-case view does not comport with Title VII's definition of religion, which includes all aspects of religious observance and practice as well as belief; and the Commission does not have a compelling interest in denying an exception under the PWFA to a religious employer because that would force religious parties to violate their sincerely held religious beliefs.

Many comments addressed the application of RFRA in lawsuits that do not involve the Government. These comments asserted that: because the Commission says RFRA may not be an applicable defense in some cases and is no defense at all to private suits,[254] the Commission needs to clarify how its RFRA process will operate; RFRA should be available in all cases, including all cases where the Government substantially burdens religious exercise through the implementation of Federal law, regardless of whether the Government is a party to the lawsuit; if RFRA is not available in cases in which the Government is not a party, then the Commission could decline to bring a lawsuit where a religious employer could have brought a successful RFRA defense, and the employer would lose its rights to religious exercise; and if a RFRA defense only is available if the Government is a party to the lawsuit, the Commission should describe the steps it will take to ensure it does not intentionally avoid involving itself in litigation with the intent of preventing the employer from raising RFRA as a defense.

The Commission also received comments stating that the Commission must conduct an individualized review of any defense raised under RFRA and ensure that there is a sufficiently strong nexus between the asserted burden and a religious exercise, the religious exercise is based on sincerely held religious beliefs, the burden is substantial, and the requested religious exception is tailored to address the burden. Further, comments asserted that the Commission must conduct an Establishment Clause analysis of any proposed exception.

Response to Comments Related to RFRA

As the Supreme Court has recognized, RFRA requires a fact-sensitive, case-by-case analysis of burdens and interests.[255] The Commission takes the protections of RFRA seriously and has instructed its staff to use ''great care in situations involving both (a) the statutory rights of employees to be free from discrimination at work, and (b) the rights of employers under the First Amendment and RFRA.'' [256] Consistent with RFRA, as part of that analysis, the Commission will ensure when considering the application of any RFRA defense raised that it assesses whether any religious burden imposed on the employer is substantial and whether enforcement is the least restrictive means of furthering a compelling governmental interest, as applied to that employer. It will further analyze any defense to ensure that any limitation on enforcement is constitutionally permissible under the Establishment Clause.[257]

Here, the Commission generally explains its understanding of the requirements of RFRA and provides some information regarding how RFRA may apply in the context of the PWFA. As stated above, RFRA requires a fact-specific analysis. Thus, in a specific situation, the information provided here may or may not apply.[258]

Although RFRA applies to enforcement by the Government, in order to inform the Commission of possible RFRA defenses and reasons the Government should not bring an enforcement action, an employer may raise a RFRA defense at any point during the Commission's administrative process. Assuming the employer asserted a RFRA defense based on a sincerely held religious belief, the Commission would first assess whether, were the Government to bring a lawsuit to enforce the PWFA against the employer, that enforcement would impose a substantial burden on the employer's religious exercise.[259] The Commission would consider a variety of factors in making that assessment.[260]

[254] *See, e.g., Listecki* v. *Off. Comm. of Unsecured Creditors,* 780 F.3d 731, 736–37 (7th Cir. 2015); *Gen. Conf. Corp. of Seventh-Day Adventists* v. *McGill,* 617 F.3d 402, 409–12 (6th Cir. 2010). The Second Circuit has held otherwise in the ADEA context, *Hankins* v. *Lyght,* 441 F.3d 96, 103–04 (2d Cir. 2006) (holding that an employer could raise RFRA as a defense to an employee's Age Discrimination in Employment Act (ADEA) claim because the ADEA is enforceable both by the EEOC and private litigants), but the Second Circuit has questioned the correctness of *Hankins* given the text of RFRA, *Rweyemamu* v. *Cote,* 520 F.3d 198, 203 & n.2 (2d Cir. 2008).

[255] *See, e.g., Gonzales* v. *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 430–31 (2006) (observing that, when applying RFRA, courts look ''beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants''); *cf. Ramirez* v. *Collier,* 595 U.S. 411, 433 (2022) (holding that the Religious Land Use and Institutionalized Persons Act, which applies RFRA's test for religious defenses in the prison context, ''requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened' '' (quoting *Holt,* 574 U.S. at 363)).

[256] *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(3).

[257] *See infra* in the preamble in section *1636.7* under *Response to Comments Related to First Amendment Establishment Clause Considerations.*

[258] Initially, the Commission notes that for a RFRA defense to arise in litigation brought by the Commission under the PWFA, there would first have to be a charge of discrimination filed where the employer refused to provide an accommodation based on its religious exercise. Then, prior to filing an enforcement action in court, the Commission would have to investigate the charge, find reasonable cause, and decide to bring litigation. At any point during that administrative process, the employer could assert a RFRA defense.

[259] *See Harris Funeral Homes,* 884 F.3d at 587 (''Under *Holt* v. *Hobbs* . . . a government action that puts a religious practitioner to the choice of engaging in conduct that seriously violates his religious beliefs or facing serious consequences constitutes a substantial burden for the purposes of RFRA.'') (internal citations, quotation marks, and alterations omitted).

[260] *See, e.g., Hobby Lobby,* 573 U.S. at 720–26 (finding that a contraceptive mandate imposed a substantial burden on religious beliefs by forcing employers to choose between providing coverage or

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The Commission also would consider whether, as applied in the specific case, filing a PWFA enforcement lawsuit would further the Government's compelling interest,[261] including as expressed by Congress.[262]

Finally, the Commission disagrees with comments stating that the Commission must file suit against those employers the Commission believes have a valid RFRA defense so that the covered entities may avoid liability by successfully proving their RFRA defense in court. Imposing such a requirement would infringe on the executive branch's Article II authority to determine which enforcement actions to bring, and the Commission will not interpret the PWFA to impose any unconstitutional requirements.[263] The Commission concludes that the better approach to situations in which it agrees with employers regarding their RFRA defenses raised during the administrative process is to refrain from bringing an enforcement action.[264]

Constitutional Considerations

The Ministerial Exception

As set out in the NPRM, the Supreme Court has recognized a ministerial exception, derived from the religion clauses of the First Amendment, which may provide an affirmative defense to an otherwise cognizable claim of a certain category of employees under certain anti-discrimination laws, including the PWFA. Under the ministerial exception, a religious organization may select those who will ''personify its beliefs,'' ''shape its own faith and mission,'' or ''minister to the faithful.'' [265] The exception applies to discrimination claims involving the selection, supervision, and removal by a religious institution of employees who perform vital religious duties at the core of the mission of the religious institution.[266]

Comments Regarding the Ministerial Exception

A few comments requested that the Commission state or clarify the scope of the First Amendment ''ministerial exception'' in the final rule, including by: adding language from *Our Lady of Guadalupe School* v. *Morrissey-Berru* to the rule; [267] stating that the exception bars all PWFA claims for qualifying ministerial employees; or stating that the PWFA covers a religious entity's non-ministerial employees.

Response to Comments Regarding the Ministerial Exception

The Commission declines to make changes regarding its interpretation of the ministerial exception, as the Commission's position is consistent with the relevant Supreme Court case law and reflects the policies set forth in this preamble. The Commission will apply the exception on a case-by-case basis in light of the facts,[268] and in determining whether the exception applies to a claim, the Commission follows the Supreme Court's reasoning in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC,*[269] *Our Lady of Guadalupe School* v. *Morrissey-Berru*,[270] and other applicable decisions, reviewing the factors set out by the Court. For example, if a religious school instructor employed by the Catholic Church as a Catechist (typically the type of teacher who performs vital religious duties) [271] asks her employer for time to attend prenatal appointments and the employer refuses to provide the leave because the teacher is pregnant but not married, and raises the ministerial exception as a defense to the employee's charge of discrimination, the Commission (after gathering relevant facts about the applicability of that defense) will likely apply the ministerial exception and find that the employee is not entitled to the requested accommodation. In making such a determination, the Commission will ''take all relevant circumstances into account'' and determine whether the ''particular position implicate[s] the fundamental purpose of the exception.'' [272]

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paying ''an enormous sum of money—as much as $475 million per year'' if they did not); *Harris Funeral Homes,* 884 F.3d at 586–90 (holding that the employer's religious exercise would not be substantially burdened by continuing to employ a transgender worker); *Braidwood Mgmt.,* 70 F.4th at 938 (finding a substantial burden by being forced to employ individuals whose conduct violates ''the company's convictions'').

[261] *See, e.g., Hobby Lobby,* 573 U.S. at 733 (''The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.''); *Harris Funeral Homes,* 884 F.3d at 591–92; *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171, 196 (2012) (''The interest of society in the enforcement of employment discrimination statutes is undoubtedly important.''); *Fremont Christian Sch.,* 781 F.2d at 1368–69 (''By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority' . . . . Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.'' (quoting *EEOC* v. *Pacific Press Publ'g Ass'n,* 676 F.2d 1272, 1280 (9th Cir. 1982), *abrogated on other grounds by Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith,* 494 U.S. 872 (1990)); *Miss. Coll.,* 626 F.2d 477, 488 (5th Cir. 1980) (stating, in a Title VII subpoena enforcement action related to a race and sex discrimination charge, that ''the government has a compelling interest in eradicating discrimination in all forms''); *Redhead* v. *Conf. of Seventh-Day Adventists,* 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) (rejecting a RFRA defense in a Title VII sex discrimination case and stating, ''generally, Title VII's purpose of eradicating employment discrimination is a 'compelling government interest' ''); *see also* H.R. Rep. No. 117–27, pt. 1, at 32 (''Although religious employers may claim that a required accommodation is a substantial burden on their free exercise of religion under RFRA, it is the position of the Committee that nondiscrimination provisions are a compelling government interest and the least restrictive means to achieve the policy of equal employment opportunity.''); *cf. Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (observing that the State has a compelling interest in eliminating sex-based discrimination) (citing *Roberts* v. *U.S. Jaycees,* 468 U.S. 609, 624 (1984) (explaining that the goal of ''eliminating discrimination and assuring [citizens] equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order'') (internal citation omitted))).

[262] *See* H.R. Rep. No. 117–27, pt. 1, at 5 (stating under the report's purpose and summary, ''When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.''); *see also Little Sisters,* 140 S. Ct. at 2392 (Alito, J., concurring) (observing that courts ''answer the compelling interest question simply by asking whether *Congress* has treated the [interest] as a compelling interest'') (emphasis in original).

[263] *See, e.g., United States* v. *Texas,* 599 U.S. 670, 678 (2023) (''Under Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" (citations omitted)); *id.* at 679 (''[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case'') (quoting *United States* v. *Nixon,* 418 U.S. 683, 693 (1974)) (internal quotation marks omitted).

[264] Additionally, under section 706(f)(1) of Title VII, which is incorporated into the PWFA in 42 U.S.C. 2000gg–2(a)(1), an employee may, as a matter of right, intervene in a case brought by the Commission on behalf of that employee. Thus, even if the Commission were required to bring such an action, the employer could still face a claim from the employee.

[265] *Hosanna-Tabor,* 565 U.S. at 188–89.

[266] *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(C)(2) (citing *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru,* 591 U.S. __, 140 S. Ct. 2049, 2055, 2066 (2020)). There is some disagreement among courts as to the applicability of the ministerial exception to hostile work environment claims. *Compare Demkovich* v. *St. Andrew the Apostle Par., Calumet City,* 3 F.4th 968, 979 (7th Cir. 2021) (applying the ministerial exception to a hostile work environment claim involving allegations of minister-on-minister harassment), *with Elvig* v. *Calvin Presbyterian Church,* 375 F.3d 951, 962 (9th Cir. 2004) (finding that a hostile work environment claim was not barred by the ministerial exception, because sexual harassment is not a protected employment decision).

[267] *See generally* 140 S. Ct. at 2049.

[268] *See id.* at 2063 (''In determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important.'').

[269] *See* 565 U.S. at 190–94.

[270] *See* 140 S. Ct. at 2063–69.

[271] *See id.* at 2057, 2066.

[272] *See* 140 S. Ct. at 2067.

First Amendment Establishment and Free Exercise Clause Considerations

The First Amendment provides that ''Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'' [273] Under the Establishment Clause of the First Amendment, the Government's actions cannot establish religion; in other words, ''government may not, consistent with a historically sensitive understanding of the Establishment Clause, make a religious observance compulsory.'' [274]

Under the Free Exercise Clause, the ''Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.'' [275] Where a law burdens religious exercise and is not neutral or generally applicable, it is subject to strict scrutiny, meaning that it must advance a compelling governmental interest and be narrowly tailored to achieve that interest.[276] By contrast, laws that merely incidentally burden religion are ordinarily not subject to strict scrutiny, and thus do not need to be justified by a compelling governmental interest, to defeat a Free Exercise claim, as long as they are neutral and generally applicable.[277] Laws are not neutral and generally applicable ''whenever they treat any comparable secular activity more favorably than religious exercise.'' [278] In addition, ''[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions'' that are entirely discretionary.[279]

Comments Related to First Amendment Establishment Clause Considerations

As noted above, the Commission received comments stating that the Commission must conduct an individualized review of any defense asserted under RFRA and ensure that there is a sufficiently strong nexus between the asserted burden and a religious exercise, the religious exercise is based on sincerely held religious beliefs, the burden is substantial, and the action taken by the government is tailored to address the burden. Further, comments asserted that the Commission must conduct an Establishment Clause analysis of any asserted RFRA defense.

Response to Comments Related to First Amendment Establishment Clause Considerations

The Commission agrees that when evaluating a religious employer's RFRA defense or any other religious defense, the Commission will consider the Establishment Clause implications as part of its case-by-case analysis.[280]

Comments Related to First Amendment Free Exercise Clause Considerations

Several comments stated that the rule could violate a covered entity's First Amendment right to the free exercise of religion. Some comments disputed whether the final rule is a rule of general applicability, asserting that the PWFA is not generally applicable, *e.g.,* because it contains religious exemptions and excludes small employers with fewer than 15 employees.

Response to Comments Related to First Amendment Free Exercise Clause Considerations

The PWFA, like Title VII, is a neutral law of general applicability.[281] Thus, it does not need to be justified by a compelling governmental interest and narrowly tailored to achieve that interest under the First Amendment Free Exercise Clause.[282] The PWFA does not provide any system of discretionary, individualized exemptions for any secular employers, and it does not treat religious exercise any less favorably than comparable secular activities.[283] Congress, in enacting the PWFA, as it did with Title VII, exempted employers (both secular and religious) with fewer than 15 employees.[284] It also provided an exception for religious employers under the rule of construction, which requires the Commission to assess whether an entity is a qualifying religious employer under an established set of factors based in case law.[285] Thus, the PWFA does not provide the Commission with discretion to grant individualized exemptions, for either secular or religious purposes.[286]

[273] U.S. Const. amend. I.

[274] *Kennedy* v. *Bremerton Sch. Dist.,* 597 U.S. 507, 536–37 (2022) (citation and internal quotation marks omitted).

[275] *Fulton* v. *City of Philadelphia,* 593 U.S. 522, 533 (2021) (citations omitted).

[276] *See, e.g., id.* at 541 (citation omitted); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 531–32 (1993).

[277] *Fulton,* 593 U.S. at 533 (citing *Emp't Div., Dep't of Hum. Res. of Ore.* v. *Smith,* 494 U.S. 872, 878–82 (1990)).

[278] *Tandon* v. *Newsom,* 593 U.S. 61, 62 (2021) (per curiam) (providing that whether two activities are comparable must be judged against the governmental interest that justifies the law at issue and concerns the risks various activities pose); *see also Fulton,* 593 U.S. at 534 (''A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'').

[279] *Fulton,* 593 U.S. at 533, 535 (citing *Smith,* 494 U.S. at 884 (1990)) (internal quotation marks omitted).

[280] As the Supreme Court has observed, ''The First Amendment provides, in part, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. We have said that these two Clauses often exert conflicting pressures, and that there can be internal tension between the Establishment Clause and the Free Exercise Clause.'' *Hosanna-Tabor,* 565 U.S. at 181 (internal citations and quotation marks omitted).

[281] *See, e.g., Hosanna-Tabor,* 565 U.S. at 190 (stating in dicta that the ADA's anti-retaliation provision, which (like Title VII) exempts certain employers for secular reasons, ''is a valid and neutral law of general applicability''); *EEOC* v. *Cath. Univ. of Am.,* 83 F.3d 455, 467 (D.C. Cir. 1996) (stating that Title VII is ''a neutral law of general application'').

[282] *See Fulton,* 593 U.S. at 533 (citing *Smith,* 494 U.S. at 878–82); *see also Smith,* 494 U.S. at 894 (O'Connor, J., concurring).

[283] *See, e.g., Fulton,* 593 U.S. at 533–34 (citing *Lukumi Babalu Aye,* 508 U.S. at 542–46; *Smith,* 494 U.S. at 884).

[284] *See* 42 U.S.C. 2000gg(2)(B)(i), 2000e(b). The Commission rejects the assertion that simply because the PWFA only applies to businesses with 15 or more employees, the Commission can never make out a compelling interest. *See, e.g., Harris Funeral Homes,* 884 F.3d at 600 (''EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination.''). As the Supreme Court has noted, Congress decided to limit Title VII's coverage to firms with 15 or more employees for the purpose of ''easing entry into the market and preserving the competitive position of smaller firms.'' *Clackamas Gastroenterology Assocs., P.C.* v. *Wells,* 538 U.S. 440, 447 (2003) (quoting the lower court's dissent, that ''Congress decided to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail'') (citation and internal quotation marks omitted). The legislative history of Title VII supports this proposition. *See Tomka* v. *Seiler Corp.,* 66 F.3d 1295, 1314 (2d Cir. 1995) (outlining Title VII's legislative history around the factors Congress considered in enacting 42 U.S.C. 2000e(b), including the costs associated with defending against discrimination claims), *abrogated on other grounds as recognized by Eisenhauer* v. *Culinary Inst. of Am.,* 84 F.4th 507, 524, n.83 (2d Cir. 2023). Federal statutes often include exemptions for small employers, and such exemptions do not undermine the larger interests served by those statutes. *See, e.g.,* FMLA, 29 U.S.C. 2611(4)(A)(i) (applicable to employers with 50 or more employees); ADEA, 29 U.S.C. 630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees); ADA, 42 U.S.C. 12111(5)(A) (applicable to employers with 15 or more employees). The government's generally applicable goal of protecting small businesses from the burdens of regulatory compliance is not comparable to the type of discretionary, individualized exemption that the Supreme Court rejected in *Fulton. See* 593 U.S. at 533–34.

[285] *See supra* in the preamble in section *1636.7(b) Rule of Construction.*

[286] *Cf. Fulton,* 593 U.S. at 536–41 (providing that the inclusion of ''a formal system of entirely discretionary exceptions'' in the contractual nondiscrimination requirement at issue rendered the requirement not generally applicable and thus subject to strict scrutiny).

First Amendment Free Speech and Expressive Association Considerations

The First Amendment provides that ''Congress shall make no law . . . abridging the freedom of speech.'' [287] To determine whether ''particular conduct possesses sufficient communicative elements to bring the First Amendment into play,'' courts consider whether ''[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'' [288]

The Supreme Court also has recognized a ''right to associate for the purpose of engaging in those activities protected by the First Amendment.'' [289] The freedom of expressive association includes a freedom not to associate.[290] In order for Government action to unconstitutionally burden the right of expressive association, a group must engage in expressive association.[291] If a group does so, then the proper inquiry is whether the Government action at issue, often the forced inclusion of a member, would significantly affect the group's ability to advocate public or private viewpoints.[292] Finally, to determine whether the Government's interest justifies the burden, the Government's interest implicated in its action is weighed against the burden imposed on the associational expression.[293]

Comments Related to First Amendment Free Speech Considerations

Several comments asserted that including infertility treatments, contraception, abortion, sterilization, and surrogacy in the definition of ''pregnancy, childbirth, or related medical conditions'' would require covered entities to provide accommodations for employees that would violate the entities' freedom of speech. For example, some comments stated that providing an accommodation related to an employee's abortion would chill the speech of covered entities by requiring them to convey a message to employees and the public that abortion is a legitimate medical procedure, contrary to their anti-abortion beliefs or identity, or because maintaining their policies would put them in the position of violating the PWFA's anti-retaliation and anti-coercion provisions.

Response to Comments Related to First Amendment Free Speech Considerations

The Commission does not agree that the PWFA or the final rule infringes on any covered entity's freedom of speech. The act of making a personnel decision, such as employing or continuing to employ an individual who has engaged in personal conduct with which an employer disagrees, is not protected speech or expressive conduct that communicates the employer's agreement with the individual's personal decisions.[294] In this business context, providing an employee a reasonable accommodation under the PWFA during their employment does not constitute speech or expressive conduct on the part of the employer.[295]

As discussed in relation to the PWFA's rule of construction, whether an employer's policies or actions could implicate the PWFA's anti-retaliation or anti-coercion provision is a highly fact-specific inquiry. For over four decades, the Commission has interpreted Title VII, which contains an anti-retaliation provision, to protect employees from being fired for having an abortion or contemplating an abortion, and courts have affirmed this interpretation.[296] The Commission is not aware of any cases during these past four decades in which an employer has challenged this interpretation on First Amendment free speech grounds. Likewise, the ADA has language similar to the PWFA's anti-coercion provision in its interference provision, and the Commission is similarly unaware of any cases where an employer challenged the interference provision on First Amendment free speech grounds. In addition, the Commission has explained in the preamble and the Interpretive Guidance in section *1636.5(f) Prohibition Against Retaliation* the type of actions that could be violations under the anti-coercion and anti-retaliation provisions; they do not involve protected speech.[297] Nevertheless, should the Commission receive a charge alleging coercion or retaliation, and should the responding employer raise constitutional concerns as a defense to the charge during the administrative charge process, the Commission will evaluate each claim on a case-by-case basis under the process it has outlined above.[298]

Comments Related to First Amendment Expressive Association Considerations

Some comments asserted that including certain pregnancy-related health care services as medical conditions related to pregnancy or childbirth would require covered entities to provide accommodations for employees that would violate the entities' First Amendment right to expressive association. In particular, some comments stated that employers, particularly those whose express mission is to oppose abortion, might be required under the rule to hire, or continue to employ, or promote, employees who have abortions in violation of an employer's policies.

Response to Comments Related to First Amendment Expressive Association Considerations

The Commission does not agree that the PWFA or the final rule infringes on any covered entity's freedom of expressive association. First, the Commission is unaware of any case holding that enforcing Title VII violates the First Amendment's right of free association, and, indeed, the Supreme Court has expressly held to the contrary.[299] Second, assuming that a covered entity can show that it engages in expressive activity, with the possible exception of certain mission-driven organizations, it is unlikely that a covered entity also could show that simply allowing an employee to access an accommodation would significantly affect its ability to advocate public or private viewpoints.[300] The Commission

[287] U.S. Const. amend. I.

[288] *Texas* v. *Johnson,* 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington,* 418 U.S 405, 410–11 (1974)).

[289] *Jaycees,* 468 U.S. at 618.

[290] *Id.* at 622–23.

[291] *Boy Scouts of America* v. *Dale,* 530 U.S. 640, 648 (2000).

[292] *Id.* at 650.

[293] *Id.* at 658–59.

[294] *See Harris Funeral Homes,* 884 F.3d at 589–90 (providing that ''bare compliance'' with antidiscrimination laws does not amount to an endorsement of a certain viewpoint).

[295] *See also Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 65–67 (2006) (concluding that a law requiring that institutions of higher education allow military recruiters access equal to that provided to other recruiters, or lose certain Federal funds, regulated conduct, not speech, and the regulated conduct was not inherently expressive such that it was protected under the First Amendment).

[296] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(c) & n.58; *Doe,* 527 F.3d at 364 (holding that Title VII, as amended by the PDA, prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Turic,* 85 F.3d at 1214 (finding the termination of a pregnant employee because she contemplated having an abortion violated the PDA).

[297] *See* § 1636.5(f).

[298] *See supra* note 242.

[299] *Hishon* v. *King & Spalding,* 467 U.S. 69, 78 (1984) (holding that, as applied to a law firm partnership, Title VII did not infringe employer's ''constitutional rights of expression or association''); *see also id.* (observing that ''[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections'') (citation and internal quotation marks omitted).

[300] *Compare Boy Scouts,* 530 U.S. at 655–59 (determining that retaining a gay scoutmaster would significantly affect the organization's expression),

believes its position strikes the correct balance between, on one hand, the Government's interest in ensuring employees affected by pregnancy, childbirth, or related medical conditions are able to remain healthy and in their jobs and, on the other, the employer's ability to express its message to the public, its employees, and other stakeholders such that its advocacy is not significantly affected by providing an accommodation.[301] Nevertheless, should the Commission receive a charge relating to an accommodation for pregnancy, childbirth, or related medical conditions, and should the responding employer raise constitutional expressive association concerns as a defense to the charge during the charge process, the Commission will evaluate each claim on a case-by-case basis under the framework outlined above.[302]

Comments Related to Constitutional Avoidance

A few comments stated that including abortion in the definition of medical conditions related to pregnancy and childbirth creates First Amendment free speech and religion conflicts, and statutes should be interpreted to avoid constitutional concerns; therefore, the Commission should exclude the possibility of an employee receiving an accommodation related to an abortion from the regulation.

Response to Comments Related to Constitutional Avoidance

As explained *supra,* the Commission disagrees that the rule categorically conflicts with the First Amendment, and thus does not agree that the canon of constitutional avoidance applies. The Commission's interpretation of ''pregnancy, childbirth, or related medical conditions'' is consistent with its interpretation of this phrase for more than four decades in Title VII, as amended by the PDA, a similar statute. In those decades, the Commission's interpretation under Title VII has never been successfully challenged on First Amendment grounds. The comments that raised this issue did not demonstrate that abortion must be excluded to avoid an unconstitutional interpretation. Moreover, the Commission cannot anticipate whether constitutional issues will arise in future litigation on facts that have not yet occurred.

Comments Regarding Requests for an Exemption for a Covered Entity's Moral Objections

Several comments stated that the final rule should provide an exemption for covered entities that object to abortion and other medical conditions related to pregnancy and childbirth based on conscience, moral, ethical, scientific, health, or medical grounds, or for any other reason that is not associated with a religious belief. A few comments further asserted that, because the PWFA rule of construction provides an exception for certain religious entities, the Commission must provide an exception for similarly situated covered entities that object to accommodations on non-religious grounds.

Response to Comments Regarding Requests for an Exemption for a Covered Entity's Moral Objections

To create a new, stand-alone exemption for secular entities would exceed the Commission's congressionally-provided authority. In enacting the PWFA, Congress restricted coverage for only two categories of employers: (1) certain qualifying religious entities under the rule of construction at section 107(b), ''subject to the applicability to religious employment'' set forth in section 702(a) of the Civil Rights Act of 1964; and (2) certain entities, regardless of religious affiliation, that have fewer than 15 employees. The Commission notes that an individual's religious beliefs may include moral and ethical beliefs,[303] and thus in individual cases, the Commission will assess asserted accommodation requests and objections based on that longstanding interpretation and applicable law. However, the Commission will not create through rulemaking a new exemption for secular organizations with certain moral or ethical beliefs, beyond the PWFA's existing exceptions.

Comments Regarding Requests for a Per Se Undue Hardship Exemption

In the alternative, several comments asserted that covered entities that do not qualify for an exemption under the rule of construction, but that nevertheless object to abortion or other medical conditions related to pregnancy or childbirth for religious reasons, reasons related to their mission, or other secular reasons, should receive a per se undue hardship exemption.

Response to Comments Regarding Requests for a Per Se Undue Hardship Exemption

The Commission declines to create a per se undue hardship exemption, for several reasons. First, the PWFA incorporates the ADA's ''undue hardship'' definition, and under the ADA, employers may assert undue hardship as a defense but must conduct an individualized assessment when determining whether a reasonable accommodation will impose an undue hardship.[304] Creating a per se rule that an employer's beliefs automatically and always create an undue hardship would be fundamentally inconsistent with this requirement that undue hardship be assessed as a defense on a case-by-case basis, and would therefore be inconsistent with the PWFA.[305] This is especially so where, as here, even the religious beliefs of employers that share the same religion are not monolithic, and the specific facts and circumstances in a given situation may affect whether the employer objects to an employee's actions on religious grounds.

Second, nothing in the PWFA provides for an exemption that directly links the undue hardship standard to an entity's religious beliefs, status, or secular beliefs. On the contrary, the statute expressly directs that the term ''undue hardship'' should ''have the meaning[ ] given such term[ ] in [the ADA] and shall be construed as such

and Slattery v. *Hochul,* 61 F.4th 278, 288 (2d Cir. 2023) (holding that rape crisis pregnancy center stated plausible claim that application of New York law prohibiting discrimination in employment based on reproductive health decisions would severely burden its right to freedom of expressive association given that the statute, if applied, would ''forc[e] [the center] to employ individuals who act or have acted against the very mission of its organization''), *with Rumsfeld,* 547 U.S. at 68–69 (explaining that a law that allows military recruiters equal access to law schools does not force the school ''to accept members it does not desire'').

[301] *See Rumsfeld,* 547 U.S. at 69–70.

[302] *See supra* note 242.

[303] In the context of Title VII's prohibition of discrimination against employees based on religion, the Commission has said that ''[c]ourts have looked for certain features to determine if an individual's beliefs can be considered religious.'' To this end, ''[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII,'' but overlap between a religious and political view may be protected under Title VII ''as long as that view is part of a comprehensive religious belief system.'' *Compliance Manual on Religious Discrimination, supra* note 215, at (12–I)(A)(1); *see also* 29 CFR 1605.1.

[304] 88 FR 54734.

[305] 42 U.S.C. 2000gg(7). The final rule creates a small category of modifications that will, ''in virtually all cases,'' be reasonable accommodations that do not impose an undue hardship. Importantly, in creating this category, the Commission did not alter the definition of ''undue hardship'' or deprive a covered entity of the opportunity to bring forward facts to demonstrate that a proposed accommodation imposes an undue hardship for its business under its own particular circumstances, even when one of the four simple modifications in § 1636.3(j)(4) is involved. Given the differences in religious beliefs and the impact of an accommodation that may violate those beliefs, it would not be possible for the Commission to determine that these beliefs would ''in virtually all cases'' cause an undue hardship.

[term is] construed under such Act and as set forth in the regulations required by this division.'' [306]

Third, the factors used to assess an undue hardship defense typically focus on measurable impacts on business operations. Under the PWFA rule, ''undue hardship'' means an action requiring significant difficulty or expense, when considered in light of several factors: (i) the nature and net cost of the accommodation needed under the PWFA; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (v) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[307] As explained by Congress, ''Like the ADA, the PWFA seeks to balance the interests of the employer and employee and, although there may be some costs associated with making a reasonable accommodation, the 'undue hardship' standard limits the employer's exposure both to overly burdensome accommodation requests and lawsuits that would attempt to hold the employer liable for failing to provide a prohibitively expensive accommodation.'' [308]

The Commission has stated that under the ADA, ''the 'undue hardship' provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. 'Undue hardship' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.'' [309] Of note, cases interpreting the impact of a reasonable accommodation on other employees or the facility's ability to conduct business have generally been about distribution of workloads, business operational needs, and elemental changes to the day-to-day operations of a business, not the moral views of coworkers or employers.[310] That said, the Commission will, as it currently does, consider all assertions of the undue hardship defense on a case-by-case basis, including whether granting a particular reasonable accommodation would ''fundamentally alter the nature of the business.''

Additionally, in determining whether there is disruption to the covered entity's business under the ADA, the Commission has stated with regard to disabilities that an employer will be unable to ''show undue hardship if the disruption to its employees [is] the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor [will] the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.'' [311] As the definition of ''undue hardship'' under the PWFA follows the ADA, the same rules will apply. An employer will not be able to demonstrate undue hardship under the PWFA if the disruption to its employees was the result of those employees' fears or prejudices. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

Ultimately, an employer may assert an undue hardship defense to any PWFA claim. An employer may be able to show undue hardship if the provision of a particular accommodation results in an impact that is unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[312] As with all undue hardship assessments, an employer would need to show individualized evidence of undue hardship.

Other Comments and Response to Comments Regarding Religious and Conscience Considerations

Several comments stated that the inclusion of abortion as a related medical condition revealed that the Commission harbored anti-Catholic bias, and others claimed that the Commission would target Catholic employers for enforcement.

As explained above, the Commission interprets the PWFA's provision regarding pregnancy, childbirth, or related medical conditions consistent with the PWFA's text and the Commission's interpretation of identical language in Title VII, an interpretation adopted more than 40 years ago. The Commission disagrees that interpreting the PWFA in a manner consistent with the statutory text and the agency's decades-long interpretation of Title VII is suggestive of any anti-Catholic bias or that the Commission otherwise harbors any bias. The Commission's enforcement decisions are based on whether the facts of the charge show reasonable cause to believe discrimination occurred. Further, the Commission's history under Title VII reflects that the Commission brings cases that protect employees who are being harassed about their decision not to have an abortion and that protect the

[306] 42 U.S.C. 2000gg(7).

[307] 88 FR 54769; § 1636.3(j).

[308] H.R. Rep. No. 117–27, pt. 1, at 29.

[309] 29 CFR part 1630, appendix, 1630.2(p) (citing S. Rep. No. 101–116, at 35 (1989); H.R. Rep. 101–485, pt. 2, at 67 (1990)).

[310] *See, e.g., Milton* v. *Scrivner, Inc.,* 53 F.3d 1118, 1125 (10th Cir. 1995) (providing that an accommodation that would result in other employees having to work harder or longer hours is not required; slowing the production schedule or assigning the plaintiffs lighter loads would fundamentally alter the nature of the defendant's warehouse operation, a change not required by law) (citing 29 CFR 1630.2(p)(2)(v) and 29 CFR part 1630, appendix, 1630.2(p)); *Turco* v. *Hoechst Celanese Corp.,* 101 F.3d 1090, 1094 (5th Cir. 1996) (determining that, where the employer had no straight day-shift chemical operator positions, moving the plaintiff to such a shift would place a heavier burden on the rest of the operators in the plant and was not required under the ADA); *Mears* v. *Gulfstream Aerospace Corp.,* 905 F. Supp. 1075, 1081 (S.D. Ga. 1995) (concluding that an accommodation that would require employees from six different departments to deliver invoices to the plaintiff adversely impacted other employees' ability to do their jobs and was an undue burden), *aff'd,* 87 F.3d 1331 (11th Cir. 1996); *Bryant* v. *Caritas Norwood Hosp.,* 345 F. Supp. 2d 155, 171 (D. Mass. 2004) (shifting responsibility for an essential function, all heavy lifting, to coworkers would have a deleterious impact on the ability of coworkers to do their own jobs); *Fralick* v. *Ford,* No. 2:12–CV–1210, 2014 WL 1875705, at *7 (D. Utah May 9, 2014) (permitting the plaintiff to work fewer than 60 hours per week was found to ''fundamentally alter the nature of'' the finance manager position and therefore was not a reasonable accommodation); *cf. Morrill* v. *Acadia Healthcare,* No. 2:17–CV–01332, 2020 WL 1249478, at *8 (D. Utah Mar. 16, 2020) (determining that the defendant failed to establish that prior equitable distribution of a mopping task amongst all employees, as a reasonable accommodation, impeded functioning of the business or harmed coworkers).

[311] *See* 29 CFR part 1630, appendix, 1630.15(d).

[312] *See* 29 CFR part 1630, appendix, 1630.2(p).

religious views of employees who oppose abortion.[313]

Second, some comments asserted that an employer's potential obligation under the PWFA to provide an accommodation for abortion could violate the religious rights of other employees, such as human resources employees, who would have to explain to an employee that a reasonable accommodation is available in these circumstances and process the paperwork. The Commission has addressed steps employers may take to respond to conflicts with religious beliefs in these circumstances in its *Compliance Manual on Religious Discrimination.*[314]

Third, some comments stated that if employees decide to work for a religious employer, then they must abide by the employer's beliefs or risk consequences. The Commission made no changes based on these comments. As explained above, the PWFA provides for defenses for religious organizations and is subject to certain other constitutional and statutory exceptions. But none of those defenses or exceptions remove all rights from employees who are employed by religious employers.

1636.8 Severability

In the final rule, the Commission has added that the severability provisions express the Commission's intent as to severability. Further, the Commission clarified that its intent regarding severability applies to the Interpretive Guidance as well and has included this language in the Interpretive Guidance in section *1636.8 Severability.*

As stated in the Interpretive Guidance in section *1636.8 Severability,* pursuant to 42 U.S.C. 2000gg–6, in places where the regulation uses the same language as the statute, if any of those identical regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of the regulation and the application of that provision of the regulation to other persons or circumstances shall not be affected. For example, if § 1636.4(d) (which uses the same language as 42 U.S.C. 2000gg–1(4) and prohibits a covered entity from requiring a qualified employee to take leave as a reasonable accommodation if there is another reasonable accommodation that can be provided) were to be found invalid or unconstitutional, it is the intent of the Commission that the remainder of the regulation shall not be affected. The Commission would continue to enforce the statute but, in this hypothetical example, would not consider it a violation if an employer required an employee to take leave as a reasonable accommodation when there was another reasonable accommodation available.

Where the regulation or the Interpretive Guidance provides additional guidance to carry out the PWFA, including examples of reasonable accommodations, it is the Commission's intent that if any of those provisions or the application of those provisions to particular persons or circumstances were to be held invalid or found to be unconstitutional, the remainder of the regulation or the Interpretive Guidance and the application of that provision of the regulation or the Interpretive Guidance to other persons or circumstances shall not be affected. For example, if a court were to determine that a certain medical condition such as a pelvic prolapse is not found to be a ''related medical condition'' in a specific case, the Commission intends other conditions could still be determined to be ''related medical conditions,'' including pelvic prolapse in another case, depending on the facts.

Preamble to the Final Economic Analysis

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

Summary of the Commission's Preliminary Economic Analysis of Impacts: Costs

According to the Commission's preliminary economic analysis, the proposed rule would impose two quantifiable costs on employers: the annual cost of providing pregnancy-related reasonable accommodations as a result of the statute and the rule, and the one-time cost of becoming familiar with the rule. In all cases, the Commission relied on publicly available data for its estimates.[315]

To estimate the annual cost of providing pregnancy-related reasonable accommodations as a result of the statute and the rule, the Commission first estimated the total number of employees who were not independently entitled to PWFA-type accommodations under an analogous State law, which the Commission calculated is 65.11 million employees.

The Commission then estimated the number of such individuals who will be entitled to a reasonable accommodation under the PWFA. To do so, the Commission first assumed that the number of such individuals will be approximately the same as the number of individuals who actually become pregnant during that year. Again, based on publicly available data, the Commission estimated that 33 percent of the 65.11 million employees who are not independently entitled to PWFA-type accommodations under an analogous State law are capable of becoming pregnant, and that of these, 4.7 percent will actually become pregnant in a given year. Applying these percentages yielded a total estimate of one million individuals who (a) were not independently entitled to PWFA-type accommodations under an analogous State law, and (b) will actually become pregnant during a given year. Finally, the Commission estimated that between 23 percent (''lower bound estimate'') and 71 percent (''upper bound estimate'') of these one million individuals (between 230,000 and 710,000 individuals) will require a pregnancy-related reasonable accommodation.

To calculate the associated costs, the Commission first estimated that the accommodations needed by 49.4 percent of the individuals above will have zero cost, leaving between 116,000 and 360,000 individuals needing accommodations with non-zero cost. It then estimated that each of the accommodations needed by these individuals would cost an average of $300 distributed over 5 years, or $60 annually. Multiplying these numbers together yielded final estimated annual costs of between $6 million and $18 million for private employers; between $800,000 and $2.4 million for State and local government employers; and between $300,000 and $800,000 for Federal employers.

[313] *See, e.g., EEOC* v. *Big Lots Stores, Inc.,* No. 9:08–CV–177, 2009 WL 10677352, at *6 (E.D. Tex. Oct. 6, 2009) (alleging, as part of the plaintiff's harassment claim, that the harasser urged the plaintiff to have an abortion). Other suits brought by the EEOC regarding abortion pertained to the EEOC protecting the religious views of employees. *See, e.g., EEOC* v. *Univ. of Detroit,* 904 F.2d 331, 335 (6th Cir. 1990) (suit brought by EEOC on behalf of an employee who did not want to pay union dues because the dues were used to support political action in favor of abortion, which the employee disagreed with on religious grounds); *EEOC* v. *Am. Fed'n of State, Cnty. & Mun. Emps., AFL–CIO,* 937 F. Supp. 166, 167 (N.D.N.Y. 1996) (addressing a lawsuit brought by EEOC on behalf of an employee who did not want to pay union dues because the dues were used to support political action in favor of abortion and the death penalty, which the employee disagreed with on religious grounds).

[314] *Compliance Manual on Religious Discrimination, supra* note 215, at Examples #44 & #45.

[315] For the Commission's preliminary economic analysis, see 88 FR 54754–65.

Comments and Response to Comments Regarding the Estimated Percentage of Individuals Capable of Becoming Pregnant Who Will Actually Become Pregnant in a Given Year

As explained above, in the NPRM, the Commission estimated that 4.7 percent of individuals who are capable of becoming pregnant will actually become pregnant in a given year.[316] Some comments stated that this estimate is too low because the Commission based its estimate on research that tracked the percentage of women participants who gave birth in a given year. As such, the 4.7 percent estimate did not include individuals who became pregnant in a given year but did not give birth, including individuals who had miscarriages, stillbirths, or abortions. Because this figure was used to calculate the number of reasonable accommodations needed, the comments further reasoned, the cost estimates did not take into account any reasonable accommodations needed by individuals who had miscarriages, stillbirths, or abortions.

The Commission agrees that the research it relied upon did not take account of individuals who became pregnant during a given year but who did not give birth, and therefore that its previous estimate of 4.7 percent was too low. To correct the shortcoming, the Commission has relied upon Centers for Disease Control (CDC) research showing that, between 2015 and 2019, live births in the United States accounted for 67% of all pregnancies among women aged 15–44 years on average.[317] Assuming that the ratio of live births to total pregnancies among women of reproductive age in the labor force is the same as among all 15–44 years old women, the Commission thus estimates that the percentage of individuals capable of becoming pregnant who will actually become pregnant in given year is 0.047 ÷ 0.67 = 0.071 (rounded up), or 7.1 percent. This revised estimate is used in the revised economic analysis below.

Comments and Response to Comments Regarding the Percentage of Pregnant Employees Needing a Reasonable Accommodation Under the PWFA

As explained above, in the NPRM, the Commission estimated that between 23 percent (lower bound estimate) and 71 percent (upper bound estimate) of individuals who are actually pregnant in a given year will need a reasonable accommodation under the PWFA.[318] The report that the Commission used to arrive at these estimates stated that 71 percent of pregnant individuals surveyed needed more frequent breaks, such as extra bathroom breaks; 61 percent needed a change in schedule or more time off; 53 percent needed a change in duties; and 40 percent needed some other type of workplace adjustment.[319] The Commission chose the highest of these numbers (71 percent) as its upper bound estimate of the percentage of pregnant employees needing accommodations.

The Commission received a comment stating that the report cited by the Commission does not support the use of 71 percent as an upper bound estimate of the percentage of pregnant individuals needing an accommodation because the report established that 71 percent of the pregnant individuals surveyed needed additional breaks, but did not state whether any of the other 29 percent of pregnant individuals surveyed needed a different type of accommodation (such as a change in schedule or a change in duties). If so, then more than 71 percent of pregnant individuals surveyed needed at least one accommodation.

The report the Commission relied upon to set its upper and lower bound estimates did not state whether any of the 29 percent of individuals who did not need additional breaks needed a different sort of accommodation. It was therefore not possible for the Commission to determine, on the basis of this report, the percentage of employees surveyed who needed at least one accommodation. The comment objecting to the Commission's use of the 71 percent estimate did not provide additional data for the Commission to consider, and the Commission could not independently locate any more precise information. The Commission therefore must rely on reasonable assumptions to set its upper bound estimate of the percentage of pregnant employees needing accommodation.

Although it is possible that some of the 29 percent of pregnant individuals who did not need additional breaks needed a different type of accommodation, the Commission continues to assume for purposes of the economic analysis that the individuals who needed a different type of pregnancy-related accommodation are a subset of those who needed additional breaks. In the Commission's opinion, it is unlikely that a pregnant individual who does not need additional breaks would need a less common type of accommodation such as a change in schedule or a change in duties. Additionally, many of the 71 percent of pregnant individuals surveyed who needed additional breaks may be entitled to them under the ADA, Title VII, or employer policies, and therefore the 71 percent figure likely overstates the number of individuals who will receive those breaks specifically as a consequence of the PWFA. The Commission is therefore confident that 71 percent is a reasonable estimate of the proportion of pregnant individuals needing accommodation under the PWFA given the paucity of data available at the time of this rulemaking.

The same comment objected to the Commission's use of 23 percent as a lower bound estimate of the percentage of pregnant employees who will need an accommodation under the rule. The Commission relied on the same report discussed immediately above to arrive at this estimate. Based on data in this report, the Commission calculated that 32 percent of pregnant individuals surveyed needed, but did not receive, more frequent breaks, such as extra bathroom breaks; 20 percent needed, but did not receive, a change in schedule or more time off; 23 percent needed, but did not receive, a change in duties; and 18 percent needed, but did not receive, some other type of workplace adjustment.[320] The Commission averaged these numbers to arrive at a lower bound estimate of 23 percent.[321]

According to the comment, the Commission's calculations established that at least 32 percent of pregnant employees surveyed needed, but did not receive, at least one pregnancy-related accommodation (specifically, additional breaks). The comment further argued that the Commission failed to offer any justification for the decision to average the four figures.

The Commission agrees with the comment that using the highest of the four figures (32 percent) is the better approach. As explained above, the report establishes that 32 percent of pregnant employees surveyed needed, but did not receive, at least one type of pregnancy-related accommodation. The Commission therefore has raised its lower bound estimate from 23 percent to 32 percent in the analysis below.

[316] *Id.* at 54757.

[317] Lauren M. Rossen et al., U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Stat., *Updated Methodology to Estimate Overall and Unintended Pregnancy Rates in the United States* 15 (2023), *https://stacks.cdc.gov/view/cdc/124395.*

[318] 88 FR 54758.

[319] Eugene R. Declercq et al., *Listening to Mothers III: New Mothers Speak Out* 36 (2013), *https://www.nationalpartnership.org/our-work/resources/health-care/maternity/listening-to-mothers-iii-new-mothers-speak-out-2013.pdf.*

[320] *Id.*

[321] 88 FR 54758.

Comments and Response to Comments Regarding the Estimated Average Cost of an Accommodation

As stated above, in its previous analysis, the Commission estimated that 49.4 percent of needed pregnancy-related accommodations will have no cost, and that the average cost of the remaining 50.6 percent will be $300 distributed over 5 years, or $60 annually.[322]

One comment stated that this estimate was too low because it did not include costs associated with having a vacant position and with looking for new hires, both of which may be necessary when a pregnant employee takes leave. The comment emphasized that these costs affect both customers and other staff members.

The Commission declines to raise the estimated average cost of an accommodation in response to this comment. To estimate costs responsibly, the Commission must rely on existing data. According to the best available data, the average cost of a non-zero-cost reasonable accommodation provided pursuant to the ADA is $300.[323] Leave is an accommodation that is available under the ADA. The costs associated with leave, including the kinds of costs identified by the comment, were therefore presumably included in the data used to generate the $300 average. Additionally, if an employer did not provide leave to the employee and simply terminated the employee, the employer would still face the costs of having a vacant position and looking for new hires. To the extent that an accommodation allows the pregnant employee to stay with the employer, the employer could realize cost savings because it will not have to hire and train new employees.[324]

Comments and Response to Comments Regarding Alleged Additional Costs: Abortion

Many comments stated that the economic analysis should be revised to incorporate not only costs arising from the provision of abortion-related reasonable accommodations, but also the costs of abortions themselves together with some of their alleged downstream consequences.

Some comments suggested adding the costs of abortions to the analysis because they mistakenly understood the proposed rule as requiring employers to bear those costs. For example, some comments stated that the proposed rule required employers to pay for abortion services or to pay for associated travel and lodging expenses as reasonable accommodations. Because the proposed rule did not, and the final rule does not, require covered employers to bear these costs, the Commission declines to amend the economic analysis to incorporate these costs to employers.

In most cases, however, comments suggesting inclusion of abortion-related costs identified costs that do not apply directly to employers. For example, some of these comments stated that the estimated cost of the rule should be increased by the value of the years of life lost by the individuals who were never born due to abortion. Others stated that the estimated cost of the rule should be revised to include health care costs that the comments alleged would be incurred by individuals who undergo abortion care. Other comments stated that the estimate should include certain large-scale societal costs that they linked to abortion. Several of these comments cited a 2022 report by Joint Economic Committee Republicans.[325]

The Commission declines to change its analysis in response to these comments. The alleged cost of abortion and its downstream consequences cannot properly be attributed to the final rule and statute simply because abortion-related accommodations are available under the PWFA.[326] Neither the statute nor the final rule has an impact on the costs that commenters allege are associated with abortion. Indeed, the comments themselves appear to acknowledge that the purported costs imposed by abortion are independent of the rule.[327]

The Commission recognizes that, under the statute and final rule, some individuals will obtain reasonable accommodations that they may not have otherwise obtained, possibly including leave as a reasonable accommodation related to an abortion.[328] But it does not follow that any of these individuals will have abortions because they were able to obtain an accommodation. It therefore does not follow that the costs associated with the abortions themselves should be included in the economic analysis.

A small number of comments argued that the proposed rule will increase the number of abortions performed, and that the economic analysis should include costs associated specifically with this increase. According to these comments, to calculate the cost of the final rule, the Commission must first determine the proportional economic impact of a single abortion and then multiply that figure by the number of additional abortions performed as a result of the rule.

The Commission declines to take this approach because the comments did not provide any evidence, and the Commission is not aware of such evidence, to support the conclusion that the number of abortions will increase as a consequence of the statute and the final rule.

A few comments asserted that the number of abortions will increase because the rule, by making abortion-related accommodations available, will make pregnant employees ''uncomfortable'' about bringing their pregnancies to term. These commenters did not provide support for this proposition, however. Other comments stated that the rule will increase the number of abortions because some employers may prefer that their employees terminate their pregnancies rather than bring their pregnancies to term, and, therefore, these employers may pressure their employees into having abortions by refusing to provide any pregnancy-related accommodations other than leave to obtain an abortion. This argument is unpersuasive because such refusal would be unlawful under the PWFA. An employer could not satisfy its PWFA obligations by providing leave to have an abortion to an individual who requests additional bathroom breaks due to pregnancy, for example, because such leave would not be an effective accommodation under those circumstances. In addition, Title VII prohibits employers from coercing

[322] *Id.* at 54759.

[323] *Id.*

[324] *Id.* at 54754.

[325] Joint Economic Committee Republicans, *The Economic Cost of Abortion* (2022), *https://www.jec.senate.gov/public/_cache/files/b8807501-210c-4554-9d72-31de4e939578/the-economic-cost-of-abortion.pdf.*

[326] Many of the comments stating that the Commission should account for the cost of abortion and its downstream consequences described the rule as containing an ''abortion mandate'' or as ''encouraging'' abortion. This is a mischaracterization of the rule. Rather than requiring or encouraging abortion, this rule simply requires employers to provide reasonable accommodations to the known limitations of employees under some circumstances.

[327] The $6.9 trillion in annual abortion-related costs identified by Joint Economic Committee Republicans in their 2022 report, for example, were said to have occurred in 2019—well before the effective date of the statute or final rule. These costs should therefore be considered part of the pre-statutory baseline, rather than new costs attributable specifically to the statute and final rule.

[328] The Commission notes that it is possible that the availability of abortion-related reasonable accommodations—such as leave—may have additional effects on the circumstances of an abortion, for example by enabling the individual to have the abortion at an earlier time; to elect a different method of abortion; to have the abortion at a nearby clinic instead of traveling to a more distant clinic; or to have the abortion performed by a reputable provider. The Commission was unable to incorporate these cost savings into the quantitative analysis, however, due to lack of data.

employees into having abortions because it prohibits them from taking an adverse action against an individual because of the individual's decision to have—or not to have—an abortion.[329]

Again, the Commission recognizes that, under the statute and the final rule, an employee who has decided to have an abortion may request and receive an abortion-related accommodation, absent undue hardship. But it does not follow from this fact alone that the individual has decided to have the abortion because of the rule. The assumption implicit in comments—that some employees will decide to have abortions because the final rule and statute make abortion-related accommodations available—is speculative.[330] Research shows that individuals who are unable to access abortion care typically are unable to do so for multiple reasons, none of which are determinative.[331] Because the Commission is unaware of any data showing specifically that access to PWFA-type accommodations will increase the number of abortions performed, it declines to add the associated costs to its analysis.[332]

Comments and Response to Comments Regarding Alleged Additional Costs: Litigation

Some comments stated that the rule would increase costs for employers by increasing litigation. Some of these provided only a very brief justification for the claim. Some comments, for example, claimed that the rule would increase litigation because it is ''expansive'' or because the range of accommodations required is broad. One comment stated that the rule is likely to invite litigation because it is likely that a different Presidential administration will change this policy. These comments did not include data or cite any supporting research.

One comment, signed by several Attorneys General from States that have PWFA-type statutes, supports the opposite conclusion:

> Nor have the PWFA-analogue States experienced a marked increase in litigation following enactment of their PWFA/Break Time law analogues. In Washington State, all but 2 of the 650 pregnancy accommodation intakes received by the Attorney General's Office resolved without the need to file a lawsuit. In New York State, which enacted its PWFA analogue in 2016, the vast majority of discrimination complaints filed with the New York Division of Human Rights involve allegations of employment discrimination, yet complaints relating to reasonable accommodations for pregnancy-related conditions account for at most .03% of all employment discrimination filings. Moreover, 86% of the employment discrimination cases that involve reasonable accommodations for a pregnancy-related condition resolve prior to an agency hearing. The pre-hearing resolution numbers are similar in Connecticut. In Oregon, only about 1.5% of cases filed with the Civil Rights Division of the state's Bureau of Labor and Industries involve pregnancy or post-partum accommodation issues, a good portion of which are voluntarily resolved. . . . And in Illinois, only 1% of charges filed with the Department of Human Rights involved pregnancy-related charges seeking an accommodation. A study in California, which enacted its state PWFA in 2000, showed the total number of pregnancy discrimination charges filed with the state human rights agency actually decreased after the law was enacted.[333]

The Commission also disagrees with the claim that its definition of ''pregnancy, childbirth, or related medical conditions'' is expansive and will increase litigation, or the characterization of its definition as an example of something that will lead to litigation because another Presidential administration will change it. As explained in the preamble to the final rule, ''pregnancy, childbirth, or related medical conditions'' is language from Title VII, and the Commission's interpretation of that phrase in the PWFA is consistent with how courts and the Commission have interpreted that phrase in Title VII. Moreover, the interpretation of ''pregnancy, childbirth, or related medical conditions'' in the PWFA is consistent with the interpretation the Commission has had in many different Presidential administrations. Finally, given the long-standing definition of ''pregnancy, childbirth, or related medical conditions'' in Title VII, changing it for the PWFA also would have the potential to create litigation.

Some comments stated more specifically that interpreting the term ''related medical conditions'' to include abortion will cause litigation because employers that comply by providing abortion-related leave as a reasonable accommodation may be found liable for pregnancy discrimination. For example, one comment stated that if an employer provided an employee sufficient leave to travel out of the State to have an abortion but denied a request by a pregnant employee who did not want an abortion for the same amount of leave to see an out-of-State obstetrician, instead only providing an amount of leave sufficient to visit an in-State obstetrician, the employer could face a claim that it is discriminating against women who do not get abortions.

The Commission disagrees that provision of abortion-related leave as a reasonable accommodation could give rise to liability for pregnancy discrimination under the circumstances described. First, if the employer is providing the leave as a reasonable accommodation, then it is not providing either employee with ''benefits.'' Rather, it is providing them with reasonable accommodations to which they are entitled under the law.

Second, the two kinds of leave are not ''unequal.'' With respect to both individuals, the employer is providing the amount of leave necessary to address the individual's known pregnancy-related limitation. It is often the case that the cash value of one reasonable accommodation is less than that of another. For example, if an employer provides one pregnant individual a reasonable accommodation of drinking water because that is what the individual needs, and provides a second pregnant individual with a chair to sit on because that is what the second pregnant individual needs, the employer is not discriminating against the first individual just because a chair costs more than permission to drink water—both individuals have been given reasonable accommodations appropriate to their known pregnancy-related limitations.

Because the comments discussed above did not provide evidence to support the conclusion that promulgation of the rule will invite increased litigation, the Commission declines to incorporate litigation-related costs into the final economic analysis.

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[329] *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (I)(A)(4)(c).

[330] To support the assertion that the costs of an abortion are attributable to the final rule and statute, research would need to show that the abortion-related accommodation provided under the rule—in most cases leave—is a but-for cause of the abortion, and that the individual does not have independent access to the leave under a different law or policy.

[331] *See, e.g.,* Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings From Two States,* 49 Persps. on Sexual & Reprod. Health 95, 98–99 (2017).

[332] The Commission notes that, even if data could be found showing that the final rule and statute will increase the number of abortions that are performed, the Commission would still need to engage in considerable speculation in order to estimate the associated costs. Although some comments cited research purporting to measure costs imposed by abortion on individuals who undergo abortion care and on society as a whole, the research did not establish a consensus on this issue. *See generally* Ushma D. Upadhyay et al., *Intended Pregnancy After Receiving* Vs. *Being Denied a Wanted Abortion,* 99 Contraception 42 (2019).

[333] Comment EEOC–2023–0004–98337, New York State Attorney General, at 5 (Oct. 10, 2023).

Comments and Response to Comments Regarding Additional Costs: Male Employees

Some comments stated that it was unclear whether the rule entitled men to pregnancy-related accommodations (including, for example, male infertility treatment), but that, if the rule entitled men to such accommodations, these costs should be reflected in the analysis. The Commission declines to incorporate these costs into the analysis because, as explained in the preamble to the final rule, the definition of ''pregnancy, childbirth, or related medical conditions'' in the final rule only encompasses medical conditions which relate to pregnancy or childbirth, ''as applied to the specific employee or applicant in question.''

Comments and Response to Comments Regarding Alleged Additional Costs: Other Costs

One comment stated that the Commission's economic analysis should account for costs arising from the loss of free speech and free exercise rights. The Commission does not agree that the regulation creates such a loss and has explained in the preamble to the final rule why free speech and religious exercise are not negatively affected by and are, instead, protected by the rule.

A few comments stated that the Commission should account for the reduction in hiring of women based on the ''expansive'' accommodation requirements. The Commission does not agree that this is a cost it should take into account for the economic analysis. First, discrimination against women because they need an accommodation, or may need an accommodation, under the PWFA violates the PWFA and potentially Title VII. Second, these comments did not provide evidence supporting the conclusion that employers will hire fewer women as a result of the rule and underlying law.

One comment stated that the Commission's economic analysis, which did not consider accommodation costs for States with their own PWFA-type statutes, did not account for the fact that these State statutes do not permit accommodations for abortions. This comment did not support this statement with data or case law, and the Commission was unable to find any independent evidence of any such restriction.[334] Additionally, as noted in the preamble to the final rule, an employee may need an abortion for a variety of reasons, which could affect the ability of the employee to use the State statute for an accommodation.

One comment stated that the economic analysis should include costs related to severance, retirement, and labor shortages, and, additionally, that it should include costs arising from the decline in private firms' participation in the national economy. The Commission declines to include these costs because the comment provided no data supporting a connection between provision of pregnancy-related reasonable accommodations, on the one hand, and an employee's decision to leave the workforce or to decline to participate in market activities, on the other hand. The Commission further notes that it received countervailing comments on this issue, suggesting that the rule will enable covered entities to prevent individuals from leaving the workforce by making pregnancy-related accommodations available to those who need them.

One comment stated that the Commission should consider the alternative of defining ''related medical conditions'' to exclude abortion. As explained in the final rule, the Commission's interpretation is consistent with the PWFA's text, and for over 40 years, the Commission and courts have interpreted the phrase ''pregnancy, childbirth, or related medical conditions'' in Title VII to include abortion. The Commission concludes that it is unnecessary to consider this alternative for the economic analysis.

One comment stated that, in States that have laws like the PWFA, employees are more likely to ask for and receive accommodations, and in States where there are no PWFA-like laws, employees are less likely to ask for or receive accommodations; thus, those who have not received accommodations prior to the PWFA should be overrepresented among those who now have rights. The Commission based its calculations on the data that is available, and this comment did not provide data to support this point or dispute the Commission's calculations.

Comments and Response to Comments Regarding the Time To Read the Regulation

Several comments stated that the Commission underestimated the time to read and understand the regulation, including stating that small businesses without a legal staff would take a long time to read and understand the rule; that the amount of time for compliance should be increased to account for time to read and review the regulation, obtain legal advice, develop a compliance policy, train employees, and implement the rule, including creating systems to collect, retain, and secure protected information; that a specific individual took 2 days to read the regulation and several of the comments; that the cost should account for the hiring of outside counsel; that the Commission should include the cost of processing each request for an accommodation; and that the Commission should account for costs to train new employees and for new businesses in future years. Most of these comments on this topic did not provide either data or evidence to support a revision by the Commission. Those that did so provided estimates that varied greatly, and none were grounded in research.

The Commission has slightly increased its estimate of the amount of time allotted for compliance activities, in part to account for the fact that the final rule and Interpretive Guidance are slightly longer, and therefore would take slightly longer to read, than the proposed rule and Interpretive Guidance contained in the NPRM, and in part in response to comments indicating additional time is needed for covered entities to become familiar with the rule. The Commission estimates that compliance activities for a covered entity will take an average of 135 minutes, or 2.25 hours, in States that do not already have laws substantially similar to the PWFA and an average of 45 minutes in States with existing laws similar to the PWFA. This estimate is consistent with the amount of time the Commission allotted for compliance activities under other recent regulations that it has published in connection with civil rights laws. For example, in publishing a regulation implementing Title II of the Genetic Information Nondiscrimination Act (GINA), the Commission estimated 3 hours for rule familiarization, which was appropriate because GINA involved a new protection against discrimination based on genetic information.[335] Conversely, the Commission did not include a calculation of the cost for rule familiarization in its rule amending its Age Discrimination in Employment Act (ADEA) regulations concerning disparate-impact claims and the reasonable factors other than age

[334] Some comments stated more generally that the impact analysis should account for the fact that some State PWFA-type laws may not be identical to the PWFA, and therefore that such States may face slightly additional costs for reasonable accommodations required by the PWFA but not by the pre-existing State law. These comments failed to identify whether or how the interpretations of the State law differ from the PWFA and to cite or provide data that would support any changes.

[335] 75 FR 68912, 68931 (Nov. 9, 2010).

defense (RFOA)[336] or its rule implementing the ADA Amendments Act (ADAAA).[337]

Here, the Commission has calculated compliance activities under the PWFA regulation in light of the fact that the PWFA is a new civil rights statute, but employers covered by the PWFA already are covered by Title VII and the ADA. Presumably, these employers already have standard procedures to inform their employees and supervisors about their rights and responsibilities under Title VII, the ADA, and other workplace laws. Given the similarities between the PWFA and the ADA and Title VII, employers will be able to use many of their existing procedures and include the PWFA in their training regarding the ADA and Title VII.[338] Further, the Commission offers training and assistance specifically tailored to small businesses.[339] The Commission does not anticipate that covered entities will need legal advice; the PWFA and the regulation draw on well-established concepts and procedures from Title VII and the ADA. For example, as under the ADA, an employer does not have to require supporting documentation to provide a PWFA accommodation; if it does, the documentation under the PWFA, like under the ADA, must be kept separate from the employee's personnel file. Thus, employers will be able to use a compliance mechanism they have already developed for the ADA for the PWFA. Similarly, employers can use the same human resources staff they use to process requests for accommodations under the ADA or Title VII for such requests under the PWFA. Accordingly, the Commission does not anticipate that covered employers will need time in addition to the time provided in the final rule.

Additionally, the Commission received comments that stated that the regulation would provide appropriate guidance and would assist employers in compliance, which would reduce employer costs.

Summary of the Commission's Preliminary Economic Analysis of Impacts: Nonquantifiable Benefits

In the NPRM, the Commission identified five primary benefits of the proposed rule and underlying statute that are difficult to quantify: (1) improvements in maternal and infant health outcomes; (2) improvements in pregnant employees' economic security; (3) non-discrimination and other intrinsic benefits, such as the enhancement of human dignity; (4) clarity in enforcement and efficiencies in litigation; and (5) benefits for covered entities.[340]

Comments and Response to Comments Regarding Non-Quantifiable Benefits

A number of comments agreed with the identified benefits and provided additional research or anecdotal evidence to support the benefits.

Regarding improvements in maternal and infant health outcomes, one comment asserted that the rule will have positive effects on pregnant employees' mental health, stating that even perceived pregnancy discrimination at work has been linked to increased stress and symptoms of postpartum depression.[341] This comment linked stress resulting from workplace discrimination and workplace conditions to increased risk of preterm birth or low birth weight, potentially resulting in serious health problems at birth that may cause long-term health and developmental consequences in children.[342] Such health challenges may result in additional health care costs; accordingly, reducing stress during pregnancy also may reduce health care costs.[343] Other comments observed that, because research shows that certain workplace conditions, such as lengthy periods of standing or walking, or high risk of chemical exposure or noise, can result in complications for a pregnant employee and their baby, accommodations to alleviate those conditions improve health outcomes for pregnant employees and their children.[344] Additionally, one comment cited a source that drew from a study that found that, overall, employment during pregnancy is associated with a reduction in the risk of preterm birth, which supports the need to keep pregnant employees in the workforce.[345] Other comments provided anecdotal evidence that employees who received accommodations under the PWFA felt secure in their employment and thus better able to focus on their new babies' needs.

Regarding improvements in pregnant employees' economic security, several comments underscored that many American workers lack a financial cushion and that the proposed rule and underlying law will mitigate short- and long-term negative financial consequences associated with losing a job at a critical time, given increased costs due to childbirth, child rearing, and childcare.[346] At least one comment observed that women of color and Native women are overrepresented in low-paid jobs with few benefits, and that providing accommodations that can help employees stay in the workforce is critical to promoting economic security.[347]

Regarding non-discrimination and other intrinsic benefits, several comments confirmed that non-discrimination and other intrinsic benefits result from the proposed rule and underlying law. For example, one comment stated that the underlying law gives pregnant employees ''a strong sense of dignity and belonging in the workforce,'' reduces stigma and stereotyping regarding pregnancy, and

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[336] 77 FR 19080, 19090–94 (Mar. 30, 2012).

[337] 76 FR 16978, 16994–95, 16999 (Mar. 25, 2011).

[338] H.R. Rep. No. 117–27, pt. 1, at 26–31 (discussing the similarities between the PWFA and the ADA and the PWFA and Title VII).

[339] EEOC, *Small Business Resource Center, https://www.eeoc.gov/employers/small-business* (last visited Mar. 25, 2024)

[340] 88 FR 54751–54.

[341] *See* Kaylee J. Hackney et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health,* 106 J. Applied Psych. 774, 777, 781 (2021).

[342] *Id.* at 778, 781; March of Dimes, *Stress and Pregnancy, https://www.marchofdimes.org/find-support/topics/pregnancy/stress-and-pregnancy* (last visited Mar. 25, 2024); March of Dimes, *Long-Term Health Effects of Preterm Birth* (Oct. 2019), *https://www.marchofdimes.org/find-support/topics/birth/long-term-health-effects-premature-birth.*

[343] March of Dimes, *Premature Birth: The Financial Impact on Business* (2013), *https://onprem.marchofdimes.org/materials/premature-birth-the-financial-impact-on-business.pdf.*

[344] *See generally* Frincy Francis et al., *Ergonomic Stressors Among Pregnant Healthcare Workers,* 21 Sultan Qaboos Univ. Med. J. 172 (2021), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8219330* (describing ergonomic stressors and pregnancy outcomes); *see also* Louisville Dep't of Pub. Health & Wellness, *Pregnant Workers Health Impact Assessment* 17–19, 23 (2019) [hereinafter *Pregnant Workers Health Impact Assessment*], *https://louisvilleky.gov/center-health-equity/document/pregnant-workers-hia-final-02182019pdf* (identifying workplace conditions that may impact the health of a pregnant worker and their child and basic accommodations to alleviate those conditions to improve health outcomes).

[345] *Pregnant Workers Health Impact Assessment, supra* note 344, at 16–17 (citing a study finding that, overall, employment during pregnancy is associated with a reduction in risk of preterm birth, although certain types of jobs or environments may increase the risk of preterm birth).

[346] *See, e.g.,* Lane Gillespie, Bankrate, *Bankrate's 2023 Annual Emergency Savings Report* (June 22, 2023), *https://www.bankrate.com/banking/savings/emergency-savings-report/* (finding that 48 percent of Americans have enough emergency savings to cover 3 months of expenses); Matthew Rae et al., KFF, *Health Costs Associated with Pregnancy, Childbirth, and Postpartum Care* (July 13, 2022), *https://www.kff.org/health-costs/issue-brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/* (noting that the average health care costs associated with ''pregnancy, childbirth, and post-partum care'' total $18,865, and the average out-of-pocket cost is $2,854).

[347] *See* Jasmine Tucker & Julie Vogtman, Nat'l Women's Law Ctr., *Hard Work Is Not Enough: Women in Low-Paid Jobs* 15 (2023), *https://nwlc.org/wp-content/uploads/2020/04/%C6%92.NWLC_Reports_HardWorkNotEnough_LowPaid_2023.pdf.*

reestablishes pregnancy as an ordinary part of employment. One comment cited a source that stated, ''The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers.'' [348] Several comments provided anecdotal accounts of the sense of dignity that receiving pregnancy-related accommodations under the PWFA has given individual employees. Another comment noted that the proposed rule and underlying law will reduce incidents in which pregnant employees experienced humiliation at the hands of supervisors who denied accommodations and singled out pregnant employees for negative treatment.

Regarding clarity in enforcement and efficiencies in litigation, multiple comments confirmed that the proposed rule would provide clarity regarding employees' rights and employers' obligations under the PWFA. One comment stated that the NPRM explains the PWFA in an understandable and accessible way. One comment from a nonprofit observed that ''dozens and dozens'' of low-wage employees had informed them of the ''transformative'' effect of the law in their lives; some employees reported that their employers had previously denied or ignored their requests for accommodation but granted them after the PWFA became effective.[349] At the same time, this nonprofit noted that many employees, particularly low-wage women of color, are still denied their rights under the PWFA, demonstrating the need for a clear and comprehensive rule. Finally, as previously noted, the comment from several State Attorneys General observed that States that had enacted laws protecting pregnant employees in the workplace did not experience a marked increase in litigation following the law's enactment, and the vast majority of complaints resolve prior to administrative proceedings or litigation.[350]

Regarding benefits for covered entities, some comments stated that employers benefit from retaining pregnant employees because searching for and training new employees results in costs and stress on an organization, which can, in turn, negatively affect customers and other employees. Several comments highlighted that laws like the PWFA enable businesses to retain valuable employees, improve productivity and morale, reduce workers' compensation costs and absenteeism, and improve company diversity, and stated that the proposed rule would have the same effects. One comment observed that, for small businesses struggling with worker shortages and seeking to incentivize employee retention, the proposed rule could facilitate incentivizing worker retention.

One comment asserted that the rule would benefit employees in industries that are traditionally male dominated, such as manufacturing and the trades, and are physically demanding. The comment stated that providing pregnancy-related accommodations will reduce occupational segregation by gender, which in turn may affect the pay gap. Although this logically may be a possible benefit, the sources cited did not directly support this proposition. The Commission thus declines to include this as a benefit of the final rule.

The Commission received a few comments asserting that certain factors offset the non-quantifiable benefits identified by the Commission. One comment stated that in its discussion of the benefits to civil rights, the Commission must account for the harm done to the civil rights of religious employers that may have to provide accommodations that conflict with their religious beliefs. The Commission does not agree with this comment; as discussed in the preamble to the final rule, several defenses are available to religious employers.

The Commission also received several comments stating that the proposed rule would create harm to women and families because of its inclusion of abortion in the definition of ''pregnancy, childbirth, or related medical conditions.'' As set out in the economic analysis and the preamble to the final rule, the rule does not require anyone to have an abortion or force employers to pay for abortions. Further, as set out in the response to comments on the quantitative analysis above, there is no evidence that the rule will increase the number of abortions. The Commission does not agree that the considerations raised in these comments should be included here.

The Commission concludes that the benefits articulated in the NPRM are attributable to the rule and the Commission incorporates supplemental evidence of each benefit, as described above, into the final rule.

Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

Summary of the Commission's Certification That the Rule Will Not Have a Significant Economic Impact on a Substantial Number of Small Entities

In the NPRM, the Commission certified that the rule will not have a significant economic impact on a substantial number of small entities.[351] The Commission reasoned that, although the rule would apply to all small entities with 15 or more employees, and therefore would affect a ''substantial'' number of small entities, it would not have a ''significant economic impact'' on a substantial number of small entities.

To justify its decision to certify in the final rule, the Commission again began its analysis by assuming that the rule will impose two quantifiable costs on small entities: the annual cost of providing pregnancy-related reasonable accommodations as a result of the statute and the rule, and the one-time cost of becoming familiar with the rule.

To estimate the one-time cost of becoming familiar with the rule, based on the analysis detailed in the Initial Regulatory Impact Analysis (IRIA), the Commission estimated that small entities in States and localities that have laws substantially similar to the PWFA will be limited to a one-time administrative cost of approximately $56.76, and that small entities that are not already subject to State or local laws substantially similar to the PWFA will face a one-time administrative cost of approximately $170.27.

To estimate the annual cost of accommodation required by the rule, consistent with the IRIA, in the NPRM the Commission assumed that the number of individuals seeking accommodations will be approximately equal to the number of individuals who actually become pregnant during that year; that 33 percent of the employees within each small entity are capable of becoming pregnant, and that, of these, 4.7 percent will actually become pregnant in a given year; that between 23 and 71 percent of pregnant individuals within each small entity will need an accommodation; that 49.4 percent of such accommodations will have no cost; and that the average cost of the remaining 50.6 percent of needed accommodations will be $300 distributed over 5 years, or $60

[348] Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present,* 108 Georgetown L.J. 167, 220–26 (2020).

[349] Comment EEOC–2023–0004–98298, A Better Balance, at 7 (Oct. 10, 2023).

[350] *See supra* note 333.

[351] 88 FR 54764. The Commission's analysis under the Regulatory Flexibility Act, summarized here, is available at 88 FR 54764–65.

annually. Using these figures, it generated the following cost estimates for small entities of various sizes: [352]

generated the following cost estimates for small entities of various sizes: [352]

Table 13 (from the NPRM): Annual Costs for Reasonable Accommodations for Small Businesses Based on Size

Number of Employees	33% Women Aged 16–50	4.7% Pregnant in a Given Year	Needing Accommodations: 23% (Lower Bound Estimate) – 71% (Upper Bound Estimate)	50.6% Non-Zero-Cost Accommodations: Lower Bound Estimate – Higher Bound Estimate (Rounded Up)	Total Expected Cost: Lower Bound Estimate – Higher Bound Estimate
15	4.95	0.233	0.054 – 0.165	1	$60
50	16.5	0.7755	0.178 – 0.55	1	$60
100	33	1.551	0.357 – 1.01	1	$60
150	49.5	2.326	0.535 – 1.652	1	$60
200	66	3.102	0.713 – 2.202	1 – 2	$60 – $120
250	82.5	3.878	0.892 – 2.75	1 – 2	$60 – $120
500	165	7.755	1.78 – 5.5	1 – 3	$60 – $180
750	247.5	11.633	2.676 – 8.259	2 – 5	$120 – $300
1000	330	15.51	3.567 – 11.012	2 – 6	$120 – $360
1250	412.5	19.388	4.459 – 13.765	3 – 7	$180 – $420
1500	495	23.265	5.351 – 16.518	3 – 9	$180 – $540

Because entities that are already subject to laws substantially similar to the PWFA are already required to provide accommodations consistent with the PWFA, their total costs were estimated to be the one-time cost of $56.75.

Total costs for entities that are not already subject to laws substantially similar to the PWFA were estimated to be the annual cost of providing reasonable accommodations as detailed in Table 13 in the NPRM (between $60 for businesses with 15 employees and $540 for businesses with 1,500 employees), plus $170.27 (the cost of becoming familiar with the rule) in the first year.

Revisions in Response to Comments That Addressed Both the IRIA and the Commission's Justification for Certifying Under the Regulatory Flexibility Act (RFA)

As detailed in the discussion of the Regulatory Impact Analysis (RIA) above, in response to comments the Commission made adjustments to its estimate of the percentage of individuals capable of becoming pregnant who actually become pregnant during a given year (revised upward from 4.7 percent to 7.1 percent), and to its lower bound estimate of the percentage of pregnant individuals who will need a reasonable accommodation (revised upward from 23 percent to 32 percent). The Commission also increased the amount of time it estimated employers would need to familiarize themselves with the rule. Because the Commission's analysis under the Regulatory Flexibility Act (RFA) relied on these same estimates, the Commission has made conforming changes below.

Comments and Response to Comments Pertaining Specifically to Small Entities

In addition to the comments that apply both to the RIA and the analysis under the RFA, the Commission received some comments specifically addressing the rule's effect on small entities.

Many comments made general statements about the rule's effect on small businesses, without addressing specific aspects of the reasoning offered by the Commission in support of its decision to certify.

Some comments stated generally that small entities will have difficulty complying with the rule. A few of these emphasized that small entities may have especial difficulty reading and understanding the rule or hiring personnel to cover for pregnant employees who take leave as a reasonable accommodation. Some asserted that small entities will hire fewer women in anticipation of added costs arising from the need to provide accommodations.

Other comments stated broadly that the rule will be beneficial to small entities. One such comment noted that many States have laws similar to the PWFA with thresholds even lower than 15 employees; that, in those States, even smaller employers must provide reasonable accommodations absent undue hardship; that providing for accommodations may allow employers to keep employees and thus reduce costs for replacement and retraining; that the PWFA will encourage pregnant employees to stay in the workforce, thereby supporting small businesses; and that in States with PWFA-type statutes, increased costs or adverse economic outcomes either have not been reported or have been so insignificant that they are not easily measurable, likely because the required accommodations tend to be low-cost or no-cost.

On balance, the Commission concludes that the comments discussed above do not provide it with sufficient

[352] *Id.* at 54764–65.

reason to withdraw its earlier decision to certify that the rule will not have a significant economic effect on a substantial number of small entities. As detailed above, these comments were not uniformly in favor of withdrawal. Further, the comments stating generally that small entities will have difficulty complying with the rule did not provide data in support of those claims. The Commission also observes that these comments generally appear to overlook the fact that, if a particular reasonable accommodation would impose undue hardship on the employer, neither the PWFA nor the rule require the employer to provide it. To the extent that the above comments predict that the rule will cause small employers to hire fewer women, the Commission notes that such action is independently unlawful pursuant to Title VII's prohibition against refusal to hire women because they may become pregnant.[353]

Some comments addressed the Commission's reasoning more directly. One comment stated that the Commission should retract its certification because over 10 percent of the 33 million small businesses in the United States will be required to comply with the rule. This comment misrepresents the Commission's reason for certifying. As explained above, in the NPRM the Commission agreed that the rule will affect a ''substantial'' number of small entities but concluded that the economic impact on such entities would, in almost all cases, fail to be ''significant.'' [354] The Commission thus declines to retract its certification in response to this comment.

One comment stated that, in estimating the cost of accommodations on small entities, the Commission should not have relied on the average cost for such accommodations, but rather should have focused on ''budget-busting'' accommodations that would be especially difficult for small entities to handle. This comment did not cite data establishing how much an accommodation would need to cost in order to qualify as ''budget-busting'' for small entities of a given size, what sorts of pregnancy-related accommodations were likely to reach that threshold, or how often such an accommodation is likely to be needed. Further, the comment did not account for the fact that the PWFA does not require employers to provide reasonable accommodations that would impose undue hardship; presumably the ''budget-busting'' accommodations would be likely to meet this standard.

One comment objected to the Commission's method of determining whether a given entity meets the 15-employee threshold for coverage under the PWFA. Specifically, the comment objected to the fact that the Commission counts temporary or seasonal employees toward this total under some circumstances. The Commission declines to change its method for determining whether an entity has 15 employees in response to this comment. The same method has been used consistently for decades under all of the statutes enforced by the EEOC and has been endorsed by the Supreme Court.[355]

One comment objected to the Commission's decision to distribute the average cost of a non-zero-cost accommodation ($300) over 5 years for purposes of the RFA analysis. The Commission distributed the costs over 5 years under the assumption that most accommodations with a cost will involve purchase of durable goods with a life of 5 years.[356] The Commission made this same assumption when it estimated the costs arising from the provision of additional reasonable accommodations as a result of the ADAAA.[357] The comment stated that small employers generally will have no use for these durable goods after they are used by the original requester. The comment provided no data to support this assertion. Further, the comment did not identify a reason why the Commission's estimate of average accommodation costs under the PWFA should differ from its estimate of the same under the ADA. The Commission, therefore, declines to amend its analysis in response to the comment.

Some comments objected to the Commission's method of estimating the percentage of employees within a given small entity who actually become pregnant in a given year. Although the Commission's estimate may be accurate for small entities in certain industries, these comments argued, they may not be accurate for small entities operating in industries that employ disproportionately high numbers of women. One comment identified ''education and health; leisure and hospitality; and retail and wholesale trade'' as industries that employ disproportionately high numbers of women. The comment offered the hypothetical situation of a preschool with 25 employees, 20 of whom are women of reproductive age. The comment concluded that the preschool likely will have continuous costs imposed by the proposed rule, even though it has just 25 employees.

The Commission is unpersuaded that it should retract its certification that the rule will not have a significant economic impact on a substantial number of small entities in response to these comments. In the Commission's view, they overestimate the costs that will be experienced in industries with disproportionately high numbers of women employees. Consider the example discussed above in which a business employs 25 employees, 20 of whom are capable of becoming pregnant. To generate a lower bound estimate of the number of expected non-zero-cost accommodations per year in the example, the Commission calculates as follows: $20 \times 0.071 \times 0.32 \times 0.506 = 0.22$ individuals per year are likely to need a non-zero-cost pregnancy-related reasonable accommodation, roughly equivalent to one individual every 5 years.[358] To generate an upper bound estimate: $20 \times 0.071 \times 0.71 \times 0.506 = 0.52$ individuals per year are likely to need a non-zero-cost pregnancy-related accommodation, roughly equivalent to one individual every 2 years. As discussed above, these costs are not expected to be high—the expected annual cost per accommodation is estimated to be $60 per year. Thus, rather than imposing ''continuous'' high costs, businesses like the one in the example should only expect to provide one relatively low-cost accommodation every 2 to 5 years.[359] Additionally, even

[353] 42 U.S.C. 2000e(k).

[354] 88 FR 54764.

[355] *See generally Walters* v. *Metro. Educ. Enters., Inc.,* 519 U.S. 202 (1997).

[356] 88 FR 54759.

[357] 76 FR 16977, 16994 (Mar. 25, 2011).

[358] The estimate was calculated by multiplying the number of individuals in the business who are capable of becoming pregnant (20) by (a) 7.1 percent, to account for the fact that only some individuals who are capable of becoming pregnant will actually become pregnant in a given year; (b) 32 percent, to account for the fact that only some pregnant individuals will need accommodation; and (c) 50.6 percent, to account for the fact that only some needed accommodations will have a cost. For a detailed discussion of these calculations, see the *Costs* section in the Final Regulatory Impact Analysis below.

[359] Further, the Commission has been given no reason to believe that the example offered in the comment and discussed here is representative of any real industry. The percentage of employees capable of becoming pregnant in the example is $20 \div 25 = 80$ percent—roughly 2.5 times as high as the 33 percent national average. Additionally, the business in the example had only 25 employees. The comment failed to provide any data establishing the existence of any industry that has a ''substantial'' number of entities that have so few employees and that employs women at such a disproportionately high rate. The example is of an entity in the education industry. The Small Business Administration does not define the meaning of ''small entity'' for any of the education-related industries in terms of a number of employees. *See* 13 CFR 121.210. It defines ''small entity'' in the elementary and secondary school industry to be an entity that has $20 million or less

Continued

if a substantial number of small entities in a particular industry were to face ''continuous'' costs as a result of the rule—as demonstrated by the calculations above, a highly unlikely occurrence—it would not follow that such costs would be ''economically significant.''

For the reasons discussed above, the Commission has determined that the comments it received regarding occupational segregation do not require it to retract its certification that the rule will not have a significant economic impact on a substantial number of small entities, or to revise its justification for certifying.

Final Economic Analysis

Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)

Introduction

The final rule has been drafted and reviewed in accordance with Executive Order (E.O.) 12866. The rule and the Interpretive Guidance are intended to add to the predictability and consistency of executive enforcement of the PWFA and to provide covered entities and employees with information regarding their rights and responsibilities. The rule is required pursuant to 42 U.S.C. 2000gg–5. The Final Regulatory Impact Analysis estimates the cost of the rule to be between $466.71 million and $484.71 million in the first year, and between $14.82 and $32.82 million annually thereafter. It estimates that the benefits will be significant. While those benefits cannot be fully quantified and monetized, the Commission concludes that, consistent with E.O. 13563, the benefits (qualitative and quantitative) will justify the costs. The Commission notes that the rule and underlying statute create many important benefits that, in the words of E.O. 13563, stem from ''values that are difficult or impossible to quantify'' including ''equity, human dignity, fairness and distributive impacts.'' Additionally, because the rule provides employees who are affected by pregnancy, childbirth, or related medical conditions with reasonable accommodations that enable them to continue working, the benefits of the rule include increased productivity. These benefits cannot be quantified at this time, however.

in annual receipts, *id.,* but the Commission was unable to determine the percentage of elementary or secondary schools with $20 million or less in annual receipts that have 25 or fewer employees.

Summary

As detailed in the Final Regulatory Impact Analysis (FRIA) section below, the final rule and underlying statute are expected to provide numerous unquantifiable benefits to qualified employees and applicants with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, especially in States that currently do not have laws substantially similar to the PWFA. It will also benefit covered entities, the U.S. economy, and society as a whole. These unquantifiable benefits include improved maternal and infant health; improved economic security for pregnant employees; increased equity, human dignity, and fairness; improved clarity of enforcement standards and efficiencies in litigation; and decreased costs related to employee turnover for covered entities.

The quantitative section in the FRIA below provides estimates of the two main expected costs associated with the rule and underlying statute: (a) annual costs associated with providing reasonable accommodations to qualified applicants and employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions by employers in States that do not currently have such a requirement, and (b) one-time administrative costs for covered entities, which include becoming familiar with the rule, posting new equal employment opportunity (EEO) posters,[360] and updating EEO policies and handbooks. The Commission expresses the quantifiable impacts in 2022 dollars and uses discount rates of 3 and 7 percent pursuant to OMB Circular A–4.

The analysis concludes that approximately 49.4 percent of the reasonable accommodations that will be required by the rule and underlying statute will have no cost to covered entities, and that the average annual cost for the remaining 50.6 percent of such accommodations is approximately $60 per year per accommodation. Taking into account that many entities covered by the PWFA are already required to provide such accommodations under State and local laws, the total impact on the U.S. economy to provide reasonable accommodations under the rule and underlying statute is estimated to be between $14.82 million and $32.82 million per year.

The estimated one-time costs associated with administrative tasks are quite low on a per-establishment basis—between $57.02 and $255.40, depending on the State and on the type of employer. Despite the low per-establishment cost, the proposed rule is a ''significant regulatory action'' under section 3(f)(1) of E.O. 12866, as amended by E.O. 14094, because the number of regulated entities—hence the number of entities expected to incur one-time administrative costs—is extremely large (including all public and private employers with 15 or more employees and the Federal Government). As a result, the Commission has concluded that the overall cost to the U.S. economy will be in excess of $200 million.[361]

Final Regulatory Impact Analysis (FRIA)

The Need for Regulatory Action

The PWFA and the final rule respond to the previously limited availability of accommodations for employees affected by pregnancy, childbirth, or related medical conditions under Federal law. Although Title VII (as amended by the Pregnancy Discrimination Act (PDA)) provided some protections for employees affected by pregnancy, childbirth or related medical conditions, court decisions regarding the ability of employees affected by pregnancy, childbirth, or related medical conditions to obtain workplace accommodations created ''unworkable'' standards that did not adequately protect pregnant employees.[362] Similarly, prior to the PWFA, some pregnant employees could obtain protections under the ADA, but these were limited.[363] Pregnant employees who could not obtain accommodations risked their economic security, which had harmful effects for

[360] The Commission posted an updated poster on its website concurrent with the PWFA's effective date of June 27, 2023. *See* EEOC, ''Know Your Rights: Workplace Discrimination is Illegal'' Poster, *https://www.eeoc.gov/poster* (last visited Mar. 25, 2024).

[361] The Congressional Budget Office (CBO) did not review the PWFA for intergovernmental or private-sector mandates because ''[s]ection 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provision that would establish or enforce statutory rights prohibiting discrimination,'' and CBO ''determined that the bill falls within that exclusion because it would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodations for pregnancy, childbirth, or related medical conditions.'' H.R. Rep. No. 117–27, pt. 1, at 41.

[362] *Id.* at 14–16 (describing court rulings under Title VII and the Supreme Court's decision in *Young,* 575 U.S. 206); *see* 88 FR 54714–16.

[363] H.R. Rep. No. 117–27, pt. 1, at 19–21 (describing court decisions under the ADA that failed to find coverage for employees with pregnancy-related disabilities).

themselves and their families.[364] Furthermore, the loss of a job can affect a pregnant employee's economic security for decades, as they lose out on ''retirement contributions . . . short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more.'' [365] Additionally, the lack of workplace accommodations can harm the health of the employee and their pregnancy.[366] While numerous States have laws that provide for accommodations for pregnant employees, the lack of a national standard prior to passage of the PWFA meant that employees' rights varied depending on the State in which they lived, some of which left employees completely unprotected.[367]

The PWFA at 42 U.S.C. 2000gg–3(a) provides that ''[n]ot later than 1 year after [the date of enactment of the Act], the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5 [of the United States Code] to carry out this chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.''

Pursuant to 42 U.S.C. 2000gg–3(a), the EEOC is issuing this rule following the procedures codified at 5 U.S.C. 553(b).

Baseline

The PWFA is a new law that requires covered entities to provide reasonable accommodations to the known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions of qualified employees. As set out in the NPRM,[368] the PWFA seeks to fill gaps in the Federal and State legal landscape regarding protections for employees affected by pregnancy, childbirth, or related medical conditions.

Employees affected by pregnancy, childbirth, or related medical conditions have certain rights under existing civil rights laws, such as Title VII, the ADA, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* (FMLA), the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), and various State and local laws.[369]

Under Title VII, an employee affected by pregnancy, childbirth, or related medical conditions may be able to obtain a workplace modification to allow them to continue to work.[370] Typically courts have only found in favor of such claims if the employee can identify another individual similar in their ability or inability to work who received such an accommodation, or if there is some direct evidence of disparate treatment (such as a biased comment or a policy that, on its face, excludes pregnant employees). However, there may not always be similarly situated employees. For this reason, some pregnant employees have not received simple, common-sense accommodations, such as a stool for a cashier [371] or bathroom breaks for a preschool teacher.[372] And even when the pregnant employee can identify other employees who are similar in their ability or inability to work, some courts still have not found a Title VII violation.[373]

Under the ADA, certain employees affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they have an ''actual'' or ''record of'' ADA disability; this standard does not include pregnancy itself but includes a pregnancy-related disability.[374]

Under the FMLA, covered employees can receive up to 12 weeks of job-protected unpaid leave for, among other things, a serious health condition, the birth of a child, and bonding with a newborn within 1 year of birth.[375] However, employees must work for an employer with 50 or more employees within 75 miles of their worksite and meet certain tenure requirements in order to be entitled to FMLA leave.[376] Survey data from 2018 show that only 56 percent of employees are eligible for FMLA leave.[377] Further, the FMLA only provides unpaid leave—it does not require reasonable accommodations that would allow employees to stay on the job and continue to be paid.

The PUMP Act requires employers who are covered by the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA), to provide reasonable break time for an employee to express breast milk for their nursing child each time such employee has need to express milk for 1 year after the child's birth. The PUMP Act also requires employers to provide a place to pump at work, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.[378]

As set out in Table 1, 30 States currently have laws similar to the PWFA that provide for accommodations for pregnant employees. In most States, again as set out in Table 1, the State laws cover the same employers that are covered by the PWFA. Employees in the remaining States and Federal Government employees have the rights set out in the Federal laws described above and, until the passage of the PWFA, did not have the protections of a law like the PWFA.

In addition to the protections provided by the above laws, the Federal Government provides 12 weeks of paid parental leave to eligible Federal employees upon the birth of a new child.[379]

[364] *Id.* at 22 (''When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies.''); *id.* at 24 (noting that ''families increasingly rely on pregnant workers' incomes.'').

[365] *Id.* at 25.

[366] *Id.* at 22 (''According to the American College of Obstetricians and Gynecologists (ACOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children.''); *id.* (describing how a lack of an accommodation led to a miscarriage for a worker).

[367] See *infra* Table 1 for a calculation of the number of employees who live in States without PWFA-analogue laws.

[368] 88 FR 54714–15.

[369] For a list of State laws, see *infra* Table 1. In addition, Federal laws regarding Federal funding such as Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.,* and the Workforce Innovation and Opportunity Act, 29 U.S.C. 3248(a)(2), provide protection from sex discrimination, including discrimination based on pregnancy, childbirth, or related medical conditions.

[370] As relevant here, Title VII protects employees from discrimination based on pregnancy, childbirth, or related medical conditions ''with respect to . . . compensation, terms, conditions, or privileges of employment[ ] because of such individual's . . . sex.'' 42 U.S.C. 2000e–2(a)(1). Discrimination because of sex includes discrimination based on ''pregnancy, childbirth, or related medical conditions.'' 42 U.S.C. 2000e(k). Title VII also provides that ''women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.'' *Id.*

[371] *See, e.g., Portillo* v. *IL Creations Inc.,* No. 1:17–cv–01083, 2019 WL 1440129, at *5 (D.D.C. Mar. 31, 2019).

[372] *See, e.g., Wadley* v. *Kiddie Acad. Int'l, Inc.,* No. 2:17–CV–05745, 2018 WL 3035785, at *4 (E.D. Pa. June 19, 2018).

[373] *See, e.g., Wal-Mart Stores E.,* 46 F.4th at 597–99 (concluding that the employer did not engage in discrimination when it failed to accommodate pregnant employees with light duty assignments, even though the employer provided light duty assignments for employees who were injured on the job); *but see, e.g., Legg,* 820 F.3d at 69, 75–77 (vacating judgment for the employer where officers injured on the job were entitled to light duty but pregnant employees were not).

[374] 42 U.S.C. 12102(2), (4); 29 CFR part 1630, appendix 1630(h); *Enforcement Guidance on Pregnancy Discrimination, supra* note 31, at (II).

[375] 29 U.S.C. 2612(a)(1); 29 CFR 825.120.

[376] 29 U.S.C. 2611(2)(A), (B).

[377] Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys* 3 (2020), *https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf.*

[378] U.S. Dep't of Lab., *FLSA Protections to Pump at Work, https://www.dol.gov/agencies/whd/pump-at-work* (last visited Mar. 25, 2024).

[379] Federal Employee Paid Leave Act, Public Law 116–92, 133 Stat. 1198, 2304–09 (2019).

Nonquantifiable Benefits

The final rule and the underlying statute create many important benefits that stem from ''values that are difficult or impossible to quantify,'' including ''equity, human dignity, [and] fairness.'' [380] These benefits are the marginal increase in those values beyond the protections provided in the laws outlined above. The Commission has identified five primary benefits of the rule and underlying statute. The Commission did not quantify each of the following benefits that are expected to result from the PWFA and its implementing regulation, however, because it did not identify sufficient data to quantify these benefits.[381]

Improvements in Health for Pregnant Employees and Their Babies

Congress enacted the PWFA in large part to improve maternal and infant health outcomes. The legislative history emphasizes that the new law was needed because ''[n]o worker should have to choose between their health, the health of their pregnancy, and the ability to earn a living.'' [382] Congress further concluded that ''providing reasonable accommodations to pregnant workers is critical to the health of women and their children.'' [383] The need to improve health outcomes surrounding pregnancy is critical—as a recent report noted, ''women in our country are dying at a higher rate from pregnancy-related causes than in any other developed nation.'' [384] Additionally, ''Black women are more than three times as likely as White women to die from pregnancy-related causes, while American Indian/Alaska Native [women] are more than twice as likely,'' [385] and a recent study shows that negative health outcomes during pregnancy disproportionately affect Black women compared to White women regardless of wealth.[386]

Some studies have shown increased risk of miscarriage,[387] preterm birth,[388] low birth weight, urinary tract infections, fainting, and other health problems for pregnant employees because of workplace conditions.[389] Research also shows that certain workplace conditions, such as lengthy periods of standing or walking, or high risk of chemical exposure or noise, can result in complications for a pregnant employee and their baby; thus accommodations to alleviate those conditions improve health outcomes for pregnant employees and their children.[390]

Additionally, the provision of accommodations may improve pregnant employees' mental health, as even perceived pregnancy discrimination at work has been linked to increased stress and symptoms of postpartum depression.[391] Stress resulting from workplace discrimination and workplace conditions can increase risk of preterm birth or low birth weight, potentially resulting in serious health problems at birth that may cause long-term health and developmental consequences in children.[392] Such health challenges may result in additional health care costs; accordingly, reducing stress during pregnancy also may reduce health care costs.[393]

Moreover, employees who do not receive needed accommodations, and who quit their jobs as a result in order to maintain a healthy pregnancy, often lose employer-sponsored health insurance in addition to losing their incomes.[394] In a letter to Congress, a group of leading health care practitioner organizations explained that when a pregnant employee loses health insurance, ''the impact on both mother and baby may be long-lasting and severe. One of the main predictors of a healthy pregnancy is early and consistent prenatal care. Loss of employment and health benefits impact family resources, threatening the ability to access vital health care when a woman needs it the most.'' [395]

[380] 76 FR 3821 (Jan. 21, 2011).

[381] Where relevant, the Commission requested additional data in the NPRM. *See* 88 FR 54749.

[382] H.R. Rep. No. 117–27, pt. 1, at 11.

[383] *Id.* at 11, 22.

[384] The White House, *White House Blueprint for Addressing the Maternal Health Crisis* 1 (2022), *https://www.whitehouse.gov/wp-content/uploads/2022/06/Maternal-Health-Blueprint.pdf.*

[385] *Id.* at 15.

[386] Kate Kennedy-Moulton et al., *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30,693, 2022), *https://www.nber.org/system/files/working_papers/w30693/w30693.pdf* (finding that maternal and infant health vary with income, but infant and maternal health in Black families at the top of the income distribution is similar to or worse than that of White families at the bottom of the income distribution).

[387] H.R. Rep. No. 117–27, pt. 1, at 22; Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 733, *Employment Considerations During Pregnancy and the Postpartum Period* e119 (2018) [hereinafter *ACOG Committee Opinion*], *https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf* (discussing studies that showed an increased risk of miscarriage or stillbirth associated with night work, working more than 40 hours a week, or extensive lifting, but noting that ''[i]t is difficult to draw definitive conclusions from these studies'').

[388] H.R. Rep. No. 117–27, pt. 1, at 22; *ACOG Committee Opinion, supra* note 387, at e119–20 (discussing studies that found a ''slight to modest risked increase'' of preterm birth with some work conditions, but also noting that it is hard to know whether these results were due to ''bias and confounding or to an actual effect'').

[389] H.R. Rep. No. 117–27, pt. 1, at 22; *see also* Hackney et al., *supra* note 341, at 774, 781 (2021) (describing two studies that demonstrated that perceived pregnancy discrimination serves as a threat to women's resources which leads to increased postpartum depressive symptoms for mothers, decreased birth weight and gestational age, and increased doctors' visits for their babies, via mothers' stress); Renee Mehra et al., '''*Oh Gosh, Why Go?' Cause They Are Going to Look At Me and Not Hire*'': *Intersectional Experiences of Black Women Navigating Employment During Pregnancy and Parenting,* BMC Pregnancy & Childbirth 2 (2023), *https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-022-05268-9* (describing studies that found that policies that protect women in the workplace during pregnancy and the postpartum period are important for maternal and infant health outcomes); H.M. Salihu et al., *Pregnancy In the Workplace,* 62 Occupational Med. 88, 94 (2012), *https://academic.oup.com/occmed/article/62/2/88/1480061?login=false* (finding that while physically demanding jobs do not pose a substantial risk to fetal health, ''[a] moderate temporary reduction in job physicality may promote improved maternal and foetal health''); *ACOG Committee Opinion, supra* note 387, at e117 (discussing modifications for physical work and how they could help the health of pregnant workers).

[390] *See generally* Francis et al., *supra* note 344 (describing ergonomic stressors and pregnancy outcomes); *see also Pregnant Workers Health Impact Assessment, supra* note 344, at 17–19, 23 (identifying workplace conditions that may impact the health of a pregnant worker and their child and basic accommodations to alleviate those conditions to improve health outcomes).

[391] Hackney et al., *supra* note 341, at 777, 781.

[392] *Id.* at 778, 781; March of Dimes, *Stress and Pregnancy, https://www.marchofdimes.org/find-support/topics/pregnancy/stress-and-pregnancy* (last visited Mar. 25, 2024); March of Dimes, *Long-Term Health Effects of Preterm Birth* (Oct. 2019), *https://www.marchofdimes.org/find-support/topics/birth/long-term-health-effects-premature-birth.*

[393] March of Dimes, *Premature Birth: The Financial Impact on Business* (2013), *https://onprem.marchofdimes.org/materials/premature-birth-the-financial-impact-on-business.pdf.*

[394] *Fighting for Fairness: Examining Legislation To Confront Workplace Discrimination, Joint Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. and the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.,* 117th Cong. 153 (2021) [hereinafter *Fighting for Fairness*] (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing employees who lose their income and, as a result, lose their health insurance, forcing them to delay or avoid critical prenatal or postnatal care).

[395] *Long Over Due: Exploring the Pregnant Workers Fairness Act (H.R. 2694), Hearing Before the Subcomm. on Civ. Rts. & Hum. Servs. of the H. Comm. on Educ. & Lab.,* 116th Cong. 142 (2019) [hereinafter *Long Over Due*] (including a letter from professional medical associations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American Public Health Association, the American College of Nurse-Midwives, the American College of Obstetricians and Gynecologists, the Association of Women's Health, Obstetric and Neonatal Nurses, the National Alliance to Advance Adolescent Health, and Physicians for Reproductive Health); *Fighting for Fairness, supra* note 394, at 30–31 (statement of Dina Bakst, Co-Founder and Co-President, A Better Balance) (discussing Julia

Finally, by helping pregnant employees avoid health risks to themselves and their pregnancies, the PWFA will help contribute to improved maternal and child health and lower health care costs nationally.

Improvements in Pregnant Employees' Economic Security

Access to reasonable accommodations at work will help employees with limitations related to pregnancy, childbirth, or related medical conditions to stay in the workforce, maintain their income, and provide for themselves and their families.[396] Based on anecdotal evidence, unavailability of accommodations often forces employees to take unpaid leave, quit their jobs, or seek jobs that are potentially less lucrative, threatening their economic security.[397] The lack of an accommodation may also have far-reaching economic effects. As the House Committee on Education and Labor Report for the PWFA stated, ''Pregnant workers who are pushed out of the workplace might feel the effects for decades, losing out on everything from 401(k) or other retirement contributions to short-term disability benefits, seniority, pensions, social security contributions, life insurance, and more.'' [398] Provision of reasonable accommodations may also have economic benefits to society as a whole by keeping people attached to the labor force and lowering the likelihood of some employees being compelled to seek public assistance after they are forced to quit their jobs.[399]

Providing needed workplace accommodations to qualified applicants and employees with limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions is another step toward ensuring women's continued and increased participation in the labor force.[400] Among other things, women's participation in the labor force is heavily impacted by pregnancy and the demands associated with raising young children.[401] The passage of the PDA in 1978, which prohibits employment discrimination based on pregnancy, childbirth, or related medical conditions and requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as other individuals similar in their ability or inability to work, increased the participation rate of pregnant women in the labor market.[402] As of 2021, over 66 percent of women in the United States who gave birth in the prior year were in the labor force,[403] up from about 57 percent in 2006.[404] Moreover, an increasing number of pregnant employees are working later into their pregnancies—over 65 percent of first-time mothers who worked during their pregnancy worked into the last month before their child's birth.[405]

By requiring reasonable accommodations for employees with limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the PWFA and this rule will further support and enhance women's labor force participation, and, in turn, grow the U.S. economy.[406]

Non-Discrimination and Other Intrinsic Benefits

Providing accommodations to employees with limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions also has important implications for equity, human dignity, and fairness.

First, by allowing pregnant employees to care for their health and the health of their pregnancies, the PWFA enhances human dignity. Employees will be able to prioritize their health and the health of their future children, giving their children the best possible start in life while also protecting their economic security. As one comment explained, the PWFA gives pregnant employees a strong sense of dignity and belonging in the workforce, and ''the reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer's inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers.'' [407]

Second, the PWFA will diminish the incidence of sex discrimination against qualified employees, enable them to reach their full potential, reduce exclusion, and promote self-respect. The statute and the rule provide for reasonable accommodations to employees who would otherwise not receive them and thus could be forced to leave their jobs or the workforce because of their pregnancy, childbirth, or related medical conditions. Also, the statute and the rule require a covered entity to engage an employee in an interactive process, rather than simply assigning the employee an accommodation, which combats stereotypes about the capabilities of employees affected by pregnancy, childbirth, or related medical conditions. Finally, the statute and the rule protect employees against retaliation and coercion for using the protections of the statute. These protections against discrimination

Barton, a pregnant corrections officer who quit her job because she did not receive an accommodation and therefore lost her health insurance).

[396] The Commission is not able to monetize or quantify this benefit because, although anecdotal evidence establishes that lack of accommodation has led employees to quit their jobs, there are no data on how frequently this happens.

[397] *Long Over Due, supra* note 395, at 15 (statement of Kimberlie Michelle Durham) (describing losing her job because she needed an accommodation and explaining that her new job did not provide overtime or benefits); *id.* at 150–53 (letter from the ACLU) (describing the ACLU's legal representation of pregnant employees, many of whom were forced to take unpaid leave or lost their jobs).

[398] *See* H.R. Rep. No. 117–27, pt. 1, at 21–22, 25.

[399] *See Long Over Due, supra* note 395, at 15 (statement of Kimberlie Michelle Durham) (describing when she was forced to go on unpaid leave after she asked for an accommodation and, as a consequence, was unable to find new employment, moved back in with family, and was unable to find a job with benefits comparable to those offered by her EMT job, including health insurance; her child is on Medicaid); *id.* at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (discussing a pregnant cashier who needed lifting restriction but was sent home and, without income, became homeless); *id.* at 46 (statement of Dina Bakst) (discussing an armored truck company employee who requested to avoid heavy lifting at the end of pregnancy but was instead sent home; as a result, she lost health insurance and needed to rely on public benefits such as food stamps); *id.* at 70 (statement of Dina Bakst) (presenting stories from State legislatures that describe savings to government assistance programs stemming from the passage of PWFA-like laws in their States).

[400] *Id.; see also id.* at 25 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., The Metro Chamber of Commerce) (''[T]he Act will help boost our country's workforce participation rate among women. In States like Kentucky, which ranks 44th in the nation for female labor participation, we know one contributor to this abysmal statistic is a pregnant worker who is forced out or quits a job due to a lack of reasonable workplace accommodations.'').

[401] Catherine Doren, *Is Two Too Many? Parity and Mothers' Labor Force Exit,* 81 J. Marriage & Fam. 327, 341 (2019) (stating that ''transition to motherhood is the primary turning point in women's labor force participation'').

[402] Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply,* 53 Int'l Econ. Rev. 1133 (2012).

[403] U.S. Dep't of Com., Census Bureau, *Births in the Past Year and Labor Force Participation for Women Aged 16–50, by Education: 2006 to 2019* (2023) [hereinafter *Births in the Past Year and Labor Force Participation*], *https://www.census.gov/data/tables/time-series/demo/fertility/his-cps.html* (select ''Historical Table 5''); *see also* Steven Ruggles et al., *IPUMS USA: Version 12.0* (2022), *https://doi.org/10.18128/D010.V12.0.*

[404] *Births in the Past Year and Labor Force Participation, supra* note 403.

[405] Lynda Laughlin, U.S. Dep't of Com., Census Bureau, *Maternity Leave and Employment Patterns of First-Time Mothers, 1961–2008* 6 (2011), *https://www2.census.gov/library/publications/2011/demo/p70-128.pdf.*

[406] H.R. Rep. No. 117–27, pt.1, at 24 (''Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most.'').

[407] Siegel, *supra* note 348, at 220–26.

promote human dignity and equity by enabling qualified employees to participate or continue to participate in the workforce.[408]

Third, because the PWFA applies to so many covered entities, it will improve equity in the workforce. Currently, employees affected by pregnancy, childbirth, or related medical conditions in higher paying jobs and non-physical jobs are much more likely to be able to control their schedules, take bathroom breaks, or eat, drink water, or telework when necessary.[409] These employees may not have to request accommodations from their employers to meet many of their pregnancy-related needs. Employees in low-wage jobs, however, are much less likely to be able to organize their schedules to allow them to take breaks that may be necessary due to pregnancy, childbirth, or related medical conditions.[410] Nearly one-third of Black and Latina workers are in low-wage jobs,[411] the types of jobs that are less likely to currently provide accommodations.[412] Therefore, the PWFA and this rule will improve equity in the workforce by ensuring that low-paid employees, including Black and Latina employees who may have a more difficult time securing voluntary accommodations, will have a right to them.

Fourth, providing reasonable accommodations to employees who would otherwise have been denied them yields third-party benefits that include diminishing stereotypes regarding employees who are experiencing pregnancy, childbirth, or related medical conditions;[413] promoting design, availability, and awareness of accommodations that can have benefits for the general public, including non-pregnant employees, and attitudinal benefits;[414] increasing understanding and fairness in the workplace;[415] and creating less discriminatory work environments that benefit employees, employers, and society.[416]

Clarity in Enforcement and Efficiencies in Litigation

Congress, in describing the goals of the PWFA, also focused on the clarity that the PWFA would bring to the question of when employers must provide accommodations for limitations related to pregnancy, childbirth, or related medical conditions: ''The PWFA eliminates a lack of clarity in the current legal framework that has frustrated pregnant workers' legal rights to reasonable accommodations while providing clear guidance to both workers and employers.''[417] By creating a national standard, the PWFA also may increase compliance with State laws requiring accommodations for pregnant employees,[418] as coming into compliance with the PWFA may increase employers' knowledge about these laws in general. In the short time that the PWFA has been in effect, one comment noted that dozens of employees had informed them of the ''transformative effect'' of the law, with employees who had previously been denied reasonable accommodations having them provided.[419] For example, an electrician's assistant reported that, following her request for a pregnancy-related accommodation, her employer attempted to place her on leave; but after advocating for herself under the PWFA, her employer exhibited increased flexibility and willingness to accommodate her.[420] An employee in telecommunications stated that, after her employer took months to respond to her request for a postpartum accommodation, she informed her employer of her rights under the PWFA, and her employer granted the accommodation request.[421] A tax specialist reported that she requested a pregnancy-related accommodation that her employer denied without explanation; after she educated her employer about the PWFA, her employer granted her request for an accommodation.[422]

By clarifying the rules regarding accommodations for pregnant employees, the PWFA and the rule will decrease the need for litigation

[408] *See* Salihu et al., *supra* note 389, at 94 (finding that ''[w]omen who perceive employers and superiors as supportive are more likely to return to work after childbirth. This reduces the risk to employers regarding loss in skill and training. Similarly, businesses that plan for and proactively approach pregnancy in the workplace show lower rates of quitting and greater ease of shifting workloads in the event of a pregnancy, which increases productivity and decreases losses''); *Long Over Due, supra* note 395, at 15 (testimony of Kimberlie Michelle Durham) (''I wanted to work. I loved my job.''). *See also* Salihu et al., *supra* note 389, at 93 (describing steps pregnant women take to combat the perception that they are a liability in the workforce and reinforce their role as ''professionals''); *Long Over Due, supra* note 395, at 41 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing an employee who was denied an accommodation but who ''desperately wanted to continue working''); Hackney et al., *supra* note 341, at 780 (explaining that managers may make incorrect assumptions about what pregnant employees want, such as assuming a reduced workload is beneficial, whereas pregnant employees might find this accommodation demeaning or discriminatory, and noting the importance of managers ''hav[ing] an open dialogue with their employees about what types of support [are] needed and desired'').

[409] *Long Over Due, supra* note 395, at 83 (statement of Rep. Barbara Lee) (describing her own pregnancy, which required bedrest, and contrasting her experience with the experience of employees in less flexible jobs).

[410] *Fighting for Fairness, supra* note 394, at 108 (statement of Fatima Goss Graves, President & CEO of the National Women's Law Center) (''[O]ver 40% of full-time workers in low-paid jobs report that their employers do not permit them to decide when to take breaks, and roughly half report having very little or no control over the scheduling of hours.''). NWLC defines low-wage occupations as jobs that pay $11.50 per hour or less (the annual equivalent of about $23,920 per year ($11.50 × 2080 hours), which assumes a 40-hour workweek for 52 weeks). Morgan Harwood & Sarah David Heydemann, *By the Numbers: Where Do Pregnant Women Work?,* Nat'l Women's Law Ctr. 4 n.11 (Aug. 2019), *https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf.*

[411] *Fighting for Fairness, supra* note 394, at 108.

[412] *Id.* at 204 (Letter from the National Partnership for Women & Families) (stating that women of color and immigrants are ''disproportionately likely to work in jobs and industries where accommodations during pregnancy are not often provided (such as home health aides, food service workers, package handlers and cleaners)''); *id.* at 207–08 (Letter from Physicians for Reproductive Choice) (''The absence of legislation like the Pregnant Workers Fairness Act disproportionately impacts pregnant people with low-incomes and migrant workers who are more likely to work in arduous settings. These are the same communities that are also most at risk of experiencing increased maternal mortality.'').

[413] *See* Salihu et al., *supra* note 389, at 93 (describing studies that have ''substantiated the pervasiveness of negative perceptions of pregnant women'' and the common belief that they serve as a liability in the workplace); *id.* at 94–95 (concluding that the issue of pregnancy in the workplace needs to be addressed proactively with an emphasis on combating stereotypes of pregnant women as incompetent or uncommitted).

[414] *See* Elizabeth F. Emens, *Integrating Accommodation,* 156 U. Pa. L. Rev. 839, 850–59 (2008) (describing a wide range of potential third-party benefits that may arise from workplace accommodations for individuals with disabilities, many of which are also relevant to accommodations for individuals protected by the PWFA).

[415] *See id.* at 883–96 (describing attitudinal third-party benefits that arise when co-workers work with individuals receiving accommodations in the workplace under the ADA, many of which are relevant to accommodations for individuals protected by the PWFA).

[416] *See Long Over Due, supra* note 395, at 3 (statement of Rep. Suzanne Bonamici) (describing the PWFA as ''an opportunity for Congress to finally fulfill the promise of the Pregnancy Discrimination Act and take an important step towards workplace gender equity,'' among other benefits).

[417] H.R. Rep. No. 117–27, pt. 1, at 11, 31 (''By guaranteeing pregnant workers the right to reasonable accommodations in the workplace, the PWFA could also decrease employers' legal uncertainty.''); *see also Long Over Due, supra* note 395, at 24 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., The Metro Chamber of Commerce) (''For our members, uncertainty means dollars. A consistent and predictable legal landscape means a business-friendly environment. Before Kentucky's law was enacted this summer, our employers were forced to navigate a complex web of Federal laws and court decisions to figure out their obligations. And now this guidance is especially beneficial for the smaller companies we represent who cannot afford expensive legal advisors.'').

[418] For a list of these laws, see *infra* Table 1.

[419] Comment EEOC–2023–0004–98298, A Better Balance, at 7 (Oct. 10, 2023).

[420] *Id.* at 88.

[421] *Id.* at 88–89.

[422] *Id.* at 89.

regarding accommodations under the PWFA. To the extent that litigation remains unavoidable in certain circumstances, the PWFA and the rule are expected to eliminate the need to litigate whether the condition in question is a ''disability'' under the ADA, and to limit discovery and litigation costs that arise under Title VII regarding determining if there are valid comparators, thus streamlining the issues requiring judicial attention.[423]

Benefits for Covered Entities

Providing accommodations needed due to pregnancy, childbirth, or related medical conditions is also likely to provide benefits to covered entities. By providing accommodations to employees affected by pregnancy, childbirth, or related medical conditions and retaining them as employees, employers will save money by not having to obtain and train new employees. The Commission is not aware of any data regarding the need to obtain and train employees arising specifically from provision of reasonable accommodations for pregnancy, childbirth, or related medical conditions. Studies examining the relationship between employee retention and provision of reasonable accommodations for disabilities generally suggest that the benefits to covered entities may be significant. According to one study, 85 percent of employers that provided accommodations to individuals with disabilities reported that doing so enabled them to retain a valued employee; 53 percent reported an increase in that employee's productivity; 46 percent reported elimination of costs associated with training a new employee; 48 percent reported an increase in that employee's attendance; 33 percent noted that providing the accommodation increased diversity in the company; and 23 percent reported a decrease in workers' compensation or other costs. Employers also noted several indirect benefits: 30 percent noted an increase in company morale, and 21 percent noted an increase in overall company productivity.[424]

Costs

Covered Entities and the Existing Legal Landscape

Entities covered by the PWFA and the regulation include all employers covered by Title VII and the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16a–16c (GERA), including private and public sector employers with 15 or more employees, Federal agencies, employment agencies, and labor organizations.[425]

In addition to the legal protections described earlier in the preamble pertaining to Title VII, the ADA, and the FMLA, there are three other important legal considerations that impact the costs of accommodations under the PWFA and this regulation.

First, 30 States and 5 localities have laws substantially similar to the PWFA, requiring covered employers to provide reasonable accommodations to pregnant employees.[426] As a result, this rule will impose minimal, if any, additional costs on the covered entities in these States and localities.[427]

Second, when it enacted the PWFA, Congress also enacted the PUMP Act, which requires employers who are covered by the FLSA to provide reasonable break time for an employee to pump breast milk each time such employee has the need to express milk for up to 1 year after the child's birth. The PUMP Act also requires employers to provide a place to pump at work, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.[428] As a result, the Commission anticipates that most employees will not need to seek reasonable accommodations regarding a time and place to pump at work under the PWFA because they will already be entitled to these under the PUMP Act.

Third, the Federal Government provides 12 weeks of paid parental leave to eligible Federal employees upon the birth of a new child.[429] As a result, these Federal employees may make fewer requests for leave as a reasonable accommodation under the PWFA as they are already guaranteed a certain amount of paid leave.

Estimate of the Number of Reasonable Accommodations That Will Be Provided as a Result of the Rule and Underlying Statute

As set out in Tables 1 and 2 and explained in detail below, the rule and underlying statute cover approximately 116.7 million employees of private establishments with 15 or more employees, 18.8 million State and local government employees, and 2.3 million Federal employees. Only a small percentage of these employees are expected to seek and be entitled to accommodations as a result of the rule and underlying statute.

Approximately 52 percent of private sector enterprises with 15 or more employees in the United States (1.4 million establishments), employing about 61.2 million employees (accounting for 52 percent of employment in those States), are currently subject to State or local laws that are substantially similar to the PWFA. The enactment of the PWFA and promulgation of the rule, therefore, should not result in additional accommodation-related costs for these employers. Subtracting 61.2 million employees from the total number of covered employees employed by private sector enterprises (116.7 million) yields a total of approximately 55.5 million employees of private sector establishments who will be covered by the rule and underlying statute, and who are not also covered by State or local laws that are substantially similar to the PWFA. Tables 1 and 2 display

[423] *See* H.R. Report No. 117–27, pt. 1, at 14–17 (describing the need to find comparators under Title VII and the difficulties it has caused pregnant employees seeking accommodations); *id.* at 17–21 (describing the protections available for pregnant employees under the ADA and the fact that frequently even pregnancies with severe complications are found by courts not to be ''disabilities'').

[424] *See Costs and Benefits of Accommodation, supra* note 209.

[425] *See* 42 U.S.C. 2000gg(2)(A). The PWFA also applies to employers covered by the Congressional Accountability Act of 1995 (42 U.S.C. 2000gg(2)(B)(ii)). The proposed regulation does not apply to employers covered under the Congressional Accountability Act, as the Commission does not have the authority to enforce the PWFA with respect to employees covered by the Act.

[426] *See infra* Table 1; *see also* U.S. Dep't of Lab., *Employment Protections for Workers Who Are Pregnant or Nursing, https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections* (last visited Mar. 25, 2024).

[427] The PWFA analogues in Alaska, North Carolina, and Texas only cover certain public employers. The laws in Louisiana and Minnesota apply to employers larger than the PWFA threshold of 15 or more employees (25 or more employees in Louisiana; 21 or more employees in Minnesota). As explained below, the analysis takes these differences into account.

[428] U.S. Dep't of Lab., *FLSA Protections to Pump at Work, https://www.dol.gov/agencies/whd/pump-at-work* (last visited Mar. 25, 2024).

[429] Federal Employee Paid Leave Act, 133 Stat. at 2304–05.

each State's share of the total national number of private sector establishments that have 15 or more employees and thus will be subject to the PWFA, and the percentage of employees in the State employed by such establishments. States with laws substantially similar to the PWFA are in Table 1; States without such a law are in Table 2.

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Table 1: Share of Employers with 15 or More Employees in States Already Subject to Local Pregnancy Accommodation Laws Similar to the PWFA[430]

State			Share in U.S. Total[431]	
	Statute	Threshold[432]	Establishments	Employment
California	Cal. Gov't Code sec. 12945(a)(3)	5	10.6%	11.6%
Colorado	Colo. Rev. Stat. sec. 24-34-402.3	5	1.9%	1.8%
Connecticut	Conn. Gen. Stat. sec. 46a-60(b)(7)(A)–(K)	3	1.2%	1.2%
Delaware	Del. Code Ann. Tit. 19, sec. 711(a)(3)(b)–(f)	4	0.4%	0.3%
District of Columbia	D.C. Code sec. 32-1231.02	1	0.4%	0.4%
Hawaii	Haw. Code R. sec. 12-46-107	1	0.4%	0.4%
Illinois	775 Ill. Comp. Stat. sec. 5/2-102(I)–(J)	1	3.9%	4.2%
Kentucky	Ky. Rev. Stat. sec. 344.040	15	1.4%	1.3%
Louisiana[433]	La. Rev. Stat. sec. 23:341ff–342	25	1.3%	1.2%

[430] U.S. Dep't of Com., Census Bureau, *The Number of Firms and Establishments, Employment, and Annual Payroll by State, Industry, and Enterprise Employment Size: 2020* (2020) [hereinafter *Firms and Establishments Data by State*], *https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html* (select ''U.S. & States, NAICS, Detailed Employment Sizes'').

Percentages in the Table reflect filtering by size and summing by State.

[431] This number is limited to enterprises with 15 or more employees.

[432] This denotes the minimum number of employees that an employer must have to be covered by the State law.

[433] These numbers only account for enterprises with at least 25 employees because Louisiana's pregnancy accommodation law applies to employers with 25 or more employees. *See* La. Rev. Stat. Ann. sec. 23:341 (2021).

Maine	Me. Stat. tit. 5, sec. 4572-A	1	0.5%	0.4%
Maryland	Md. Code, State Gov't sec. 20- 609	15	1.9%	1.8%
Massachusetts	Mass. Gen. Laws ch. 151B, sec. 4(1E)(a)	6	2.3%	2.6%
Minnesota[434]	Minn. Stat. sec. 181.939	21	1.7%	2.0%
Nebraska	Neb. Rev. Stat. sec. 48-1102(11), 1102(18)	15	0.7%	0.6%
Nevada	Nev. Rev. Stat. sec. 613.438	15	0.9%	1.0%
New Jersey	N.J. Stat. Ann. Sec. 10:5-3.1	1	2.6%	2.8%
New Mexico	N.M. Code R. sec. 9.1.1.7(HH)(2)	4	0.6%	0.5%
New York	N.Y. Exec. Law sec. 292(21-e), (21-f); sec. 296(3)	4	5.2%	6.3%
North Dakota	N.D. Cent. Code Ann. Sec. 14-02.4-03	1	0.3%	0.3%
Oregon	Or. Rev. Stat. sec. 659A.029	6	1.4%	1.2%
Pennsylvania[435]	Phila. Code sec. 9-1128	1 (Philadelphia)	0.4%	0.5%
Rhode Island	R.I. Gen. Laws sec. 28-5-7.4(a)(1)–(3)	4	0.3%	0.3%
South Carolina	S.C. Code Ann. Sec. 1-13-80(A)(4)	15	1.6%	1.5%
Tennessee	Tenn. Code. Ann. Sec. 50-10-103	15	2.2%	2.1%
Utah	Utah Code sec. 34A-5-106(1)(g)	15	0.9%	1.1%
Vermont	Vt. Stat. Ann. Tit. 21, sec. 495k(a)(1)	1	0.2%	0.2%
Virginia	Va. Code sec. 2.2-3909	5	2.8%	2.6%
Washington	Wash. Rev. Code sec. 43.10.005(2)	15	2.3%	2.2%
West Virginia	W. Va. Code sec. 5-11B-2	12	0.6%	0.4%
Total[436]			**51%**	**52%**
Total (in millions)			**1.4**	**61.2**

[434] These numbers only account for enterprises with at least 25 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 21 to 24 employees are not available.

[435] Pennsylvania does not have a State-wide pregnancy accommodation law, but Philadelphia does. *See* Phila. Code sec. 9–1128 (2014). Philadelphia accounts for approximately 9 percent of Pennsylvania establishments and approximately 12 percent of individuals employed in Pennsylvania. *See* U.S. Dep't of Comm., Census Bureau, *The Number of Firms and Establishments, Employment, and Annual Payroll by Congressional District, Industry, and Enterprise Employment Size: 2019* (2019), *https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html* (select ''State by Congressional District, NAICS Sectors''). The calculation is based on the total number of establishments and total employment in Pennsylvania and in Philadelphia County and the shares of employment in each.

[436] This total does not include Alaska, North Carolina, and Texas, where the pregnancy accommodation laws only apply to certain public employees.

Table 2: Share of Total U.S. Employer Establishments with 15 or More Employees in States That Will Be Impacted by PWFA[437]

	Share in U.S. Total[438]	
State	**Establishments**	**Employment**
Alabama	1.5%	1.3%
Alaska[439]	0.2%	0.2%
Arizona	2.0%	2.0%
Arkansas	0.9%	0.8%
Florida	6.0%	6.8%
Georgia	3.1%	3.1%
Idaho	0.6%	0.4%
Indiana	2.2%	2.1%
Iowa	1.1%	1.0%
Kansas	1.0%	0.9%
Louisiana[440]	0.2%	0.1%
Michigan	2.9%	3.0%
Minnesota[441]	0.3%	0.1%
Mississippi	0.9%	0.7%
Missouri	2.1%	1.9%
Montana	0.4%	0.2%
New Hampshire	0.5%	0.5%
North Carolina[442]	3.2%	3.0%
Ohio	3.8%	3.8%
Oklahoma	1.2%	1.0%
Pennsylvania[443]	3.8%	3.7%
South Dakota	0.3%	0.3%
Texas[444]	8.5%	8.5%
Wisconsin	2.0%	2.0%
Wyoming	0.2%	0.1%
Total	**49%**	**48%**
Total (in millions)	**1.3**	**55.5**

Similarly, approximately 11.5 million State and local government employees are covered by laws that are substantially similar to the PWFA.[445] Subtracting this number from the total number of covered State and local government employees (18.8 million) yields a total of 7.3 million State and local government employees who will be covered by the rule and underlying statute and who are not already covered by State or local laws substantially similar to the PWFA.

[437] *Firms and Establishments Data by State, supra* note 430. Percentages in the table reflect filtering by size and summing by State.

[438] This number is limited to enterprises with 15 or more employees.

[439] Alaska's statute, codified at Alaska Stat. sec. 39.20.520 (1992), covers public employers only.

[440] These numbers only include enterprises with 15–24 employees because Louisiana's pregnancy accommodation law applies to employers with 25 or more employees. La. Rev. Stat. Ann. sec. 23:341 (2021).

[441] These numbers only include enterprises with 15–24 employees because Minnesota's pregnancy accommodation law applies to employers with 21 or more employees. Minn. Stat. sec. 181.940, 181.9414, 181.9436 (2014). Data on enterprises with 15–20 employees are not available.

[442] North Carolina Executive Order No. 82 (2018) covers public employers only.

[443] *See supra* note 435.

[444] The Texas statute, codified at Tex. Loc. Gov't Code sec. 180.004 (2001), covers local public employers only.

[445] U.S. Dep't of Com., Census Bureau, *2021 ASPEP Datasets & Tables* (2021) [hereinafter *ASPEP Datasets*], *https://www.census.gov/data/datasets/2021/econ/apes/annual-apes.html.* The calculation is based on data from the ''State Government Employment & Payroll Data'' and the ''Local Government Employment & Payroll'' files, in the ''Government Function'' column.

Finally, there are 2.3 million Federal employees. The Federal Government does not currently require accommodations for pregnant employees; thus, the PWFA provides a new right for these employees.[446]

Again, however, not all employees who are now covered by the PWFA will seek and be entitled to accommodations as a result of the rule and underlying statute; only a small percentage will become pregnant and need accommodations in a given year.

To estimate the number of individuals who will be entitled to a pregnancy-related accommodation, and who will receive one as a result of the PWFA and its implementing regulations, the Commission first estimates the proportion of newly covered employees who are capable of becoming pregnant. In 2021, women of reproductive age (aged 16–50 years) comprised approximately 33 percent of U.S. employees.[447] On the basis of this finding, the Commission adopts 33 percent as its estimate of the percentage of employees who are capable of becoming pregnant.

The Commission next estimates the proportion of individuals capable of becoming pregnant who will actually become pregnant in a given year. Research shows that approximately 4.7 percent of individuals who are capable of becoming pregnant gave birth to at least one child during the previous year.[448] This figure must be adjusted upward to account for the fact that not all individuals who become pregnant give birth—some pregnant individuals have miscarriages, stillbirths, or abortions. Research shows that, between 2015 and 2019, live births in the United States accounted for 67 percent of all pregnancies among women aged 15–44 years on average.[449] Assuming that the ratio of live births to total pregnancies among women of reproductive age in the labor force is the same as among all 15–44 years old women, the Commission estimates that the percentage of individuals capable of becoming pregnant who will actually become pregnant in given year is $0.047 \div 0.67 = 0.071$ (rounded up), or 7.1 percent. The Commission thus adopts 7.1 percent as its estimate of the percentage of individuals capable of becoming pregnant within a population who will actually become pregnant in a given year.

Applying these percentages to the numbers above yields totals (rounded to the nearest 1,000) of, in a given year, 1.3 million private sector employees ($55{,}500{,}000 \times 0.33 \times 0.071$), 171,000 State and local government employees ($7{,}300{,}000 \times 0.33 \times 0.071$), and 54,000 Federal employees ($2{,}300{,}000 \times 0.33 \times 0.071$) who are both newly eligible for reasonable accommodations under the rule and underlying statute, and who may be expected to become pregnant in a given year. Tables 3, 4, and 5 display these calculations.

Table 3: Computation of Expected Number of Pregnant Women Eligible for PWFA Accommodations at Private Employers

Total employment in establishments covered under PWFA (*i.e.*, those with 15 or more employees)	116.7 million
Total employment in establishments covered under PWFA, with existing PWFA-type accommodations under State/local laws (from Table 1)	61.2 million
Total employment in establishments covered under PWFA, without existing PWFA-type accommodations under State/local laws (from Table 2)	55.5 million
Share of 16-50 years old women	33%
Total number of women employees newly eligible for accommodations under PWFA (33% of 55.5 million)	18.3 million
Expected share of women employees to be pregnant in a year	7.1%
Expected number of pregnant employees newly eligible for accommodations under PWFA (7.1% of 18.3 million)	1.3 million

[446] As noted above, however, most Federal employees are entitled to 12 weeks of paid parental leave during the 12-month period following birth of a child (or other qualifying event) under the FEPLA. *See* Federal Employee Paid Leave Act, 133 Stat. at 2304–05. Individuals eligible for such leave may be less likely to need leave as a reasonable accommodation under the PWFA.

[447] *See* Ruggles et al., *supra* note 403.

[448] *Id.*

[449] Rossen et al., *supra* note 317, at 9 tbl. A.

Table 4 Computation of Expected Number of Pregnant Women Eligible for PWFA Accommodations in State and Local Government Employment[450]

Total State and local government employment	18.8 million
Total State and local government employment in States with existing PWFA-type accommodations under State/local laws[451]	11.5 million
Total State and local government employment in States without existing PWFA-type accommodations under State/local laws[452]	7.3 million
Share of 16-50 years old women	33%
Total number of State and local government women employees newly eligible for accommodations under PWFA (33% of 7.3 million)	2.41 million
Expected share of women employees to be pregnant in a year	7.1%
Expected number of pregnant State and local government employees newly eligible for accommodations under PWFA (7.1% of 2.41 million)	171,000

Table 5: Computation of Expected Number of Pregnant Women Eligible for PWFA Accommodations in Federal Government Employment

Total Federal Government civilian employment[453]	2.3 million
Share of 16-50 years old women	33%
Total number of women Federal Government employees newly eligible for accommodations under PWFA	0.76 million
Expected share of women employees to be pregnant in a year	7.1%
Expected number of pregnant Federal Government employees newly eligible for accommodations under PWFA (7.1% of 0.76 million)	54,000

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The sum of the expected number of pregnant women eligible for PWFA accommodations in the private sector (1.3 million), State and local government (171,000), and Federal Government (54,000) is 1.525 million.

The Commission next estimates the proportion of pregnant individuals in the workplace who may need a pregnancy-related reasonable accommodation and who will receive such accommodation as a result of the rule and the underlying statute. Data regarding the number of pregnant employees needing some type of accommodation are limited. One survey indicated that 71 percent of pregnant employees experience a pregnancy-related limitation that requires extra breaks, such as bathroom breaks; 61 percent experience a limitation that requires a change in schedule or more time off, for example, to see prenatal care providers; 53 percent experience a limitation that requires a change in duties, such as less lifting or more sitting; and 40 percent experience a limitation that requires some other type of workplace adjustment.[454]

The research establishes that 71 percent of pregnant individuals surveyed needed the most common type of pregnancy-related reasonable accommodation: additional breaks. The Commission assumes for purposes of the final economic impact analysis that the pregnant individuals in the study who needed one of the more unusual accommodations are a subset of the 71 percent who need additional breaks. The Commission thus adopts 71 percent as its upper bound estimate of the percentage of pregnant employees who will need a pregnancy-related accommodation under the rule.[455] Applying the 71 percent estimate yields upper bound estimates (rounded to the nearest 1,000) of 923,000 private sector employees (71 percent of 1,300,000), 121,000 State and local government employees (71 percent of 171,000), and 38,000 Federal sector employees (71 percent of 54,000), for a total 1,082,000 employees, who will need a reasonable accommodation and who will receive one as a result of the PWFA and the rule in a given year.

In setting its lower bound estimate, the Commission observes that not every individual who is newly entitled to a pregnancy-related accommodation under the PWFA and the rule, and who receives such an accommodation, will receive it as a result of the rule. Some of these individuals will already be entitled to receive pregnancy-related accommodations under other authorities, independently of the PWFA and its implementing regulations—some will already be entitled to them under the ADA, others will be entitled to them under Title VII, and yet others will be

[450] The calculation is based on data as described in *ASPEP Datasets, supra* note 445.

[451] This number includes 12 percent of State and local government employment in Pennsylvania to account for Philadelphia's PWFA-type law, excludes local government employment in North Carolina because the existing law only applies to State employees, and excludes State government employment in Texas because the existing law only applies to local governments.

[452] This number includes State and local government employment in Pennsylvania not accounted for by Philadelphia, includes local government employment in North Carolina because the existing law only applies to State employees, and includes State government employment in Texas because the existing law only applies to local governments.

[453] U.S. Dep't of Com., Bureau of Econ. Analysis, *Full-Time and Part-Time Employees by Industry, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&1921=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJDYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJOSVBBX1RhYmxlX0xpc3QiLCIxOTMiXV19* (last updated Sept. 29, 2023).

[454] Declercq et al., *supra* note 319, at 36. As explained in the preamble, the Commission is maintaining this as the high bound of employees who may need an accommodation because this is the percentage of employees who needed the simplest accommodation (*e.g.,* breaks to use the bathroom).

[455] The Commission asserts that this estimate is almost certainly too high because, although 71 percent of the pregnant individuals participating in the research needed a reasonable accommodation, not all such individuals needed the PWFA to obtain such accommodation. As explained above, many individuals who need pregnancy-related accommodations may already be entitled to them under the ADA, Title VII, or formal or informal employer policies.

entitled to them under formal or informal employer policies.[456] Therefore, costs arising from pregnancy-related accommodations cannot always be attributed to the rule and the underlying statute, even where the employee in question was not previously covered under a State law analogous to the PWFA.

To generate its lower bound estimate, the Commission reduces its upper bound estimate of 71 percent to reflect the fact that some of those individuals would receive their requested accommodation independently of the rule. According to the study cited above,[457] 42 percent of the individuals who needed additional breaks due to a pregnancy-related limitation did not receive them because they were never requested, and 3 percent did not receive them because the employer denied their request. Thus, $0.71 \times 0.45 = 0.32$, or 32 percent, of pregnant individuals surveyed needed, but did not receive the requested accommodation. On the basis of this research, the Commission adopts 32 percent as its lower bound estimate of the percentage of pregnant employees who will need a reasonable accommodation under the PWFA and its implementing regulations. Applying this percentage yields lower bound estimates (rounded to the nearest 1,000) of approximately 416,000 private sector employees (32 percent of 1,300,000); 55,000 State and local government employees (32 percent of 171,000); and 17,000 Federal sector employees (32 percent of 54,000), for a total of 488,000 employees who will need, and be newly entitled to, reasonable accommodations under the rule and underlying statute in a given year.

Cost of Accommodation

Accommodations that allow pregnant employees to continue to perform their job duties, thereby allowing them to receive continued pay and benefits, include additional rest or bathroom breaks, use of a stool or chair, a change in duties to avoid strenuous physical activities, and schedule changes to attend prenatal appointments.[458] Some of these accommodations, especially additional rest or bathroom breaks and provision of a stool or chair, are expected to impose minimal or no additional costs on the employer. Certain other types of accommodations, such as allowing the employee to avoid heavy lifting or exposure to certain types of chemicals, may be easy to provide in some jobs but more difficult to provide in others, necessitating temporary restructuring of responsibilities or transferring to a different position.

The Commission was unable to find any data on the average cost of reasonable accommodations related specifically to pregnancy, childbirth, or related medical conditions. The Commission has therefore relied on the available data on the cost of accommodations for individuals with disabilities for purposes of this analysis.

A survey conducted by the Job Accommodation Network (JAN) indicates that most workplace accommodations for individuals with disabilities are low-cost.[459] Of the employers participating in this survey between 2019 and 2022, 49.4 percent reported that they provided an accommodation needed because of a disability that did not cost anything to implement. The Commission believes that the percentage of no-cost accommodations is likely to be higher for accommodations related specifically to pregnancy, childbirth, or related medical conditions, because many will be simple and no-cost like access to water, stools, or more frequent bathroom breaks, and because the vast majority will be temporary. Nevertheless, because the Commission is unable to locate any data on the percentage of accommodations needed because of pregnancy-related conditions that have no cost, the Commission conservatively assumes for purposes of this analysis that the percentages are the same.

The same research showed that the median one-time cost of providing a non-zero-cost accommodation was $300. Only 7.2 percent of employers reported that they provided an accommodation that resulted in ongoing annual costs. Because pregnancy is a temporary condition, the ongoing costs incurred by 7.2 percent of employers are unlikely to be applicable to pregnancy-related accommodations, and the Commission adopts $300 as the median one-time cost for employers that incurred a cost (50.6 percent of employers). Again, although the Commission believes that the average cost is likely lower for accommodations needed specifically for pregnancy, childbirth, or related medical conditions, it will use the data for the purposes of this analysis.

Because non-zero-cost accommodations generally involve durable goods such as additional stools, infrastructure for telework, and machines to help with lifting, and because these goods generally have a useful life of 5 years, the Commission will assume that the annual cost of providing these accommodations is approximately $60 per year per accommodation.[460]

Using these cost estimates, and applying them to the upper and lower bound estimates for the number of additional accommodations that will likely be required by the rule and underlying statute, the estimated annual costs (rounded to the nearest 1,000) for private employers is between $12.60 million and $28.02 million; the estimated annual costs for State and local governments is between $1.68 million and $3.66 million, and the estimated annual costs for the Federal Government is between $540,000 and $1.14 million. *See* Tables 6, 7, and 8.

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Table 6: Estimated Reasonable Accommodation Costs to Private Employers with 15 or More Employees

Cost of accommodation	Lower Bound (32%)	Upper Bound (71%)
Number of women needing accommodation	416,000	923,000
Number of non-zero-cost accommodations (50.6%)	210,000	467,000
Annual cost of accommodation	$12.60 million	$28.02 million

[456] Additionally, some workplace modifications, such as providing personal protective equipment, and protecting employees from exposures to hazardous chemicals, may already be required by Federal or State workplace health and safety laws, regardless of whether the employee is pregnant.

[457] *See* Declercq et al., *supra* note 319, at 36. We note that this study was conducted prior to many PWFA-type laws being enacted. Because the data are being used to estimate the number of requests that will occur in States and localities that do not already have PWFA-type laws, EEOC believes it is appropriate to rely on this survey.

[458] *Id.; see also Long Over Due, supra* note 395, at 79 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (describing potential accommodations).

[459] *Costs and Benefits of Accommodation, supra* note 209.

[460] The Commission made a similar assumption of a 5-year life for accommodations in its cost analysis of the amendments to the ADA. 76 FR 16977, 16994 (Mar. 25, 2011).

Table 7: Estimated Reasonable Accommodation Costs to State and Local Government Employers

Cost of accommodation	Lower Bound (32%)	Upper Bound (71%)
Number of women needing accommodation	55,000	121,000
Number of non-zero-cost accommodations (50.6%)	28,000	61,000
Annual cost of accommodation	$1.68 million	$3.66 million

Table 8: Estimated Reasonable Accommodation Costs to the Federal Government

Cost of accommodation	Lower Bound (32%)	Upper Bound (71%)
Number of women needing accommodation	17,000	38,000
Number of non-zero-cost accommodations (50.6%)	9,000	19,000
Annual cost of accommodation	$540,000	$1.14 million

Table 9: One-Time Administrative Costs

	Number of Establishments (a)	Time for Rule Familiarization (b)	Equal Opportunity Officer Fully-Loaded Wage (c)	Rule Familiarization Cost (a) × (b) × (c)
Private employers in States with existing PWFA-type laws	1.4 million	0.75 hours	$113.51	$119.19 million
Private employers in States without existing PWFA-type laws	1.3 million	2.25 hours	$113.51	$332.03 million
Public employers in States with existing PWFA-laws	3,255[461]	0.75 hours	$76.03	$186,000
Public employers in States without existing PWFA-type laws	2,533[462]	2.25 hours	$76.03	$433,000
Federal Government	209[463]	2.25 hours	$103.76[464]	$49,000
Total				$451.89 million

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Thus, the overall economic cost on the U.S. economy of providing reasonable accommodations pursuant to the rule and underlying statute is estimated to be between $14.82 million and $32.82 million annually.

[461] This is based on the distinct number of States and local government filers of the 2021 EEO–4 survey where available, and the 2021 Annual Survey of Public Employment & Payroll (ASPEP) when not available.

[462] *Id.*

[463] *See* EEOC, *Department of Agency List with Second Level Reporting Components, https://www.eeoc.gov/federal-sector/management-directive/department-or-agency-list-second-level-reporting-components* (last visited Mar. 25, 2024).

[464] As described above, a GS–14, Step 5 salary is $63.21 per hour. *See* U.S. Off. of Pers. Mgmt., *Salary Table 2023-RUS* (Jan. 2023), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf.* This is then adjusted for average hourly benefits for Federal employees. *See* Cong. Budget Off., *Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015,* at 14 (Apr. 25, 2017), *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf* (reporting that the average benefits for Federal employees range from $21.30 per hour to $29.80 per hour). This analysis uses the high estimate of $29.80 to compute the total hourly compensation at $93.01 ($63.21 + $29.80). The Commission was unable to find data on overhead costs for the Federal Government. The Commission assumed the rate to be the same as in the private sector (17 percent), *see supra* note 467, totaling $10.75 ($63.21 × 0.17) per hour. This resulted in a fully-loaded hourly compensation rate of $103.76 (%63.21 + 29.80 + 10.75).

The costs in Tables 6, 7, and 8 likely overestimate the costs to covered entities in at least six respects:

- The estimated one-time cost of $300 per non-zero-cost accommodation is based on costs of accommodations for individuals with disabilities generally, not only those related to pregnancy, among the JAN survey respondents. The Commission believes that the average cost of accommodations related to pregnancy, childbirth, or related medical conditions is less than the average cost of disability-related accommodations because many of the reasonable accommodations requested under the PWFA will be simple and inexpensive to provide, and the vast majority will be temporary.
- The sample obtained in the JAN study may not be representative of all employers, because employers who consult with JAN are likely to be facing more difficult and costly accommodation issues than employers overall.[465]
- The estimate does not account for the fact that some employees who will be entitled to reasonable accommodations under the PWFA and the rule are independently entitled to accommodations under the ADA or Title VII, to break time and a private place to pump at work under the PUMP Act, and, in some cases, leave under the FMLA or the Federal Employees Paid Leave Act.[466]
- The estimate does not account for the fact that some employers voluntarily provide accommodations to employees affected by pregnancy, childbirth, or related medical conditions and may not incur new costs.
- This analysis does not account for the fact that not all employees who seek accommodations will meet the definition of ''qualified,'' and an employer may decline to provide a reasonable accommodation if doing so creates an undue hardship.

[465] JAN provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network, *https://askjan.org/* (last visited Mar. 25, 2024).

[466] Brown et al., *supra* note 377, at 6 (finding that about 56 percent of U.S. employees were eligible for FMLA in 2018, and 25 percent of the FMLA leave taken in the prior 12 months accounted for the arrival of a new child).

The Commission did not include costs related to processing requests for accommodation in its estimate because it expects these costs to be extremely low. Employers that are covered by State or local laws substantially similar to the PWFA already have these procedures in place. The Commission assumes that employers not covered by such State or local laws, and the Federal Government, will adapt existing procedures for providing accommodations under Title VII and the ADA and for providing leave under the FMLA.

One-Time Administrative Costs for Covered Entities

Administrative costs, which include rule familiarization, posting new EEO posters, and updating EEO policies and handbooks, represent additional, one-time direct costs to covered entities.

It is estimated that in States that do not already have laws substantially similar to the PWFA, compliance activities for a covered entity would take an average of 135 minutes, or 2.25 hours, by an Equal Opportunity Officer who is paid a fully-loaded wage of $113.51 per hour[467] ($76.03 for a State or local government employee).[468] In States with already existing laws similar to the PWFA, an Equal Opportunity Officer will take an average of 45 minutes for compliance activities. For the Federal Government, which does not have an existing PWFA, it is estimated that compliance activities would take an average of 135 minutes by an Equal Opportunity Officer at a GS 14–5 salary.[469] These calculations are displayed in Table 9.

Totals and Discount Rates

Total costs for providing reasonable accommodations in each year are estimated by multiplying the number of non-zero accommodations in Tables 6–8 above by the upfront cost of $300. Because these are assumed to be durable accommodations, we assume that an employer that acquires an accommodation in a given year will reuse the accommodation throughout its useful life. Throughout the document, we assume a useful life of 5 years, which amounts to an average annual cost of $60. To more accurately reflect the present value of these upfront expenses, EEOC annualizes the total costs.

Adding the annualized cost of providing reasonable accommodations, assuming a useful life of 5 years (between $14.82 million and $32.82 million), to the estimated administrative costs in year 1 ($451.89 million) yields estimated total costs of between $466.71 million and $484.71 million in the first year, and between $14.82 million and $32.82 million annually thereafter.

Table 10 provides the analysis of discount rates at 3% and 7%, as required by OMB Circular A–4, for the lower and upper bound costs of providing accommodations. Table 11 provides that information for the one-time administrative costs.

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[467] The Commission anticipates that the bulk of the workload under this rule would be performed by employees in occupations similar to those associated with the Standard Occupational Classification (SOC) code of SOC 11–3121 (Human Resources Managers). According to the U.S. Bureau of Labor Statistics, the mean hourly wage rate for Human Resources Managers in May 2022 was $70.07. *See* U.S. Dep't of Lab., Bureau of Lab. Stat., *Employment of Human Resources Managers, by State, May 2022* (2022), *https://www.bls.gov/oes/current/oes113121.htm#st.* For this analysis, the Commission used a fringe benefits rate of 45 percent and an overhead rate of 17 percent, resulting in a fully-loaded hourly compensation rate for Human Resources Managers of $113.51 ($70.07 + ($70.07 × 0.45) + ($70.07 × 0.17)).

[468] U.S. Dep't of Lab., Bureau of Lab. Stat., *Employer Costs for Employee Compensation for State and Local Government Workers by Occupational and Industry Group* (Mar. 17, 2023), *https://www.bls.gov/news.release/archives/ecec_03172023.pdf.* Total employer compensation costs for State and local government averaged $57.60 per hour worked (see Table 3 row 1, column 1 of the cited document). Average compensation ranged from $68.57 in management, professional, and related occupations (row 3) to $40.05 in sales and office occupation (row 7). This analysis uses the high estimate of $68.57 per hour worked, which includes average wage and salary cost of $43.87 per hour (row 3, column 3) and average benefit costs of $24.70 per hour (row 3, column 5). The Commission was not able to find data on overhead costs for State and local governments. The Commission assumed the rate to be the same as in the private sector (17 percent), *see supra* note 467, totaling $7.46 ($43.87 × 0.17) per hour. This resulted in a fully-loaded hourly compensation rate of $76.03 ($43.87 + $24.70 + $7.46).

[469] In 2023, a GS–14, Step 5 salary is $63.21 per hour. *See* U.S. Off. of Pers. Mgmt., *Salary Table 2023–RUS* (Jan. 2023), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf.*

Table 10: Annualized Reasonable Accommodation Costs (in $ millions) at 0% (Undiscounted), 3% and 7% Discount Rates[470]

	Private - All	Federal Government	State and Local Government	Total
	Lower Bound			
Estimated total reasonable accommodation costs	**$63.0**	**$2.7**	**$8.4**	**$74.1**
Assuming useful life of accommodations to be 5 years				
Annualized, 0% discount rate, 5 years	$12.60	$0.54	$1.68	$14.82
Annualized, 3% discount rate, 5 years	$13.36	$0.57	$1.78	$15.71
Annualized, 7% discount rate, 5 years	$14.36	$0.62	$1.91	$16.89
Assuming useful life of accommodations to be 10 years				
Annualized, 0% discount rate, 10 years	$6.30	$0.27	$0.84	$7.41
Annualized, 3% discount rate, 10 years	$7.17	$0.31	$0.96	$8.43
Annualized, 7% discount rate, 10 years	$8.38	$0.36	$1.12	$9.86
	Upper Bound			
Estimated total reasonable accommodation costs	**$140.1**	**$5.7**	**$18.3**	**$164.1**
Assuming useful life of accommodations to be 5 years				
Annualized, 0% discount rate, 5 years	$28.02	$1.14	$3.66	$32.82
Annualized, 3% discount rate, 5 years	$29.70	$1.21	$3.88	$34.79
Annualized, 7% discount rate, 5 years	$31.93	$1.30	$4.17	$37.40
Assuming useful life of accommodations to be 10 years				
Annualized, 0% discount rate, 10 years	$14.01	$0.57	$1.83	$16.41
Annualized, 3% discount rate, 10 years	$15.95	$0.65	$2.08	$18.68
Annualized, 7% discount rate, 10 years	$18.64	$0.76	$2.44	$21.84

Table 11: Annualized Administrative Costs

	Estimated administrative costs (in $ millions)			
Year	Private–All	Federal Government	State and Local Government	Total
1	$451.22	$0.049	$0.619	$451.89
2	$0	$0	$0	$0
3	$0	$0	$0	$0
4	$0	$0	$0	$0
5	$0	$0	$0	$0
6	$0	$0	$0	$0
7	$0	$0	$0	$0
8	$0	$0	$0	$0
9	$0	$0	$0	$0
10	$0	$0	$0	$0
Annualized, 3% discount rate, 10 years	$51.36	$0.006	$0.07	$51.44
Annualized, 7% discount rate, 10 years	$60.04	$0.007	$0.08	$60.13
Total, 3% discount rate, 10 years (in $ millions)	$438.08	$0.05	$0.60	$438.73
Total, 7% discount rate, 10 years (in $ millions)	$421.70	$0.05	$0.58	$422.33

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Time Horizon of Analysis

Neither the PWFA nor the rule contains a sunset provision.

The cost analysis assumes a one-time administrative cost for employers, and the amount of time varies depending on whether the employer is in a State with or without its own version of the PWFA.

The cost and benefit analysis calculates the annual cost of accommodations per pregnant employee who may need them. Because different employees enter the labor market every year and may become pregnant, or an employee who was pregnant may become pregnant again, the Commission does not believe that the need for accommodations or the costs or benefits will substantially change over time.

Range of Regulatory Alternatives

The range of alternatives available to the Commission consistent with the Executive Order is narrow:

- Because 42 U.S.C. 2000gg–3(a) requires the Commission to issue regulations, the Commission could not consider non-regulatory alternatives.
- Because 42 U.S.C. 2000gg determines coverage, the Commission could not consider exemptions based on firm size or geography.
- Because 42 U.S.C. 2000gg–2 provides how the statute will be enforced, the Commission could not consider alternative methods of enforcement, such as market-oriented approaches, performance standards, default rules, monitoring by other agencies, or reporting.
- Because section 109 of the PWFA states when the law will go into effect, the Commission could not consider alternative compliance dates.[471]

Further, because the PWFA is a Federal law that intentionally sets a national standard, the Commission could not consider deferring to State or local regulations. The one exception to this is that 42 U.S.C 2000gg–5(a)(1) provides that nothing in the PWFA invalidates or limits rights under Federal, State, or local laws that provide equal or greater protection for individuals affected by pregnancy, childbirth, or related medical conditions. The rule includes this language. Thus, the rule does not preempt State or local regulations that provide equal or greater protection relative to the PWFA.

The Commission considered two regulatory alternatives, discussed below. The Commission does not believe that either alternative would decrease the costs for covered entities.

Definition of ''In the Near Future''

The statute at 42 U.S.C. 2000gg(6) defines a ''qualified'' employee to include employees whose inability to perform one or more essential functions of the job is temporary, who will be able to perform the essential functions ''in the near future,'' and whose inability to perform essential function(s) can be reasonably accommodated without undue hardship.

The final rule defines ''in the near future'' to mean ''generally within 40 weeks'' for pregnancy only. The Commission considered, but rejected, shorter periods such as 6 months or less[472] for several reasons. First, pregnancy generally lasts 40 weeks; a rule that an employee is only ''qualified'' if they are able to perform all the essential functions of the job within 6 months of the function(s) being temporarily suspended could classify many employees who need a temporary suspension of an essential function(s) for a longer period as ''unqualified'' and therefore ineligible for reasonable accommodations. The Commission believes that this outcome would frustrate the purpose of the statute, which is to enable employees who need temporary accommodations related to pregnancy, childbirth, or related medical conditions to continue working.

Second, defining ''in the near future'' to mean ''generally 40 weeks'' for pregnancy does not mean that the employer will be required to actually provide a reasonable accommodation for that length of time. The definition of ''in the near future'' is one step in the definition of ''qualified''; even if an employee can meet this part of the definition, an employer still may refuse to provide an accommodation if the employer cannot reasonably accommodate the temporary suspension of the essential function or if doing so would impose ''undue hardship'' (defined as significant difficulty or expense, relative to the employer's overall resources). Additionally, not all employees who need an essential function(s) suspended will need it suspended for 40 weeks. It is the Commission's hope that setting a single standard for the meaning of ''in the near future'' for pregnancy will benefit both employers and employees by reducing litigation over the meaning of the term and placing the focus on the central issue of whether the accommodation would impose an undue hardship.

If the definition of ''qualified'' is ''generally 40 weeks'' rather than ''less than 6 months,'' more pregnant employees will be able to meet the definition of qualified. It is not possible to estimate how many. The Commission anticipates that there will be little or no additional cost to covered entities because it is the act of providing an accommodation—not classifying an individual as meeting part of the definition of qualified—that imposes actual costs on the employer. A covered entity can still argue that the accommodation would impose an undue hardship. Further, even if it provides the accommodation, the covered entity is likely to experience cost savings from not having to recruit, hire, or train a new employee.

The Commission also considered not defining the term ''in the near future,'' but determined that doing so would harm employers by increasing uncertainty and harm employees by failing to ensure equal treatment.

Predictable Assessments

In the section defining ''undue hardship,'' the rule lists four job modifications often sought by pregnant employees that, in virtually all cases, will be found to be reasonable accommodations that do not impose undue hardship: (1) carrying or keeping water near and drinking, as needed; (2) allowing additional restroom breaks, as needed; (3) allowing sitting for those whose work requires standing and standing for those whose work requires sitting, as needed; and (4) allowing breaks to eat and drink, as needed.

As explained in the NPRM, these accommodations are repeatedly discussed in the PWFA's legislative history as common sense, low-cost accommodations that most pregnant employees will need.[473] To increase

[470] Exec. Off. of the President, Off. of Mgmt. & Budget, *Circular A–4* (Sept. 17, 2003), *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/* (addressing discount rates).

[471] 136 Stat. 6089.

[472] H.R. Rep. No. 117–27, pt. 1, at 28 (citing *Robert,* 691 F.3d at 1218). Although it does not define ''in the near future,'' *Robert* cites to *Epps,* 353 F.3d at 593, which found that under the ADA, a request for leave that would last 6 months was too long to be ''in the near future'' to qualify as a possible reasonable accommodation.

[473] See H.R. Rep.117–27, pt. 1, at 11, 22, 29, 113; *Fighting for Fairness, supra* note 394, at 4 (statement of Rep. Suzanne Bonamici); *Long Over Due, supra* note 395, at 7 (statement of Rep. Jerrold Nadler), 25 (statement of Iris Wilbur, Vice President of Government Affairs & Public Policy, Greater Louisville, Inc., The Metro Chamber of Commerce), 83 (statement of Rep. Barbara Lee). *See also* 168 Cong. Rec. H10,527 (daily ed. Dec. 23, 2022) (statement of Rep. Jerrold Nadler); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S7,079 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. H2,324 (daily ed. May 14, 2021) (statement of Rep. Suzanne Bonamici).

efficiency and to decrease the time that it takes for employees to receive these accommodations, the Commission has determined that these modifications will in virtually all cases be determined to be reasonable accommodations that do not impose an undue hardship.

As an alternative to providing that these simple, common-sense modifications will virtually always be determined to be reasonable accommodations that do not impose undue hardship, the Commission considered taking the position that such modifications would always be reasonable accommodations and never impose undue hardship. The Commission decided against this approach because some employers may encounter circumstances that would lead to a determination that these modifications are not reasonable accommodations and/or would impose an undue hardship.

The Commission also considered the option of not including information regarding ''predictable assessments'' in the rule. The Commission determined that providing this information will be helpful to the public because doing so explains to covered entities and employees how the Commission intends to enforce the PWFA, potentially increases voluntary compliance, and increases certainty for covered entities, which will decrease costs.

The Commission does not anticipate that the rule's ''predictable assessments'' section would increase costs for covered entities. The examples given are low- to no-cost accommodations, and under the rule, the employer may still claim that these modifications would impose an undue hardship.

Uncertainty in Benefits, Costs, and Net Benefits

The Commission has based its estimates of the costs and benefits of the rule on the best data available to it at the current time. Nevertheless, the Commission recognizes these estimates are somewhat uncertain in several respects.

The data used to estimate the cost of providing accommodations as required by the PWFA come entirely from research on the cost of accommodations for individuals with disabilities; the Commission is not aware of any data concerning the cost of accommodations that relate specifically to pregnancy, childbirth, or related medical conditions. The reliance on ADA data has likely resulted in an inflated cost estimate. As discussed above, the Commission believes that the percentage of accommodations that do not cost anything to implement is likely to be higher for accommodations related specifically to pregnancy, childbirth, or related medical conditions than for accommodations needed because of a disability. Additionally, in some cases, an individual who is entitled to an accommodation under the PWFA may be entitled to it under another law or policy. For example, although leave often may be needed for recovery from childbirth, Bureau of Labor Statistics data show that 88 percent of employees already have access to some unpaid family leave independent of the PWFA, either through the FMLA or otherwise.[474] Therefore, with respect to these individuals, any costs attributable to or benefits accruing from the PWFA for leave related to childbirth would be limited to the short period of time during which such leave is required due to childbirth but unavailable from those other sources.

Conclusion

As detailed above, the estimated annual cost of providing accommodations required by the rule and underlying statute—but not independently required by a State or local law substantially similar to the PWFA—is estimated to be up to $28.02 million for private employers, up to $3.66 million for State and local governments, and up to $1.14 million for the Federal Government. In addition, employers are expected to face one-time costs associated with complying with the rule and underlying statute. These are estimated to be $451.22 million for private employers ($119.19 million for private employers in States with existing PWFA-type laws + $332.03 million for private employers in States without existing PWFA-type laws), $619,000 for State and local governments ($186,000 for public employers in States with existing PWFA-type laws + $433,000 for public employers in States without existing PWFA-type laws), and $49,000 for the Federal Government.

These figures are almost certainly overestimates of the costs imposed by the rule, in part because some of the accommodations required by the rule and underlying statute are already required under the ADA and Title VII and some employers voluntarily provide accommodations. Due to a lack of data, however, the Commission was unable to account for this overlap in the above analysis.

The Commission has nevertheless determined that the benefits of the rule and underlying statute justify its costs.[475] The annual costs associated with the main requirement of the rule—to give reasonable accommodations to individuals who need them because of pregnancy, childbirth, or related medical conditions—are not significant under section 3(f)(1) of E.O. 12866. And although the aggregate one-time compliance costs are in excess of $200 million, and therefore significant, the estimated cost on a per-establishment basis is low—between $57.02 and $255.40, depending on whether or not the State in which the entity is located has a law substantially similar to the PWFA and on the type of employer.

The benefits of the rule and underlying statute to employees affected by pregnancy, childbirth, or related medical conditions, however, are significant, including improved health, improved economic security, and increased equity, human dignity, and fairness. The number of individuals who may experience such benefits is relatively large—the number of employees who will be newly entitled to reasonable accommodations for pregnancy and may need them is estimated to be between approximately 488,000 and 1.082 million per year. This number does not include the children, family members, and members of society at large who also will potentially enjoy some of the benefits listed above.

The Commission further concludes that the rule is tailored to impose the least burden on society consistent with achieving the regulatory objectives, and that the agency has selected the approach that maximizes net benefits. The range of alternatives available to the Commission was extremely limited. The alternatives that were consistent with the PWFA's statutory language would not, in the Commission's opinion, reduce costs to employers.

Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires the Commission to evaluate the economic impact of this rule on small entities. The RFA defines small entities to include small businesses, small organizations, including not-for-profit organizations, and small governmental jurisdictions. The Commission must determine whether the rule would impose a significant economic impact on a

[474] U.S. Dep't of Labor, Bureau of Lab. Stat., *Access to Paid and Unpaid Family Leave in 2018* (Feb. 27, 2019), *https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm.*

[475] 76 FR 3821 (Jan. 21, 2011).

substantial number of such small entities.

When an agency issues a rulemaking proposal, the RFA requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will ''describe the impact of the rule on small entities.'' [476] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. For the reasons outlined below, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small businesses range in size, based on the industry, between 1 to 1,500 employees; [477] the PWFA and the rule apply to all employers in the United States with 15 or more employees. Thus, for purposes of the RFA, the Commission has determined that the regulation will have an economic impact on a substantial number of small entities.[478]

However, the Commission has determined that the economic impact on entities affected by the PWFA and the rule will not be ''significant.''

As detailed in the FRIA above, the impact on small entities in States and localities that have laws substantially similar to the PWFA will be limited to a one-time administrative cost of approximately $85.13 in the first year for small private employers (0.75 hours × $113.51 hourly wage), and $57.02 for small State or local government employers (0.75 hours × $76.03 hourly wage). Since these entities are already required to provide accommodations consistent with the PWFA, they will face no additional costs for accommodations.

Small entities that are not already subject to State or local laws substantially similar to the PWFA will face a one-time administrative cost of approximately $255.40 for private employers (2.25 hours × $113.51 hourly wage) and $171.07 for State or local government employers (2.25 hours × $76.03 hourly wage), plus annual costs associated with providing reasonable accommodations consistent with the rule and underlying statute. To calculate the cost of providing such accommodations, the Commission has constructed cost estimates for a range of small business sizes.

Table 12: Annual Costs for Reasonable Accommodations for Small Businesses Based on Size

Number of Employees	33% Women Aged 16-50	7.1% Pregnant In a Given Year	Needing Accommodations: 32% (Lower Bound Estimate) – 71% (Upper Bound Estimate)	50.6% Non-Zero-Cost Accommodations: Lower Bound Estimate – Higher Bound Estimate (Rounded Up)	Total Expected Cost: Lower Bound Estimate – Higher Bound Estimate
15	4.95	0.351	0.112 – 0.249	1	$60
50	16.5	1.172	0.375 – 0.832	1	$60
100	33	2.34	0.749 – 1.66	1	$60
150	49.5	3.515	1.124 – 2.496	1 – 2	$60 – $120
200	66	4.686	1.5 – 3.327	1 – 2	$60 – $120
250	82.5	5.858	1.875 – 4.159	1 – 3	$60 – $180
500	165	11.715	3.749 – 8.318	2 – 5	$120 – $300
750	247.5	17.573	5.623 – 12.477	3 – 7	$180 – $420
1000	330	23.43	7.498 – 16.635	4 – 9	$240 – $540
1250	412.5	29.288	9.372 – 20.794	5 – 11	$300 – $660
1500	495	35.145	11.246 – 24.953	6 – 13	$360 – $780

Using the amounts for a small entity with 500 employees as an example, the calculation was conducted as follows:

- Based on data outlined in the FRIA above, the Commission estimates that approximately 33 percent, or 165, of these employees are women of reproductive age (aged 16–50 years),[479] and that approximately 7.1 percent of these, or 11.715 employees, will give birth to at least one child during a given year.
- The Commission again adopts 71 percent as its upper bound estimate and 32 percent as its lower bound estimate of the percentage of pregnant employees who will need a reasonable accommodation related to pregnancy.
- Thus, the Commission estimates that between 3.749 (32 percent of 11.715) and 8.318 (71 percent of 11.715) employees of a small entity with 500 employees will require annually a reasonable accommodation under the PWFA.
- The Commission further assumes, based on data regarding the average cost of reasonable accommodations for individuals with disabilities presented in the FRIA above, that 50.6 percent of the required accommodations will have a non-zero cost.
- This yields lower and upper bound estimates of the number of non-zero-cost accommodations of 1.9 (50.6 percent of 3.749) and 4.21 (50.6 percent of 8.318), respectively. Rounding up these numbers, the Commission estimates that

[476] 5 U.S.C. 603(a).

[477] U.S. Small Bus. Admin., *Table of Size Standards* (Mar. 17, 2023), *https://www.sba.gov/document/support-table-size-standards.*

[478] For example, there are over 1 million businesses with between 20 and 500 employees. *See* U.S. Dep't of Com., Census Bureau, *Small Business Week: April 30–May 6, 2023* (Apr. 30, 2023), *https://www.census.gov/newsroom/stories/small-business-week.html.*

[479] The Commission acknowledges that there may be industries in which the representation rate for individuals capable of giving birth is higher than 33 percent. The Commission has determined, however, that these differences are not large enough to affect the decision to certify that the final rule will not have a significant economic impact on a substantial number of small entities. For a discussion in the response to comments received, see *supra, Summary of the Commission's Certification That the Rule Will Not Have a Significant Economic Impact on a Substantial Number of Small Entities* in the preamble.

a small entity with 500 employees will be required to provide between 2 and 5 additional non-zero-cost accommodations per year as a result of the rule and underlying statute. Multiplying by an average cost of $60 per year for each accommodation, the estimated total cost for accommodations required under the PWFA per small entity with 500 employees is between $120 and $300.

Thus, the annual cost of providing reasonable accommodations for entities not already subject to State or local laws substantially similar to the PWFA is estimated to be between $60 (lower bound estimate, for entities with 15 employees) and $780 (upper bound estimate, for entities with 1,500 employees).

The costs detailed above are not likely to constitute a ''significant'' economic impact for many small entities, if any. Further, the Commission notes that all businesses in the United States with 15 or more employees already must comply with Title VII and the ADA, both of which could, in certain circumstances, require accommodations for employees affected by pregnancy, childbirth, or related medical conditions. Further, Title VII, the ADA, and State laws requiring accommodations for pregnancy apply to all industries; given that, the Commission does not believe that the PWFA will have a greater effect in any industry.

Accordingly, the Chair of the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), requires the EEOC to consider the impact of information collection burdens imposed on the public. The PRA typically requires an agency to provide notice and seek public comments on any ''collection of information'' contained in a rule.[480]

The Commission has determined that there is no new requirement for information collection associated with this rule.

Consequently, this rule does not require review by the Office of Management and Budget under the authority of the PRA.

Executive Order 13132 (Federalism)

The Commission has reviewed this rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The statute at 42 U.S.C. 2000gg(2) provides that the PWFA applies to employers as that term is defined in Title VII. States and local governments are subject to Title VII, including its prohibition on sex discrimination, which includes discrimination based on pregnancy, childbirth, or related medical conditions. The statute at 42 U.S.C. 2000gg–4 provides that a State will not be immune under the 11th Amendment to actions brought under the PWFA in a court of competent jurisdiction and that in any action against a State for a violation of the PWFA, remedies, including remedies both at law and in equity, are available for such violation to the same extent that they are available against any other public or private entity. The rule does not limit or expand these statutory definitions. Additionally, the regulation will not have substantial direct effects ''on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Unfunded Mandates Reform Act of 1995

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that the Commission determine whether a regulation proposes a Federal mandate that may result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in a single year (adjusted annually for inflation). However, 2 U.S.C. 1503 excludes from UMRA's ambit any provision in a final regulation that, among other things, enforces constitutional rights of individuals or establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability; thus, UMRA does not apply to the PWFA.[481]

Plain Language

The Commission has attempted to draft this final rule in plain language.

Assessment of Federal Regulations and Policies on Families

The undersigned hereby certifies that the rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act of 1999. To the contrary, by providing reasonable accommodation to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship, the rule will have a positive effect on the economic well-being and security of families.

Executive Order 13175 (Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The definition of ''covered entity'' in the PWFA follows that of Title VII; Title VII exempts ''a corporation wholly owned by an Indian tribe.''[482]

Executive Order 12988 (Civil Justice Reform)

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 1636

Administrative practice and procedure, Equal employment opportunity, Reasonable accommodation, Pregnancy.

For the Commission.

Charlotte A. Burrows,

Chair.

■ For the reasons set forth in the preamble, the EEOC amends 29 CFR chapter XIV by adding part 1636 to read as follows:

PART 1636—PREGNANT WORKERS FAIRNESS ACT

Sec.

[480] *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

[481] H.R. Report No. 117–27, pt. 1, at 41 (containing a report by the Congressional Budget Office stating that the PWFA was not reviewed ''for intergovernmental or private-sector mandates'' because it falls within the exception to the Unfunded Mandates Reform Act as it ''would extend protections against discrimination in the workplace based on sex to employees requesting reasonable accommodation for pregnancy, childbirth, or related medical conditions'').

[482] 42 U.S.C. 2000e(b).

Authority: 42 U.S.C. 2000gg *et seq.*

§ 1636.1 Purpose.

(a) The purpose of this part is to implement the Pregnant Workers Fairness Act, 42 U.S.C. 2000gg *et seq.* (PWFA).

(b) The PWFA:

(1) Requires a covered entity to make reasonable accommodation to the known limitations of a qualified employee related to pregnancy, childbirth, or related medical conditions, absent undue hardship;

(2) Prohibits a covered entity from requiring a qualified employee to accept an accommodation, other than a reasonable accommodation arrived at through the interactive process;

(3) Prohibits the denial of employment opportunities based on the need of the covered entity to make reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee;

(4) Prohibits a covered entity from requiring a qualified employee to take leave if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee;

(5) Prohibits a covered entity from taking adverse actions in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions;

(6) Prohibits discrimination against an employee for opposing unlawful discrimination under the PWFA or participating in a proceeding under the PWFA;

(7) Prohibits coercion of individuals in the exercise of their rights under the PWFA; and

(8) Provides remedies for individuals whose rights under the PWFA are violated.

§ 1636.2 Definitions—general.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4.

(b) *Covered entity* means *respondent* as defined in section 701(n) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(n), and includes:

(1) *Employer,* which is a person engaged in an industry affecting commerce who has 15 or more employees, as defined in section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b);

(2) *Employing office,* as defined in section 101 of the Congressional Accountability Act of 1995, 2 U.S.C. 1301, and 3 U.S.C. 411(c);

(3) An entity employing a State employee (or the employee of a political subdivision of a State) described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16c(a); and

(4) An entity to which section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a), applies.

(c) *Employee* means:

(1) An employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(f);

(2) [Reserved]

(3) A covered employee (including an applicant), as defined in 3 U.S.C. 411(c);

(4) A State employee (including an applicant) (or the employee or applicant of a political subdivision of a State) described in section 304(a) of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16c(a); and

(5) An employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a), applies.

(d) *Person* means person as defined by section 701(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(a).

§ 1636.3 Definitions—specific to the PWFA.

(a) *Known limitation. Known limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity, whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.

(1) *Known,* in terms of limitation, means the employee or the employee's representative has communicated the limitation to the employer.

(2) *Limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, of the specific employee in question. ''Physical or mental condition'' is an impediment or problem that may be modest, minor, and/or episodic. The physical or mental condition may be that an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy. The definition also includes when an employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself. The physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.

(b) *Pregnancy, childbirth, or related medical conditions.* ''Pregnancy'' and ''childbirth'' refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). ''Related medical conditions'' are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, ''related medical conditions'': termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

(c) *Employee's representative. Employee's representative* means a family member, friend, union representative, health care provider, or other representative of the employee.

(d) *Communicated to the employer. Communicated to the employer,* with

respect to a known limitation, means an employee or the employee's representative has made the employer aware of the limitation by communicating with a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee's tasks (or the equivalent for an applicant), human resources personnel, or another appropriate official, or by following the steps in the covered entity's policy to request an accommodation.

(1) The communication may be made orally, in writing, or by another effective means.

(2) The communication need not be in writing, be in a specific format, use specific words, or be on a specific form in order for it to be considered ''communicated to the employer.''

(e) *Consideration of mitigating measures.* (1) The determination of whether an employee has a limitation shall be made without regard to the ameliorative effects of mitigating measures.

(2) The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an employee has a limitation.

(f) *Qualified employee. Qualified employee* with respect to an employee with a known limitation under the PWFA means:

(1) An employee who, with or without reasonable accommodation, can perform the essential functions of the employment position. With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to be able to perform the essential functions, with or without a reasonable accommodation, at the end of the leave, if time off is granted, or if the employee is qualified as set out in paragraph (f)(2) of this section after returning from leave.

(2) Additionally, an employee shall be considered qualified if they cannot perform one or more essential functions if:

(i) Any inability to perform an essential function(s) is for a temporary period, where ''temporary'' means lasting for a limited time, not permanent, and may extend beyond ''in the near future'';

(ii) The essential function(s) could be performed in the near future. This determination is made on a case-by-case basis. If the employee is pregnant, it is presumed that the employee could perform the essential function(s) in the near future because they could perform the essential function(s) within generally 40 weeks of its suspension; and

(iii) The inability to perform the essential function(s) can be reasonably accommodated. This may be accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of their position or, depending on the position, other arrangements, including, but not limited to: the employee performing the remaining functions of their position and other functions assigned by the covered entity; the employee performing the functions of a different job to which the covered entity temporarily transfers or assigns the employee; or the employee being assigned to light duty or modified duty or participating in the covered entity's light or modified duty program.

(g) *Essential functions. Essential functions* mean the fundamental job duties of the employment position the employee with a known limitation under the PWFA holds or desires. The term ''essential functions'' does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for their expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time that would be spent on the job performing the function during the time the requested accommodation will be in effect;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(h) *Reasonable accommodation—generally.* (1) With respect to an employee or applicant with a known limitation under the PWFA, reasonable accommodation includes:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a known limitation under the PWFA to be considered for the position such qualified applicant desires;

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified employee with a known limitation under the PWFA to perform the essential functions of that position;

(iii) Modifications or adjustments that enable a covered entity's employee with a known limitation under the PWFA to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without known limitations; or

(iv) Temporary suspension of essential function(s) and/or modifications or adjustments that permit the temporary suspension of essential function(s).

(2) To request a reasonable accommodation, the employee or the employee's representative need only communicate to the covered entity that the employee needs an adjustment or change at work due to their limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions).

(i) The communication may be made to any of the individuals in paragraph (d) of this section. The provisions of paragraphs (d)(1) and (2) of this section, which define what it means to communicate a limitation to a covered entity, apply to communications under this paragraph (h)(2).

(ii) An employee's request does not have to identify a medical condition, whether from paragraph (b) of this section or otherwise, or use medical terms.

(3) To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process as explained in paragraph (k) of this section.

(i) *Reasonable accommodation—examples.* Reasonable accommodation may include, but is not limited to:

(1) Making existing facilities used by employees readily accessible to and usable by employees with known limitations under the PWFA;

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; breaks for use of the restroom, drinking, eating, and/or resting; acquisition or modification of

equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting or carrying; modifying the work environment; providing seating for jobs that require standing, or allowing standing for jobs that require sitting; appropriate adjustment or modifications of examinations or policies; permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) or providing unpaid leave for reasons including, but not limited to, recovery from childbirth, miscarriage, stillbirth, or medical conditions related to pregnancy or childbirth, or to attend health care appointments or receive health care treatment related to pregnancy, childbirth, or related medical conditions; placement in the covered entity's light or modified duty program or assignment to light duty or modified work; telework, remote work, or change of work site; adjustments to allow an employee to work without increased pain or increased risk to the employee's health or the health of the pregnancy; temporarily suspending one or more essential functions of the position; providing a reserved parking space if the employee is otherwise entitled to use employer-provided parking; and other similar accommodations for employees with known limitations under the PWFA.

(3) The reasonable accommodation of leave includes, but is not limited to, the examples in paragraphs (i)(3)(i) through (iii) of this section.

(i) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or unpaid leave, including, but not limited to, leave during pregnancy; to recover from childbirth, miscarriage, stillbirth, or other related medical conditions; and to attend health care appointments or receive health care treatments related to pregnancy, childbirth, or related medical conditions;

(ii) The ability to use paid leave (whether accrued, short-term disability, or another employer benefit) or unpaid leave for a known limitation under the PWFA; and

(iii) The ability to choose whether to use paid leave (whether accrued, short-term disability or another employer benefit) or unpaid leave to the extent that the covered entity allows employees using leave for reasons not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions to choose between the use of paid leave and unpaid leave.

(4) Reasonable accommodation related to lactation includes, but is not limited to:

(i) Breaks, a space for lactation, and other related modifications as required under the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093 (2022)), if not otherwise provided under the PUMP Act;

(ii) Accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is a place other than a bathroom; that it is shielded from view and free from intrusion; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk;

(iii) Accommodations related to nursing during work hours (where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity); and

(iv) Other reasonable accommodations, including those listed in paragraphs (i)(1) through (3) of this section.

(5) The temporary suspension of one or more essential functions of the position in question, as defined in paragraph (g) of this section, is a reasonable accommodation if an employee with a known limitation under the PWFA is unable to perform one or more essential functions with or without a reasonable accommodation and the conditions set forth in paragraph (f)(2) of this section are met.

(j) *Undue hardship*—(1) *In general.* Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (j)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered, with no one factor to be dispositive, include:

(i) The nature and net cost of the accommodation needed under the PWFA;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(3) *Temporary suspension of an essential function(s).* If an employee with a known limitation under the PWFA meets the definition of ''qualified employee'' under paragraph (f)(2) of this section and needs one or more essential functions of the relevant position to be temporarily suspended, the covered entity must provide the accommodation unless doing so would impose an undue hardship on the covered entity when considered in light of the factors provided in paragraphs (j)(2)(i) through (v) of this section as well as the following additional factors where they are relevant and with no one factor to be dispositive:

(i) The length of time that the employee will be unable to perform the essential function(s);

(ii) Whether, through the factors listed in paragraph (f)(2)(iii) of this section or otherwise, there is work for the employee to accomplish;

(iii) The nature of the essential function(s), including its frequency;

(iv) Whether the covered entity has provided other employees in similar positions who are unable to perform the essential function(s) of their position with temporary suspensions of the essential function(s);

(v) If necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and

(vi) Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

(4) *Predictable assessments.* The individualized assessment of whether a modification listed in paragraphs (j)(4)(i) through (iv) of this section is a reasonable accommodation that would cause undue hardship will, in virtually all cases, result in a determination that the four modifications are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee who is

pregnant. Therefore, with respect to these modifications, the individualized assessment should be particularly simple and straightforward:

(i) Allowing an employee to carry or keep water near and drink, as needed;

(ii) Allowing an employee to take additional restroom breaks, as needed;

(iii) Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and

(iv) Allowing an employee to take breaks to eat and drink, as needed.

(k) *Interactive process. Interactive process* means an informal, interactive process between the covered entity and the employee seeking an accommodation under the PWFA. This process should identify the known limitation under the PWFA and the adjustment or change at work that is needed due to the limitation, if either of these is not clear from the request, and potential reasonable accommodations. There are no rigid steps that must be followed.

(l) *Limits on supporting documentation.* (1) A covered entity is not required to seek supporting documentation. A covered entity may seek supporting documentation from an employee who requests an accommodation under the PWFA only when it is reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. The following situations are examples of when it is not reasonable under the circumstances to seek supporting documentation:

(i) When the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and the adjustment or change at work needed due to the limitation are obvious and the employee provides self-confirmation as defined in paragraph (l)(4) of this section;

(ii) When the employer already has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation;

(iii) When the employee is pregnant and seeks one of the modifications listed in paragraphs (j)(4)(i) through (iv) of this section due to a physical or mental condition related to, affected by, or arising out of pregnancy (a limitation) and the employee provides self-confirmation as defined in paragraph (l)(4) of this section;

(iv) When the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during work hours (where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity), and the employee provides self-confirmation, as defined in paragraph (l)(4) of this section; or

(v) When the requested accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.

(2) When it is reasonable under the circumstances, based on paragraph (l)(1) of this section, to seek supporting documentation, the covered entity is limited to seeking reasonable documentation.

(i) *Reasonable documentation* means the minimum that is sufficient to:

(A) Confirm the physical or mental condition (*i.e.,* an impediment or problem that may be modest, minor, and/or episodic; a need or a problem related to maintaining the employee's health or the health of the pregnancy; or an employee seeking health care related to pregnancy, childbirth, or a related medical condition itself) whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102;

(B) Confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together with paragraph (l)(2)(i)(A) of this section, ''a limitation''); and

(C) Describe the adjustment or change at work that is needed due to the limitation.

(ii) Covered entities may not require that supporting documentation be submitted on a specific form.

(3) When it is reasonable under the circumstances, based on paragraph (l)(1) of this section, to seek supporting documentation, a covered entity may require that the reasonable documentation comes from a health care provider, which may include, but is not limited to: doctors, midwives, nurses, nurse practitioners, physical therapists, lactation consultants, doulas, occupational therapists, vocational rehabilitation specialists, therapists, industrial hygienists, licensed mental health professionals, psychologists, or psychiatrists. The health care provider may be a telehealth provider. The covered entity may not require that the health care provider submitting documentation be the provider treating the condition at issue. The covered entity may not require that the employee seeking the accommodation be examined by a health care provider selected by the covered entity.

(4) *Self-confirmation* means a simple statement where the employee confirms, for purposes of paragraph (l)(1)(i), (iii), or (iv) of this section, the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation), and the adjustment or change at work needed due to the limitation. The statement can be made in any manner and can be made as part of the request for reasonable accommodation under paragraph (h)(2) of this section. A covered entity may not require that the statement be in a specific format, use specific words, or be on a specific form.

§ 1636.4 Nondiscrimination with regard to reasonable accommodations related to pregnancy.

(a) It is an unlawful employment practice for a covered entity not to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

(1) An unnecessary delay in providing a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA, 42 U.S.C. 2000gg–1(1), even if the covered entity eventually provides the reasonable accommodation. In determining whether there has been an unnecessary delay, factors to be considered, with no one factor to be dispositive, include:

(i) The reason for the delay;

(ii) The length of the delay;

(iii) The length of time that the accommodation is needed. If the accommodation is needed for a short time, unnecessary delay in providing it may effectively mean failure to provide the accommodation;

(iv) How much the employee and the covered entity each contributed to the delay;

(v) Whether the covered entity was engaged in actions related to the reasonable accommodation request during the delay;

(vi) Whether the accommodation was or would be simple or complex to provide. There are certain accommodations, set forth in § 1636.3(j)(4), that are common and easy to provide. Delay in providing these accommodations will virtually always result in a finding of unnecessary delay; and

(vii) Whether the covered entity offered the employee an interim reasonable accommodation during the interactive process or while waiting for the covered entity's response. For the purposes of this factor, the interim reasonable accommodation should be one that allows the employee to continue working. Leave will not be considered an interim reasonable accommodation supporting this factor, unless the employee selects or requests leave as an interim reasonable accommodation.

(2) An employee with known limitations related to pregnancy, childbirth, or related medical conditions is not required to accept an accommodation. However, if such employee rejects a reasonable accommodation that is necessary to enable the employee to perform an essential function(s) of the position held or desired or to apply for the position, or rejects the temporary suspension of an essential function(s) if the employee is qualified under § 1636.3(f)(2), and, as a result of that rejection, cannot perform an essential function(s) of the position, or cannot apply, the employee will not be considered ''qualified.''

(3) A covered entity cannot justify failing to provide a reasonable accommodation or the unnecessary delay in providing a reasonable accommodation to a qualified employee with known limitations related to pregnancy, childbirth, or related medical conditions based on the employee failing to provide supporting documentation, unless:

(i) The covered entity seeks the supporting documentation;

(ii) Seeking the supporting documentation is reasonable under the circumstances as set out in § 1636.3(l)(1);

(iii) The supporting documentation is ''reasonable documentation'' as defined in § 1636.3(l)(2); and

(iv) The covered entity provides the employee sufficient time to obtain and provide the supporting documentation.

(4) When choosing among effective accommodations, the covered entity must choose an accommodation that provides the qualified employee with known limitations related to pregnancy, childbirth, or related medical conditions equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average employee without a known limitation who is similarly situated. The similarly situated average employee without a known limitation may include the employee requesting an accommodation at a time prior to communicating the limitation.

(b) It is an unlawful employment practice for a covered entity to require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in 42 U.S.C. 2000gg(7) and described in § 1636.3(k).

(c) It is an unlawful employment practice for a covered entity to deny employment opportunities to a qualified employee if such denial is based on the need, or potential need, of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee.

(d) It is an unlawful employment practice for a covered entity:

(1) To require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee that does not result in an undue hardship for the covered entity; but

(2) Nothing in paragraph (d)(1) of this section prohibits leave as a reasonable accommodation if that is the reasonable accommodation requested or selected by the employee, or if it is the only reasonable accommodation that does not cause an undue hardship.

(e) It is an unlawful employment practice for a covered entity:

(1) To take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

(2) Nothing in paragraph (e)(1) of this section limits the rights available under 42 U.S.C. 2000gg–2(f).

§ 1636.5 Remedies and enforcement.

(a) *Employees covered by Title VII of the Civil Rights Act of 1964*—(1) *In general.* The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4 *et seq.,* to the Commission, the Attorney General, or any person alleging a violation of Title VII of such Act, 42 U.S.C. 2000e *et seq.,* shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of the PWFA against an employee described in 42 U.S.C. 2000gg(3)(A), except as provided in paragraphs (a)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(b) [Reserved]

(c) *Employees covered by Chapter 5 of Title 3, United States Code*—(1) *In general.* The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this section provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this section against an employee described in 42 U.S.C. 2000gg(3)(C), except as provided in paragraphs (c)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures this section provides to the President, the Commission, the Board, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this section provides to the President, the

Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(d) *Employees covered by Government Employee Rights Act of 1991*—(1) *In general.* The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991, 42 U.S.C. 2000e–16b and 2000e–16c, to the Commission or any person alleging a violation of section 302(a)(1) of such Act, 42 U.S.C. 2000e–16b(a)(1), shall be the powers, remedies, and procedures the PWFA provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of the PWFA against an employee described in 42 U.S.C. 2000gg(3)(D), except as provided in paragraphs (d)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures the PWFA provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(e) *Employees covered by Section 717 of the Civil Rights Act of 1964*—(1) *In general.* The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of the PWFA against an employee described in 42 U.S.C. 2000gg(3)(E), except as provided in paragraphs (e)(2) and (3) of this section.

(2) *Costs and fees.* The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes, 42 U.S.C. 1988, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) *Damages.* The powers, remedies, and procedures provided in section 1977A of the Revised Statutes, 42 U.S.C. 1981a, including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures the PWFA provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes, 42 U.S.C. 1981a(a)(1)).

(f) *Prohibition against retaliation*—(1) *Prohibition against retaliation.* No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by the PWFA or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA.

(i) An employee need not be a qualified employee with a known limitation under the PWFA to bring an action under this paragraph (f)(1).

(ii) A request for reasonable accommodation for a known limitation under the PWFA constitutes protected activity under this paragraph (f)(1).

(iii) An employee does not actually have to be deterred from exercising or enjoying rights under the PWFA in order for the retaliation to be actionable.

(2) *Prohibition against coercion.* It shall be unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the PWFA.

(i) An individual need not be a qualified employee with a known limitation under the PWFA to bring an action under this paragraph (f)(2).

(ii) An individual does not actually have to be deterred from exercising or enjoying rights under the PWFA for the coercion, intimidation, threats, harassment, or interference to be actionable.

(3) *Remedy.* The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this section regarding retaliation or coercion.

(g) *Limitation on monetary damages.* Notwithstanding paragraphs (a)(3), (c)(3), (d)(3), and (e)(3) of this section, if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to the PWFA or this part, damages may not be awarded under section 1977A of the Revised Statutes, 42 U.S.C. 1981a, if the covered entity demonstrates good faith efforts, in consultation with the qualified employee with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the business of the covered entity.

§ 1636.6 Waiver of State immunity.

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of the PWFA. In any action against a State for a violation of the PWFA, remedies (including remedies both at law and in equity) are available for such a violation to the same extent such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 1636.7 Relationship to other laws.

(a) *In general.* (1) The PWFA and this part do not invalidate or limit the powers, remedies, and procedures under any Federal law, State law, or the law of any political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

(2) The PWFA and this part do not require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment, or affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) *Rule of construction.* The PWFA and this part are subject to the applicability to religious employment set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a).

(1) Nothing in 42 U.S.C. 2000gg–5(b) or this part should be interpreted to limit a covered entity's rights under the U.S. Constitution.

(2) Nothing in 42 U.S.C. 2000gg–5(b) or this part should be interpreted to limit an employee's rights under other civil rights statutes.

§ 1636.8 Severability.

(a) The Commission intends that, if any provision of the PWFA or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of the statute and the application of that provision to other persons or circumstances shall not be affected.

(b) The Commission intends that, if any provision of this part that uses the same language as the statute, or the application of that provision to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of this part and the application of that provision to other persons or circumstances shall not be affected.

(c) The Commission intends that, if any provision of this part or the interpretive guidance in appendix A to this part that provides additional guidance to implement the PWFA, including examples of reasonable accommodations, or the application of that provision to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of this part or the interpretive guidance and the application of that provision to other persons or circumstances shall not be affected.

Appendix A to Part 1636—Interpretive Guidance on the Pregnant Workers Fairness Act

I. Introduction

1. The Pregnant Workers Fairness Act (PWFA) requires a covered entity to provide reasonable accommodations to a qualified employee's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the business of the covered entity. Although employees affected by pregnancy, childbirth, or related medical conditions have certain rights under existing civil rights laws, including Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. 2000e *et seq.,* and the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12111 *et seq.,*[1] Congress determined that the legal protections offered by these two statutes, particularly as interpreted by the courts, were ''insufficient to ensure that pregnant workers receive the accommodations they need.'' [2]

2. The PWFA, at 42 U.S.C. 2000gg–3, directs the U.S. Equal Employment Opportunity Commission (EEOC or Commission) to promulgate regulations to implement the PWFA.

3. This Interpretive Guidance addresses the major provisions of the PWFA and its regulation and explains the major concepts pertaining to nondiscrimination with respect to reasonable accommodations for known limitations (physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) under the statute. The Interpretive Guidance represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by the regulation and the Interpretive Guidance when enforcing the PWFA.

II. General Information and Terms Used in the Regulation and Interpretive Guidance

1. The PWFA at 42 U.S.C. 2000gg(3) uses the term ''employee (including an applicant)'' in its definition of ''employee.'' [3] Thus, throughout the statute, the final regulation, and this Interpretive Guidance, the term ''employee'' should be understood to include ''applicant'' where relevant. Because the PWFA relies on Title VII for its definition of ''employee,'' that term also includes ''former employee,'' where relevant.[4] The PWFA defines ''covered entity'' using the definition of ''employer'' from different statutes, including Title VII.[5] Thus ''covered entities'' under the PWFA include public or private employers with 15 or more employees, unions, employment agencies, and the Federal Government.[6] In the regulation and this Interpretive Guidance, the Commission uses the terms ''covered entity'' and ''employer'' interchangeably.

2. This Interpretive Guidance contains many examples to illustrate situations under the PWFA. The examples do not, and are not intended to, cover every limitation or possible accommodation under the PWFA. Depending on the facts in the examples, the same facts could lead to claims also being brought under other statutes that the Commission enforces, such as Title VII and the ADA. Moreover, the situations in specific examples could implicate other Federal laws, including, but not limited to, the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* (FMLA); the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* (OSH Act); and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093 (2022)).[7] Finally, although some examples state that the described actions ''would violate'' the PWFA, additional facts not described in the examples could change that determination.[8]

III. 1636. Definitions—Specific to the PWFA

1636.3(a) Known Limitation

1. Section 1636.3(a) reiterates the definition of ''known limitation'' from 42 U.S.C. 2000gg(4) of the PWFA and then provides definitions for the operative terms.

1636.3(a)(1) Known

2. Paragraph (a)(1) adopts the definition of ''known'' from the PWFA and thus defines it to mean that the employee, or the employee's representative, has communicated the limitation to the covered entity.[9]

1636.3(a)(2) Limitation

3. Paragraph (a)(2) adopts the definition of ''limitation'' from the PWFA and thus defines it to mean a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.[10] The limitation must be of the specific employee in question. The ''physical or mental condition'' that is the limitation may be a modest, minor, and/or episodic impediment or problem. The definition encompasses when an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy.[11]

4. The definition of ''limitation'' also includes when an employee is seeking health care related to the pregnancy, childbirth, or a related medical condition itself. Under the ADA, when an individual has an actual or a record of a disability, employers often may be required to provide the reasonable accommodation of leave so that an employee

[1] References to the ADA throughout this part and the Interpretive Guidance in this appendix are intended to apply equally to the Rehabilitation Act of 1973, as all nondiscrimination standards under title I of the ADA also apply to Federal agencies under section 501 of the Rehabilitation Act. *See* 29 U.S.C. 791(f).

[2] H.R. Rep. No. 117–27, pt. 1, at 12 (2021).

[3] 42 U.S.C. 2000gg(3).

[4] *Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 346 (1997).

[5] 42 U.S.C. 2000gg(2)(A), (B)(i), (B)(iii), (B)(iv). The other statutes are the Congressional Accountability Act of 1995 and 3 U.S.C. 411(c).

[6] The statute at 42 U.S.C. 2000gg(2) provides that the term ''covered entity'' has the meaning given the term ''respondent'' under 42 U.S.C. 2000e(n) and includes employers as defined in 42 U.S.C. 2000e(b), 2000e–16c(a), and 2000e–16(a). The statute at 42 U.S.C. 2000gg–5(b) provides as a rule of construction that the chapter is subject to the applicability to religious employment set forth in 42 U.S.C. 2000e–1(a) [section 702(a) of the Civil Rights Act of 1964].

[7] To the extent that an accommodation in an example is required under another law, like the OSH Act, the example should not be read to suggest that such a requirement is not applicable.

[8] In this part and the Interpretive Guidance, the Commission uses the terms ''leave'' and ''time off'' and intends those terms to cover leave however it is identified by the specific employer. Additionally, in this part and the Interpretive Guidance, the Commission uses the term ''light duty.'' The Commission recognizes that ''light duty'' programs, or other programs providing modified duties, can vary depending on the covered entity. *See* EEOC, *Enforcement Guidance: Workers' Compensation and the ADA,* text preceding Question 27 (1996) [hereinafter *Enforcement Guidance: Workers' Compensation*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada.* The Commission intends ''light duty'' to include the types of programs included in Questions 27 and 28 of the *Enforcement Guidance: Workers' Compensation* and any other policy, practice, or system that a covered entity has for accommodating employees, including when one or more essential functions of a position are temporarily excused.

[9] 42 U.S.C. 2000gg(4).

[10] *Id.*

[11] In § 1636.3(a)(2) and the Interpretive Guidance, the Commission uses the phrase ''maintaining their health or the health of the pregnancy.'' This includes avoiding risk to the employee's health or to the health of the pregnancy.

can obtain medical treatment.[12] Similarly, under the PWFA, an employee may require a reasonable accommodation of leave to attend health care appointments or receive treatment for or recover from their pregnancy, childbirth, or related medical conditions.[13] In passing the PWFA, Congress sought, in part, to help pregnant employees maintain their health.[14] Thus, the PWFA covers situations when an employee requests an accommodation in order to maintain their health or the health of their pregnancy and avoid negative consequences, and when an employee seeks health care for their pregnancy, childbirth, or related medical conditions. Practically, allowing for accommodations to maintain health and attend medical appointments may decrease the need for a more extensive accommodation because the employee may be able to avoid more serious complications.

5. The physical or mental condition (the limitation) required to trigger the obligation to provide a reasonable accommodation under the PWFA does not need to meet the definition of a ''disability'' under the ADA.[15] In other words, an employee need not have an impairment that substantially limits a major life activity to be entitled to a reasonable accommodation under the PWFA, nor does an employee need to have an ''impairment'' as defined in the regulation implementing the ADA.[16] The PWFA can cover physical or mental conditions that also are covered under the ADA. In these situations, an individual may be entitled to an accommodation under the ADA as well as the PWFA.

6. The PWFA does not create a right to reasonable accommodation based on an individual's association with someone else who may have a PWFA-covered limitation. Nor is a qualified employee entitled to accommodation because they have a physical or mental condition related to, affected by, or arising out of someone else's pregnancy, childbirth, or related medical conditions. For example, a spouse experiencing anxiety due to a partner's pregnancy is not covered by the PWFA. Time for bonding or time for childcare also is not covered by the PWFA.

7. Whether an employee has a ''physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions'' shall be construed broadly to the maximum extent permitted by the PWFA.

Related to, Affected by, or Arising Out of

8. The PWFA's use of the inclusive terms ''related to, affected by, or arising out of''[17] means that pregnancy, childbirth, or related medical conditions do not need to be the sole, the original, or a substantial cause of the physical or mental condition at issue for the physical or mental condition to be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions.

9. Whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions will be apparent in the majority of cases. Pregnancy and childbirth cause systemic changes that not only create new physical and mental conditions but also can exacerbate preexisting conditions and can cause additional pain or risk.[18] Thus, a connection between an employee's physical or mental condition and their pregnancy, childbirth, or related medical conditions will be readily ascertained when an employee is currently pregnant or the employee is experiencing or has just experienced childbirth.

10. For example, if an employee is pregnant and as a result has pain when standing for long periods of time, the employee's physical or mental condition (pain when standing for a protracted period) is related to, affected by, or arising out of the employee's pregnancy. An employee who is pregnant and because of the pregnancy cannot lift more than 20 pounds has a physical condition related to, affected by, or arising out of pregnancy, because lifting is associated with low back pain and musculoskeletal disorders that may be exacerbated by physical changes associated with pregnancy.[19] An employee who is pregnant and seeks time off for prenatal health care appointments is attending medical appointments related to, affected by, or arising out of pregnancy. An employee who requests an accommodation to attend therapy appointments for postpartum depression has a medical condition related to pregnancy or childbirth (postpartum depression) and is obtaining health care related to, affected by, or arising out of a related medical condition. A pregnant employee who is seeking an accommodation to limit exposure to secondhand smoke to protect the health of their pregnancy has a physical or mental condition (trying to maintain the employee's health or the health of their pregnancy, or to address increased sensitivity to secondhand smoke) related to, affected by, or arising out of pregnancy. A lactating employee who seeks an accommodation to take breaks to eat has a related medical condition (lactation) and a physical condition related to, affected by, or arising out of it (increased nutritional needs). A pregnant employee seeking time off in order to have an amniocentesis procedure is attending a medical appointment related to, affected by, or arising out of pregnancy. An employee who requests leave for in vitro fertilization (IVF) treatment for the employee to get pregnant has a limitation, either related to potential or intended pregnancy or a medical condition related to pregnancy (difficulty in becoming pregnant or infertility), and is seeking health care related to, affected by, or arising out of it. An employee whose pregnancy is causing fatigue has a physical condition (fatigue) related to, affected by, or arising out of pregnancy. An employee whose pregnancy is causing back pain has a physical condition (back pain) related to, affected by, or arising out of pregnancy. This is not by any means a complete list of physical or mental

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[12] EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,* at text after n.49 (2002) [hereinafter *Enforcement Guidance on Reasonable Accommodation*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.*

[13] *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Off. of Women's Health, *Prenatal Care, https://www.womenshealth.gov/a-z-topics/prenatal-care* (last updated Feb. 22, 2021) (stating that during pregnancy usually visits are once a month until week 28, twice a month from weeks 28–36 and once a week from week 36 to birth); Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 736, *Optimizing Postpartum Care* (reaff'd 2021), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care* (stating the importance of regular postpartum care); and Opinion No. 826, *Protecting and Expanding Medicaid to Improve Women's Health* (2021), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/protecting-and-expanding-medicaid-to-improve-womens-health* (encouraging the expansion of Medicaid to improve postpartum care).

[14] *See* Markup of the Paycheck Fairness Act; Pregnant Workers Fairness Act; Workplace Violence Prevention for Health Care and Social Service Workers Act, YouTube (2021), at 54:46 (statement of Rep. Kathy E. Manning) (stating that a goal of the PWFA is to help pregnant workers ''deliver healthy babies while maintaining their jobs''); at 21:50 (statement of Rep. Robert C. Scott) (''[W]ithout [these] basic protections, too many workers are forced to choose between a healthy pregnancy and their paychecks.''); at 1:35:01 (statement of Rep. Lucy McBath) (''[N]o mother should ever have to choose between the health of herself/themselves and their child or a paycheck.''); and at 1:37:38 (statement of Rep. Suzanne Bonamici) (''[P]regnant workers should not have to choose between a healthy pregnancy and a paycheck.''), *https://www.youtube.com/watch?v=p6Ie2S9sTxs; see also* H.R. Rep. No. 117–27, pt. 1, at 12 (workers whose pregnancy-related impairments substantially limit a major life activity are covered by the ADA; ''this standard leaves women with less serious pregnancy-related impairments, and who need accommodations, without legal recourse''); *id.* at 22–23 (accommodations are frequently needed by, and should be provided to, people with healthy pregnancies); *id.* at 23 (example of an ''uneventful pregnancy'' in which a woman needed more bathroom breaks); *id.* at 14–21 (outlining the gaps created by court interpretations of Title VII and the ADA that the PWFA is intended to fill so that pregnant workers can receive reasonable accommodations); *id.* at 56 (noting that a ''minor limitation'' can be covered because it presumably requires only minor accommodations).

[15] 42 U.S.C. 2000gg(4).

[16] *See* 29 CFR 1630.2(h).

[17] The statute at 42 U.S.C. 2000gg(4) defines the term ''known limitation'' as a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Most of the prohibited acts in the statute, however, use the phrase ''known limitations related to the pregnancy, childbirth, or related medical conditions.'' *See* 42 U.S.C. 2000gg–1(1), (3)–(5). Thus, the Commission will define ''related to, affected by, or arising out of'' as one phrase and will not attempt to define each of the parts of it separately.

[18] *See, e.g.,* Danforth's Obstetrics & Gynecology 286 (Ronald S. Gibbs et al. eds., 10th ed. 2008) (''Normal pregnancy entails many physiologic changes . . . .''); Clinical Anesthesia 1138 (Paul G. Barash et al. eds., 6th ed. 2009) (''During pregnancy, there are major alterations in nearly every maternal organ system.'')

[19] Am. Coll. of Obstetricians & Gynecologists, Comm. Opinion No. 733, *Employment Considerations During Pregnancy and the Postpartum Period* (reaff'd 2023), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.*

conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, but rather a discussion of examples to illustrate application of the legal rule.

11. The Commission recognizes that some physical or mental conditions (which can be ''limitations'' as defined by the PWFA [20]), including some of those in the examples in paragraph 10 of this section, may occur even if they are not related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (*e.g.,* attending medical appointments, increased nutritional needs, constraints on lifting). The Commission anticipates that confirming whether a physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions usually will be straightforward and can be accomplished through the interactive process. If a physical or mental condition is not covered by the PWFA, it may be that the physical or mental condition constitutes a disability that is covered by the ADA.

12. There may be situations where a physical or mental condition begins as something that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and, once the pregnancy, childbirth, or related medical conditions resolve, the physical or mental condition remains, evolves, or worsens. To confirm whether the employee's physical or mental condition is still related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, the employer and the employee can engage in the interactive process.

13. There will be situations where an individual with a physical or mental condition that is no longer related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions has an ''actual'' or ''record of'' disability under the ADA. In those situations, an individual may seek an accommodation under the ADA and the reasonable accommodation process would follow the ADA.[21]

14. Finally, there may be situations where the pregnancy, childbirth, or related medical conditions exacerbate existing conditions that may be disabilities under the ADA. In those situations, an employee can seek an accommodation under the PWFA or the ADA, or both statutes.

1636.3(b) Pregnancy, Childbirth, or Related Medical Conditions

15. The PWFA uses the term ''pregnancy, childbirth, or related medical conditions,'' which appears in Title VII's definition of ''sex.'' [22] Because Congress chose to write the PWFA using the same language as Title VII, § 1636.3(b) gives the term ''pregnancy, childbirth, or related medical conditions'' the same meaning as under Title VII.[23]

16. The non-exhaustive list of examples in § 1636.3(b) for the definition of ''pregnancy'' and ''childbirth'' includes current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), and labor and childbirth (including vaginal delivery and cesarean section).[24]

17. ''Related medical conditions'' are medical conditions that relate to pregnancy or childbirth.[25] To be a related medical condition, the medical condition need not be caused solely, originally, or substantially by pregnancy or childbirth.

18. There are some medical conditions where the relation to pregnancy will be readily apparent. They can include, but are not limited to, lactation (including breastfeeding and pumping), miscarriage, stillbirth, having or choosing not to have an abortion, preeclampsia, gestational diabetes, and HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome.[26]

[20] 42 U.S.C. 2000gg(4) (providing that a ''known limitation'' is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer).

[21] *See, e.g.,* 29 CFR 1630.2(o)(3); 29 CFR part 1630, appendix, 1630.2(o)(3) and 1630.9.

[22] *See* 42 U.S.C. 2000e(k).

[23] *See, e.g., Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 536 (2015) (''If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'') (omissions in original) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)); *Bragdon* v. *Abbott,* 524 U.S. 624, 645 (1998) (''When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.''); *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978) (''[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.''); *Hall* v. *U.S. Dep't of Agric.,* 984 F.3d 825, 840 (9th Cir. 2020) (''Congress is presumed to be aware of an agency's interpretation of a statute. We most commonly apply that presumption when an agency's interpretation of a statute has been officially published and consistently followed. If Congress thereafter reenacts the same language, we conclude that it has adopted the agency's interpretation.'') (internal citations and quotation marks omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012) (''[W]hen a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning.''); H.R. Rep. No. 117–27, pt. 1, at 11–17 (discussing the history of the passage of the PDA; explaining that, due to court decisions, the PDA did not fulfill its promise to protect pregnant employees; and that the PWFA was intended to rectify this problem and protect the same employees covered by the PDA).

[24] EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues,* (I)(A) (2015) [hereinafter *Enforcement Guidance on Pregnancy Discrimination*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues* (providing that the phrase ''pregnancy, childbirth, or related medical conditions'' includes current pregnancy, past pregnancy, potential or intended pregnancy, infertility treatment, use of contraception, lactation, breastfeeding, and the decision to have or not have an abortion, among other conditions); *see, e.g., Kocak* v. *Cmty. Health Partners of Ohio, Inc.,* 400 F.3d 466, 470 (6th Cir. 2005) (reasoning that the plaintiff ''cannot be refused employment on the basis of her potential pregnancy''); *Piraino* v. *Int'l Orientation Res., Inc.,* 84 F.3d 270, 274 (7th Cir. 1996) (rejecting ''surprising claim'' by the defendant that no pregnancy discrimination can be shown where the challenged action occurred after the birth of the plaintiff's baby); *Pacourek* v. *Inland Steel Co.,* 858 F. Supp. 1393, 1397, 1402–04 (N.D. Ill. 1994) (observing that the PDA gives a woman ''the right . . . to be financially and legally protected before, during, and after her pregnancy'' and stating ''[a]s a general matter, a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act'') (internal citations and quotation marks omitted); *Donaldson* v. *Am. Banco Corp., Inc.,* 945 F. Supp. 1456, 1464 (D. Colo. 1996) (''It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.''); *Neessen* v. *Arona Corp.,* 708 F. Supp. 2d 841, 851 (N.D. Iowa 2010) (finding the plaintiff covered by the PDA where the defendant allegedly refused to hire her because she had recently been pregnant and given birth); EEOC, *Commission Decision on Coverage of Contraception,* at (I)(A) (Dec. 14, 2000), *https://www.eeoc.gov/commission-decision-coverage-contraception* (''The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.''); *Cooley* v. *DaimlerChrysler Corp.,* 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (determining that, although the defendant employer's policy was facially neutral, denying a prescription medication that allows an employee to control their potential to become pregnant is ''necessarily a sex-based exclusion'' that violates Title VII, as amended by the PDA, because only people who have the capacity to become pregnant use prescription contraceptives, and the exclusion of prescription contraceptives may treat medication needed for a sex-specific condition less favorably than medication necessary for other medical conditions); *Erickson* v. *Bartell Drug Co.,* 141 F. Supp. 2d 1266, 1271–72 (W.D. Wash. 2001) (determining that the selective exclusion of prescription contraceptives from an employer's generally comprehensive prescription drug plan violated the PDA because only people who have the capacity to become pregnant use prescription contraceptives).

[25] *Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(A)(4).

[26] *Id.; see also Hicks* v. *City of Tuscaloosa,* 870 F.3d 1253, 1259–60 (11th Cir. 2017) (finding lactation and breastfeeding covered under the PDA, and asserting that ''[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related 'physiological process' '') (internal citation omitted); *EEOC* v. *Houston Funding II, Ltd.,* 717 F.3d 425, 428 (5th Cir. 2013) (holding that ''lactation is a related medical condition of pregnancy for purposes of the PDA''); *Doe* v. *C.A.R.S. Prot. Plus, Inc.,* 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion); *Turic* v. *Holland Hosp., Inc.,* 85 F.3d 1211, 1214 (6th Cir. 1996) (finding the termination of the employment of a pregnant employee because she contemplated having an abortion violated the PDA); *Carney* v. *Martin Luther Home, Inc.,* 824 F.2d 643, 648 (8th Cir. 1987) (referencing the PDA's legislative history

Continued

Pregnancy causes systemic changes that can create new medical conditions and risks and can exacerbate preexisting conditions and the risks posed by such conditions.[27] Thus, the fact that a medical condition is related to pregnancy will usually be evident when the medical condition develops, is exacerbated, or poses a new risk during an employee's current pregnancy. Additionally, the relation will be apparent in many cases where the medical condition develops, is exacerbated, or poses a new risk during an employee's childbirth or during the employee's postpartum period.

19. However, simply because a condition is listed as one that may be a related medical condition does not mean it necessarily meets the definition of ''related medical conditions'' for the purposes of the PWFA. To be a related medical condition for the PWFA, the employee's medical condition must relate to pregnancy or childbirth. If an employee has a condition but, in their situation, it does not relate to pregnancy or childbirth, the condition is not covered under the PWFA. For example, if an employee who gave birth 2 weeks ago is vomiting because of food poisoning, that medical condition is not related to pregnancy or childbirth and the employee is not eligible on that basis for a PWFA reasonable accommodation.

20. Related medical conditions may include conditions that existed before pregnancy or childbirth and for which an individual may already receive an ADA reasonable accommodation. Pregnancy or childbirth may exacerbate the condition, such that additional or different accommodations are needed. For example, an employee who received extra breaks to eat or drink due to Type 2 diabetes before pregnancy (an ADA reasonable accommodation) may need additional accommodations during pregnancy to monitor and manage the diabetes more closely to avoid or minimize adverse health consequences to the employee or the pregnancy. As another example, an employee may have had high blood pressure that could be managed with medication prior to pregnancy, but once the employee is pregnant, the high blood pressure may pose a risk to the employee or their pregnancy such that the employee needs bed rest. In these situations, an employee could request a continued or an additional accommodation under the ADA and/or an accommodation under the PWFA.

21. The Commission emphasizes that the list of ''pregnancy, childbirth or related medical conditions'' in § 1636.3(b) is non-exhaustive; to receive an accommodation a qualified employee does not have to specify a condition on this list or use medical terms to describe a condition.

22. When an employer has received a request for an accommodation under the PWFA, the employer and employee can engage in the interactive process, if necessary, in order to confirm whether a medical condition is related to pregnancy or childbirth.

1636.3(c) Employee's Representative

23. The limitation may be communicated to the covered entity by the employee or the employee's representative. The term ''employee's representative'' encompasses any representative of the employee, including a family member, friend, union representative, health care provider, or other representative. In most instances, the Commission expects that the representative will have the employee's permission before communicating the limitation to the covered entity, but there may be some situations, for example if the employee is incapacitated, where that is not the case. Once the covered entity is made aware of the limitation, the representative's participation in any aspect of the reasonable accommodation process is at the discretion of the employee, and the employee may decide not to have the representative participate at any time. In most instances, the Commission expects that the covered entity will engage directly with the employee, even where the employee's representative began the process, but acknowledges that in some situations, for example, when the employee is incapacitated or the representative is the employee's attorney, the covered entity will need to continue to engage with the representative rather than the employee.

1636.3(d) Communicated to the Employer and 1636.3(h)(2) How To Request a Reasonable Accommodation

24. Section 1636.3(d) and (h)(2) sets out how an employee informs a covered entity of their limitation in order to make it ''known'' and how an employee requests a reasonable accommodation. In practice, the Commission expects that these actions—communicating the limitation to the employer and requesting a reasonable accommodation—will take place at the same time.

25. Informing the employer of the limitation and requesting a reasonable accommodation should not be complicated or difficult. The covered entity must permit an employee to do both through various avenues and means, as set forth in § 1636.3(d). Given that many accommodations requested under the PWFA will be straightforward—like additional bathroom breaks or access to water—the Commission emphasizes the importance of employees being able to obtain accommodations by communicating with the employer representative(s) with whom they would normally consult if they had questions or concerns about work matters. Employees should not be made to wait for a reasonable accommodation, especially one that is simple and imposes negligible cost or is temporary, because they spoke to the ''wrong'' supervisor. The individuals to whom an employee can communicate to seek accommodation include persons with supervisory authority for or who regularly direct the employee's work (or the equivalent for the applicant) and human resources personnel. Depending on the situation, employees also may communicate with other appropriate officials such as an agent of the employer (*e.g.,* a search firm, staffing agency, or third-party benefits administrator).

26. Section 1636.3(d)(1) and (2) explains that the communication informing the covered entity of the limitation does not need to be in writing, be in a specific format, use specific words, or be on a specific form in order for it to be considered ''communicated to the employer.''

27. Just as the communication informing the covered entity of the limitation does not need to be in writing or use specific phrases, the same is true for the request for a reasonable accommodation. Employees may inform the employer of the limitation and request an accommodation in a conversation or may use another mode of communication to inform the employer.[28] A covered entity may choose to confirm a request in writing or may ask the employee to fill out a form or otherwise confirm the request in writing. However, the covered entity cannot ignore or close an initial request that satisfies § 1636.3(h)(2) if the employee does not complete such confirmation procedures, because that initial request is sufficient to place the employer on notice.[29] If a form is used, the form should be a simple one that does not deter the employee from pursuing the request and does not delay the provision of an accommodation. Additionally, although employees are not required to communicate limitations or request reasonable accommodations in writing, an employee may choose email or other written means to submit a request for an accommodation, which can promote clarity and create a record of their request. Finally, the request for accommodation does not need to be in the form of a ''request,'' *i.e.,* an employee does not need to ''ask'' but may provide a statement of their need for an accommodation.

28. The requirement that no specific words or phrases are necessary to communicate a limitation or request a reasonable accommodation includes not needing to specifically identify whether a condition is ''pregnancy, childbirth, or related medical conditions'' or whether it is a ''physical or mental condition.'' The statutory definition of ''limitation'' uses the words ''condition''

and noting commentator agreement that ''[b]y broadly defining pregnancy discrimination, Congress clearly intended to extend protection beyond the simple fact of an employee's pregnancy to include 'related medical conditions' such as nausea or potential miscarriage'') (internal citations and quotation marks omitted); *Ducharme* v. *Crescent City Déjà Vu, LLC,* 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (finding that ''abortion is encompassed within the statutory text prohibiting adverse employment actions 'because of or on the basis of pregnancy, childbirth, or related medical conditions' ''); 29 CFR part 1604, appendix, Questions 34–37 (1979) (addressing coverage of abortion under the PDA); H.R. Rep. No. 95–1786, at 4 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4766 (''Because the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.'').

[27] *See supra* note 18.

[28] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Questions 1–3 (addressing requests for accommodation under the ADA).

[29] *See id.*

and ''related'' twice (''known limitation'' means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.).[30] Under § 1636.3(d), ''physical or mental conditions'' are impediments or problems affecting an employee that may be modest or minor.[31] A ''physical or mental condition'' includes when an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy; or is seeking health care related to pregnancy, childbirth, or a related medical condition itself.[32] ''Related medical conditions'' are conditions related to the pregnancy or childbirth of the specific employee in question.

29. Many, but not all, conditions related to pregnancy and childbirth can be both a ''limitation'' and a ''related medical condition.'' For example, hyperemesis gravidarum experienced during pregnancy is a ''condition'' that could be classified as either a ''limitation'' (nausea and vomiting that arises out of pregnancy), or a ''related medical condition'' (a condition that is related to pregnancy); similarly, incontinence could be a ''limitation'' (for example, when someone who is pregnant becomes less able to comfortably hold urine and thus requires more frequent bathroom breaks), or a ''related medical condition'' (for example, when the medical condition of incontinence arises out of or is exacerbated as a result of pregnancy or childbirth).[33] Either way, such needs can be a reason for a reasonable accommodation under the PWFA.

30. Because the statute uses the same term (''condition'') to define both ''limitation'' and ''related medical conditions'' and because some ''conditions'' can be both a ''limitation'' and a ''related medical condition,'' an employee does not have to identify whether a particular condition is a ''limitation'' or a ''related medical condition'' when requesting a reasonable accommodation. For example, where an employee is experiencing nausea and vomiting in connection with a pregnancy, the employee need not determine whether this is a ''limitation'' or a ''related medical condition'' in order to request an accommodation under the PWFA. Similarly, there is no need for the employer to make such a determination before granting an accommodation under the PWFA.

31. Finally, PWFA limitations also may be ADA disabilities.[34] Therefore, an employee is not required to identify the statute under which they are requesting a reasonable accommodation. Doing so would require that employees seeking accommodations use specific words or phrases, which § 1636.3(d) prohibits.

[30] 42 U.S.C. 2000gg(4); 29 CFR 1636.3(a)(2).

[31] 29 CFR 1636.3(a)(2).

[32] *Id.*

[33] By contrast, normal weight gain during pregnancy that necessitates a larger uniform would be a ''limitation'' but not a ''related medical condition.''

[34] 42 U.S.C. 2000gg(4); *see also infra* in the Interpretive Guidance in section *1636.7(a)(1)* under *The PWFA and the ADA.*

1636.3(e) Consideration of Mitigating Measures

32. There may be steps that an employee can take to mitigate, or lessen, the effects of a known limitation such as taking medication, getting extra rest, or using a reasonable accommodation. Paragraph (e) of § 1636.3 explains that the ameliorative, or positive, effects of ''mitigating measures,'' as that term is defined in the ADA,[35] shall not be considered when determining whether the employee has a limitation under the PWFA. By contrast, the detrimental or non-ameliorative effects of mitigating measures, such as negative side effects of medication, the burden of following a particular treatment regimen, and complications that arise from surgery, may be considered when determining whether an employee has a limitation under the PWFA.[36] Both the positive and negative effects of mitigating measures may be considered when determining what accommodation an employee may need.

1636.3(f) Qualified Employee

33. An employee must meet the definition of ''qualified'' in the PWFA in one of two ways.[37] Paragraph (f) of § 1636.3 reiterates the statutory language that ''qualified employee'' means an employee who, with or without reasonable accommodation, can perform the essential functions of the position.[38] Additionally, following the statute, § 1636.3(f) also states that an employee shall be considered qualified if: (1) any inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.[39]

34. For both definitions of qualified, the determination of whether an employee with a known limitation is qualified should be based on the capabilities of the employee at the time of the relevant employment decision.[40] The determination of qualified should not be based on speculation that the employee may become unable in the future to perform certain tasks, may cause increased health insurance premiums or workers' compensation costs, or may require leave.[41]

1636.3(f)(1) Qualified Employee—With or Without Reasonable Accommodation

35. The first way that an employee can be ''qualified'' under 42 U.S.C. 2000gg(6) is if they can perform the essential functions of their job with or without reasonable accommodation, which is the same language as in the ADA and is interpreted accordingly. ''Reasonable'' has the same meaning as under the ADA on this topic—an accommodation that ''seems reasonable on its face, *i.e.,* ordinarily or in the run of cases,'' ''feasible,'' or ''plausible.''[42] Many employees will meet this part of the PWFA definition of qualified. For example, a pregnant cashier who needs a stool to perform the job will be qualified with the reasonable accommodation of a stool. A teacher recovering from childbirth who needs additional bathroom breaks will be qualified with a reasonable accommodation that allows such breaks.

''Qualified'' for the Reasonable Accommodation of Leave

36. When determining whether an employee who needs leave as a reasonable accommodation meets the definition of ''qualified,'' the relevant inquiry is whether the employee would be able to perform the essential functions of the position, with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated), with the benefit of a period of leave (*e.g.,* intermittent leave, part-time work, or a period of leave or time off). Thus, an employee who needs some form of leave to recover from a known limitation related to pregnancy, childbirth, or related medical conditions can readily meet the definition of ''qualified'' under the first part of the PWFA definition because it is reasonable to conclude that once they return from the period of leave (or during the time they are working if it is intermittent leave), they will be able to perform the essential functions of the job, with or without additional reasonable accommodations, or will be ''qualified'' under the second part of the PWFA definition.[43]

1636.3(f)(2) Qualified Employee—Temporary Suspension of an Essential Function(s)

37. The PWFA provides that an employee can meet the definition of ''qualified'' even if they cannot perform one or more essential functions of the position in question with or without a reasonable accommodation, provided three conditions are met: (1) the inability to perform an essential function(s) is for a temporary period; (2) the essential function(s) could be performed in the near future; and (3) the inability to perform the

[35] *See* 42 U.S.C. 12102(4)(E).

[36] *See* 29 CFR 1630.2(j)(1)(vi) and (j)(4)(ii); *see also* 29 CFR part 1630, appendix, 1630.2(j)(1)(vi).

[37] The PWFA does not address prerequisites for a position. Whether an employee is qualified for the position in question is determined based on whether the employee can perform the essential functions of the position, with or without a reasonable accommodation, or based on the second part of the PWFA's definition of ''qualified.'' 42 U.S.C. 2000gg(6).

[38] 42 U.S.C. 2000gg(6).

[39] 42 U.S.C. 2000gg(6)(A)–(C).

[40] *See* 29 CFR part 1630, appendix, 1630.2(m).

[41] *See* 29 CFR part 1630, appendix, 1630.2(m).

[42] *US Airways, Inc.* v. *Barnett,* 535 U.S. 391, 401–02 (2002); *see, e.g., Shapiro* v. *Twp. of Lakewood,* 292 F.3d 356, 360 (3d Cir. 2002) (citing the definition from *Barnett*); *Osborne* v. *Baxter Healthcare Corp.,* 798 F.3d 1260, 1267 (10th Cir. 2015) (citing the definition from *Barnett*); *EEOC* v. *United Airlines, Inc.,* 693 F.3d 760, 762 (7th Cir. 2012) (citing the definition from *Barnett*); *see also Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text accompanying nn.8–9 (citing the definition from *Barnett*).

[43] If the employee will not be able to perform all of the essential functions at the end of the leave period, with or without accommodation, the employee may still be qualified under the second part of the PWFA's definition of qualified employee. 42 U.S.C. 2000gg(6).

essential function(s) can be reasonably accommodated.[44]

38. Based on the overall structure and wording of the statute, the second part of the definition of ''qualified'' is relevant only when an employee cannot perform one or more essential functions of the job in question, even with a reasonable accommodation, due to a known limitation under the PWFA. It is not relevant in any other circumstance. If the employee can perform the essential functions of the position with or without a reasonable accommodation, the first definition of ''qualified'' applies (*i.e.,* able to do the job with or without a reasonable accommodation). For example, if a pregnant employee requests additional restroom breaks, they are qualified if they can perform the essential functions of the job with the reasonable accommodation of additional restroom breaks, and, if so, there is no need to reach the second part of the definition of ''qualified,'' *i.e.,* to apply definitions of ''temporary'' or ''in the near future,'' or to determine whether the inability to perform an essential function(s) can be reasonably accommodated (as no such inability exists).

39. By contrast, some examples of situations where the second part of the definition of ''qualified'' may be relevant include: (1) a pregnant construction worker is told by their health care provider to avoid lifting more than 20 pounds during the second through ninth months of pregnancy, an essential function of the worker's job requires lifting more than 20 pounds, and there is not a reasonable accommodation that will allow the employee to perform that function without lifting more than 20 pounds; and (2) a pregnant police officer is unable because of their pregnancy to perform patrol duties during the third through ninth months of pregnancy, patrol duties are an essential function of the job, and there is not a reasonable accommodation that will allow the employee to perform the patrol duties.

40. This definition is solely concerned with determining whether an individual is ''qualified.'' An employer may still defend the failure to provide the reasonable accommodation based on undue hardship.

1636.3(f)(2)(i) Temporary

41. ''Temporary'' means that the need to suspend one or more essential functions is ''lasting for a limited time,[45] not permanent, and may extend beyond 'in the near future.' '' How long it may take before the essential function(s) can be performed is further limited by the definition of ''in the near future.''

1636.3(f)(2)(ii) In the Near Future

42. An employee can be qualified under the exception in 42 U.S.C. 2000gg(6)(A)–(C) if they could perform the essential function(s) ''in the near future.'' In explaining the inclusion of this additional definition of ''qualified,'' the House Report analogized the suspension of an essential function under the PWFA to cases under the ADA regarding leave; ''in the near future'' is a term some courts have used in the context of determining whether an employee can perform the essential functions of the job with a reasonable accommodation of leave and, therefore, is qualified under the ADA.[46] These ADA leave cases provide some helpful guideposts to interpret this term in the PWFA. Under the ADA, courts have concluded that an employee who needs indefinite leave (that is, leave for a period of time that they cannot reasonably estimate under the circumstances) cannot perform essential job functions ''in the near future.''[47] Similarly, the Commission concludes that a need under the PWFA to indefinitely suspend an essential function(s) cannot reasonably be considered to meet the standard of an employee who could perform the essential function(s) ''in the near future.''[48]

43. Pregnancy is a temporary condition with an ascertainable end date; the request to temporarily suspend an essential function(s) due to a current pregnancy will never be indefinite and will not be more than generally 40 weeks. Thus, for a current pregnancy, § 1636.3(f) defines ''in the near future'' to mean generally 40 weeks from the start of the temporary suspension of an essential function(s). To define ''in the near future'' as less than generally 40 weeks—*i.e.,* the duration of a full-term pregnancy—would run counter to a central purpose of the PWFA of keeping pregnant employees in the workforce even when pregnancy, childbirth, or related medical conditions necessitate the reasonable accommodation of temporarily suspending the performance of one or more essential functions of a job.[49]

44. The Commission emphasizes that the definition in § 1636.3(f)(2)(ii) does not mean that the essential function(s) always must be suspended for 40 weeks, or that if an employee seeks the temporary suspension of an essential function(s) for 40 weeks the employer must automatically grant it. The actual length of the temporary suspension of the essential function(s) will depend upon what the employee requires, and the covered entity always has available the defense that it would create an undue hardship. However, the mere fact that the temporary suspension of one or more essential functions is needed for any time period up to and including generally 40 weeks for a pregnant employee will not, on its own, render an employee unqualified under the PWFA.

45. For conditions other than a current pregnancy, the Commission is not setting a specific length of time for ''in the near future'' because, unlike a current pregnancy, there is not a consistent measure of how long these diverse conditions can generally last, and thus, what ''in the near future'' might mean in different instances.

46. The Commission notes that beyond an agreement that an indefinite amount of time does not meet the standard of ''in the near future,'' how long a period of leave may be under the ADA and still be a reasonable accommodation (thus, allowing the individual to remain qualified) varies.[50] The

[44] 42 U.S.C. 2000gg(6); *see* H.R. Rep. No. 117–27, pt. 1, at 27 (''[T]he temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.' . . . [T]here may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.'').

[45] *Temporary, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/temporary* (last visited Mar. 13, 2024) (defining ''temporary'' as ''lasting for a limited time''). This definition is consistent with logic in the House Report, which states that ''the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified' '' and cites to *Robert* v. *Board of County Commissioners of Brown County,* 691 F.3d 1211, 1218 (10th Cir. 2012). *See* H.R. Rep. No. 117–27, pt. 1, at 27, n.109.

[46] H.R. Rep. No. 117–27, pt. 1, at 27–28. As explained *infra,* this definition of ''qualified'' at 42 U.S.C. 2000gg(6)(A)–(C) is not used to determine ''qualified'' for the purposes of leave under the PWFA.

[47] *See, e.g., Herrmann* v. *Salt Lake City Corp.,* 21 F.4th 666, 676–77 (10th Cir. 2021); *Cisneros* v. *Wilson,* 226 F.3d 1113, 1129 (10th Cir. 2000), *overruled on other grounds by Bd. of Trs. of Univ. of Ala.* v. *Garrett,* 531 U.S. 356 (2001). The Commission cites these ADA cases because they use the term ''in the near future'' in a related context (employees are ''qualified'' for leave under the ADA because the leave will allow them to return to work and perform essential functions ''in the near future''). The Commission emphasizes its position, as discussed below, that under both the PWFA and the ADA, leave provided as an accommodation does not constitute a suspension of an essential function. Thus, under the PWFA, in determining whether an essential function could be performed ''in the near future,'' the period of time during which an employee may be on leave is not included in the assessment. Likewise, in determining whether an individual is qualified for leave as a reasonable accommodation under the PWFA, the statutory term ''in the near future'' is not relevant.

[48] However, the Commission notes that the employee's inability to pinpoint the exact date when they expect to be able to perform the essential functions of the position, or their ability to provide only an estimated range of dates, does not make the temporary suspension of the essential function(s) ''indefinite'' or mean that they cannot perform the job's essential functions ''in the near future.'' The fact that an exact date is not necessary is supported by the language in the statute, which requires that the essential function(s) ''could'' be performed in the near future. 42 U.S.C. 2000gg(6)(B).

[49] *See* H.R. Rep. No. 117–27, pt. 1, at 5 (''When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies.''); *id.* at 22 (''When pregnant workers are not provided reasonable accommodations on the job, they are oftentimes forced to choose between economic security and their health or the health of their babies.''); *id.* at 24 (''Ensuring pregnant workers have reasonable accommodations helps ensure that pregnant workers remain healthy and earn an income when they need it the most.''); *id.* at 33 (''The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions . . . . The PWFA is one crucial step needed to reduce the disparities pregnant workers face by ensuring that pregnant women, and especially pregnant women of color, can remain safe and healthy at work.'').

[50] *See, e.g., Robert,* 691 F.3d at 1218 (citing a case in which a 6-month leave request was too long to be a reasonable accommodation but declining to address whether, in the instant case, a further exemption following the 6-month temporary

Commission believes, however, that depending on the facts of a case, leave cases that allow for a longer period are more relevant to the determination of ''in the near future'' under the PWFA for three reasons. First, what constitutes ''in the near future'' may differ depending on factors, including but not limited to, the known limitation and the employee's position. For example, an employee whose essential job functions require lifting only during the summer months would remain qualified even if unable to lift during a 7-month period over the fall, winter, and spring months because the employee could perform the essential function ''in the near future'' (in this case, as soon as the employee was required to perform that function). Second, the determination of whether the employee could resume the essential functions of their position in the near future is only one step in the definition of qualified; standing alone, it does not require the employer to provide an accommodation. If the temporary suspension cannot be reasonably accommodated, or if the temporary suspension causes an undue hardship, the employer is not required to provide it.[51]

Third, as detailed in the notice of proposed rulemaking (NPRM), especially in the first year after giving birth, employees may experience serious health issues related to their pregnancy that may prevent them from performing the essential functions of their positions.[52] Accommodating these situations and allowing employees to stay employed are among the key purposes of the PWFA.

47. Further, the Commission recognizes that employees may need an essential function(s) temporarily suspended because of a current pregnancy; take leave to recover from childbirth; and, upon returning to work, need the same essential function(s) or a different one temporarily suspended due to the same or a different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In keeping with the requirement that the determination of whether an individual is qualified under the PWFA should be made at the time of the employment decision,[53] the determination of ''in the near future'' should be made when the employee asks for each accommodation that requires the suspension of one or more essential functions. Thus, an employee who is 3 months pregnant and who is seeking an accommodation of the temporary suspension of an essential function(s) due to a limitation related to pregnancy will meet the definition of ''in the near future'' because the inability to perform the essential function(s) will end in less than 40 weeks. When the employee returns to work from leave after childbirth, if the employee needs an essential function temporarily suspended for a reason related to pregnancy, childbirth, or related medical conditions, there should be a new determination made as to whether the employee is qualified under § 1636.3(f)(2). In other words, there is a new calculation of ''in the near future'' with the new employment decision that involves the temporary suspension of an essential function(s).[54]

48. Determining ''in the near future'' in the definition of ''qualified'' when the employment decision is made is necessary because it would often be difficult, if not impossible, for a pregnant employee to predict what their limitations (if any) will be when returning to work after pregnancy. While pregnant, they may not know whether and, if so, for how long, they will have a known limitation or need an accommodation. They also may not know whether an accommodation after returning to work will require the temporary suspension of an essential function(s), and, if so, for how long. All of these questions may be relevant under the PWFA's second definition of ''qualified.''

49. Leave as a reasonable accommodation (*e.g.,* for recovery from pregnancy, childbirth, or related medical conditions or any other purpose) does not count as time when an essential function(s) is suspended and, thus, is not relevant for the second part of the definition of ''qualified'' (§ 1636.3(f)(2)). If an individual needs leave as a reasonable accommodation under the PWFA or, indeed, any reasonable accommodation other than the temporary suspension of an essential function(s), only the first part of the definition of ''qualified'' is relevant (§ 1636.3(f)(1)). In the case of leave, the question would be whether the employee, after returning from the requested period of leave, would be able to perform the essential functions of the position with or without reasonable accommodation (or, if not, if the inability to perform the essential function(s) is for a temporary period, the essential function(s) could be performed in the near future, and the inability to perform the essential function(s) can be reasonably accommodated). Furthermore, for some employees, leave to recover from childbirth will not require a reasonable accommodation because they have a right to leave under Federal, State, or local law or under an employer's policy.[55]

1636.3(f)(2)(iii) Can Be Reasonably Accommodated

50. The second part of the PWFA's definition of ''qualified'' further requires that the suspension ''can be reasonably accommodated.'' [56] For some positions, this may mean that one or more essential functions are temporarily suspended, with or without assigning the essential function(s) to someone else, and the employee continues to perform the remaining functions of the job. For other positions, some of the essential function(s) may be temporarily suspended, with or without assigning the essential function(s) to someone else, and the employee may be given other tasks to replace them. In other situations, one or more essential functions may be temporarily suspended, with or without giving the essential function(s) to someone else, and the employee may perform the functions of a different job to which the employer temporarily transfers or moves them, or the employee may participate in the employer's light or modified duty program.[57]

51. Examples Regarding § 1636.3(f)(2):

Example #1/Definition of ''Qualified'': One month into pregnancy, Akira, an employee in

accommodation at issue would exceed ''reasonable durational bounds'') (citing *Epps* v. *City of Pine Lawn,* 353 F.3d 588, 593 (8th Cir. 2003)); *see also Blanchet* v. *Charter Commc'ns, LLC,* 27 F.4th 1221, 1225–26, 1230–31 (6th Cir. 2022) (determining that a pregnant employee who developed postpartum depression and requested a 5-month leave after her initial return date, and was fired after requesting an additional 60 days of leave could still be ''qualified,'' as additional leave could have been a reasonable accommodation); *Cleveland* v. *Fed. Express Corp.,* 83 F. App'x 74, 76–81 (6th Cir. 2003) (declining ''to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation'' and determining that a 6-month medical leave for a pregnant employee with systemic lupus could be a reasonable accommodation); *Garcia-Ayala* v. *Lederle Parenterals, Inc.,* 212 F.3d 638, 641–42, 646–49 (1st Cir. 2000) (reversing the district court's finding that a secretary was not a ''qualified individual'' under the ADA because additional months of unpaid leave could be a reasonable accommodation, even though she had already taken over year of medical leave for breast cancer treatment, and rejecting per se rules as to when additional medical leave is unreasonable); *Nunes* v. *Wal-Mart Stores, Inc.,* 164 F.3d 1243, 1245–1247 (9th Cir. 1999) (opining that, because extending leave to 9 months to treat a fainting disorder could be a reasonable accommodation, an employee's inability to work during that period of leave did not automatically render her unqualified); *Cayetano* v. *Fed. Express Corp.,* No. 1:19–CV–10619, 2022 WL 2467735, at *1–*2, *4–*7 (S.D.N.Y. July 6, 2022) (determining that an employee who underwent shoulder surgery could be ''qualified'' because 6 months of leave is not per se unreasonable as a matter of law); *Durrant* v. *Chemical/Chase Bank/Manhattan Bank, N.A.,* 81 F. Supp. 2d 518, 519, 521–22 (S.D.N.Y. 2000) (concluding that an employee who was on leave for nearly 1 year due to a leg injury and extended her leave to treat a psychiatric condition could be ''qualified'' under the ADA with the accommodation of additional leave of reasonable duration).

[51] The Commission is aware of and disagrees with ADA cases that held, for example, that 2 to 3 months of leave following a 12-week FMLA period was presumptively unreasonable as an accommodation. *See, e.g., Severson* v. *Heartland Woodcraft, Inc.,* 872 F.3d 476, 481 (7th Cir. 2017). In any event, such cases have no bearing on the determination of ''in the near future'' under the definition of ''qualified'' for the PWFA because this definition expressly contemplates temporarily suspending one or more essential functions.

[52] 88 FR 54724–25; *see, e.g.,* Susanna Trost et al., U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019* (2022), *https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html* (stating that 53% of pregnancy-related deaths occurred from one week to one year after delivery, and 30% occurred one- and one-half months to one year postpartum).

[53] *See* 29 CFR part 1630, appendix, 1630.2(m).

[54] There is a new calculation regardless of whether the employee seeks to temporarily suspend the same essential function that was suspended during pregnancy or a different one.

[55] For additional information on how leave should be addressed under the PWFA, *see infra* in the Interpretive Guidance in section *1636.3(h)* under *Particular Matters Regarding Leave as a Reasonable Accommodation.*

[56] 42 U.S.C. 2000gg(6)(C).

[57] *See* H.R. Rep. No. 117–27, pt. 1, at 27 (''[T]he temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker 'unqualified.' . . . [T]here may be a need for a pregnant worker to temporarily perform other tasks or otherwise be excused from performing essential functions before fully returning to her position once she is able.'').

a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of the job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to continue to perform her other tasks that do not require exposure to the chemicals.

1. Known limitation and request for accommodation: Akira's need to avoid exposure to chemicals is a physical or mental condition related to, affected by, or arising out pregnancy, childbirth, or related medical conditions; Akira needs an adjustment or change at work due to the limitation; and Akira has communicated this information to her employer.

2. Qualified: If modifications that would allow Akira to continue to perform the essential functions of her position (such as enclosing the chemicals, providing a local exhaust vent, or providing additional personal protective gear) are not effective or cause an undue hardship, Akira can still be qualified under the definition that allows for a temporary suspension of an essential function(s).

a. Akira's inability to perform the essential function(s) is temporary.

b. Akira can perform the essential function(s) of her job in the near future because she is pregnant and needs an essential function(s) suspended for less than 40 weeks.

c. Akira's inability to perform the essential function(s) may be reasonably accommodated. The employer can suspend the essential function(s) that requires her to work with the chemicals, while allowing her to do the remainder of her job.

Example #2/Definition of ''Qualified'': Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should adhere to clinical guidelines for lifting during pregnancy, which means she should not continue to lift 30–40 pounds, which she routinely did at work when moving packages as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

1. Known limitation and request for accommodation: Lydia's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Lydia needs the temporary suspension of an essential function(s).

a. Lydia's inability to perform the essential function(s) is temporary.

b. Lydia can perform the essential function(s) of her job in the near future because Lydia is pregnant and needs an essential function(s) suspended for less than 40 weeks.

c. Lydia's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated through the existing light duty program.

Example #3/Definition of ''Qualified'': Olga's position as a carpenter involves lifting heavy wood that weighs more than 20 pounds. Upon returning to work after giving birth, Olga tells her supervisor that she has a lifting restriction of 10 pounds due to her cesarean delivery. The restriction is for 8 weeks. The employer does not have an established light duty program but does have other design or administrative duties that Olga can perform.

1. Known limitation and request for accommodation: Olga's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Olga needs the temporary suspension of an essential function(s).

a. Olga's inability to perform the essential function(s) is temporary.

b. Olga can perform the essential function(s) of her job in the near future because she needs the essential function(s) suspended for 8 weeks.[58]

c. Olga's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Olga to design or administrative duties.

Example #4/Definition of ''Qualified'': One of the essential functions of Elena's position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.

1. Known limitation and request for accommodation: Elena's inability to sleep, anxiety, fatigue, dizziness, and blurred vision are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Elena needs the temporary suspension of an essential function(s).

a. Elena's inability to perform the essential function(s) is temporary.

b. Elena can perform the essential function(s) of her job in the near future because she needs an essential function(s) suspended for 12 weeks.[59]

c. Elena's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Elena to duties such as answering questions and selling merchandise at the visitor's center.

Example #5/Definition of ''Qualified'': Tamara's position at a retail establishment involves working as a cashier and folding and putting away clothing. In her final trimester of pregnancy, Tamara develops carpal tunnel syndrome that makes gripping objects and buttoning clothing difficult. Tamara seeks the temporary suspension of the essential functions of folding and putting away clothing. The employer provides the accommodation and temporarily assigns Tamara to greeting and assisting customers, tasks that cashiers are normally assigned to on a rotating basis. When she returns to work after she gives birth, Tamara continues to experience carpal tunnel symptoms, which her doctor believes will cease in approximately 16 weeks.

1. Known limitation and request for accommodation: Tamara's inability to grip objects and button clothing are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.

2. Qualified: Tamara needs the temporary suspension of an essential function(s).

a. Tamara's inability to perform the essential function(s) is temporary.

b. Tamara can perform the essential functions of her job in the near future because she needs an essential function(s) suspended for 16 weeks.[60]

c. Tamara's need to temporarily suspend an essential function(s) of her job may be reasonably accommodated by temporarily suspending the essential function(s) and temporarily assigning Tamara to duties such as greeting and assisting customers.

1636.3(g) Essential Functions

52. Section 1636.3(g) adopts the Commission's definition of ''essential functions'' contained in the regulation implementing the ADA.[61] Thus, in determining whether something is an essential function, the first consideration is whether employees in the position actually are required to perform the function. This consideration will generally include one or more of the factors listed in § 1636.3(g)(1), although this list is non-exhaustive. Relevant evidence as to whether a particular function

[58] *See Cehrs* v. *Ne. Ohio Alzheimer's Rsch. Ctr.,* 155 F.3d 775, 781–783 (6th Cir. 1998) (determining that an employee suffering from severe psoriasis who was on an 8-week leave of absence and requested an additional 1-month leave could be ''otherwise qualified'' under the ADA).

[59] *See Criado* v. *IBM Corp.,* 145 F.3d 437, 443–43 (1st Cir. 1998) (concluding that an employee with severe anxiety and depression who was on leave for approximately 6 weeks and requested an extension of temporary leave was ''qualified'' under the ADA); *Durrant,* 81 F. Supp. 2d at 519, 521–22 (concluding that an employee who was on leave for nearly 11 months due to a leg injury and extended her leave to treat a psychiatric condition could be ''qualified'' under the ADA); *Powers* v. *Polygram Holding,* 40 F. Supp. 2d 195, 199 (S.D.N.Y. 1999) (determining that an employee experiencing bipolar disorder who requested a total of 17 weeks of leave could be ''qualified'' under the ADA).

[60] *See Rascon* v. *U.S. W. Commc'ns, Inc.,* 143 F.3d 1324, 1333 (10th Cir. 1998) (agreeing that an employee diagnosed with post-traumatic stress disorder who requested a 4-month leave for a treatment program was a ''qualified'' individual under the ADA), *abrogated on other grounds by New Hampshire* v. *Maine,* 532 U.S. 742 (2001).

[61] *See* 29 CFR 1630.2(n).

is essential includes, but is not limited to, information from the employer (such as the position description) and information from incumbents (including the employee requesting the accommodation) about what they actually do on the job.[62] This includes whether employees in the position actually will be required to perform the function during the time for which an accommodation is expected to be needed. The list of factors in § 1636.3(g)(2) is not exhaustive, and other relevant evidence also may be presented. No single factor is dispositive, and greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.[63]

1636.3(h) Reasonable Accommodation—Generally

1636.3(h)(1) Definition of Reasonable Accommodation

53. The statute at 42 U.S.C. 2000gg(7) states that the term ''reasonable accommodation'' has the meaning given to it in section 101 of the ADA[64] and shall be construed as it is construed under the ADA and the Commission's regulation implementing the PWFA. Thus, under the PWFA, as under the ADA, the obligation to make reasonable accommodation is a form of non-discrimination and is therefore best understood as a means by which barriers to the equal employment opportunity are removed or alleviated.[65] A modification or adjustment is reasonable if it ''seems reasonable on its face, *i.e.,* ordinarily or in the run of cases''; this means it is ''reasonable'' if it appears to be ''feasible'' or ''plausible.''[66] An accommodation also must be effective in meeting the qualified employee's needs, meaning it removes a work-related barrier and provides the employee with equal employment opportunity.[67]

54. Under the PWFA, ''reasonable accommodation'' has the same definition as under the ADA, with the exceptions noted in items (1) through (3) of this paragraph.[68] Therefore, like the ADA, reasonable accommodation under the PWFA includes: (1) modifications or adjustments to the job application process that enable a qualified applicant with a known limitation to be considered for the position; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position is preformed to allow a qualified employee with a known limitation to perform the essential functions of the job; and (3) modifications or adjustments that enable an employee with a known limitation to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without known limitations.[69]

55. Because the PWFA also provides for reasonable accommodations when a qualified employee temporarily cannot perform one or more essential functions of a position but can meet the requirements of 42 U.S.C. 2000gg(6)(A)–(C), reasonable accommodations under the PWFA also include modifications or adjustments that allow a qualified employee with a known limitation to temporarily suspend one or more essential functions of the position. This can be either through the essential function(s) being suspended or through the essential function(s) being suspended and the employee doing other work as set out in § 1636.3(f)(2)(iii).

1636.3(h)(2) How To Request a Reasonable Accommodation

56. To request a reasonable accommodation, the employee (or the employee's representative) must communicate to the employer that they need an adjustment or change at work due to their known limitation (a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions). Section 1636.3(d) applies to communications to request a reasonable accommodation. An employee may use plain language and need not mention the PWFA. An employee does not have to use the phrases ''reasonable accommodation,'' ''limitation,'' ''known limitation,'' ''qualified,'' or ''essential function''; use any medical terminology; provide a specific medical condition; use any other specific words or phrases; or put the explanation of the need for accommodation in the form of a request.

57. In these examples, the employee is communicating both their limitation and that they need an adjustment or change at work due to the limitation. The Commission expects that in the vast majority of cases these two communications will happen at the same time. All of these are examples of requests for reasonable accommodations under the PWFA.

Example #6: A pregnant employee tells her supervisor, ''I'm having trouble getting to work at my scheduled starting time because of morning sickness.''

Example #7: An employee who gave birth 3 months ago tells the person who assigns her work at the employment agency, ''I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.''

Example #8: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

Example #9: At the employee's request, an employee's spouse requests light duty for the employee because the employee has a lifting restriction related to pregnancy; the employee's spouse uses the employer's established process for requesting a reasonable accommodation.

Example #10: An employee tells a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer's online form for requesting an accommodation.

Example #11: An employee tells a supervisor that she needs time off to recover from childbirth.

Alleviating Increased Pain or Risk to Health Due to the Known Limitation

58. One reason an employee may seek a reasonable accommodation is to alleviate increased pain or risk to health that is attributable to the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that has been communicated to the employer (the known limitation).[70] When dealing with requests for accommodation concerning the alleviation of increased pain or risk to health associated with a known limitation, the goal is to provide an accommodation that allows the qualified employee to alleviate the identified pain or risk to health.

59. Examples Regarding Alleviating Pain or Risk to Health Due to the Known Limitation:

Example #12/Alleviating Pain or Risk to Health: Celia is a factory worker whose job requires her to regularly move boxes that weigh 50 pounds. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. When Celia returns to work after giving birth,

[62] *See* 29 CFR 1630.2(n); 29 CFR part 1630, appendix, 1630.2(n).

[63] *See* 29 CFR part 1630, appendix, 1630.2(n).

[64] *See* 42 U.S.C. 12111(9).

[65] *See* 29 CFR part 1630, appendix 1630.9.

[66] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at General Principles (quoting *Barnett,* 535 U.S. at 403–06).

[67] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at General Principles & Question 9; 29 CFR part 1630, appendix, 1630.9.

[68] *See* 42 U.S.C. 2000gg(7).

[69] *See* 29 CFR 1630.2(o)(1)(i) through (iii). The requirement for employers to provide reasonable accommodations when requested that provide for equal benefits and privileges encompasses the requirement that an accommodation should provide the individual with an equal employment opportunity. 29 CFR part 1630, appendix, 1630.9. This requirement stems from the ADA's prohibition on discrimination in ''terms, conditions, and privileges of employment.'' 42 U.S.C. 12112(a). The PWFA prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee for using or requesting an accommodation and Title VII—which applies to employees affected by pregnancy, childbirth, or related medical conditions—prohibits discrimination in the terms, conditions, or privileges of employment. *See* 42 U.S.C. 2000e–2(a)(1). Based on the text of the PWFA, Title VII, and the requirement under the PWFA that reasonable accommodation has the same definition as in the ADA, the same requirement applies. Thus, a reasonable accommodation under the PWFA includes a change to allow employees affected by pregnancy, childbirth, or related medical conditions nondiscrimination in the terms, conditions, or privileges of employment or, in shorthand, to enjoy equal benefits and privileges. *See also* EEOC, *Compliance Manual Section 613 Terms, Conditions, and Privileges of Employment,* 613.1(a) (1982) [hereinafter *Compliance Manual on Terms, Conditions, and Privileges of Employment*], *https://www.eeoc.gov/laws/guidance/cm-613-terms-conditions-and-privileges-employment* (providing that ''terms, conditions, and privileges of employment'' are ''to be read in the broadest possible terms'' and ''a distinction is rarely made between terms of employment, conditions of employment, or privileges of employment'').

[70] Depending on the facts of the case, the accommodation sought will allow an applicant to apply for the position, or an employee to perform the essential functions of the job, to enjoy equal benefits and privileges of employment, or to temporarily suspend an essential function(s) of the job.

which was by cesarean section, Celia requests that she limit tasks to those that do not require moving boxes of more than 30 pounds for 3 months because heavier lifting could increase the risk to her health and her continued recovery from childbirth. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship. However, under the PWFA, the employer would not be required to provide an accommodation for Celia's knee pain unless it was related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The employer also may have accommodation responsibilities regarding Celia's knee pain and lifting restrictions under the ADA.

Example #13/Alleviating Pain or Risk to Health: Emily is a candidate for a police officer position. The application process takes place over several months and has multiple steps, one of which is a physical agility test. By the time it is Emily's turn to take the test, she is 7 months pregnant. To avoid risk to her health and the health of her pregnancy, Emily asks that the test be postponed and that her application be kept active so that once she has recovered from childbirth, she can resume the application process and not have to re-apply. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #14/Alleviating Pain or Risk to Health: Jackie's position at a fabrication plant involves working with certain chemicals, which Jackie thinks is the reason she has a nagging cough and chapped skin on her hands. For the one year when she is nursing, Jackie seeks the accommodation of a temporary suspension of an essential function—working with the chemicals—because of the risk that the chemicals will contaminate the milk she produces. The employer provides the accommodation. After Jackie stops nursing, she no longer has any known limitations. Thus, under the PWFA, she can be assigned to work with the chemicals again even if she would prefer not to do that work, because the PWFA requires an employer to provide an accommodation only if it is needed due to a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Jackie's employer may have accommodation responsibilities under the ADA.

Example #15/Alleviating Pain or Risk to Health: Margaret is a retail worker who is pregnant. Because of her pregnancy, Margaret feels pain in her back and legs when she has to move stacks of clothing from one area to the other, one of the essential functions of her position. She can still manage to move the clothes, but, because of the pain, she requests a cart to use when she is moving the garments. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #16/Alleviating Pain or Risk to Health: Lourdes is pregnant and works outdoors as a farmworker. The conditions where she works expose her to certain chemicals and the conditions can be slippery. Because of her pregnancy, Lourdes has a problem with her balance and is more likely to slip and fall, and she needs to avoid exposure to the chemicals that she is normally exposed to at work. She seeks the accommodation of working indoors, which will allow her to avoid the conditions that could lead her to slip and fall and will allow her to avoid exposure to the chemicals. There is indoor work, which Lourdes is occasionally assigned to perform, available at the farm, as well as work that does not involve chemicals. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #17/Alleviating Pain or Risk to Health: Avery works as an administrative assistant and is pregnant. Avery normally works in the office and commutes by driving and public transportation. Due to pregnancy, Avery is experiencing sciatica; commuting is painful because it requires Avery to sit and stand in one position for an extended period of time. Avery seeks the accommodation of teleworking or changing the start and end time of the workday in order to commute during less crowded times and reduce the commute time and thereby reduce the pain. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #18/Alleviating Pain or Risk to Health: Arya is pregnant and works in a warehouse. When it is hot outside, the temperature in the warehouse increases to a level that creates a risk to Arya and her pregnancy.[71] Arya seeks an accommodation of a portable cooling device to reduce the risk to her health and the health of her pregnancy because of the heat in her workplace. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Example #19/Alleviating Pain or Risk to Health: Talia is a nurse and is pregnant. The community where she lives is experiencing a surge in cases of a contagious respiratory viral disease that has been shown to increase the risk of negative outcomes for pregnancy. To reduce her risk and the risk to her pregnancy, Talia requests additional protective gear and to not be assigned to patients exhibiting symptoms of this virus. Under the PWFA, the employer is required to provide the requested accommodation (or another reasonable accommodation) absent undue hardship.

Particular Matters Regarding Leave as a Reasonable Accommodation

60. Under the PWFA, leave may be a reasonable accommodation.[72] If an employee requests leave as an accommodation or if there is no other reasonable accommodation that does not cause an undue hardship, the covered entity should evaluate whether to offer leave as a reasonable accommodation under the PWFA. This is the case even if the covered entity does not offer leave as an employee benefit,[73] the employee is not eligible for leave under the employer's leave policy, or the employee has exhausted the leave the covered entity provides as a benefit (including leave exhausted under a workers' compensation program, the FMLA, or similar State or local laws).[74]

61. The Commission recognizes that there may be situations where an employer provides a reasonable accommodation to a qualified pregnant employee (*e.g.,* a stool, additional breaks, or temporary suspension of one or more essential functions) under the PWFA, and then the employee requests leave as a reasonable accommodation (*e.g.,* to recover from childbirth). In these situations, the covered entity should consider the request for the reasonable accommodation of leave to recover from childbirth in the same manner that it would any other request for leave as a reasonable accommodation. This requires first considering whether the employee will be able to perform the essential functions of the position with or without a reasonable accommodation after the period of leave, or, if not, whether, after the period of leave, the employee will meet the definition of ''qualified'' under § 1636.3(f)(2).[75]

62. A qualified employee with a known limitation who is granted leave as a reasonable accommodation under the PWFA is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an undue hardship.[76] When the employee is

[71] U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, *Heat and Pregnant Women* (Aug. 25, 2022), *https://www.cdc.gov/disasters/extremeheat/heat_and_pregnant_women.html.*

[72] H.R. Rep. No. 117–27, pt. 1, at 29 (noting that ''leave is one possible accommodation under the PWFA, including time off to recover from delivery'').

[73] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text preceding Question 17 (explaining that if an employee with a disability needs 15 days of leave and an employer only provides 10 days of paid leave, the employer should allow the employee to use 10 days of paid leave and 5 days of unpaid leave). The Commission has stated in a technical assistance document regarding leave and the ADA that an employer should consider providing unpaid leave to an employee with a disability as a reasonable accommodation even when the employer does not offer leave as an employee benefit. *See* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act,* at text above Example 4 (2016) [hereinafter *Technical Assistance on Employer-Provided Leave*], *https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act.*

[74] *See supra* note 73. If an employee has a right to leave under the FMLA, an employer policy, or a State or local law, the employee is entitled to leave regardless of whether they request leave as a reasonable accommodation. An employee who needs leave beyond what they are entitled to under those laws or policies may request a reasonable accommodation.

[75] These considerations are relevant only if the leave is needed as a reasonable accommodation. The covered entity should first consider if there is a leave program that covers the need for leave to recover from childbirth and for which the employee is eligible. If there is a leave program that covers the request, the covered entity may not need to assess the employee's ability to perform essential functions upon return from leave under the PWFA.

[76] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 18. As

ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (*i.e.,* the employee can perform the essential functions of the position with or without reasonable accommodation under § 1636.3(f)(1) or if the employee meets the definition of ''qualified'' under § 1636.3(f)(2)).[77]

63. Under the PWFA, an employer does not have to provide a reasonable accommodation if it causes an undue hardship—a significant difficulty or expense. Thus, if an employer can demonstrate that the impact of the leave requested as a reasonable accommodation poses an undue hardship under the factors set out in § 1636.3(j)(2)—for example, because of the impact of its length, frequency, or unpredictable nature, or because of another factor that causes significant difficulty or expense—it does not have to provide the requested leave under the PWFA.

64. Employees must be permitted to choose whether to use paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or unpaid leave to the same extent that the covered entity allows employees to choose between these types of leave when they are using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions.[78] Similarly, an employer must continue an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status, such as paid or unpaid leave. An employer is not required to provide additional paid leave under the PWFA beyond the amount provided to similarly situated employees.[79]

Ensuring That Employees Are Not Penalized for Using Reasonable Accommodations

65. Generally, covered entities are not required to lower production standards for qualified employees receiving accommodations under the PWFA.[80] However, for example, when the reasonable accommodation is leave, the employee may not be able to meet a production standard during the period of leave or, depending on the length of the leave, meet that standard for a defined period of time (*e.g.,* the production standard measures production in 1 year and the employee was on leave for 4 months). Thus, if the reasonable accommodation is leave, the production standard may need to be prorated to account for the reduced amount of time the qualified employee worked.[81]

66. In addition, covered entities making reasonable accommodations must ensure that their ordinary workplace policies or practices—including, but not limited to, attendance policies, productivity quotas, and requirements for mandatory overtime—do not operate to penalize qualified employees for utilizing PWFA accommodations.[82] When a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—a qualified employee cannot be penalized, or threatened with a penalty, for failing to perform work during that non-work period, including through actions like the assessment of penalty points for time off or discipline for failing to meet a production quota. For example, if a call center employee with a known limitation requests and is granted 2 hours of unpaid leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately. Alternatively, the accommodation could allow for the qualified employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced, as long as this would not make the accommodation ineffective.

67. Similarly, policies that monitor employees for time on task (whether through automated means or otherwise) and penalize them for being off task may need to be modified to avoid imposing penalties for non-work periods that the qualified employee was granted as a reasonable accommodation. This includes situations in which hours worked or time on task are used to measure traits like ''productivity,'' ''focus,'' ''availability,'' or ''contributions.'' For example, if, as a reasonable accommodation, a qualified employee is excused from working overtime, and ''availability'' or ''contribution'' is measured by an employee's overtime hours, a qualified employee should not be penalized in those categories.

68. If an accommodation under the PWFA involves the temporary suspension of an essential function(s) of the position, a covered entity may not penalize a qualified employee for not performing the essential function(s) that has been temporarily suspended. So, for example, a covered entity must not penalize a qualified employee for not meeting a production standard related to the performance of the essential function(s) that has been temporarily suspended.

69. Penalizing an employee in these situations could render the accommodation ineffective, thus making the covered entity liable for failing to make reasonable accommodation.[83] It also may be an adverse action in the terms, conditions, or privileges of employment or retaliation.[84]

70. The following examples illustrate situations where penalizing an employee may violate 42 U.S.C. 2000gg–1(1) (failing to make reasonable accommodation absent undue hardship), (5) (prohibiting employers from taking adverse action against an employee on account of the employee using a reasonable accommodation), and/or section 2000gg–2(f) (prohibiting retaliation).

Example #20/Not Penalizing Employees: Arisa works in a fulfillment center that tracks employee productivity using personal tracking devices that monitor an employee's time on task and how long it takes an employee to complete a task. If the technology determines that an employee is spending insufficient time on task or taking too long to complete a task, the employee receives a warning, which can escalate to a reprimand and further discipline. Arisa is pregnant and, as a reasonable accommodation, is permitted to take bathroom breaks as necessary. Because the wearable technology determines that due to the approved additional bathroom breaks Arisa is spending insufficient time on task, Arisa receives a warning.

Example #21/Not Penalizing Employees: Hanh works in a call center that has a ''no-fault'' attendance policy where employees accrue penalty points for all absences and late arrivals, regardless of the reason for the lateness or absence. The policy allows for discipline or termination when an employee accrues enough points within a certain time period. Hanh gave birth and has had some complications that involve heavy vaginal bleeding for which she occasionally needs time off, and she also needs to attend related medical appointments. She sought, and her employer provided, the reasonable accommodations of being able to arrive up to 1 hour late on certain days with time to attend medical appointments. Despite the reasonable accommodations, because of the no-fault policy, Hanh accrues penalty points under the policy, subjecting her to possible discipline or termination.

Example #22/Not Penalizing Employees: Afefa, a customer service agent who is pregnant, requests two additional 10-minute rest breaks and additional bathroom breaks, as needed, during the workday. The employer determines that these breaks would not pose an undue hardship and grants the request. Because of the additional breaks, Afefa responds to three fewer calls during a shift. Afefa's supervisor gives her a lower performance rating because of her decrease in productivity.

Personal Use

71. The obligation to provide reasonable accommodation under the PWFA, like that under the ADA, does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the qualified employee with a known limitation. However, adjustments or modifications that might otherwise be considered personal may be required as

under the ADA, if an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer should consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue their leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.

[77] *See id.*

[78] A failure to allow an employee affected by pregnancy, childbirth, or related medical conditions to use paid or unpaid leave to the same extent that the covered entity allows employees using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions to do so or a failure to continue health care insurance for an employee affected by pregnancy, childbirth, or related medical conditions to the same extent that a covered entity does for other employees may be a violation of Title VII as well.

[79] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.48.

[80] *See id.* at text accompanying n.14.

[81] *See id.* at Question 19.

[82] *See id.*

[83] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 19; *see also* 42 U.S.C. 2000gg–1(1) and the regulations in this part.

[84] 42 U.S.C. 2000gg–1(5); 42 U.S.C. 2000gg–2(f).

reasonable accommodations ''where such items are specifically designed or required to meet job-related rather than personal needs.'' [85]

72. For example, if a warehouse employee is pregnant and is having difficulty sleeping, the PWFA would not require as a reasonable accommodation for the employer to provide a pregnancy pillow to help with sleeping because that is strictly for an employee's personal use. However, allowing the employee some flexibility in start times for the workday may be a reasonable accommodation because it modifies an employment-related policy. In a different context, if the employee who is having trouble sleeping works at a job that involves sleeping between shifts on-site, such as a job as a firefighter, sailor, emergency responder, health care worker, or truck driver, a pregnancy pillow may be a reasonable accommodation because the employee is having difficulty sleeping because of the pregnancy, the employer is providing pillows for all employees required to sleep on-site, and the employee needs a modification of the pillows provided.

All Services and Programs

73. Under the PWFA, as under the ADA, the obligation to make reasonable accommodations applies to all services and programs provided in connection with employment and to all non-work facilities provided or maintained by an employer for use by its employees, so that employees with known limitations can enjoy equal benefits and privileges of employment.[86] Accordingly, the obligation to provide reasonable accommodations, barring undue hardship, includes providing access to employer-sponsored placement or counseling services, such as employee assistance programs, to employer-provided cafeterias, lounges, gymnasiums, auditoriums, transportation, and to similar facilities, services, or programs.[87] This includes situations where an employee is traveling for work and may need, for example, accommodations at a different work site or during travel.

Interim Reasonable Accommodations

74. An interim reasonable accommodation can be used when there is a delay in providing the reasonable accommodation. For example, an interim reasonable accommodation may be sought when: there is a sudden onset of a known limitation under the PWFA, sometimes as an emergency, including one that makes it unsafe, risky, or dangerous to continue performing the normal tasks of the job; while the interactive process is ongoing, such as when an employer is waiting for the arrival of ordered equipment; or when the employee is waiting for the employer's decision on the accommodation request.

75. Providing an interim reasonable accommodation is a best practice under the PWFA and may help limit a covered entity's exposure to liability under 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(1)), or 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).

76. For example, consider a situation where an employee lets their supervisor know that they are pregnant and need to avoid working with certain chemicals in the workplace. Given the chemicals and the fact that the employee is pregnant, the employee needs the change immediately. In this situation, the best practice is to provide the employee with an interim reasonable accommodation that meets the employee's needs or limitations and allows the employee to perform tasks for the benefit of the employer while the employer determines its response. This is the best possible situation for both the employer and the employee, and the one that the Commission strongly encourages. In addition, this type of interim reasonable accommodation could help mitigate a claim of delay by the employee.[88] The shortcomings and risks of two other approaches an employer might take are addressed in the following scenarios.

- Require the employee to continue to work with the chemicals while the employer determines its response. In this situation, the employee would be forced to work outside of their restrictions. In addition to placing the employee in a situation that the PWFA was enacted to prevent—choosing between their health and the health of their pregnancy on one hand and a paycheck on the other—the covered entity may be risking liability under 42 U.S.C. 2000gg–1(1) (if there is an unnecessary delay in providing the accommodation), and/or State and Federal workplace health and safety laws.
- Require the employee to take leave while the employer determines its response. In this situation, the employee is not exposed to the chemicals, so the risk is mitigated. However, depending on the facts, this option can have a severely detrimental effect on the employee—either because the leave is unpaid or because the employee is forced to use their paid leave. Meanwhile, the employee is unable to perform tasks for the employer.

77. Moreover, depending on the facts, requiring an employee to take unpaid leave or use their leave after they ask for an accommodation and are awaiting a response could lead to a violation of 42 U.S.C. 2000gg–2(f). For example, if the employee is put on unpaid leave, even though there is paid work that the employer reasonably could have given the employee, the employer's decision could be retaliatory because it might well dissuade a reasonable person from engaging in protected activity, such as asking for an accommodation under the PWFA. If the employer's actions were challenged, the employer would have to produce a legitimate, non-discriminatory reason for its actions. The employee could then show that the real reason for the action was retaliation.[89] Because the claim would arise under 42 U.S.C. 2000gg–2(f), the employee would not have to show that they are qualified under 42 U.S.C. 2000gg(6), and the employer would not have recourse to an undue hardship defense.

78. The possible connection between requiring leave as an interim reasonable accommodation and a potential violation of 42 U.S.C. 2000gg–2(f) is in keeping with the purposes of the PWFA. The PWFA recognizes that historically employees with limitations related to pregnancy, childbirth, or related medical conditions have been required to take leave to their detriment. Thus, 42 U.S.C. 2000gg–1(4) limits the use of leave as a reasonable accommodation, prohibiting employers from requiring qualified employees with known limitations to take leave as a reasonable accommodation where there is another reasonable accommodation that will allow them to remain at work that does not result in an undue hardship.

79. Examples Regarding Interim Reasonable Accommodations:

Example #23/Interim Reasonable Accommodation: Alicia is pregnant and works in a fulfillment center. Her job involves regularly moving boxes that weigh 15 to 20 pounds. On her Saturday shift, she informs her supervisor, Michelle, that she is pregnant and that she is worried about lifting these packages while she is pregnant. Michelle recognizes that Alicia is requesting a reasonable accommodation under the PWFA. While Michelle tells Alicia that she needs to wait until Monday to consult with human resources on the next steps, Michelle also immediately offers Alicia a cart to help move the boxes and assigns her to a line that has lighter packages. On Monday, Michelle tells Alicia that she will be provided with a hoist to help Alicia lift packages, but it will take a few days before it is installed. In the meantime, Alicia can continue to use the cart and work the lighter line. Once the hoist arrives, Alicia is able to use it while working on her usual line. If there were an unnecessary delay in providing the reasonable accommodation, and if Alicia were to challenge the delay as constituting a failure to make an accommodation, the employer could argue that the interim reasonable accommodation mitigates its liability.

Example #24/Interim Reasonable Accommodation: Nour is pregnant, and she drives a delivery van. Her employer uses vans that do not have air conditioning. It is summer and the temperature is over 100 degrees. Nour tells her supervisor she is pregnant and needs a change at work because of the risk to her health and the health of her pregnancy because of the excessive heat. Her supervisor orders equipment that will help Nour, such as a personal cooling vest or neck fan. While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do. In this situation, the employer could tell Nour that she may take leave while waiting for the equipment to arrive.

Example #25/Interim Reasonable Accommodation: The scenario is the same as described in Example #24, but there is office work that Nour could perform while waiting for the equipment. Further, there is evidence

[85] *See* 29 CFR part 1630, appendix, 1630.9.

[86] *See id.*

[87] *See id.*

[88] Section 1636.4(a)(1)(vii).

[89] *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues,* (II)(C)(1)–(3) (discussing causation standard and evidence of causation), (4) (discussing facts that would defeat a claim of retaliation), and (III) (discussing ADA interference claims) (2016) [hereinafter *Enforcement Guidance on Retaliation*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.*

that the supervisor and others at the covered entity discussed the idea of giving Nour office work but decided against it because then ''every woman is going to come in here and demand it.'' In this situation, failing to provide Nour the opportunity to work in the office could be a violation of 42 U.S.C. 2000gg–2(f).

80. Covered entities that do not provide interim reasonable accommodations are reminded that an unnecessary delay in making a reasonable accommodation, including in responding to the initial request, in the interactive process, or in providing the accommodation may result in a violation of the PWFA if the delay constitutes an unlawful failure to make reasonable accommodation, as set forth in 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(1)).

1636.3(i) Reasonable Accommodation—Examples

81. The definition of ''reasonable accommodation'' in § 1636.3(h)(1) tracks the meaning of the term from the ADA statute, regulation, and EEOC guidance documents.[90] The PWFA, at 42 U.S.C. 2000gg–3, directs the Commission to issue regulations providing examples of reasonable accommodations addressing known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The Commission notes that a qualified employee may need more than one of these accommodations at the same time, as a pregnancy progresses, or before, during, or after pregnancy. This list of possible reasonable accommodations is non-exhaustive.[91]

- Frequent breaks. The Commission has long construed the ADA to require additional breaks as a reasonable accommodation, absent undue hardship.[92] Under the PWFA, for example, a pregnant employee might need more frequent breaks due to shortness of breath; an employee recovering from childbirth might need more frequent restroom breaks or breaks due to fatigue; an employee who is nursing during work hours, where the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity (for example, if the employee normally works from home and the child is there or the child is at a nearby or onsite day care center), may need additional breaks to nurse during the workday;[93] or an employee who is lactating might need more frequent breaks for water, for food, or to pump.[94]
- Sitting/Standing. The Commission has recognized the provision of seating for jobs that require standing and standing for those that require sitting as potential reasonable accommodations under the ADA.[95] Under the PWFA, reasonable accommodation of these needs might include, but is not limited to, policy modifications and the provision of equipment, such as seating, a sit/stand desk, or anti-fatigue floor matting, among other possibilities.
- Schedule changes, part-time work, and paid and unpaid leave. Permitting the use of paid leave (whether accrued, as part of a short-term disability program, or as part of any other employee benefit) or providing unpaid leave is a potential reasonable accommodation under the ADA.[96] Additionally, leave for medical treatment can be a reasonable accommodation.[97] By way of example, under the PWFA an employee could need a schedule change to attend a round of IVF appointments to get pregnant; a part-time schedule to address fatigue during pregnancy; or unpaid leave for recovery from childbirth, medical treatment, postpartum treatment or recuperation related to a cesarean section, episiotomy, infection, depression, thyroiditis, or preeclampsia.
- Telework. Telework (or ''remote work'' or ''work from home'') has been recognized by the Commission as a potential reasonable accommodation under the ADA.[98] Under the PWFA, telework could be used to accommodate, for example, a period of bed rest, a mobility impairment, or a need to avoid heightened health risk, such as from a communicable disease.
- Parking. Providing a reserved parking space if the employee is otherwise entitled to use employer-provided parking may be a reasonable accommodation to assist an employee who is experiencing fatigue or limited mobility related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
- Light duty. Assignment to light duty or placement in a light duty program has been recognized by the Commission as a potential reasonable accommodation, even if the employer's light duty positions are normally reserved for those injured on-the-job and the person seeking a light duty position as an accommodation does not have an on-the-job injury.[99]
- Making existing facilities accessible or modifying the work environment.[100] Examples of reasonable accommodations might include allowing access to an elevator not normally used by employees; moving the employee's workspace closer to a bathroom; providing a fan to regulate temperature; moving a pregnant or lactating employee to a different workspace to avoid exposure to chemical fumes; changing the assigned worksite of the employee; or modifying the work space by providing local exhaust ventilation or providing enhanced personal protective equipment and training to reduce exposure to chemical hazards.[101] As noted in the regulation, this also may include modifications of the work environment to allow an employee to pump breast milk at work.[102]

[90] *See* 42 U.S.C. 12111(9); 29 CFR 1630.2(o); *Enforcement Guidance on Reasonable Accommodation, supra* note 12.

[91] *See, e.g.,* H.R. Rep. No. 117–27, pt. 1, at 29 (stating that ''[t]he Job Accommodation Network (JAN), an ADA technical assistance center . . . lists numerous potential accommodations . . . including more than 20 suggested accommodations just for lifting restrictions related to pregnancy'').

[92] *Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 22; *see also* H.R. Rep. 117–27, pt. 1, at 22; 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.); 168 Cong. Rec. S10,081 (daily ed. Dec. 22, 2022) (statement of Sen. Robert P. Casey, Jr.).

[93] The Commission cautions that this provision is intended to address situations where the employee and child are in close proximity in the normal course of business. It is not intended to state that there is a right to create proximity to nurse because of an employee's preference. Of course, there may be limitations that would allow an employee to request as a reasonable accommodation the creation of proximity (*e.g.,* a limitation that made pumping difficult or unworkable).

[94] Breaks may be paid or unpaid depending on the employer's normal policies and other applicable laws. Breaks may exceed the number that an employer normally provides because reasonable accommodations may require an employer to alter its policies, barring undue hardship.

[95] *Enforcement Guidance on Reasonable Accommodation, supra* note 12, at General Principles, Example B; *see also* H.R. Rep. No. 117–27, pt. 1, at 11, 22, 29.

[96] 29 CFR part 1630, appendix, 1630.2(o); *see also Technical Assistance on Employer-Provided Leave, supra* note 73. Additionally, an employer prohibiting an employee from using accrued leave for pregnancy, childbirth, or related medical conditions while allowing other employees to use leave for similar reasons also may violate Title VII.

[97] *See* 29 CFR part 1630, appendix, 1630.2(o).

[98] *See, e.g., Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 34.

[99] *See Enforcement Guidance: Workers' Compensation, supra* note 8, at Question 28; *see also* 168 Cong. Rec. S7,048 (daily ed. Dec. 8, 2022) (statement of Sen. Robert P. Casey, Jr.) (''What are other types of reasonable accommodations that pregnant workers might request? Light duty is a common example.''); *id.* at S7,049 (statement of Sen. Patty Murray) (noting that workers need accommodations because ''their doctors say they need to avoid heavy lifting''); H.R. Rep. 117–27, pt. 1, at 14–17 (discussing *Young* v. *United Parcel Serv., Inc.,* 575 U.S. 206 (2015), a case involving light duty for pregnant employees).

[100] *See* 42 U.S.C. 12111(9); 29 CFR 1630.2(o)(1)(ii) and (o)(2)(i).

[101] *See, e.g.,* U.S. Dep't of Lab., Occupational Health & Safety Admin., *Recommended Practices for Safety and Health Programs, https://www.osha.gov/safety-management/hazard-prevention* (last visited Mar. 18, 2024).

[102] On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328, Div. KK, 136 Stat. 4459, 6093). The law extended coverage of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. 201 *et seq.,* protections for nursing employees to apply to most employees. The FLSA provides most employees with the right to break time and a place to pump breast milk at work for a year following the child's birth. 29 U.S.C. 218d; U.S. Dep't of Lab., *Field Assistance Bulletin No. 2023–02: Enforcement of Protections for Employees to Pump Breast Milk at Work* (May 17, 2023), *https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf;* U.S. Dep't of Lab., *Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work* (Jan. 2023), *https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers.* Employees who are not covered by the PUMP Act or employees who seek to pump longer than 1 year may seek reasonable accommodations regarding pumping under the PWFA. Further, whether or not employees are covered by the PUMP Act, employees may seek under the PWFA any reasonable accommodations needed for lactation, including things not necessarily required by the PUMP Act such as access to a sink, a refrigerator, and electricity. *See, e.g.,* U.S. Dep't of Lab., *Notice on Reasonable Break Time for Nursing Mothers,* 75 FR 80073, 80075–76 (Dec. 21, 2010) (discussing space requirements and noting factors such as the location of the area for pumping compared to the employee's workspace, the availability of a sink and running water, the location of a refrigerator to store

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• Job restructuring.[103] Job restructuring might involve, for example, removing a marginal function (any nonessential job function) that requires a pregnant employee to climb a ladder or occasionally retrieve boxes from a supply closet, or providing assistance with manual labor.[104]

• Temporarily suspending one or more essential function(s). For some positions, this may mean that one or more essential function(s) are temporarily suspended, and the employee continues to perform the remaining functions of the job. For others, the essential function(s) will be temporarily suspended, and the employee may be assigned other tasks. For still others, the essential function(s) will be temporarily suspended, and the employee may perform the functions of a different job to which the employer temporarily transfers or assigns them. For yet others, the essential function(s) will be temporarily suspended, and the employee will participate in the employer's light or modified duty program.

• Acquiring or modifying equipment, uniforms, or devices.[105] Examples of reasonable accommodations might include providing uniforms and equipment, including safety equipment, that account for changes in body size during and after pregnancy, including during lactation; providing devices to assist with mobility, lifting, carrying, reaching, and bending; or providing an ergonomic keyboard to accommodate pregnancy-related hand swelling or tendonitis.

• Adjusting or modifying examinations or policies.[106] Examples of reasonable accommodations include allowing employees with a known limitations to postpone examinations that require physical exertion. Adjustments to policies also could include increasing the time or frequency of breaks to eat or drink or to use the restroom.

82. Pursuant to 42 U.S.C. 2000gg–3, the following are further examples of types of reasonable accommodations and how they can be analyzed.[107]

Example #26/Telework: Gabriela, a billing specialist in a doctor's office, experiences nausea and vomiting beginning in her first trimester of pregnancy. Because the nausea makes commuting extremely difficult, Gabriela makes a verbal request to her manager stating she has nausea and vomiting due to her pregnancy and requests that she be permitted to work from home for the next 2 months so that she can avoid the difficulty of commuting. The billing work can be done from her home or in the office.

1. Known limitation and request for reasonable accommodation: Gabriela's nausea and vomiting is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Gabriela needs an adjustment or change at work due to the limitation; Gabriela has communicated the information to the employer.

2. Qualified: Gabriela can perform the essential functions of the job with the reasonable accommodation of telework.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #27/Temporary Suspension of an Essential Function: Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of her pregnancy to stop lifting more than 25 pounds for the remainder of the pregnancy. One of the essential functions of the job is to assist patients in dressing, bathing, and moving from and to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which employees who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

1. Known limitation and request for reasonable accommodation: Nisha's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Nisha needs an adjustment or change at work due to the limitation; Nisha has communicated that information to the employer.

2. Qualified: Nisha is asking for the temporary suspension of an essential function. The suspension is temporary, and Nisha can perform the essential functions of the job ''in the near future'' (generally within 40 weeks). It appears that the inability to perform the function can be reasonably accommodated through its temporary suspension and Nisha's placement in the light duty program.

3. The employer must grant the reasonable accommodation of temporarily suspending the essential function (or another reasonable accommodation) absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program.

Example #28: The scenario is the same as described in Example #27 of this appendix, except that the employer establishes that the light duty program is limited to 10 slots and all 10 slots are filled for the next 6 months. In these circumstances, the employer should consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer should consider providing a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Example #29/Temporary Suspension of Essential Function(s): Fatima's position as a farmworker usually involves working outdoors in the field although there also is indoor work such as sorting produce. After she returns from giving birth, Fatima develops postpartum thyroiditis, which has made her extremely sensitive to heat, and has contributed to muscle weakness and fatigue. She seeks the accommodation of a 7-month temporary suspension of the essential function of working outdoors in hot weather.

1. Known limitation and request for reasonable accommodation: Fatima's sensitivity to heat, muscle weakness, and fatigue are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Fatima needs an adjustment or change at work due to the limitation; Fatima has communicated this information to the employer.

2. Qualified: Fatima is asking for the temporary suspension of an essential function. The suspension is temporary, and Fatima could perform the essential functions of the job in the near future (7 months). It appears that the inability to perform the essential function can be reasonably accommodated by temporarily assigning Fatima indoor work, such as sorting produce.

3. The employer must grant the accommodation of temporarily suspending the essential function (or another reasonable accommodation) absent undue hardship.

Example #30/Assistance with Performing an Essential Function: Mei, a warehouse worker, uses her employer's online accommodation portal to ask for a dolly to assist her for 3 months in moving items that are bulky, in order to accommodate lifting and carrying restrictions due to her cesarean section.

1. Known limitation and request for reasonable accommodation: Mei's lifting and carrying restrictions are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Mei needs an adjustment or change at work due to the limitation; Mei has communicated this information to the employer.

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milk, and electricity may affect the amount of break time needed). The PUMP Act is enforced by the Department of Labor, not the EEOC.

[103] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii).

[104] *See* H.R. Rep. No. 117–27, pt. 1, at 29.

[105] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii); *see also* H.R. Rep. No. 117–27, pt. 1, at 28.

[106] *See* 42 U.S.C. 12111(9)(B); 29 CFR 1630.2(o)(2)(ii); *see also* H.R. Rep. No. 117–27, pt. 1, at 28.

[107] As with all the examples in this Interpretive Guidance, these examples are illustrative only and are not intended to suggest that these are the only conditions under which an employee may receive a reasonable accommodation, or that the reasonable accommodations sought or given in the examples are the only ones that should be selected in similar situations.

For further examples, see the Job Accommodation Network (JAN), which provides free assistance regarding workplace accommodation issues. *See generally* Job Accommodation Network [hereinafter JAN], *https://askjan.org/* (last visited Mar. 25, 2024). Covered entities and employees also may seek additional information from the National Institute for Occupational Safety and Health (NIOSH). *See* U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Reproductive Health and The Workplace, https://www.cdc.gov/niosh/topics/repro/default.html* (last reviewed May 1, 2023).

2. Qualified: Mei can perform the essential functions of the job with the reasonable accommodation of a dolly.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #31/Appropriate Uniform and Safety Gear: Ava is a police officer and is pregnant. They ask their union representative for help getting a larger size uniform and larger size bullet proof vest in order to cover their growing pregnancy. The union representative asks management for an appropriately-sized uniform and vest for Ava.

1. Known limitation and request for reasonable accommodation: Ava's inability to wear the standard uniform and safety gear is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Ava needs an adjustment or change at work due to the limitation; Ava's representative has communicated this information to the employer.

2. Qualified: Ava can perform the essential functions of the job with the reasonable accommodation of appropriate gear.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #32/Temporary Suspension of Essential Function(s): Darina is a police officer and is 3 months pregnant. She talks to human resources about being taken off of patrol and put on light duty for the remainder of her pregnancy to avoid physical altercations and the need to physically subdue suspects, which may harm her pregnancy. The department has an established light duty program that it uses for officers with injuries that occurred on the job.

1. Known limitation and request for reasonable accommodation: Darina's inability to perform certain patrol duties is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Darina needs an adjustment or change at work due to the limitation; Darina has communicated this information to the employer.

2. Qualified: The suspension of the essential functions of patrol duties is temporary, and Darina can perform the essential functions of the job in the near future (within generally 40 weeks). It appears that the temporary suspension of the essential functions can be accommodated through the light duty program.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #33/Temporary Suspension of Essential Function(s): Rory works in a fulfillment center where she is usually assigned to a line that requires moving 20-pound packages. After returning from work after giving birth, Rory lets her supervisor know that she has a lifting restriction of 10 pounds due to sciatica during her pregnancy that continues postpartum. The restriction is for 6 months. The employer does not have an established light duty program. There are other lines in the warehouse that do not require lifting more than 10 pounds.

1. Known limitation and request for reasonable accommodation: Rory's lifting restriction is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Rory needs an adjustment or change at work due to the limitation; Rory has communicated this information to the employer.

2. Qualified: The suspension of the essential function of lifting packages that weigh up to 10 pounds is temporary, and Rory can perform the essential function in the near future (6 months). It appears that the temporary suspension of the essential function could be accommodated by temporarily assigning her to a different line.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #34/Unpaid Leave: Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for 10 days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave, she is not covered by the FMLA, and the employer does not have a company policy regarding the provision of unpaid leave. Nevertheless, Tallah is covered by the PWFA.

1. Known limitation and request for reasonable accommodation: Tallah's need for time for recovery is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Tallah needs an adjustment or change at work due to the limitation; Tallah has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Tallah will be able to perform the essential functions of the job with or without accommodation.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

Example #35/Unpaid Leave for Prenatal Appointments: Margot started working at a retail store shortly after she became pregnant. She has an uncomplicated pregnancy. Because she has not worked at the store very long, she has earned very little leave and is not covered by the FMLA. In her fifth month of pregnancy, she asks her supervisor for the reasonable accommodation of unpaid time off beyond the leave she has earned to attend her regularly scheduled prenatal appointments.

1. Known limitation and request for reasonable accommodation: Margot's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Margot needs an adjustment or change at work due to the limitation; Margot has communicated the information to the employer.

2. Qualified: Margot can perform the essential functions of the job with the reasonable accommodation of leave to attend health care appointments.

3. The employer must grant the accommodation of unpaid time off (or another reasonable accommodation) absent undue hardship.

Example #36/Unpaid Leave for Recovery from Childbirth: Sofia, a custodian, is pregnant and will need 6 to 8 weeks of leave to recover from childbirth. Sofia is nervous about asking for leave, so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy, but no policy for longer periods of leave. Sofia is not eligible for FMLA leave because her employer is not covered by the FMLA.

1. Known limitation and request for reasonable accommodation: Sofia's need to recover from childbirth is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Sofia needs an adjustment or change at work due to the limitation; Sofia's representative has communicated this information to the employer.

2. Qualified: After the reasonable accommodation of leave, Sofia will be able to perform the essential functions of the job with or without reasonable accommodation.

3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

Example #37/Unpaid Leave for Medical Appointments: Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

1. Known limitation and request for reasonable accommodation: Taylor's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Taylor needs an adjustment or change at work due to the limitation; Taylor has communicated this information to the employer.

2. Qualified: Taylor can perform the essential functions of the job with a reasonable accommodation of time off to attend the health care appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent an undue hardship.

Example #38/Unpaid Leave: Claudine is 6 months pregnant and asks for leave so that she can attend her regular check-ups. The clinic where Claudine gets her health care is an hour drive away, the clinic frequently gets delayed, and Claudine has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine's employer is not covered by the FMLA, and Claudine does not have any sick leave left. Claudine asks human resources for time off as a reasonable accommodation so she can attend her medical appointments.

1. Known limitation and request for reasonable accommodation: Claudine's need to attend health care appointments is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Claudine needs an adjustment or change at work due to the limitation; Claudine has communicated that information to the employer.

2. Qualified: Claudine can perform the essential functions of the job with a reasonable accommodation of time off to attend health care appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #39/Telework: Raim, a social worker, is pregnant. As her third trimester starts, she is feeling more fatigue and needs more rest. She asks her supervisor if she can telework and see clients virtually so she can lie down and take rest breaks between client appointments.

1. Known limitation and request for reasonable accommodation: Raim's fatigue is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Raim needs an adjustment or change at work due to the limitation; Raim has communicated that information to the employer.

2. Qualified: Assuming the appointments can be conducted virtually, Raim can perform the essential functions of the job with the reasonable accommodation of working virtually. If there are certain appointments that must be done in person, the reasonable accommodation could be a few days of telework a week and then other accommodations that would give Raim time to rest, such as assigning Raim in-person appointments at times when traffic will be light so that they are easy to get to, or setting up Raim's assignments so that on the days when she has in-person appointments she has breaks between them. Or the reasonable accommodation can be the temporary suspension of the essential function of in-person appointments.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #40/Temporary Workspace/Possible Temporary Suspension of Essential Function(s): Brooke, a research assistant who is in her first trimester of pregnancy, asks the lead researcher in the laboratory for a temporary workspace that would allow her to work in a well-ventilated area because her work involves hazardous chemicals that her health care provider has told her to avoid. There are several research projects she can work on that do not involve exposure to hazardous chemicals.

1. Known limitation and request for reasonable accommodation: Brooke's need to avoid the chemicals related to maintaining her health or the health of her pregnancy is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Brooke needs an adjustment or change at work due to the limitation; Brooke has communicated this information to the employer.

2. Qualified: If working with hazardous chemicals is an essential function of the job, Brooke may be able to perform that function with the accommodation of a well-ventilated work area, a chemical fume hood, local exhaust ventilation, and/or personal protective equipment such as chemical-resistant gloves, a lab coat, and a powered air-purifying respirator. If providing these modifications would be an undue hardship or would not be effective, Brooke can still be qualified with the temporary suspension of the essential function of working with the hazardous chemicals because Brooke's inability to work with hazardous chemicals is temporary, and Brooke can perform the essential functions of the job in the near future (within generally 40 weeks). Her need to avoid exposure to hazardous chemicals also can be accommodated by allowing her to focus on the other research projects.

3. The employer must grant the accommodation (or another reasonable accommodation), absent undue hardship. If the employer cannot accommodate Brooke in a way that allows Brooke to continue to perform the essential function(s) of the position, the employer should consider providing alternative reasonable accommodations, including temporarily suspending one or more essential functions, absent undue hardship.

Example #41/Temporary Transfer to Different Location: Katherine, a budget analyst who has cancer also is pregnant, which creates complications for her cancer treatment. She asks her manager for a temporary transfer so that she can work out of an office in a larger city that has a medical center that can address her medical needs due to the combination of cancer and pregnancy. Katherine is able to do all her essential functions for the original office from the employer's other location and can continue to work full-time while obtaining treatment.

1. Known limitation and request for reasonable accommodation: Katherine's need for treatment at a particular medical facility related to maintaining her health or the health of the pregnancy is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Katherine needs an adjustment or change at work due to the limitation; Katherine has communicated that information to the employer.

2. Qualified: Katherine is able to perform the essential functions of the job and work full-time with the reasonable accommodation of a temporary transfer to a different location.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship. A reasonable accommodation can include a workplace change to facilitate medical treatment, including accommodations such as leave, a schedule change, or a temporary transfer to a different work location needed in order to obtain treatment.

Example #42/Pumping Breast Milk: Salma gave birth 13 months ago and wants to be able to pump breast milk at work. Salma works for an employment agency that sends her to different jobs for a day or week at a time. Salma asks the person at the agency who makes her assignments to ensure she will be able to take breaks and have a space to pump breast milk at work at her various assignments.

1. Known limitation and request for reasonable accommodation: Salma's need to express breast milk is a physical or mental condition related to, affected by, or arising out pregnancy, childbirth, or related medical conditions; Salma needs an adjustment or change at work due to the limitation; Salma has communicated this information to the employer.

2. Qualified: Salma is able to perform the essential functions of the jobs to which she is assigned with the reasonable accommodation of being assigned to workplaces where she can pump at work.

3. The agency must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #43/Commuting: Jayde is a retail clerk who gave birth 2 months ago. Because of childbirth, Jayde is experiencing urinary incontinence, constipation, and hemorrhoids. Jayde normally commutes by driving 45 minutes; because of the limitations due to childbirth, it is painful for Jayde to sit in one position for an extended period, and Jayde may need a bathroom during the commute. Jayde requests the reasonable accommodation of working at a different, closer store for 2 months. The commute to this other store is only 10 minutes.

1. Known limitation and request for reasonable accommodation: Jayde's urinary incontinence, constipation, and hemorrhoids are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Jayde needs an adjustment or change at work due to the limitation; Jayde has communicated this information to the employer.

2. Qualified: Jayde can perform the essential functions of the job with the reasonable accommodation of a temporary assignment to a different location.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

Example #44/Medications Affected by Pregnancy: Riya is a data analyst who is pregnant, and her health care provider recommended that she stop taking her current ADHD medication and switch to another medication. As Riya is adjusting to her new medication, she finds it more difficult to concentrate and asks for more frequent breaks, a quiet place to work, and for her tasks to be divided up into smaller duties.

1. Known limitation and request for reasonable accommodation: Riya's difficulty concentrating due to her change in medication is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; Riya needs an adjustment or change at work due to the limitation; Riya has provided this information to the employer.

2. Qualified: Riya can perform the essential functions of the job with the reasonable accommodation of more frequent breaks, a quiet place to work, and division of her tasks into smaller duties.

3. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

1636.3(j) Undue Hardship

1636.3(j)(1) Undue Hardship—In General

83. The PWFA provides that ''undue hardship'' shall be construed under the

PWFA as it is under the ADA and as set forth in this part.[108] This part, at § 1636.3(j)(1), reiterates the definition of undue hardship provided in the ADA statute and regulation, which explains that undue hardship means significant difficulty or expense incurred by a covered entity.[109] Because the definition of undue hardship under the PWFA follows the ADA, under the PWFA the term ''undue hardship'' means significant difficulty or expense in, or resulting from, the provision of the accommodation. The ''undue hardship'' provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. ''Undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[110]

84. As under the ADA, if an employer asserts undue hardship based on cost, then there will be a determination made regarding whose financial resources should be considered.[111] Further, in determining whether an accommodation causes an undue hardship an employer cannot simply assert that a needed accommodation will cause it undue hardship and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case-by-case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.[112]

85. As the Commission has stated under the ADA, ''[u]ndue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' [113]

86. Additionally, an employer cannot demonstrate undue hardship based on employees', clients', or customers' fears or prejudices toward the employee's pregnancy, childbirth, or related medical conditions, nor can an employer demonstrate undue hardship based on the possibility that the provision of an accommodation would negatively impact the morale of other employees.[114] Employers, however, may be able to show undue hardship where the provision of an accommodation would be unduly disruptive to other employees' ability to work.

87. Consistent with the ADA, a covered entity asserting that a reasonable accommodation will cause an undue hardship must offer other reasonable accommodations that it can provide, absent undue hardship.[115] Additionally, if the employer can provide only part of the reasonable accommodation absent undue hardship—for example, the employer can provide 6 weeks of leave absent undue hardship but the 8 weeks that the employee is seeking would cause undue hardship—the employer must provide the reasonable accommodation up to the point of undue hardship. Thus, in the example, the employer would have to provide 6 weeks of leave and then consider whether there are other reasonable accommodations it could provide for the remaining 2 weeks that would not cause an undue hardship.

1636.3(j)(2) Undue Hardship Factors

88. Section 1636.3(j)(2) sets out factors to be considered when determining whether a particular accommodation would impose an undue hardship on the covered entity using the factors from the ADA regulation.[116]

89. Examples Regarding Undue Hardship:

Example #45/Undue Hardship: Patricia, a convenience store clerk, requests that she be allowed to switch from full-time to part-time work for the last 3 months of her pregnancy due to extreme fatigue. The store assigns two clerks per shift. If Patricia's hours are reduced, the other clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. It also would be infeasible for the store to hire a temporary worker on short notice at this time. Based on these facts, the employer likely can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce Patricia's hours. The employer, however, must offer other reasonable accommodations, such as providing a stool and allowing rest breaks throughout the shift, assuming they do not cause undue hardship.

Example #46/Undue Hardship: Shirin, a dental hygienist who is undergoing IVF treatments, needs to attend medical appointments for the IVF treatment near her house every other day and is fatigued. She asks her supervisor if the essential function of seeing patients can be temporarily suspended, so that she does not see patients 3 days a week and instead can work from home on those days assisting with billing and insurance claims, work for which she is qualified. Temporarily suspending the essential function of seeing patients and allowing Shirin to work at home may be an undue hardship for the employer because there is only one other hygienist and there is not enough work for Shirin to do remotely. However, the employer must offer other reasonable accommodations, such as a schedule that would allow Shirin breaks between patients, part-time work, permitting her to work from home for 1 or 2 days, or a reduced schedule, assuming they do not cause undue hardship.

Example #47/Undue Hardship: Cynthia, an office manager working in a large building, has asthma that she controls with medication. Because of her pregnancy, her asthma becomes worse, and she requests a ban on airborne irritants and chemicals (*e.g.,* fragrances, sprays, cleaning products) in the building. The employer could potentially show that ensuring a workplace completely free of any scents or irritants would impose a significant financial and administrative burden on it, as a ban would be difficult to enforce and encompass a wide variety of hygiene and cleaning products. Nevertheless, the employer must offer alternative accommodations, such as providing an air purifier, minimizing the use of irritants in her vicinity, or allowing her to telework, assuming they do not cause undue hardship.

1636.3(j)(3) Undue Hardship—Temporary Suspension of an Essential Function(s)

90. In certain circumstances, the PWFA requires an employer to accommodate an employee's temporary inability to perform one or more essential functions. Therefore, § 1636.3(j)(3) provides additional factors that may be considered when determining whether the temporary suspension of one or more essential functions causes an undue hardship. These additional factors include: the length of time that the employee will be unable to perform the essential function(s); whether, through the methods listed in § 1636.3(f)(2)(iii) (describing potential reasonable accommodations related to the temporary suspension of essential function(s)) or otherwise, there is work for the employee to accomplish;[117] the nature of the essential function(s), including its frequency; whether the covered entity has provided other employees in similar positions who are unable to perform essential function(s) of their positions with temporary suspensions of those function(s) and other duties; if necessary, whether or not there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.

91. As with other reasonable accommodations, if the covered entity can establish that accommodating an employee's temporary suspension of an essential function(s) would impose an undue hardship

[108] 42 U.S.C. 2000gg(7).

[109] 42 U.S.C. 12111(10)(A); 29 CFR 1630.2(p); *see Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.112.

[110] *See* 29 CFR part 1630, appendix, 1630.2(p). The ADA defines ''undue hardship'' at 42 U.S.C. 12111(10).

[111] *See* 29 CFR part 1630, appendix, 1630.2(p).

[112] *See* 29 CFR part 1630, appendix, 1630.15(d).

[113] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text accompanying n.113.

[114] *See* 29 CFR part 1630, appendix, 1630.15(d) (explaining that under the ADA an employer cannot show undue hardship based on employees' fears or prejudices toward the individual's disability or by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs); *Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text surrounding n.117; *cf. Groff* v. *DeJoy,* 600 U.S. 447, 472 (2023) (providing that, under the Title VII undue hardship standard, an employer may not justify refusal to accommodate based on other employees' bias or hostility).

[115] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text after n.116.

[116] *See* 29 CFR 1630.2(p).

[117] The employer is not required to make up work for an employee.

if extended beyond a certain period of time, the covered entity would only be required to provide that accommodation for the period of time that it does not impose an undue hardship. For example, consider the situation where an employee seeks to have an essential function suspended for 6 months. The employer can go without the function being accomplished for 4 months, but after that, it will create an undue hardship. The employer must accommodate the employee's inability to perform the essential function for 4 months and then consider whether there are other reasonable accommodations that it can provide, absent undue hardship, for the remaining time.

92. Section 1636.3(j)(3)(iv) is intended to account for situations where the covered entity has provided a similar accommodation to other employees. If the covered entity has temporarily suspended essential functions for other employees in similar positions before, it would tend to demonstrate that the accommodation is not an undue hardship. The reverse, however, is not true. A covered entity's failure to temporarily suspend an essential function(s) in the past does not tend to demonstrate that the accommodation creates an undue hardship because reasonable accommodation can include changing workplace procedures or rules.

1636.3(j)(4) Undue Hardship—Predictable Assessments [118]

93. The Commission has identified a limited number of simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by a qualified employee due to pregnancy.

94. These modifications are: (1) allowing an employee to carry or keep water near and drink, as needed; (2) allowing an employee to take additional restroom breaks, as needed; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing an employee to take breaks to eat and drink, as needed.[119] These accommodations are low cost and unlikely to affect the overall financial resources of the covered entity, the operations of the facility, or the ability of the facility to conduct business.[120] By identifying these predictable assessments, the Commission seeks to improve how quickly employees will be able to receive certain simple, common accommodations for pregnancy under the PWFA and thereby reduce litigation.

95. The Commission emphasizes that the predictable assessments provision does not alter the meaning of the term ''reasonable accommodation'' or ''undue hardship.'' Employers should still conduct an individualized assessment when one of these accommodations is requested by a pregnant employee to determine if the requested accommodation causes an undue hardship, and employers may still bring forward facts to demonstrate that the proposed accommodation imposes an undue hardship for its business under its own particular circumstances. Instead, the provision informs covered entities that the individualized assessment of whether one of the straightforward and simple modifications listed in paragraphs (j)(4)(i) through (iv) is a reasonable accommodation that would cause undue hardship will, in virtually all cases, result in a determination that the four modifications are reasonable accommodations that will not impose an undue hardship under the PWFA when they are requested as workplace accommodations by an employee who is pregnant.

96. Examples Regarding Predictable Assessments:

Example #48/Predictable Assessments: Amara, a quality inspector for a manufacturing company, experiences painful swelling in her legs, ankles, and feet during the final 3 months of her pregnancy. Her job requires standing for long periods of time, although it can be performed sitting as well. Amara asks the person who assigns her daily work for a stool to sit on while she performs her job. Amara's swelling in her legs and ankles is a physical or mental condition related to, affected by, or arising out of pregnancy. Amara's request is for a modification that will virtually always be a reasonable accommodation that does not impose an undue hardship. The employer argues that it has never provided a stool to any other worker who complained of difficulty standing, but points to nothing that suggests that this modification is not reasonable or that it would impose an undue hardship on the operation of the employer's business. The employer has not established that providing Amara a stool imposes an undue hardship.

Example #49/Predictable Assessments: Jazmin, a pregnant teacher who typically is only able to use the bathroom when her class is at lunch, requests additional bathroom breaks during her sixth month of pregnancy. Jazmin's need for additional bathroom breaks is a physical or mental condition related to, affected by, or arising out of pregnancy. The employer argues that finding an adult to watch over the Jazmin's class when she needs to take a bathroom break imposes an undue hardship. However, there are several teachers in nearby classrooms, aides in some classes, and an administrative assistant in the front office, any of whom, with a few minutes' notice, would be able to provide supervision either by standing in the hallway between classes or sitting in Jazmin's classroom to allow Jazmin a break to use bathroom. The employer has not established that providing Jazmin with additional bathroom breaks imposes an undue hardship.

Example #50/Predictable Assessments: Addison, a clerk responsible for receiving and filing construction plans for development proposals, needs to maintain a regular intake of water throughout the day to maintain a healthy pregnancy. They ask their manager if an exception can be made to the office policy prohibiting liquids at workstations. Addison's need to maintain a regular intake of water is a physical or mental condition related to, affected by, or arising out of pregnancy. Here, although the manager decides against allowing Addison to bring water into their workstation, he proposes that a table be placed just outside the workstation and gives permission for Addison to access water placed on the table as needed. The employer has satisfied its obligation to provide a reasonable accommodation.

Undue Hardship—Consideration of Prior or Future Accommodations

97. An employer may consider the current impact of past and current cumulative costs or burdens of accommodations that have already been granted to other employees or the same employee, when considering whether a new request for the same or a similar accommodation imposes an undue hardship. For example, where an employer is already allowing two of the three employees who are able to open the store to arrive after opening time on certain days, it could pose an undue hardship to grant the accommodation of a delayed arrival time to the third employee on those same days.

98. The fact that an employer has provided the same or similar accommodations in the past may indicate that the accommodation can be provided without causing an undue hardship. Additionally, even if an employer previously failed to provide an employee a similar type of accommodation, if the employer intends to assert that providing the accommodation to another employee would pose an undue hardship, the employer should engage in the interactive process with the employee regarding the currently requested accommodation and determine whether the same conditions that previously imposed an undue hardship still exist. Ultimately, whether a particular accommodation will impose an undue hardship for an employer is determined on a case-by-case basis.

99. While an employer may consider the impact of prior accommodations granted to the employee currently seeking an accommodation, the mere fact that an employee previously received an accommodation or, indeed, several accommodations, does not establish that it would impose an undue hardship on the employer to grant a new accommodation.

100. Thus, for example, the fact that an employer already has provided an employee with an accommodation, such as the

[118] The term ''predictable assessments'' also is seen in the ADA regulations, where it applies to establishing coverage. In the ADA, ''predictable assessments'' are impairments that will ''in virtually all cases'' be considered a disability covered by the ADA. 29 CFR 1630.2(j)(3). As used in this PWFA rule, however, the term relates to accommodations, not limitations or disabilities.

[119] The first and fourth categories of predictable assessments are related but separate. The first category of accommodations addresses an employee's ability to carry water on the employee's person while they perform their job duties, or their ability to have water nearby while working, without requiring the employee to take a break to access and drink it. The fourth category of accommodations addresses an employee's ability to take additional, short breaks in performing work (either at the employee's work location or a break location) to eat and drink (including beverages that are not water). Additionally, depending on the worksite, any employee may be able to eat or drink at the work location without taking a break.

[120] As explained in the NPRM, the Commission identified these modifications based on the legislative history of the PWFA and analogous State laws. 88 FR 54734.

temporary suspension of an essential function due to their pregnancy, does not establish that providing this accommodation due to a post-pregnancy limitation would be an undue hardship. Instead, the employer would have to provide evidence showing that continuing the temporary suspension would impose an undue hardship. This showing could include, for example, evidence demonstrating why and how the cumulative impact of having already provided the accommodation during pregnancy makes the current impact of providing it post-pregnancy rise to the level of significant difficulty or expense.

101. A covered entity cannot demonstrate that a reasonable accommodation imposes an undue hardship based on the possibility—whether speculative or near certain—that it will have to provide the accommodation to other employees in the future.[121] Relatedly, a covered entity that receives numerous requests for the same or similar accommodations at the same time (for example, parking spaces closer to the factory) cannot fail to provide all of them simply because processing the volume of current or anticipated requests is, or would be, burdensome or because it cannot grant all of them. Rather, the covered entity must evaluate and provide reasonable accommodations on a case-by-case basis unless, or until, doing so imposes an undue hardship.

102. Finally, for the purposes of an employer asserting undue hardship based on the impact of prior or future accommodations, as with any assertion of an undue hardship, ''[g]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' [122]

Undue Hardship and Safety

103. An employer's contention that the accommodation an employee requests would cause a safety risk to co-workers or clients will be assessed under the PWFA's undue hardship standard. For example, consider a qualified pregnant employee in a busy fulfillment center that has narrow aisles between the shelves of products. The employee asks for the reasonable accommodation of a cart to use while they are walking through the aisles filling orders. The employer's assertion that the aisles are too narrow and its concern for the safety of other workers being bumped by the cart could be raised as a defense based on undue hardship, specifically § 1636.3(j)(2)(v), but the employer will have to demonstrate that the accommodation would actually pose an undue hardship.

104. If a particular reasonable accommodation causes an undue hardship because of safety, just as with any other situation where an employer cannot provide the requested accommodation, the employer must provide an alternative reasonable accommodation, if there is one available that does not impose an undue hardship. Importantly, assertions by employers that employees create a safety risk merely by being pregnant (as opposed to a safety risk that stems from an accommodation for a pregnancy-related limitation) should be addressed under Title VII's bona fide occupational qualification (BFOQ) standard and not under the PWFA.[123]

1636.3(k) Interactive Process

105. The PWFA states that the interactive process will typically be used to determine an appropriate reasonable accommodation.[124] Section 1636.3(k) largely adopts the explanation of the interactive process in the regulation implementing the ADA.[125] Section 1636.3(k) defines the interactive process as an informal, interactive process and states that the process should identify the known limitation and the adjustment or change at work that is needed due to the limitation, if either of these are not clear from the request, as well as potential reasonable accommodations.

106. There are no rigid steps that must be followed when engaging in the interactive process under the PWFA, and information provided by the employee does not need to be in any specific format, include specific words, or be on a specific form.

107. In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation so that the interactive process can be a brief discussion. The request and granting of the accommodation can occur in a single informal conversation or short email exchange.[126]

108. Examples Regarding the Interactive Process:

Example #51/Interactive Process: Marge works at an assembly plant. She is 5 weeks pregnant. She knows that staying hydrated is important during pregnancy. She texts her supervisor that she is pregnant and that she needs to carry water with her and use the bathroom more frequently. Her supervisor explains how Marge can call for a substitute when she needs a break, and Marge uses that system when she needs to drink water or go to the bathroom.

Example #52/Interactive Process: Launa is a customer service representative. She is 6 weeks pregnant. Some mornings she has morning sickness. She has found that eating small amounts during the morning helps to control it. Launa uses the company's internal message system to tell her supervisor that she is pregnant and either needs to take breaks to eat or needs to eat in her cubicle, and that she may need a break if she is feeling nauseous. Her supervisor agrees.

109. In some instances, for example to determine an appropriate reasonable accommodation, the employer and employee may engage further in the interactive process. The process is not composed of rigid steps but is an opportunity for the covered entity and employee to participate in a dialogue to quickly identify a reasonable accommodation that enables the employee to address their limitation through a reasonable accommodation that does not pose an undue hardship. The interactive process also may provide an opportunity for the covered entity and the employee to discuss how different accommodations will provide the employee with equal employment opportunity and what accommodation the employee prefers.[127]

110. While the interactive process is an informal exchange of information, there are still certain rules that apply. The ADA restrictions on when employers are permitted to ask disability-related questions and require medical examinations apply to all such inquiries or examinations, whether employers make them of people with or without disabilities, including questions that an employer asks during the interactive process under the PWFA.[128] For example, an employer who requires an employee who requests an accommodation due to a pregnancy-related limitation to fill out a form identifying their physical and mental impairments would have difficulty demonstrating that this disability-related inquiry is job-related and consistent with business necessity, as required by the ADA.[129] Further, if a covered entity has sufficient information from the employee to determine whether they have a PWFA limitation and need an adjustment or change at work due to the limitation, requiring the

[121] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at n.113.

[122] *See id.,* text at n.113.

[123] *See, e.g., UAW* v. *Johnson Controls,* 499 U.S. 187, 211 (1991) (striking down the employer's fetal protection policy that limited the opportunities of women); *Everts* v. *Sushi Brokers LLC,* 247 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2017) (relying on *Johnson Controls* and denying BFOQ defense in a case regarding a pregnant employee as a restaurant server, noting that, ''[u]nlike cases involving prisoners and dangers to customers where a BFOQ defense might be colorable, the present situation is exactly the type of case that Title VII guards against''); *EEOC* v. *New Prime, Inc.,* 42 F. Supp. 3d 1201, 1213–14 (W.D. Mo. 2014) (relying on *Johnson Controls* and denying a policy allegedly in place for the ''privacy'' and ''safety'' of women employees was a BFOQ); *Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(B)(1)(c).

[124] 42 U.S.C. 2000gg(7).

[125] *See* 29 CFR 1630.2(o)(3).

[126] 42 U.S.C. 2000gg–1(2) (§ 1636.4(b)) prohibits a covered entity from requiring a qualified employee with a PWFA limitation to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.

[127] During the interactive process, especially if it is lengthened due to, for example, equipment being ordered or the employee waiting for information from or an appointment with a health care provider, the employer should determine how to address the employee's needs while the interactive process is ongoing. *See, e.g., Enforcement Guidance on Reasonable Accommodation, supra* note 12, at n.89 (discussing a situation when the employee is waiting for reassignment). The Commission has discussed a similar situation with regard to postponing an employee's evaluation pending the employee receiving a requested reasonable accommodation. EEOC, *Technical Assistance on Applying Performance and Conduct Standards to Employees with Disabilities,* Examples 8 & 11 (2008) *https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities. See also supra* in the Interpretive Guidance in section *1636.3(h)* under *Interim Reasonable Accommodations.*

[128] *See* 42 U.S.C. 12112(d); 29 CFR 1630.13, 1630.14.

[129] 42 U.S.C. 12112(d)(4)(A); 29 CFR 1630.14(c).

employee to provide additional information could be a violation of the PWFA's anti-retaliation provision (42 U.S.C. 2000gg–2(f)) (§ 1636.5(f)) or the PWFA's prohibition on taking adverse action in response to a request for reasonable accommodation (42 U.S.C. 2000gg–1(5)) (§ 1636.4(e)). If an employer decides to seek supporting documentation in response to a request for a PWFA reasonable accommodation, the restrictions limiting supporting documentation set forth in § 1636.3(l) apply. Finally, any medical information obtained during the interactive process under the PWFA must be maintained on separate forms and in separate medical files and be treated as a confidential medical record, in accordance with the ADA's rules on the confidentiality of medical information, as explained in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.* Of particular relevance to the PWFA, the fact that an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information. Similarly, disclosing that an employee is receiving or has requested an accommodation under the PWFA or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA, usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition.

Recommendations for an Interactive Process

111. Appropriate reasonable accommodations are best determined through a flexible interactive process that includes both the employer and the employee with the known limitation. Employers and employees may use some of the steps noted in paragraph 112 of this section, if warranted, to address requests for reasonable accommodations under the PWFA, but the Commission emphasizes that, as under the ADA, a covered entity and an employee do not have to complete all or even some of these steps. The Commission expects that typically a simple conversation will be sufficient for employers to obtain all the information needed to determine the appropriate reasonable accommodation. As with the ADA, a covered entity should respond expeditiously to a request for reasonable accommodation and act promptly to provide the reasonable accommodation.[130]

112. If an employer has not obtained enough information to determine the appropriate reasonable accommodation through the initial request or a simple conversation or email exchange, the flexible interactive process may continue. For example, when an employee with a known limitation has requested a reasonable accommodation regarding the performance of the essential functions of the job, the covered entity, using a problem-solving approach, may, as needed:

a. Analyze the particular job involved and determine its purpose and essential functions;

b. Consult with the employee with a known limitation to ascertain what kind of accommodation is necessary given the known limitation;

c. In consultation with the employee with the known limitation, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions of the position. If the employee's limitation means that they are temporarily unable to perform one or more essential functions of the position, the parties also must consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary and the employee could perform the essential function(s) in the near future; and

d. Consider the preference of the employee to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the covered entity.[131]

113. Steps (b) to (d) outlined in paragraph 112 of this section can be adapted and applied to requests for reasonable accommodations related to the application process and to benefits and privileges of employment. In those situations, in step (c), the consideration should be how to enable the applicant with a known limitation to be considered for the position in question or how to provide an employee with a known limitation with the ability to enjoy equal benefits and privileges of employment.

114. In some instances, neither the employee requesting the accommodation nor the covered entity may be able to readily identify an appropriate accommodation. For example, an applicant needing an accommodation may not know enough about the equipment used by the covered entity or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the covered entity may not know enough about an employee's known limitation and its effect on the performance of the job to suggest an appropriate accommodation. In these situations, the steps in paragraph 112 of this section may be helpful as part of the employer's reasonable effort to identify the appropriate reasonable accommodation. In addition, parties may consult outside resources such as State or local entities, non-profit organizations, or the Job Accommodation Network (JAN) for ideas regarding potential reasonable accommodations.[132]

Engaging in the Interactive Process

115. A covered entity's failure to engage in the interactive process, in and of itself, is not a violation of the PWFA, just as it is not a violation of the ADA. However, a covered entity's failure to initiate or participate in the interactive process with the employee after receiving a request for reasonable accommodation could result in liability if the employee does not receive a reasonable accommodation even though one is available that would not have posed an undue hardship.[133] Relatedly, an employee's unilateral withdrawal from or refusal to participate in the interactive process can constitute sufficient grounds for failing to provide the reasonable accommodation.[134]

116. In situations where employers are permitted to seek supporting documentation, because employees may experience difficulty obtaining appointments with health care providers, especially early in pregnancy, the covered entity should be aware that it may take time for the employee to find a health care provider and provide documentation. Delay caused by the difficulty an employee faces in obtaining information from a health care provider in these circumstances should not be considered a withdrawal from or refusal to participate in the interactive process. If there is such a delay, an employer should consider providing an interim reasonable accommodation.

117. As set out in Example #53 of this appendix, if an employee requests an accommodation but then is unable to engage in the interactive process because of an emergency, an employer should not penalize the employee but rather should wait and restart the interactive process once the employee returns.

Example #53/Interruption of Interactive Process: Beryl is a quality control inspector at a labware manufacturing plant. She is in the early stage of pregnancy, and Beryl's employer does not know that she is pregnant. In the middle of her shift, Beryl suddenly experiences cramping and bleeding. She tells her supervisor that she thinks she is having a miscarriage and needs to leave. The next afternoon, Beryl's partner calls the supervisor and explains that Beryl will be resting at home for the next 24 hours. Following time at home, Beryl returns to the workplace and follows up with her supervisor regarding her emergency departure.

The bleeding and cramping Beryl experienced is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, and Beryl identified an adjustment or change needed at work (leave). Thus, Beryl made a request for a reasonable accommodation under the PWFA, and it serves to start the PWFA interactive process.

The employer received Beryl's request, but the interactive process was interrupted by the emergency situation that required immediate action. The interactive process resumed when Beryl's partner spoke with the supervisor and provided further information regarding Beryl's condition. When Beryl spoke with her supervisor upon her return, she reengaged in the interactive process. Through this continued conversation, the

[130] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 10. Following the steps laid out for the interactive process is not a defense to liability if the employer fails to provide a reasonable accommodation that it could have provided absent undue hardship.

[131] *See* 29 CFR part 1630, appendix, 1630.9.

[132] *See* JAN, *supra* note 107. *See also* U.S. Dep't of Lab., Occupational Safety & Health Admin., *Ergonomics–Solutions to Control Hazards, https://www.osha.gov/ergonomics/control-hazards* (last visited Apr. 3, 2024); U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Reproductive Health and The Workplace, https://www.cdc.gov/niosh/topics/repro/* (last reviewed May 1, 2023).

[133] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 6.

[134] *See id.*

employer was able to gather sufficient information to determine that Beryl had a limitation under the PWFA and was entitled to a reasonable accommodation. The employer must grant Beryl leave for the time she took off because of her miscarriage unless it can establish that doing so would be an undue hardship. Moreover, if the employer is one that automatically assigns points or penalizes employees for unexcused absences, Beryl should not be penalized for using the leave because she was entitled to the accommodation of leave.[135]

1636.3(l) Limits on Supporting Documentation

118. A covered entity is not required to seek supporting documentation from an employee who requests an accommodation under the PWFA. If a covered entity decides to seek supporting documentation, the covered entity is permitted to do so only when reasonable under the circumstances to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. When seeking documentation is reasonable, the employer is limited to seeking documentation that itself is reasonable.

119. The restrictions on a covered entity seeking supporting documentation are enforceable through different parts of the PWFA. As set out in § 1636.4(a)(3), as part of 42 U.S.C. 2000gg–1(1), a covered entity may not fail to provide a reasonable accommodation based on the employee's failure to provide supporting documentation if the covered entity's request for supporting documentation violates the standards set out in § 1636.3(l). Moreover, as discussed in section *1636.5(f)* of this appendix under *Possible Violations of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information,* a covered entity may violate the PWFA's retaliation provisions by seeking documentation or information in circumstances beyond those that are permitted under § 1636.3(l). This is the case whether or not the employee provides the documentation or information sought by the employer and whether or not the employer grants the accommodation.

120. In addition to the PWFA regulation, covered entities are reminded that the ADA's limitations on disability-related inquiries and medical exams apply to all ADA-covered employers.[136] These ADA limitations protect all of the covered entity's employees whether they have disabilities or not and whether they are seeking an ADA reasonable accommodation or not. Thus, employers responding to reasonable accommodation requests under the PWFA should be mindful of the ADA's limitations on the employer's ability to make disability-related inquiries or require medical exams in response to these requests.[137] For example, separate from requirements imposed by the PWFA and § 1636.3(l), a covered entity may not ask an employee who requests an accommodation under the PWFA if the employee has asked for other reasonable accommodations in the past or whether the employee has preexisting conditions, because these questions are disability-related inquiries, *i.e.,* questions that are likely to elicit disability-related information, and they are not job-related and consistent with business necessity in these circumstances. Further, an employer may not require that an employee seeking an accommodation under the PWFA complete specific forms that ask for information regarding ''impairments'' or ''major life activities.'' These are disability-related inquiries and, because they are not job-related and consistent with business necessity in these circumstances, they would violate the ADA.

121. The Commission notes that pregnant employees may experience limitations and, therefore, require accommodations, before they have had any pregnancy-related medical appointments. Pregnant employees also may experience difficulty obtaining an immediate appointment with a health care provider early in a pregnancy or finding a health care provider at all. The Commission encourages employers who choose to seek supporting documentation, when that is permitted under § 1636.3(l), to consider the best practice of granting interim reasonable accommodations if an employee indicates that they have tried to obtain documentation and it will be provided at a later date.

1636.3(l)(1) Seeking Supporting Documentation Only When Reasonable Under the Circumstances

122. The Commission expects that most PWFA interactive processes will consist of simple exchanges of information between employees and employers, such as brief conversations or emails, and that many of these will be concluded very shortly after the employee with a known limitation requests a reasonable accommodation, without any requests for further information. Once an employer has determined an appropriate reasonable accommodation, such as through these types of simple communications, no further interactive process is necessary.

123. The PWFA does not require employers to seek supporting documentation from employees requesting accommodations. Under the PWFA, a covered entity may seek supporting documentation only if it is reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.

124. Under § 1636.3(l), situations when it would be reasonable under the circumstances for a covered entity to seek supporting documentation include, for example, if a pregnant employee asks for the temporary suspension of an essential function(s) that involves climbing ladders due to dizziness and the danger of falling, then the employer may, but is not required to, seek reasonable documentation, which is the minimum that is sufficient to confirm the physical or mental condition—*i.e.,* dizziness and increased risk related to falling; confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together ''a limitation''); and describe the adjustment or change at work needed due to the limitation—*i.e.,* how high the employee may climb, the types of actions the employee should avoid, and how long the modification will be needed. As another example, if an employee requests an accommodation for a known limitation but has only a vague idea of what type of accommodation would be effective and the employer also does not know of a potential accommodation, it would be reasonable under the circumstances for the employer to seek supporting documentation describing the adjustment or change at work needed due to the limitation to help identify the needed accommodation. The employer also may consult resources such as JAN.[138]

125. Section 1636.3(l) provides five examples of when it would not be reasonable under the circumstances for the employer to seek supporting documentation.

1636.3(l)(1)(i)—Obvious

126. Under the PWFA, it is not reasonable under the circumstances for an employer to seek supporting documentation when the physical or mental condition related to, affected by, or arising out of the pregnancy, childbirth, or related medical conditions (the limitation) and the adjustment or change at work that is needed due to the limitation are obvious.

127. In practice, the Commission expects this example will usually apply when the

[135] There also may be other types of situations where the employer is on notice of the need for accommodation but then the interactive process is interrupted. *See, e.g., King* v. *Steward Trumbull Mem'l Hosp., Inc.,* 30 F.4th 551, 568 (6th Cir. 2022) (''Anti-discrimination laws sometimes require employers to accommodate unexpected circumstances. Sudden illnesses and episodic flare-ups are, by nature, difficult to plan for and can be quite disruptive to those who fall ill and those around them. But that does not mean that accommodating a sudden flare-up will cause undue hardship merely because handling these situations requires more flexibility.'')

Some workplace attendance policies explicitly provide for unexpected absences by, for example, not penalizing workers who experience an emergency health situation. *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text accompanying n.74. Providing this type of leave to some workers but not to workers affected by pregnancy, childbirth, or related medical conditions could be a violation of Title VII. Finally, if the worker does not qualify for coverage under the PWFA, there may be other laws, like the ADA or the FMLA, that would apply.

[136] The PWFA and title I of the ADA apply to the same entities. Therefore, all entities covered by title I of the ADA also are covered by the PWFA.

[137] For further discussion of this topic, *see infra* section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.*

[138] *See* JAN, *supra* note 107.

employee is obviously pregnant.[139] Whether someone is ''obviously'' pregnant can depend on a number of factors, and not everyone who is pregnant looks the same, but there is a large subset of pregnant workers who most individuals would agree are ''obviously'' pregnant, *i.e.,* the pregnancy is showing and onlookers easily notice by looking. To limit problems that can arise in some instances when employers attempt to determine if someone is pregnant by looking at them, the regulation requires the employee to confirm the limitation and the adjustment or change at work needed due to the limitation through self-confirmation as defined in § 1636.3(l)(4). This may happen in the same conversation where the employee requests an accommodation.

128. Thus, for example, when an obviously pregnant employee confirms they are pregnant and asks for a different size uniform or related safety gear, the limitation and the adjustment or change at work needed due to the limitation are obvious, and the employer may not seek supporting documentation. In situations where some information is obvious and other information is not, the employer may seek supporting documentation relevant only to the non-obvious issue. Thus, if an obviously pregnant employee requests the reasonable accommodation of leave related to childbirth and recovery and confirms that they are pregnant, it may be reasonable under the circumstances for the employer to seek supporting documentation about the length of leave for recovery, but it would not be reasonable to seek supporting documentation regarding the limitation. Of course, the employer does not have to seek supporting documentation and can simply engage the employee in a discussion about how much leave the employee will need and when they will need it.

1636.3(l)(1)(ii)—Known

129. The second example of when it would not be reasonable to seek supporting documentation is when the employer already has sufficient information to determine that the employee has a PWFA limitation and the adjustment or change at work needed due to the limitation. For example, if an employee already provided documentation stating that because of their recent cesarean section they should not lift over 20 pounds for 2 months, the employer may not seek further supporting documentation during those 2 months because the employer already has sufficient information.[140]

130. This principle also applies to episodic conditions. If an employer already has sufficient information to determine that the employee has a PWFA limitation that is episodic (*e.g.,* migraines that are related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions), and the adjustment or change at work needed periodically due to the limitation (breaks or time off), the employer cannot seek additional or new supporting documentation every time the condition arises.

1636.3(l)(1)(iii)—Predictable Assessments

131. The third example of when it is not reasonable under the circumstances for an employer to seek supporting documentation is based on the common types of pregnancy modifications sought under the PWFA. Specifically, it is not reasonable under the circumstances for an employer to seek supporting documentation when an employee, at any time during their pregnancy, seeks one of the following modifications, due to their pregnancy: (1) carrying or keeping water near for drinking, as needed; (2) taking additional restroom breaks, as needed; (3) sitting, for those whose work requires standing, and standing, for those whose work requires sitting, as needed; and (4) taking breaks to eat and drink, as needed. In these situations, an employee must provide self-confirmation as defined in § 1636.3(l)(4). Example #10 of this appendix shows how this can be part of the request for an accommodation. It is not reasonable to seek supporting documentation when an employee is pregnant, seeks one of the four listed modifications, and provides self-confirmation as defined in paragraph (l)(4) because these are a small set of commonly sought modifications that are widely known to be needed during an uncomplicated pregnancy.

1636.3(l)(1)(iv)—Lactation

132. The fourth example of when it is not reasonable under the circumstances to seek supporting documentation concerns lactation and pumping at work or nursing during work hours. Specifically, it is not reasonable under the circumstances to seek supporting documentation when the reasonable accommodation is related to a time and/or place to pump or any other modification related to pumping at work,[141] and the employee has provided a self-confirmation as set out in § 1636.3(l)(4). Likewise, it is not reasonable under the circumstances to seek supporting documentation when the reasonable accommodation is related to time to nurse during work hours when the regular location of the employee's workplace makes nursing during work hours a possibility because the child is in close proximity and the employee has provided self-confirmation as set out in paragraph (l)(4).[142]

133. It is not reasonable to seek supporting documentation regarding pumping or nursing at work because lactation beginning around or shortly after birth is an obvious fact. Additionally, and pragmatically, health care providers may not be able to provide supporting documentation about the details of how a specific employee is managing nursing or pumping, as this is not something necessarily discussed with a health care provider. This example does not, however, apply to all reasonable accommodations related to lactation; thus, this example would not apply if a lactating employee requested full-time remote work due to a condition that makes pumping difficult.

1636.3(l)(1)(v)—Employer's Own Policies or Practices

134. The fifth example of when it would not be reasonable under the circumstances for a covered entity to seek supporting documentation relates to an employer's own policies or practices. If the requested accommodation is one that is available to employees without known limitations pursuant to the covered entity's policies or practices without submitting supporting documentation, then it is not reasonable for the employer to seek supporting documentation from an employee seeking a similar accommodation under the PWFA. For example, if an employer has a policy or practice of requiring supporting documentation only for the use of leave for 3 or more consecutive days, it would not be reasonable to ask someone who is using the same type of leave due to a known limitation under the PWFA to submit supporting documentation when they request leave for 2 or fewer days.[143]

1636.3(l)(2) Reasonable Documentation

135. Under the PWFA, reasonable accommodations are available for physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, the covered entity is limited to seeking documentation that is itself reasonable. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, the covered entity may require that the supporting documentation come from a health care provider.

136. Confirming the physical or mental condition requires only a simple statement that the physical or mental condition meets the first part of the definition of ''limitation'' at § 1636.3(a)(2), (*i.e.,* the physical or mental condition is: an impediment or problem, including ones that are modest, minor, or episodic; a need or a problem related to maintaining the health of the employee or the pregnancy, or that the employee is seeking

[139] ''Obvious'' means that the condition is apparent without being mentioned. In terms of pregnancy itself, this may depend on physical appearance, *i.e.,* whether the pregnancy is ''showing.'' This is a concept that the Commission has used previously regarding pregnancy discrimination. *Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(A)(1)(a) (discussing the ''obviousness'' of pregnancy and a discrimination claim).

[140] This example does not mean that when it is otherwise reasonable in the circumstances to seek supporting documentation, an employer is prohibited from doing so because the employee has simply stated that they have a limitation and need an adjustment or change at work due to the limitation. However, the employer also is not required to seek documentation and can accept the employee's statement.

[141] *See supra* note 102 for discussion of the PUMP Act and the types of accommodations that may be requested with regard to pumping.

[142] ''Nursing during work hours'' could include, for example, when an employee who always teleworks from home and has their child at home takes a break to nurse the child, or when an employee takes a break to travel to a nearby daycare center to nurse.

[143] Conversely, if regular employer policies or practices would require documentation when the PWFA would not, or would require more documentation than the PWFA would allow in a situation where the employee is requesting an accommodation under the PWFA, the PWFA's restrictions on supporting documentation would apply.

health care related to the pregnancy, childbirth, or a related medical condition itself).[144] The physical or mental condition can be a PWFA limitation whether or not such condition is an impairment or a disability under the ADA.[145] Some examples of physical or mental conditions that could be limitations are that the employee: has a back injury; has swollen ankles; is experiencing vomiting; has a lifting restriction; is experiencing fatigue; should not be exposed to a certain chemical; should avoid working in the heat; needs to avoid certain physical tasks such as walking, running, or physical confrontation because of increased risk; needs to attend a health care appointment; or needs to recover from a health care procedure. Because the physical or mental condition can be something like fatigue or vomiting, there is no need for the statement to contain a medical diagnosis. Thus, documentation is sufficient under § 1636.3(l)(2) even if it does not contain a medical diagnosis, as long as it has a simple statement of the physical or mental condition.

137. The supporting documentation should confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The supporting documentation need not state that the pregnancy, childbirth, or related medical conditions are the sole, the original, or a substantial cause of the physical or mental condition at issue because the statute only requires that the physical or mental condition be ''related to, affected by, or arising out of'' pregnancy, childbirth, or related medical conditions.[146] If relevant, the documentation should include confirmation that the ''related medical condition'' is related to pregnancy or childbirth.

138. The employer also may seek reasonable documentation to describe the adjustment or change at work that is needed due to the limitation and an estimate of the expected duration of the need for the adjustment or change. This may be, for example: no heavy lifting for approximately 4 months; cannot stand for more than 30 minutes at a time until the end of the pregnancy; the maximum amount of weight involved in the lifting restriction and the approximate length of the restriction; the approximate number of and length of breaks; the kind of support or equipment needed and for approximately how long; a change in the type of protective equipment or ventilation needed and for approximately how long it will be needed; the need to limit movement and be allowed to lie down when necessary and for approximately how long the employee will need to limit movement; a change in work location and the approximate length of time of the change; a period of leave expected to be needed for recovery or to attend health care appointments; or the essential function(s) that should be temporarily suspended and for how long.

139. Where the supporting documentation meets the standards described in this section, it is sufficient to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation. Accordingly, a covered entity that has received sufficient documentation but fails to provide an accommodation based on the failure to provide sufficient documentation, or continues to seek additional documentation or information, risks liability under 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(3)) and/or 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).

140. Examples Regarding Documentation:[147]

Example #54/Reasonable Documentation: Amelia recently returns to work after giving birth and recovery from childbirth. Amelia requests that she not be required to lift more than 30 pounds due to a back injury arising out of her pregnancy. Amelia's employer can use the interactive process to identify Amelia's limitation and what accommodation will address her limitation. Amelia's employer may, but is not required to, seek supporting documentation; in this situation, the employer decides to seek supporting documentation from Amelia. At Amelia's request, her obstetrician emails the human resources department, explaining that Amelia's recent pregnancy has caused a back injury and that she should avoid lifting more than 30 pounds for approximately the next 3 months. This is sufficient documentation to confirm that Amelia has a limitation—a physical or mental condition (a back injury, which is an impediment or problem) related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions—and to describe an adjustment or change at work that is needed due to the limitation (avoid lifting more than 30 pounds for approximately the next three months). Because this is sufficient documentation, the covered entity failing to provide Amelia an accommodation based on a lack of documentation may violate 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(3)), and the covered entity trying to obtain additional documentation or information related to Amelia's request for a reasonable accommodation may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).

Example #55 Reasonable Documentation: Rachna is 6 months pregnant and has just learned that she has preeclampsia. She requires limited activity and bed rest for the remainder of her pregnancy to limit the risks to her health and the health of her pregnancy. Rachna's employer can use the interactive process to identify Rachna's limitation and what accommodation will address her limitation. Rachna's employer may, but is not required to, seek supporting documentation; in this situation, the employer decides to seek supporting documentation from Rachna. Rachna provides her employer with a note from her midwife saying that, because of risks related to her health and the health of her pregnancy, Rachna needs to limit activities that involve sitting or standing, needs bed rest as much as possible, and should not commute to work for the remaining 3 months of her pregnancy. This is sufficient documentation to confirm that Rachna has a limitation—a physical or mental condition (maintaining the health of the employee or the employee's pregnancy) related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions—and to describe the change at work that is needed (limiting activities involving sitting and standing, lying down as much as possible, and not commuting for the remainder of her pregnancy). Because this is sufficient documentation, the covered entity failing to provide Rachna an accommodation based on a lack of documentation may violate 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)(3)), and the covered entity trying to obtain additional documentation or information related to her request for a reasonable accommodation may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).

141. Because a covered entity is limited to the minimum supporting documentation necessary, a covered entity may not require that a pregnancy be confirmed through a specific test or method. Moreover, such a requirement could implicate the ADA's provisions that medical examinations only are permitted when they are job-related and consistent with business necessity.[148]

142. Additionally, covered entities may not require that supporting documentation be submitted on a specific form, but only that documentation meets the requirements of § 1636.3(l)(2). If covered entities offer an optional form for employees to use in submitting supporting documentation, the covered entities may wish to review preexisting forms they have for reasonable accommodations or leave to ensure their compliance with the PWFA. For example, the PWFA does not require that an employee have a ''serious health condition'' and the statute does not use the term ''major life activity,'' so employer forms or other employer communications seeking supporting documentation for PWFA-related reasonable accommodations should not use this terminology.

1636.3(l)(3) Limitations on a Covered Entity Seeking Supporting Documentation From a Health Care Provider

143. When it is reasonable under the circumstances for the covered entity to seek supporting documentation, a covered entity may require that the supporting documentation comes from a health care provider. The regulation contains a non-exhaustive list of possible health care providers that is based on the non-exhaustive list provided in the Commission's ADA policy guidance.[149]

144. The covered entity may not require that the health care provider who is submitting documentation be the provider treating the employee for the condition at issue, as long as the health care provider is able to confirm the physical or mental

[144] Section 1636.3(a)(2).

[145] 42 U.S.C. 2000gg(4); *see* 29 CFR 1630.3(h).

[146] 42 U.S.C. 2000gg(4); *see supra* in section *1636.3(a)(2)* of this appendix under *Related to, Affected by, or Arising Out of*.

[147] The conditions described in these examples also may be disabilities under the ADA and therefore may entitle the employee to an accommodation under the ADA, regardless of whether they are entitled to one under the PWFA.

[148] 42 U.S.C. 12112(d)(4)(A).

[149] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 6.

condition; confirm that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together ''a limitation''); and describe the adjustment or change at work that is needed due to the limitation. The covered entity may not require that an employee be examined by a health care provider of the covered entity's choosing.

1636.3(l)(4) Self-Confirmation of Pregnancy or Lactation

145. For the purposes of supporting documentation under the PWFA, self-confirmation is a simple statement in which the employee confirms, as set forth in § 1636.3(l)(1)(i), (iii) and (iv), the limitation and adjustment or change that is needed at work due to the limitation. The self-confirmation statement can be made in any manner and can be made as part of the request for reasonable accommodation under § 1636.3(h)(2). For example, self-confirmation may be spoken, it may be recorded or live, or it may be written on paper or electronically, such as in an email or text. Self-confirmation does not need to use any particular words or format, does not need to be written on a form, does not need to be a particular length, does not need to be notarized or otherwise verified, and does not need to be accompanied by documentary or physical evidence. In many instances, the self-confirmation will be part of what the employee communicates when they start the reasonable accommodation process. Example #10 of this appendix, where an employee tells a manager of her need for more frequent bathroom breaks and explains that the breaks are needed because the employee is pregnant, is an example of self-confirmation of pregnancy.

Interaction Between the PWFA and the ADA

146. Employers covered by the PWFA also are covered by the ADA.[150] The ADA's statutory text includes express restrictions on when a covered entity may require medical exams and make disability-related inquiries.[151] These restrictions apply to all the interactions between covered entities and their employees, regardless of whether an individual has a disability. Thus, for example, if an employee is requesting a reasonable accommodation under the PWFA, the ADA's restrictions apply and prevent an employer from seeking the employee's entire medical record or asking the employee if they have received accommodations in the past because these inquiries are likely to elicit information about a disability and are not job-related and consistent with business necessity in these circumstances. Independent of these ADA restrictions, § 1636.3(l)(2) also prohibits seeking this type of documentation under the PWFA because it goes beyond the definition of reasonable documentation. Finally, depending on the facts, seeking such information could violate 42 U.S.C. 2000gg–2(f).

147. The ADA provides for the confidentiality of medical information, subject to limited disclosure rules.[152] These rules apply to medical information in the employer's possession, including information obtained by an employer from disability-related inquiries or medical exams, or information obtained as part of the reasonable accommodation process.[153] That an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information. The ADA requires that employers keep such information confidential and only disclose it within the confines of the ADA's limited disclosure rules. Similarly, disclosing that an employee is receiving or has requested a reasonable accommodation under the PWFA usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition and thus must be treated as confidential medical information as well. This is explained further in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information.*

148. If there is a situation where an employee requests an accommodation and both the PWFA and the ADA could apply, the employer should apply the provision that it would be less demanding for the employee to satisfy. For example, assume a pregnant employee has diabetes that is exacerbated by the pregnancy and needs breaks to eat or drink. Under the PWFA, the covered entity cannot seek supporting documentation (as set forth in § 1636.3(l)(1)(iii)) and this is the provision that the employer should apply.

IV. 1636.4 Nondiscrimination With Regard to Reasonable Accommodations Related to Pregnancy

1636.4(a) Failing To Provide Reasonable Accommodation

1. The statute at 42 U.S.C. 2000gg–1(1) prohibits a covered entity from not making a reasonable accommodation for a qualified employee with a known limitation related to pregnancy, childbirth, or related medical conditions unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. This provision of the PWFA uses the same language as the ADA, and the rule likewise uses the language from the corresponding ADA regulation.[154] Because 42 U.S.C. 2000gg–1(1) uses the same operative language as the ADA, it should be interpreted in a similar manner.

2. This section is violated when a covered entity fails to make reasonable accommodation to a qualified employee with a known limitation, absent undue hardship.[155] However, a covered entity does not violate 42 U.S.C. 2000gg–1(1) merely by refusing to engage in the interactive process; for a violation, there also must have been a reasonable accommodation that the employer could have provided absent undue hardship.

1636.4(a)(1) Unnecessary Delay in Providing a Reasonable Accommodation

3. An unnecessary delay in providing a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA if the delay constitutes a failure to provide a reasonable accommodation. This can be true even if the reasonable accommodation is eventually provided, when the delay was unnecessary. Unnecessary delay that can be actionable under this section can occur at any time during the accommodation process including, but not limited to, responding to the initial request, during the interactive process, or in implementing the accommodation once the request is approved. Delay by a third-party administrator acting on behalf of the covered entity is attributable to the covered entity.

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[150] 42 U.S.C 12111(5) (ADA); 42 U.S.C. 2000gg(2) (PWFA).

[151] 42 U.S.C. 12112(d), 12112(d)(4)(A).

[152] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), (d)(4); EEOC, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA,* at text accompanying nn.9–10 (2000) [hereinafter *Enforcement Guidance on Disability-Related Inquiries*], *http://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees* (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.''); EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,* at text accompanying n.6 (1995) [hereinafter *Enforcement Guidance: Preemployment Disability-Related Questions*], *https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical. https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical* (''Medical information must be kept confidential.''). In addition, Federal agencies are covered by the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and many Federal agencies maintain equal employment opportunity records subject to a Privacy Act System of Records Notice.

[153] *See Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at General Principles (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record.'') and text after n.12 (''[T]he ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.'').

[154] *See* 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9(a).

[155] The regulation in § 1636.4, following the language in the statute, uses the phrase ''known limitations related to pregnancy, childbirth, or related medical conditions.'' 42 U.S.C. 2000gg–1(1), (3)–(5). Given the definition in the statute of ''known limitation'' (42 U.S.C. 2000gg(4)), the phrase ''known limitations related to pregnancy, childbirth, or related medical conditions'' in § 1636.4 and 42 U.S.C. 2000gg–1 should be understood to mean that the known limitations are related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions or that ''known limitations'' mean physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

4. Section 1636.4(a)(1) sets out the factors that are used when determining whether a delay in the provision of a reasonable accommodation violates the PWFA. Section 1636.4(a)(1) sets out the factors already identified in the ADA guidance [156] and adds three additional factors, described in paragraphs 5, 6, and 7 of this section.

5. First, whether providing the accommodation was simple or complex is a factor to be considered. Under the PWFA, there are certain modifications, set forth in § 1636.3(j)(4), that will virtually always be found to be reasonable accommodations that do not impose an undue hardship: (1) allowing a pregnant employee to carry or keep water near and drink, as needed; (2) allowing a pregnant employee to take additional restroom breaks, as needed; (3) allowing a pregnant employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing a pregnant employee to take breaks to eat and drink, as needed. If there is delay in providing these accommodations to a qualified employee with a known limitation, it will virtually always be found to be unnecessary because of the presumption that these modifications will be reasonable accommodations that do not impose an undue hardship.

6. Second, whether the covered entity offered the employee an interim reasonable accommodation during the interactive process is a factor to be considered. The offer of an interim reasonable accommodation can be made at any time following the request for accommodation. The provision of an interim accommodation will decrease the likelihood that an unnecessary delay will be found. Under this factor, the interim reasonable accommodation should be one that enables the employee to keep working as much as possible; the provision of leave will not be considered as a factor that can excuse delay, unless the employee selects, or requests, leave as an interim reasonable accommodation.[157]

7. Third, the length of time for which the employee will need the reasonable accommodation is another factor to be considered. Given that limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions are frequently temporary, an unnecessary delay in providing an accommodation may mean that the period necessitating the accommodation could pass without action simply because of the delay.

1636.4(a)(2) Refusing an Accommodation

8. An employee with a known limitation is not required to accept a reasonable accommodation. However, if the rejection of the reasonable accommodation results in the employee being unable to perform the essential functions of the job, the employee is not qualified. This provision mirrors the language from a similar provision in the ADA regulation,[158] with the inclusion of employees who are qualified under § 1636.3(f)(2).

1636.4(a)(3) Covered Entity Failing To Provide a Reasonable Accommodation Due to Lack of Supporting Documentation

9. A covered entity cannot defend the failure to provide an accommodation based on the lack of supporting documentation if: the covered entity did not seek supporting documentation; seeking supporting documentation was not reasonable under the circumstances as defined in § 1636.3(l)(1); the covered entity sought documentation beyond that which is reasonable as defined in § 1636.3(l)(2); or the covered entity did not provide the employee sufficient time to obtain and provide the supporting documentation sought.

1636.4(a)(4) Choosing Among Possible Accommodations

10. The covered entity must provide an effective accommodation, *i.e.,* one that meets the employee's needs or limitations. If there is more than one effective accommodation, the employee's preference should be given primary consideration.[159] However, the employer providing the accommodation has the ultimate discretion to choose among effective reasonable accommodations.[160] The employer may choose, for example, the less expensive accommodation, the accommodation that is easier for it to provide, or, generally, the accommodation that imposes the least hardship.[161] In the situation where the employer is choosing among effective reasonable accommodations and does not provide the accommodation that is the employee's preferred accommodation, the employer does not have to show that it is an undue hardship to provide the employee's preferred accommodation.

11. A covered entity's ''ultimate discretion'' in choosing a reasonable accommodation is limited by certain other considerations. First, 42 U.S.C. 2000gg–1 (§ 1636.4(a)(4)) requires that the accommodation must provide the qualified employee with a known limitation with equal employment opportunity.[162] By this, the Commission means an opportunity to attain the same level of performance, experience the same level of benefits, or otherwise enjoy the same terms, conditions, and privileges of employment as are available to the average similarly situated employee without a known limitation, which includes the individual who needs the accommodation when they are without the known limitation.[163] This may be shown by evidence of the opportunities that would have been available to the employee seeking the accommodation had they not identified a known limitation or sought an accommodation, or other evidence that tends to demonstrate that the accommodation provided to the employee did not provide equal employment opportunity. Depending on the facts, selecting the accommodation that does not provide equal opportunity could violate 42 U.S.C. 2000gg–1(1), 2000gg–1(5), or 2000gg–2(f).[164]

12. Second, 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process.

13. Third, 42 U.S.C. 2000gg–1(4) prohibits a covered entity from requiring a qualified employee with a known limitation to take leave, whether paid or unpaid, if there is a reasonable accommodation that will allow the employee to continue to work, absent undue hardship.

14. Fourth, 42 U.S.C. 2000gg–1(5) prohibits a covered entity from taking adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

15. Fifth, 42 U.S.C. 2000gg–2(f) prohibits retaliation and coercion by covered entities.

16. These limitations to the ''ultimate discretion'' of a covered entity to choose among effective accommodations are described in the discussions of §§ 1636.4(b), (d), and (e) and 1636.5(f).

17. Example Regarding Failing To Provide Equal Employment Opportunity:

Example #56/Failing To Provide Equal Employment Opportunity: Yasmin's job requires her to travel to meet with clients. Because of her pregnancy, she is not able to travel for 3 months. She asks that she be allowed to conduct her client meetings via

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[156] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 10 & n.38. The *Enforcement Guidance* notes that these are ''relevant factors'' but not that these are the only factors.

[157] The restriction on using leave as an interim accommodation is based on 42 U.S.C. 2000gg–1(4) and 2000gg–2(f).

[158] *See* 29 CFR 1630.9(d).

[159] *See* 29 CFR part 1630, appendix, 1630.9.

[160] *Id.*

[161] *Id.*

[162] *See also Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 9, Example B.

[163] *See* 29 CFR part 1630, appendix, 1630.9; 29 CFR part 1630, appendix, 1630.2(o) (explaining that reassignment should be to a position with equivalent pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time); *see also Enforcement Guidance on Reasonable Accommodation, supra* note 12, at text following n.80 (''However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.''); *cf.* EEOC, *Compliance Manual on Religious Discrimination,* (12–IV)(A)(3) (2021) [hereinafter *Compliance Manual on Religious Discrimination*], *https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination* (stating that in the context of a religious accommodation, an accommodation would not be reasonable ''if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so''); EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities,* Example 5 (2007), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities* (explaining how a worker can be a comparator for themselves).

[164] Depending on the facts, this could be a violation of Title VII's prohibition on sex discrimination as well.

video conferencing. Although this accommodation would allow her to perform her essential job functions and would not impose an undue hardship, her employer reassigns her to smaller, local accounts. Being assigned only to these accounts is not an effective accommodation because it limits Yasmin's opportunity to compete for promotions and bonuses as she had in the past. This could be a violation of 42 U.S.C. 2000gg–1(1), because Yasmin is denied an equal opportunity to compete for promotions; thus, her employer has failed to provide her a reasonable accommodation. The employer's actions also could violate 42 U.S.C. 2000gg–1(5) and 2000gg–2(f), or Title VII's prohibition against pregnancy discrimination.

1636.4(b) Requiring a Qualified Employee To Accept an Accommodation

18. The statute at 42 U.S.C. 2000gg–1(2) prohibits a covered entity from requiring a qualified employee to accept an accommodation other than any reasonable accommodation arrived at through the interactive process. Pursuant to this provision in the PWFA and § 1636.4(b), a covered entity cannot require a qualified employee to accept an accommodation such as light duty or a temporary transfer, or delay of an examination that is part of the application process, without engaging in the interactive process, even if the covered entity's motivation is concern for the employee's health or pregnancy.

19. The statute at 42 U.S.C. 2000gg–1(2) does not require that the employee have a limitation, known or not; thus, a violation of 42 U.S.C. 2000gg–1(2) could occur if a covered entity believes that a qualified employee is pregnant and decides, without engaging in the interactive process with the employee, that the employee needs a particular accommodation, and unilaterally requires the employee to accept the accommodation, even though the employee has not requested it and can perform the essential functions of the job without it. For example, this provision could be violated if an employment agency, without discussing the situation with the candidate, decides that a candidate recovering from a miscarriage needs an accommodation in the form of not being sent to certain jobs that the agency views as too physical. Similarly, a violation could result if an employer decides to excuse a qualified pregnant employee from overtime as an accommodation without the employee seeking an accommodation and the employer and the employee engaging in the interactive process.[165]

20. Additionally, a violation could occur if a covered entity receives a request for a reasonable accommodation and unilaterally imposes an accommodation that was not requested by the qualified employee without engaging in the interactive process.

21. Example Regarding Requiring an Employee To Accept an Accommodation:

Example #57/Requiring an Employee To Accept an Accommodation: Kia, a restaurant server, is pregnant. She asks for additional breaks during her shifts as her pregnancy progresses because she feels tired, and her feet are swelling. Her employer, without engaging in the interactive process with Kia, directs Kia to take host shifts for the remainder of her pregnancy, because it allows her to sit for long periods. The employer has violated 42 U.S.C. 2000gg–1(2) (§ 1636.4(b)), because it required Kia to accept an accommodation other than one arrived at through the interactive process, even if Kia's earnings did not decrease and her terms, conditions, and privileges of employment were not harmed.

Moreover, if the host shift does not provide Kia with equal terms, conditions, and privileges of employment (*e.g.,* Kia's wages decrease or Kia no longer can earn tips), the covered entity also may have violated 42 U.S.C. 2000gg–1(1) (requiring reasonable accommodation absent undue hardship); 2000gg–1(5) (prohibiting adverse action in terms, conditions, or privileges of employment); and/or 2000gg–2(f) (prohibiting retaliation) (§§ 1636.4(a) and (e) and 1636.5(f)).

22. Finally, this provision also could be violated if a covered entity has a rule that requires all qualified pregnant employees to stop a certain function—such as traveling—automatically, without any evidence that the particular employee is unable to perform that function.

1636.4(c) Denying Opportunities to Qualified Employees

23. The statute at 42 U.S.C. 2000gg–1(3) prohibits a covered entity from denying employment opportunities to a qualified employee with a known limitation if the denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions of the qualified employee. Thus, an employee's known limitation and need for a reasonable accommodation cannot be part of the covered entity's decision regarding hiring, discharge, promotion, or other employment decisions, unless the reasonable accommodation would impose an undue hardship on the covered entity.

24. This provision in the PWFA uses language similar to that of the ADA, and § 1636.4(c) likewise uses language similar to the corresponding ADA regulation.[166] Section 1636.4(c) encompasses situations where the covered entity's decision is based on the future possibility that a reasonable accommodation will be needed, *i.e.,* 42 U.S.C. 2000gg–1(3) prohibits a covered entity from making a decision based on its belief that an employee may need a reasonable accommodation in the future regardless of whether the employee has asked for one or not. Thus, under § 1636.4(c), this prohibition would include situations where a covered entity refuses to hire a pregnant applicant because the covered entity believes that the applicant will need leave to recover from childbirth, regardless of whether the covered entity knows the exact amount of leave the applicant will require, or whether the applicant has mentioned the need for leave as a reasonable accommodation to the covered entity.

1636.4(d) Requiring a Qualified Employee To Take Leave

25. A covered entity may not require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the employee's known limitations related to pregnancy, childbirth, or related medical conditions absent undue hardship.

26. This provision does not prohibit a covered entity from offering leave as a reasonable accommodation if leave is the reasonable accommodation requested or selected by the qualified employee, or if it is the only reasonable accommodation that does not cause an undue hardship. As provided in § 1636.3(i)(3), both paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave are potential reasonable accommodations under the PWFA.

1636.4(e) Adverse Action on Account of Requesting or Using a Reasonable Accommodation

27. The PWFA contains overlapping provisions that protect employees, applicants, and former employees seeking or using reasonable accommodations. Importantly, nothing in the PWFA limits which provision an employee may use to protect their rights.

28. One of these provisions is 42 U.S.C. 2000gg–1(5), which prohibits adverse action in the terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

29. The protections provided by 42 U.S.C. 2000gg–1(5) are likely to have significant overlap with 42 U.S.C. 2000gg–2(f), which prohibits retaliation. However, the PWFA's anti-retaliation provisions apply to a broader group of individuals and actions than 42 U.S.C. 2000gg–1(5) does.

30. ''Terms, conditions, or privileges of employment'' is a term from Title VII, and the Commission has interpreted it to encompass a wide range of activities or practices that occur in the workplace including, but not limited to: discriminatory work environment or atmosphere; duration of work (such as the length of an employment contract, hours of work, or attendance); work rules; job assignments and duties; and job advancement (such as training, support, and performance evaluations).[167] In addition, for the purposes of 42 U.S.C. 2000gg–1(5), ''terms, conditions, or privileges of employment'' can include hiring, discharge, or compensation.

[165] These actions also could violate Title VII's prohibition of disparate treatment based on sex. *See Enforcement Guidance on Pregnancy Discrimination, supra* note 24, at (I)(B)(1).

[166] *See* 42 U.S.C. 12112(b)(5)(B); 29 CFR 1630.9(b).

[167] 42 U.S.C. 2000e–2(a)(1); *Compliance Manual on Terms, Conditions, and Privileges of Employment, supra* note 69, at 613.1(a) (stating that the language is to be read in the broadest possible terms and providing a list of examples).

31. This provision prohibits a covered entity from taking a harmful action against a qualified employee. For example, this provision prohibits a covered entity from penalizing an employee for having requested or used an accommodation that the covered entity had granted previously.

32. Examples Regarding Adverse Action in Terms, Conditions, or Privileges of Employment:

Example #58/Adverse Action in Terms, Conditions, or Privileges of Employment: Nava took leave to recover from childbirth as a reasonable accommodation under the PWFA, and, as a result, failed to meet the sales quota for that quarter, which led to a negative performance appraisal. The negative appraisal could be a violation of 42 U.S.C. 2000gg–1(5) because Nava received it due to the use of a reasonable accommodation. If an employee receives the reasonable accommodation of leave, a production standard, such as a sales quota, may need to be prorated to account for the reduced amount of time the employee works.[168]

33. Also, an employer may violate this provision if there is more than one reasonable accommodation that does not impose an undue hardship, and the employer, after the interactive process, chooses the accommodation that causes an adverse action with respect to the terms, conditions, or privileges of employment, despite the existence of an alternative accommodation that would not do so.

Example #59/Adverse Action in Terms, Conditions, or Privileges of Employment: Ivy asks for additional bathroom breaks during the workday because of pregnancy, including during overtime shifts. After talking to Ivy, Ivy's supervisor decides Ivy should simply not work overtime, because during the overtime shift there are fewer employees and the supervisor does not want to bother figuring out coverage for Ivy's bathroom breaks, although it would not be an undue hardship to do so. As a result, Ivy is not assigned overtime and loses earnings. The employer's actions could violate 42 U.S.C. 2000gg–1(5) because Ivy suffered the adverse action of not being assigned to overtime and losing wages because she used a reasonable accommodation.

Example #60/Adverse Action in Terms, Conditions, or Privileges of Employment: Leah asks for telework due to morning sickness. Through the interactive process, it is determined that either telework or a later schedule combined with an hour rest break in the afternoon would allow Leah to perform the essential functions of her job without imposing an undue hardship. Although Leah prefers telework, the employer would rather Leah be in the office. It would not be a violation of 42 U.S.C. 2000gg–1(5) to offer Leah the schedule change/rest break, instead of telework, as a reasonable accommodation.

34. The facts set out in Examples #58 and #59 of this appendix also could violate 42 U.S.C. 2000gg–1(1) and 2000gg–2(f).

V. 1636.5 Remedies and Enforcement

1. In crafting the PWFA remedies and enforcement section, Congress recognized the advisability of using the existing mechanisms for redress of other forms of employment discrimination. The regulation at § 1636.5(a), (c), (d), and (e) follows the language of the statute.

1636.5(a) Remedies and Enforcement Under Title VII

2. The enforcement mechanisms, procedures, and remedies available to employees and others covered by Title VII apply to the PWFA.[169] Thus, employees covered by section 706 of Title VII may file charges alleging violations of the PWFA with the Commission, and the Commission will investigate them using the same process as set out in Title VII.[170] Similarly, the Commission will use the same rules to determine the time limits for filing a charge; if the State or locality in which the charge has been filed has a law prohibiting sex discrimination, pregnancy discrimination, or specifically providing accommodations for pregnancy, childbirth, or related medical conditions, the deadline to file a charge will be 300 days.[171]

1636.5(e) Remedies and Enforcement Under Section 717 of the Civil Rights Act of 1964

3. The applicable procedures and available remedies for employees covered by section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16, apply under the PWFA. Employees covered by section 717 of Title VII may file complaints with the relevant Federal agency which will investigate them, and the Commission will process appeals using the same process as set out in Title VII for Federal employees. Thus, the Commission's implementing regulations found at 29 CFR part 1614 (Federal sector equal employment opportunity) apply to the PWFA as well.

Damages

4. As with other Federal employment discrimination laws, the PWFA provides for recovery of pecuniary and non-pecuniary damages, including compensatory and punitive damages. The statute's adoption by reference of section 1977A of the Revised Statutes of the United States, 42 U.S.C. 1981a, also imports the limitations on the recovery of compensatory damages and punitive damages generally applicable in employment discrimination cases, depending on the size of the employer. Punitive damages are not available in actions against a government, government agency, or political subdivision. This part lays out these requirements involving damages in separate paragraphs under § 1636.5(a) through (e).

1636.5(f) Prohibition Against Retaliation

5. The anti-retaliation provisions of the PWFA should be interpreted broadly, like those of Title VII and the ADA, to effectuate Congress' broad remedial purpose in enacting these laws.[172] The protections of these provisions extend beyond qualified employees with known limitations and cover activity that may not yet have occurred, such as a circumstance in which a covered entity threatens an employee with termination if they file a charge or requires an employee to sign an agreement that prohibits such individual from filing a charge with the Commission.[173]

1636.5(f)(1) Prohibition Against Retaliation

6. The types of conduct prohibited, the standard for determining what constitutes retaliatory conduct, and the individuals protected under the PWFA are the same as they are under Title VII.[174] Accordingly, this provision prohibits discrimination against employees who engage in protected activity, which includes '"participating' in an EEO process or 'opposing' discrimination."[175] Title VII's anti-retaliation provision is broad and protects an employee from conduct, whether related to employment or not, that a reasonable person would have found ''materially adverse,'' meaning that the action ''well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.''[176] Additionally, Title VII's anti-retaliation provision protects employees, applicants, and former employees.[177] The same interpretations apply to the PWFA's anti-retaliation provision.[178]

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[168] *See Enforcement Guidance on Reasonable Accommodation, supra* note 12, at Question 19.

[169] 42 U.S.C. 2000gg–2(a), (d), (e).

[170] *See* 29 CFR part 1601.

[171] *See EEOC* v. *Dolgencorp, LLC,* 899 F.3d 428, 433–34 (6th Cir. 2018) (applying the 300-day time limit to a charge alleging failure to provide a reasonable accommodation under the ADA filed in Tennessee where the state statute prohibited discrimination against individuals with disabilities but did not provide for reasonable accommodations, noting, ''[t]he relevant question is whether the state agency has the power to entertain the claimant's disability discrimination claim, not whether state law recognizes the same theories of discrimination as federal law'').

[172] *See Enforcement Guidance on Retaliation and Related Issues, supra* note 89, at (II)(A)(1) (describing the broad protection of the participation clause); *id.* at (II)(A)(2), (2)(a) (describing the broad protection of the opposition clause).

[173] *See* EEOC, *Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes,* (II) (1997), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes* (''[P]romises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.'').

[174] *See* 42 U.S.C. 2000gg–2(f)(1) (using the same language as 42 U.S.C. 2000e–3(a)).

[175] *See Enforcement Guidance on Retaliation, supra* note 89, at (II)(A); *see also id.* at (II)(A)(1), (2) (describing protected activity under Title VII's anti-retaliation clause).

[176] *Burlington N. & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53, 68 (2006) (internal citations and quotation marks omitted).

[177] *See* 42 U.S.C. 2000e–3(a). The statute at 42 U.S.C. 2000gg–2(f)(1) applies to an ''employee'' which 42 U.S.C. 2000gg(3) defines to include applicants. The statute at 42 U.S.C. 2000gg(3) relies on the Title VII definition of employee, which includes former employees, where relevant. *See also Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 346 (1997) (finding former employees are protected under Title VII's anti-retaliation provision).

[178] All retaliatory conduct under Title VII (and the ADA), including retaliation that takes the form of harassment, is evaluated under the legal standard for retaliation. *See Enforcement Guidance on Retaliation, supra* note 89, at (II)(B)(3).

7. Section 1636.5(f) contains three other provisions based on the statutory language and established anti-retaliation concepts under Title VII and the ADA.

8. First, 42 U.S.C. 2000gg–2(f)(1) protects ''any employee,'' not only ''a qualified employee with a known limitation''; therefore, an employee, applicant, or former employee need not establish that they have a known limitation or are qualified (as those terms are defined in the PWFA) to bring a claim under 42 U.S.C. 2000gg–2(f)(1).[179]

9. Second, a request for a reasonable accommodation under the PWFA constitutes protected activity, and therefore retaliation for such a request is prohibited.[180]

10. Third, an employee, applicant, or former employee does not have to be actually deterred from exercising or enjoying rights under this section for the retaliation to be actionable.[181]

1636.5(f)(2) Prohibition Against Coercion

11. The PWFA's anti-coercion provision uses the same language as the ADA's interference provision, with one minor variation in the title of the section.[182] The scope of the PWFA anti-coercion provision is broader than the anti-retaliation provision; it reaches those instances ''when conduct does not meet the 'materially adverse' standard required for retaliation.'' [183] Following the language of 42 U.S.C. 2000gg–2(f)(2) and consistent with the ADA's analogous interference provision, § 1636.5(f)(2) protects individuals, not qualified employees with a known limitation under the PWFA. Thus, the individual need not be an employee, applicant, or former employee and need not establish that they have a known limitation or that they are qualified (as those terms are defined in the PWFA) to bring a claim for coercion under the PWFA.[184]

12. The purpose of this provision is to ensure that employees are free to avail themselves of the protections of the statute. Thus, consistent with the ADA regulation for the analogous provision, § 1636.5(f)(2) includes ''harass'' in the list of prohibitions; the inclusion is intended to characterize the type of adverse treatment that may in some circumstances violate the coercion provision.[185] Section 1636.5(f)(2) also states that an individual does not actually have to be deterred from exercising or enjoying rights under this section for the coercion to be actionable.[186]

13. Importantly the coercion provision does not apply to any and all conduct or statements that an individual finds intimidating; it only prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of PWFA rights.[187]

Some examples of coercion include:

- coercing an individual to relinquish or forgo an accommodation to which they are otherwise entitled;
- intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired;
- issuing a policy or requirement that purports to limit an employee's rights to invoke PWFA protections (*e.g.,* a fixed leave policy that states ''no exceptions will be made for any reason'');
- interfering with a former employee's right to file a PWFA lawsuit against a former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and
- subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because they assisted a coworker in requesting a reasonable accommodation.[188]

Possible Violations of 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information

14. Seeking documentation or information that goes beyond the parameters laid out in § 1636.3(l) when an employee requests a reasonable accommodation under the PWFA may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) because seeking such information or documentation might well dissuade a reasonable person from engaging in protected activity, such as requesting a reasonable accommodation, or might constitute coercion. Circumstances under which going beyond the parameters of § 1636.3(l) may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) include:

- Seeking supporting documentation or information in response to an employee's request for reasonable accommodation when it is not reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation, whether or not the employee provides the documentation or information and whether or not the employer grants the accommodation.
- Continued efforts to obtain more information or supporting documentation when sufficient information or supporting documentation has already been provided to allow the employer to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and the adjustment or change at work that is needed due to the limitation, whether or not the employee provides the documentation or information and whether or not the employer grants the accommodation.[189]

15. Disclosing medical information, threatening to disclose medical information, or requiring an employee to share their medical information other than in the limited situations set out in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information* also may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)) because such actions might well dissuade a reasonable person from engaging in protected activity, such as requesting a reasonable accommodation, or might constitute coercion.[190]

16. Actions that the courts or the Commission have previously determined may be retaliation or interference under Title VII or the ADA may violate the retaliation and coercion provisions of the PWFA as well. Depending on the facts, a covered entity's retaliation for activity protected under the PWFA also may violate 42 U.S.C. 2000gg–1(1) (because these actions may make the accommodation ineffective) or 2000gg–1(5) (prohibiting adverse actions) (§ 1636.4(a) and (e)).

17. The following examples could violate 42 U.S.C. 2000gg–2(f) and also may violate 42 U.S.C. 2000gg–1(1), (5) or other laws.

Example #61/Retaliatory Performance Appraisal: Perrin requests a stool to sit on

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[179] *See Enforcement Guidance on Retaliation, supra* note 89, at (II)(A)(3).

[180] *See id.* at (II)(A)(2)(e) and Example 10.

[181] *See id.* at (II)(B)(1), (2) (stating that the retaliation ''standard can be satisfied even if the individual was not in fact deterred'' and that ''[i]f the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it falls short of its goal'').

[182] The ADA uses the phrase ''Interference, coercion, or intimidation'' to preface the prohibition against interference (42 U.S.C. 12203(b)), whereas the PWFA uses ''Prohibition against coercion'' (42 U.S.C. 2000gg–2(f)(2)). The language of the prohibitions is otherwise identical.

[183] *See Enforcement Guidance on Retaliation, supra* note 89, at (III).

[184] *See id.*

[185] *See* 29 CFR 1630.12(b); *see also Enforcement Guidance on Retaliation, supra* note 89, at text accompanying n.177 (stating, with regard to the ADA, that ''[t]he statute, regulations, and court decisions have not separately defined the terms 'coerce,' 'intimidate,' 'threaten,' and 'interfere.' Rather, as a group, these terms have been interpreted to include at least certain types of actions which, whether or not they rise to the level of unlawful retaliation, are nevertheless actionable as interference.'').

[186] *See Enforcement Guidance on Retaliation, supra* note 89, at (II)(B)(1), (2) (noting that actions can be challenged as retaliatory even if the person was not deterred from engaging in protected activity).

[187] *See id* at (III) (discussing the ADA's interference provision).

[188] *See id.*

[189] This is based on a similar policy adopted under the ADA. *See Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at Question 11 (''[W]hen an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual provide more documentation and/or submit to a medical examination could be considered retaliation.''). The Commission notes that if the covered entity can show that it had a good faith belief that the submitted documentation was insufficient and thus sought additional documentation, its actions would not be retaliatory because they would lack the requisite intent.

[190] As described in detail *infra* in section *1636.7(a)(1)* of this appendix under *Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information,* the ADA's rules on medical confidentiality apply to medical information obtained under the PWFA and allow for disclosure of such information only in specific, limited circumstances. *See* 42 U.S.C. 12112(d)(3); 29 CFR 1630.14; *Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at text accompanying nn.9–10; *Enforcement Guidance: Preemployment Disability-Related Questions, supra* note 152, at text accompanying n.6.

due to her pregnancy which makes standing difficult. Lucy, Perrin's supervisor, denies Perrin's request. The corporate human resources department instructs Lucy to grant the request because there is no undue hardship. Angry about being told to provide the reasonable accommodation, Lucy thereafter gives Perrin an unjustified poor performance rating and denies Perrin's request to attend training that Lucy approves for Perrin's coworkers.

Example #62/Retaliatory Surveillance: Marisol files an EEOC charge after Cyrus, her supervisor, refuses to provide her with the reasonable accommodation of help with lifting following her cesarean section. Marisol also alleges that after she requested the accommodation, Cyrus asked two coworkers to: conduct surveillance on Marisol, including watching her at work; note with whom she associated in the workplace; suggest to other employees that they should avoid her; and report her breaks to Cyrus, who said he kept a record of this information ''just in case.''

Example #63/Seeking Supporting Documentation Beyond § 1636.3(l): Mara provides her employer with a note from her health care provider explaining that she is pregnant and will need the functions of her position that require her to be around certain chemicals to be temporarily suspended. Mara's supervisor requires that Mara confirm the pregnancy through an ultrasound, even though the employer already has sufficient information to determine whether Mara has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.

Example #64/Dissuaded from Requesting an Accommodation: During an interview at an employment agency, Arden tells the human resources staffer, Stanley, that Arden is dealing with complications from their recent childbirth and may need time off for doctor's appointments during their first few weeks at work. Stanley counsels Arden that needing leave so soon after starting will be a ''black mark'' on their application and that it would be a waste of time for the employment agency to try to find work for Arden.

Example #65/Threatening Future Employment: Merritt, who gets jobs through an employment agency, is fired after requesting an accommodation under the PWFA. The employment agency refuses to refer Merritt to other employers, telling Merritt that the agency only refers workers who will not cause any trouble.

Example #66/Disciplined for Assisting Other Employees: Jessie, a factory union steward, ensures that workers know about their rights under the PWFA and encourages employees with known limitations to ask for reasonable accommodations. Jessie helps employees navigate the reasonable accommodation process and provides suggestions of possible reasonable accommodations. Factory supervisors, annoyed by the number of PWFA reasonable accommodation requests, write up Jessie for trivial timekeeping violations and other actions that had not been deemed worthy of discipline prior to Jessie assisting other employees with their PWFA accommodation requests.

Example #67/Negative Reference: While she was pregnant, Laila requested and received the reasonable accommodation of a temporary suspension of the essential function of moving heavy boxes and placement in the light duty program. After giving birth, Laila tells her employer that she has decided to resign and stay home for a year. Her employer responds that if Laila follows through and resigns now, the employer will have no choice but to give her a negative reference because Laila demanded an accommodation but did not have the loyalty to come back after having her baby.

Example #68/Seeking Supporting Documentation Beyond § 1636.3(l): Robbie, a retail worker, is pregnant. Her job requires her to stand at a cash register. Because of her pregnancy, Robbie has difficulty standing for long periods of time. Robbie explains the situation to the manager, who requires Robbie to produce a signed doctor's note saying that Robbie is pregnant and needs to sit. Because Robbie is pregnant and has requested one of the simple modifications that will virtually always be found to be a reasonable accommodation that does not impose an undue hardship, and she has confirmed the limitation and her need for the modification due to the limitation, the manager is not permitted to seek supporting documentation, as set forth in § 1636.3(l)(1)(iii).

Example #69/Disciplined Through Workplace Policy: Tina gave birth and started a new job. She is experiencing urinary incontinence related to, affected by, or arising out of childbirth and needs time to attend a medical appointment. Her new employer has a policy that employees cannot be absent during the first 90 days of work. Tina requests and is given the reasonable accommodation of time to attend her medical appointment, but then is issued a disciplinary write-up for missing work during her first 90 days.

Example #70/Retaliatory Failure to Provide Interim Reasonable Accommodation: Dominique is lactating and, based on the recommendation of her health care provider, requests additional safety gear and protection to reduce the risk that chemicals she works with will contaminate her breast milk. The equipment has to be ordered, and the employer puts Dominique on unpaid leave while waiting for the equipment, although there is available work that Dominique could perform that would not require her to be around the chemicals while she waits for the additional safety gear. Additionally, her supervisor tells human resources staff that he is tired of accommodating Dominique because she asked for accommodations during her pregnancy as well and there has to be an end to her requests.

Example #71/Retaliation for Requesting Safety Information: Wynne is pregnant and is in a probationary period as a janitor. She asks her supervisor for safety information about the cleaning products that she handles as part of her job and explains it is to help her determine if she needs to ask for a reasonable accommodation regarding exposure to the chemicals. Her supervisor tells her not to worry and warns her that trying to get this kind of information will mark her as a troublemaker. During her first review near the end of the probationary period, the supervisor notes that, for an entry-level janitor, Wynne asks many questions and behaves like a troublemaker. The supervisor terminates Wynne even though she was performing satisfactorily.

Example #72/Seeking Supporting Documentation Beyond § 1636.3(l): An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide medical documentation in support of the request. Cora, a production worker who is 8 months pregnant, requests additional bathroom breaks. The employer applies the policy to her, refusing to provide the accommodation until she submits supporting documentation, even though under § 1636.3(l)(1)(iii) the employer is not permitted to seek documentation in this situation.

Example #73/Seeking Supporting Documentation Beyond § 1636.3(l) and Failure to Provide Accommodation: An employer adopts a policy requiring everyone who requests a reasonable accommodation to provide supporting documentation. Fourteen months after giving birth, Alex wants to continue to pump at work, which is beyond the length of time the PUMP Act requires. She explains her request to her supervisor and asks that she have breaks to pump and that the room provided have a chair, a table, access to electricity and running water. Alex's employer refuses to grant the accommodations unless Alex provides supporting documentation from her health care provider. Alex cannot provide the information, so she stops pumping. In addition to potentially violating 42 U.S.C 2000gg–2(f), the employer cannot use the lack of supporting documentation as a defense to the failure to provide the accommodations because seeking documentation was not reasonable under the circumstances as set forth in § 1636.3(l)(1)(iv) and thus these actions may violate 42 U.S.C 2000gg–1(1) (§ 1636.4(a)(3)).

Example #74/Retaliatory Waiver of Rights: An employer adopts a policy under which an employee who files a claim with the EEOC or another outside agency automatically waives their right to have a complaint processed through the employer's internal complaint procedure. Rebecca submitted an internal complaint to her supervisor after her request for a reasonable accommodation was denied and, a month later, filed a charge with the EEOC. The employer notified her that it would stop investigating her internal complaint until the EEOC matter was resolved, but that she would be free to pursue the internal resolution of her complaint if she withdrew her EEOC charge. The employer's policy is retaliatory because it adversely affects the employee by stripping her of an employment privilege for filing a charge with the EEOC.

Example #75/Disclosure of Medical Information: Caroline requested and received an accommodation under the PWFA in the form of a lifting restriction due to a back injury related to her pregnancy. Caroline's

accommodation was granted early in her third trimester. Two weeks after her accommodation went into effect, during a team meeting, Caroline's supervisor went around the table describing each team members' duties, sighing as she explained that Caroline had a back injury due to pregnancy that prevented her from lifting and that Caroline's injury was the reason that other team members had extra duties. At each biweekly team meeting for the next two months, Caroline's supervisor noted that team members continued to be assigned extra duties because of Caroline's back injury. In addition to potential violation 42 U.S.C 2000gg–2(f), this disclosure of medical information violates the ADA's confidentiality rules, as it does not fit within any of the five disclosure exceptions.

Example #76/Retaliatory Harassment: Benita requested and received an accommodation under the PWFA in the form of a one-hour delayed start time due to morning sickness related to her pregnancy. Benita's coworkers are aware that she is receiving the accommodation due to a condition related to her pregnancy. A few days after Benita's accommodation is granted, her coworkers start to make unwelcome, critical comments about her ''late'' arrivals on a frequent basis, including that other pregnant individuals were able to start work on time during their pregnancies, that being able to ''work during pregnancy is mind over matter,'' and calling her ''lazy'' and a ''slacker.'' The coworkers schedule meetings that begin a half hour before Benita arrives in the office and complain to Benita's supervisor that she arrives late to those meetings. Because she cannot attend the meetings, Benita falls behind on her work.

1636.5(g) Limitation on Monetary Damages

18. The PWFA at 42 U.S.C. 2000gg–2(g), using the language of the Civil Rights Act of 1991, 42 U.S.C. 1981a(a)(3), provides a limitation on damages based on a ''good faith effort'' to provide a reasonable accommodation. The covered entity bears the burden of proof for this affirmative defense. This limitation on damages applies to violations of 42 U.S.C. 2000gg–1(1) (§ 1636.4(a)) only. It does not apply to any other provisions of the PWFA.

VI. 1636.7 Relationship to Other Laws

1636.7(a)(1) Relationship to Other Laws in General

1. The PWFA does not limit the rights of individuals affected by pregnancy, childbirth, or related medical conditions under a Federal, State, or local law that provides greater or equal protection. It is equally true that a Federal, State, or local law that provides less protection for individuals affected by pregnancy, childbirth, or related medical conditions than the PWFA does not limit the rights provided by the PWFA.

2. Federal laws, including, but not limited to, Title VII, the ADA, the FMLA, the Rehabilitation Act, the PUMP Act, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.,* provide protections for employees affected by pregnancy, childbirth, or related medical conditions. Numerous States and localities also have laws that provide accommodations for pregnant employees.[191] All of the protections for employees affected by pregnancy, childbirth, or related medical conditions in these laws are unaffected by the PWFA. If these laws provide greater protections than the PWFA, the greater protections will apply. For example, the State of Washington's Healthy Starts Act provides that certain accommodations, including lifting restrictions of 17 pounds or more, cannot be the subject of an undue hardship defense.[192] If an employee in Washington is seeking a lifting restriction as a reasonable accommodation for a pregnancy-related reason under the Healthy Starts Act, an employer in Washington cannot argue that a lifting restriction of 20 pounds is an undue hardship, even though that defense could be raised if the claim were brought under the PWFA.

3. Section 1636.7(a) also applies to Federal or State occupational health and safety laws and collective bargaining agreements (CBAs). Thus, nothing in the PWFA limits an employee's rights under laws such as the OSH Act or under a CBA if either of those provide protection greater than or equal to that of the PWFA.

The PWFA and Title VII

4. The PWFA uses many terms and definitions from Title VII, and conduct that is the subject of PWFA claims also may give rise to claims under Title VII. For example, a qualified pregnant employee who sought leave for recovery from childbirth and was terminated may have a claim under both Title VII for sex discrimination and the PWFA for failure to accommodate, adverse employment action, or retaliation.[193]

5. Under Title VII, employees affected by pregnancy, childbirth, or related medical conditions may be able to receive accommodations if they can identify a comparator similar in their ability or inability to work.[194] Under the PWFA, qualified employees with physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions are entitled to reasonable accommodations (absent undue hardship) whether or not other employees have those accommodations and whether or not the affected employees are similar in their ability or inability to work as employees not so affected. Additionally, if the covered entity offers a neutral reason or policy to explain why qualified employees affected by pregnancy, childbirth, or related medical conditions cannot access a specific benefit, the qualified employee with a known limitation under the PWFA still may ask for a waiver of that policy as a reasonable accommodation. Under the PWFA, the employer must grant the waiver, or another reasonable accommodation, absent undue hardship. If, for example, an employer denies a qualified pregnant employee's request to join its light duty program as a reasonable accommodation because the program is for employees with on-the-job injuries, it may be a reasonable accommodation for the employer's light duty program policy to be waived. Finally, employers in this situation should remember that if there are others to whom the benefit is extended, the Supreme Court stated in *Young* v. *UPS* that ''[the employer's] reason [for refusing to accommodate a pregnant employee] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates.'' [195] Thus, if the undue hardship defense of the employer under the PWFA is based solely on cost or convenience, that defense could, under certain fact patterns, nonetheless lead to liability under Title VII.

6. Finally, nothing in the PWFA, this part, or this Interpretive Guidance should be interpreted to reduce or limit any protections provided by Title VII.

The PWFA and the ADA

7. The PWFA uses many terms and definitions from the ADA. Conduct that is the subject of PWFA claims also may give rise to claims under the ADA. For example, an employee with postpartum depression seeking a reasonable accommodation to attend treatment whose employer fails to provide the accommodation may have a claim under both the PWFA and the ADA (and possibly also Title VII). Similarly, an employee who has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions may have both a known limitation under the PWFA and a disability under the ADA (where the physical or mental condition substantially limits a major life activity, including a major bodily function—in other words, the individual would have an ''actual'' ADA disability).[196] In such case, the employee may be entitled to accommodation, absent undue hardship, under both the PWFA and the ADA.

8. While it will depend on the specific facts, if an employee could be covered under either the PWFA or the ADA, a covered entity's analysis, in most cases, should begin with the PWFA because the definition of ''known limitation'' under the PWFA covers situations when the ADA does not apply.[197]

9. Requests for accommodation under the PWFA may be indistinguishable from requests for accommodation under the ADA and there will be situations in which both statutes apply. In one instance, the PWFA known limitation also may be an ADA disability. In another, employees with existing disabilities may seek ADA coverage for those, while also invoking the PWFA to address limitations related to pregnancy, childbirth, or related medical conditions interacting with an existing disability. In these situations, employees with disabilities may require additional or different accommodations and are entitled to them,

[191] U.S. Dep't of Lab., Women's Bureau, *Employment Protections for Workers Who Are Pregnant or Nursing, www.dol.gov/agencies/wb/pregnant-nursing-employment-protections* (last visited Mar. 25, 2024).

[192] Wash. Rev. Code 43.10.005(1)(d).

[193] *See* 42 U.S.C. 2000gg–1(1), (5); 2000gg–2(f).

[194] 42 U.S.C. 2000e(k).

[195] 575 U.S. at 229.

[196] 42 U.S.C. 12102(1); 29 CFR 1630.2(g).

[197] 42 U.S.C. 2000gg(4).

absent undue hardship, under the PWFA and/or the ADA.

10. There also will be situations where an employee with a disability who has an accommodation under the ADA seeks and is granted an accommodation under the PWFA. For example, an employee who uses an adaptive keyboard as an ADA reasonable accommodation temporarily may be assigned to a new position as part of an accommodation under the PWFA because an essential function of their original position has been temporarily suspended. In this situation, the employer must continue to provide the adaptive keyboard as an ADA reasonable accommodation if it is necessary for the employee to perform the essential functions of the new position.

11. Because an individual may be covered by both the ADA and the PWFA, and the PWFA provides at 42 U.S.C. 2000gg–5(a)(1) that nothing in the statute shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions, a covered entity must apply the law that provides the worker the most protection.

12. Examples Regarding Disability and Pregnancy:

Example #77/Disability and Pregnancy: Roxy is an accountant who has developed gestational hypertension and preeclampsia late in her pregnancy, causing damage to her kidneys. As a result, Roxy needs leave for periodic medical appointments to protect her own health and the health of her pregnancy. Because Roxy's condition is both a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions and a condition that substantially limits one of her major bodily functions (kidney function), it qualifies as both a limitation under the PWFA and a disability under the ADA. Absent undue hardship, the employer must provide Roxy with the accommodation she requires due to her pregnancy (under the PWFA) and her disability (under the ADA). Of course, one effective accommodation may be sufficient to satisfy requirements under both statutes in this instance.

Example #78/Disability and Pregnancy: Farah is a nurse who has diabetes, and her employer has provided her with the accommodation of breaks to eat small meals throughout the day and breaks to check her insulin levels. When Farah becomes pregnant, she experiences morning sickness that makes it difficult for her to eat in the morning. As a result, she needs more breaks for eating later in the day and occasionally needs a break to rest while at work. Absent undue hardship, the employer must provide Farah with the additional accommodations she requires due to her pregnancy under the PWFA.

13. In cases where both the ADA and PWFA apply, if an employer fails to provide an accommodation the employee could potentially file a claim for failure to accommodate under both the ADA and the PWFA. They also could file a separate ADA claim if they experienced disparate treatment based on a disability.

Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information

14. Important protections from the ADA that apply to all covered employees continue to apply when employees are seeking accommodations under the PWFA. First, the rules limiting the ability of covered entities to make disability-related inquiries or require medical exams in the ADA apply to all disability-related inquiries and medical exams including those made in the context of requests for PWFA accommodation.[198] For example, a covered entity may not ask an employee who is seeking an accommodation under the PWFA whether the employee has asked for other accommodations in the past or has preexisting conditions because these questions are likely to elicit information about a disability and are not job-related and consistent with business necessity in this context. Similarly, an employer's response to an employee's request for accommodation under the PWFA that requires the employee to complete a release permitting the employer to obtain the employee's complete medical records would not be job-related or consistent with business necessity.

15. Second, under the ADA, covered entities are required to keep medical information of all applicants, employees, and former employees (whether or not those individuals have disabilities) confidential, with limited exceptions.[199] The Commission has repeatedly stated that the requirement applies to all medical information in the employer's possession, whether obtained through inquiries pursuant to the ADA or otherwise.[200] Thus, this protection applies to medical information obtained under the PWFA, including medical information provided voluntarily and medical information provided as part of the reasonable accommodation process. Moreover, as a practical matter, in many circumstances under the PWFA, the medical information obtained by an employer may involve a condition that could be a disability; rather than an employer attempting to parse out whether to keep certain information confidential or not, all medical information should be kept confidential.[201] Therefore, medical information obtained under the PWFA is subject to the ADA requirement that information regarding the medical condition or history of any employee be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.[202]

16. That an employee is pregnant, has recently been pregnant, or has a medical condition related to pregnancy or childbirth is medical information. The ADA requires that employers keep such information confidential and only disclose it within the confines of the limited disclosure rules described in paragraphs 17 and 18 of this section. Similarly, disclosing that an employee is receiving or has requested an accommodation under the PWFA, or has limitations for which they requested or are receiving a reasonable accommodation under the PWFA, usually amounts to a disclosure that the employee is pregnant, has recently been pregnant, or has a related medical condition.

17. As set forth at 29 CFR 1630.14, under the ADA, medical information must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with the ADA shall be provided relevant information on request.

18. In addition to what is stated in the ADA regulation: covered entities (iv) may disclose the medical information to State workers' compensation offices, State second injury funds, or workers' compensation insurance carriers in accordance with State workers' compensation laws; and (v) may use the medical information for insurance purposes.[203] All these disclosure exceptions apply to medical information obtained under the PWFA. Disclosing medical information in any circumstances, other than those set forth in these five recognized disclosure exceptions, violates the ADA's confidentiality rule.

19. In addition, as explained in section *1636.5(f)* of this appendix under *Possible Violations of 42 U.S.C. 2000gg–2(f)*

[198] *See* 42 U.S.C. 12112(d); 29 CFR 1630.13, 1630.14.

[199] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1)(i) through (iii), (c)(1), (d)(4); *Enforcement Guidance on Disability-Related Inquiries, supra* note 152, at text accompanying nn.9–10 (''The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . ., as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.'') and text after n.12 (''[T]he ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.''); *Enforcement Guidance: Preemployment Disability-Related Questions, supra* note 152, at text accompanying n.6 (''Medical information must be kept confidential.'').

[200] *See supra* note 199. This policy also appears in numerous EEOC technical assistance documents. *See, e.g.,* EEOC, *Visual Disabilities in the Workplace and the Americans with Disabilities Act,* at text preceding n.43 (2023), *https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act#q8* (''With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee.'').

[201] Requests for accommodation under the PWFA also may overlap with FMLA issues, and the FMLA requires medical information to be kept confidential as well. 29 CFR 825.500(g).

[202] 42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1), (c)(1), and (d)(4)(i); *see Enforcement Guidance: Preemployment Disability-Related Questions, supra* note 152, at text accompanying the question ''Can medical information be kept in an employee's regular personnel file?''

[203] *See Enforcement Guidance: Preemployment Disability-Related Questions, supra* note 152, at text accompanying the heading ''Confidentiality.''

(§ 1636.5(f)) Based on Seeking Supporting Documentation During the Reasonable Accommodation Process and Disclosure of Medical Information, disclosing medical information, threatening to disclose medical information, or requiring an employee to share their medical information other than in the limited situations set out in paragraphs 17 and 18 of this section also may violate 42 U.S.C. 2000gg–2(f) (§ 1636.5(f)).[204] Given the protections for confidential medical information under the ADA and the potential of violating 42 U.S.C. 2000gg–2(f), if a covered entity is under an obligation to disclose medical information received under the PWFA in any circumstances other than those provided in this Interpretive Guidance, before doing so it should inform the individual to whom the information relates of its intent to disclose the information; identify the specific reason for the disclosure; and provide sufficient time for the individual to object.

20. Finally, nothing in the PWFA, this part, or this Interpretive Guidance should be interpreted to reduce or limit any protections provided by the ADA.

1636.7(a)(2) Limitations Related to Employer-Sponsored Health Plans

21. The statute at 42 U.S.C. 2000gg–5(a)(2) states that nothing in the PWFA shall be construed to require an employer-sponsored health plan to pay for or cover any item, procedure, or treatment and, further, that nothing in the PWFA shall be construed to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for an abortion.

1636.7(b) Rule of Construction

22. The statute at 42 U.S.C. 2000gg–5(b) provides a ''rule of construction'' stating that the PWFA is ''subject to the applicability to religious employment'' set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1(a). The relevant portion of section 702(a) provides that Title VII shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[205] Section 1636.7(b) reiterates the PWFA statutory language and adds that nothing in 42 U.S.C. 2000g–5(b) or this part should be interpreted to limit the rights of a covered entity under the U.S. Constitution or the rights of an employee under other civil rights statutes. As with assertions of section 702(a) of the Civil Rights Act of 1964 in Title VII matters, when 42 U.S.C. 2000gg–5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.[206]

VII. 1636.8 Severability

1. The PWFA at 42 U.S.C. 2000gg–6 contains a severability provision regarding the statute. Section 1636.8 repeats the statutory provision and also addresses the Commission's intent regarding the severability of the Commission's regulations in this part and this Interpretive Guidance.

2. Following Congress' rule for the statute, in places where this part uses the same language as the statute, if any of those identical regulatory provisions, or the application of those provisions to particular persons or circumstances, is held invalid or found to be unconstitutional, the remainder of this part and the application of that provision of this part to other persons or circumstances shall not be affected.

3. In other places, where this part or this Interpretive Guidance provide additional guidance to carry out the PWFA, including examples of reasonable accommodations, following Congress' intent regarding the severability of the provisions of the statute, it is the Commission's intent that if any of those regulatory provisions or the Interpretive Guidance or the application of those provisions or the Interpretive Guidance to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this part or the Interpretive Guidance and the application of that provision of this part or the Interpretive Guidance to other persons or circumstances shall not be affected.

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[204] *See, e.g., Haire* v. *Farm & Fleet of Rice Lake, Inc.,* No. 2:21–CV–10967, 2022 WL 128815, at *8–*9 (E.D. Mich. Jan. 12, 2022) (disclosing personal and confidential information about an employee's medical condition and mental health episodes to her coworkers could constitute retaliation under Title VII); *Holtrey* v. *Collier Cnty. Bd. of Cnty. Comm'rs,* No. 2:16–CV–00034, 2017 WL 119649, at *3 (M.D. Fla. Jan. 12, 2017) (determining that an employer's disclosure of its employee's confidential medical information about his genito-urinary system to his coworkers and subordinates could constitute retaliation under FMLA, relying on Title VII's definition of ''materially adverse action'').

[205] The PWFA makes no mention of section 703(e)(2) of the Civil Rights Act of 1964, which provides a second statutory exemption for religious educational institutions in certain circumstances.

[206] The case-by-case analysis of religious defenses asserted in response to a charge under the PWFA is consistent with the Commission's framework evaluating similar defenses under other statutes the Commission enforces. *See Compliance Manual on Religious Discrimination, supra* note 163, at (12–I)(C).

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Part V

Federal Deposit Insurance Corporation

12 CFR Part 303
Request for Comment on Proposed Statement of Policy on Bank Merger Transactions; Agency Information Collection Activities; Proposals, Submissions, and Approvals; Proposed Rule and Notice

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064–ZA31

Request for Comment on Proposed Statement of Policy on Bank Merger Transactions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed Policy Statement; Request for Comment.

SUMMARY: The FDIC invites comments on a proposed Statement of Policy (SOP) on Bank Merger Transactions (Proposed SOP) that is relevant to all insured depository institutions (IDIs). The Proposed SOP would replace the FDIC's current SOP on Bank Merger Transactions (Current SOP) and proposes a principles-based overview that describes the FDIC's administration of its responsibilities under the Bank Merger Act (BMA). The Proposed SOP focuses on the scope of transactions subject to FDIC approval, the FDIC's process for evaluating merger applications, and the principles that guide the FDIC's consideration of the applicable statutory factors as set forth in the BMA. The Supplementary Information section below contains explanatory content, including historical data, to provide additional context for the Proposed SOP.

DATES: Comments must be received by June 18, 2024.

ADDRESSES: All comments related to this Proposed SOP must include the agency name and RIN 3064–ZA31. Please send comments by one method only directed to:

- *Agency Website: http://www.fdic.gov/regulations/laws/federal/.* Follow the instructions for submitting comments on the agency's website.
- *Email: Comments@fdic.gov.* Include RIN 3064–ZA31 in the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments-RIN: 3064–ZA31, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW, building (located on F Street NW) on business days between 7:00 a.m. and 5:00 p.m. ET.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/*—including any personal information provided—for public inspection. Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: George Small, Senior Examination Specialist, Division of Risk Management Supervision, 347–267–2453, *gsmall@fdic.gov;* Annmarie Boyd, Senior Counsel, Legal Division, 202–898–3714, *aboyd@fdic.gov;* Benjamin Klein, Supervisory Counsel, Legal Division, 202–898–7027, *bklein@fdic.gov;* Jessica Thurman, Chief, Division of Depositor and Consumer Protection, 202–898–3579, *jthurman@fdic.gov;* Mark Haley, Chief, Division of Complex Institution Supervision and Regulation, 917–320–2911, *mahaley@fdic.gov;* and Ryan Singer, Chief, Division of Insurance and Research, 202–898–7532, *rsinger@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Bank Merger Act (BMA), Section 18(c) of the Federal Deposit Insurance Act (FDI Act), prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. The FDIC is one of three Federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.[1] The FDIC also has jurisdiction to act on merger applications that solely involve IDIs in which the acquiring, assuming, or resulting institution is a state nonmember bank or state savings association (FDIC-supervised institution).[2]

In order to implement its responsibilities under the BMA, the FDIC has codified regulations; issued a Statement of Policy (SOP); and published the Applications Procedures Manual (APM). The FDIC's APM provides application-processing instructions for the FDIC's professional staff assigned to review, evaluate, and process applications, notices, and other requests submitted to the FDIC. The APM includes a section on processing merger applications that provides detailed procedural instructions to staff, as well as information regarding the assessment of each statutory factor. In 2019, the FDIC published the APM to its external website to provide greater transparency regarding the FDIC's internal application processes. In light of prospective changes to the bank merger process, additional revisions are planned for the APM chapter on mergers. Finally, together with the other Federal banking agencies, the FDIC has issued an interagency application form, which includes a supplemental section specific to the FDIC. Concurrent with this Proposed SOP, the FDIC is seeking comment on proposed revisions to its supplemental section to the interagency form.

The current SOP on Bank Merger Transactions (Current SOP), last amended in 2008, addresses the FDIC's process for reviewing proposed merger applications in the context of the applicable statutory factors.[3] Since the Current SOP was last revised, the BMA has been amended and significant changes have occurred in the banking industry and financial system, including continued growth and consolidation. This growth and consolidation, which has been ongoing for the past several decades, has significantly reduced the number of smaller banking organizations, increased the number of large and systemically important banking organizations, and contributed to the need for a review of the regulatory framework that applies to bank merger transactions subject to the BMA.[4]

The number of large IDIs, especially IDIs with total assets of $100 billion or more, has grown considerably over the past few decades. This is due to a combination of factors, including consolidation in the banking sector (fueled in part by mergers and acquisitions), the easing of interstate banking restrictions,[5] and organic

[1] 12 U.S.C. 1828(c)(1).

[2] 12 U.S.C. 1828(c)(2).

[3] FDIC Statement of Policy on Bank Merger Transactions, 73 FR 8870.

[4] 12 U.S.C. 1828(c).

[5] Prior to the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103–328, many states did not permit intra-state or interstate branching, and interstate branch

growth. As of December 31, 2004, there were only 12 IDIs with total assets greater than $100 billion; however, that number increased to 33 by December 31, 2023. Of the 33 IDIs with total assets greater than $100 billion, nine were owned by the eight U.S. bank holding companies designated as U.S. Global Systemically Important Banks (GSIBs), and four were owned by foreign banking organizations designated as foreign GSIBs.[6] While IDIs with total assets of more than $100 billion as of December 31, 2023, comprised less than one percent of the total number of IDIs, they held approximately 71 percent of total industry assets and approximately 68 percent of domestic deposits.

The FDIC has a responsibility to promote public confidence in the banking system, maintain financial stability, and resolve failing IDIs. Given the increased number, size, and complexity of large banks, greater attention to the financial stability risks that could arise from a merger involving a large bank is warranted. In particular, the failure of a large IDI could present greater challenges to the FDIC's resolution and receivership functions, and could present a broader financial stability threat. For various reasons, including their size, sources of funding, and other organizational complexities, the resolution of large IDIs can present significant risk to the Deposit Insurance Fund (DIF), as well as material operational risk for the FDIC. In addition, as a practical matter, the size of an IDI may limit the resolution options available to the FDIC in the event of failure.

After the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to include, for the first time, a factor related to the risk to the stability of the United States (U.S.) banking or financial system (financial stability factor). The FDIC is seeking public comment on the SOP's approach to the financial stability factor, which integrates and builds upon the FDIC's existing framework for assessing this factor.

On July 9, 2021, an Executive Order addressed the impact that consolidation may have on maintaining a competitive marketplace. The Executive Order also addressed the impact that consolidation may have on maintaining a fair, open, and competitive marketplace, as well as the impact on the welfare of workers, farmers, small businesses, startups, and consumers. The FDIC continues to coordinate with the Department of Justice (DOJ) and the other Federal banking agencies in modernizing bank merger oversight.[7]

On March 31, 2022, the FDIC published in the **Federal Register** a request for information and comment (RFI) regarding the application of the laws, practices, rules, regulations, guidance, and SOP that apply to merger transactions subject to FDIC approval.[8] The RFI requested comments regarding the effectiveness of the FDIC's existing framework in meeting the requirements of the BMA. After review of the public comments received in response to the RFI, the FDIC determined that it is both timely and appropriate to review its regulatory framework for merger transactions as outlined in the Current SOP. The Proposed SOP was drafted in consideration of the comments received regarding the RFI and is being published in the **Federal Register** to obtain further input from interested parties.

II. Summary of Comments

While not all of the questions described in the RFI are pertinent to the SOP, the FDIC is summarizing the comments received to provide transparency with respect to the overall process for developing updated merger-related policies and procedures. The FDIC received 33 comment letters in response to the RFI.[9] The majority of RFI commenters (25 or 76 percent) were in favor of at least some changes to the FDIC's merger review processes. Six RFI commenters (18 percent) were against changes to the FDIC's merger review processes, and two RFI commenters (6 percent) were neither in favor of, nor against, changes to the FDIC's merger review processes.

Among RFI commenters in favor of updating the FDIC's processes that apply to merger transactions, four common themes for potential changes were observed: (i) amend the calculation of market concentration and the competitive effects analysis; (ii) enhance the analysis of the convenience and needs of the community to be served factor; (iii) establish risk criteria and thresholds for the analysis of the financial stability factor; and (iv) create a *de minimis* exception (or presumption of approval) for mergers involving small and mid-sized IDIs.

Some RFI commenters suggested the need for an interagency approach to the development of any new merger regulations, guidelines, and instructions, and noted that any new elements should be applied prospectively. RFI commenters also suggested enhancing the public's ability to review and comment on proposed mergers, including making the information exchange (questions posed and responses received between the FDIC and applicants) a part of the public record. Finally, RFI commenters requested that the FDIC review, to the extent possible, the effects of past mergers to evaluate the appropriateness of any revised merger guidelines. These RFI commenters requested that the FDIC make the results of the evaluation public and apply the results to future merger decisions.

Six RFI commenters were against updating the FDIC's merger related processes. In general, these RFI commenters argued that the FDIC's current framework for reviewing proposed merger transactions was sound and that revisions might harm the banking sector. More specifically, some RFI commenters argued that any change to the competitive review would make bank mergers more difficult; and such changes risked disproportionately impacting community, mid-size, and regional banks.

Multiple RFI commenters suggested revisions to the receipt and compilation of the FDIC's Summary of Deposits (SOD) data, and amendments to the calculations to improve the quality, accuracy, and consistency of the data used to calculate the Herfindahl–Hirschman Index (HHI).[10] The RFI commenters broadly agreed that the increased presence of non-bank firms, including those specializing in financial technology (fintech), and increased consolidation within the banking industry necessitate revision to the evaluative considerations for competitive effects to reflect the economic realities and the industry's competitive landscape. Some RFI

branching was not federally sanctioned. Following the passage of this law, many multi-bank holding companies with subsidiary IDIs with different home states chose to consolidate existing bank charters.

[6] *See* Financial Stability Board 2022 list of GSIBs available at *https://www.fsb.org/wp-content/uploads/P211122.pdf*

[7] E.O. 14036 ''Promoting Competition in the American Economy'' (July 9, 2021). On December 18, 2023, the DOJ and the Federal Trade Commission (FTC) jointly released the 2023 Merger Guidelines (guidelines). These guidelines build upon, expand, and clarify frameworks set out in previous versions.

[8] 87 FR 18740 (March 31, 2022).

[9] Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions. See 87 FR 18740.

[10] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI calculation can also be applied to other relevant Consolidated Reports of Condition categories or other appropriate sources of data, aside from deposits. For example, the HHI analysis may also include data relative to commercial and industrial loans.

commenters posited that deposit data for institutions that rely on technology-based delivery channels are not dependent on their branch locations.

Multiple RFI commenters stated that the HHI threshold for prospective competitive effects concerns should be increased from its current limit. These RFI commenters contended that the HHI screens applied to the banking industry were stricter than those that had been applied in any other industry. In the opinion of these RFI commenters, raising the HHI would account for the growing competition that IDIs with physical branches face from competitors with different business models, including fintech firms and digital banks.

Conversely, other RFI commenters suggested the overall HHI threshold should be lowered, and the threshold for a change in HHI should be revised from the current level. These RFI commenters suggested that mergers disproportionally affect low- to moderate-income and/or minority communities, and therefore, the threshold (and any change in it) must be lowered to appropriately capture competitive effects.

Some RFI commenters suggested consideration of alternate measures of concentration and/or evaluating the HHI of other asset or product categories such as business loans or residential lending. In addition, multiple RFI commenters requested that the FDIC revise the SOD data collection and calculation to improve precision. These RFI commenters suggested that the FDIC: (i) differentiate corporate and centrally booked deposits from retail deposits; (ii) amend methods and reporting standards, and provide more guidance on how a reporting entity attributes deposits to branches; (iii) include more data on depositors in certain circumstances in order to increase geographic specificity; and (iv) add data on thrifts, credit unions, fintech firms, farm credit banks, and online entities that serve customers in the relevant market.

Multiple RFI commenters recommended revisions to the analysis of the convenience and needs of the community to be served statutory factor. In general, these RFI commenters recommended that the FDIC focus the analysis on the additive benefits of the merger transaction for consumers, particularly in low- to moderate-income and minority communities; and place higher burden on applicants to demonstrate the public interest benefits of the transaction. Concerns with regard to the impact of branch closings were noted. A few RFI commenters suggested that the applicant should be required to submit a full plan related to branch closings.

Approximately half of the RFI commenters requested that the Federal banking agencies establish specific stability risk considerations (*e.g.* size, substitute providers, interconnectedness, complexity, and cross-border activities) and formalize thresholds (such as total asset metrics) for developing a resolution plan for large bank mergers.

About one quarter of RFI commenters noted a perceived burden on small institutions. These RFI commenters requested that the FDIC create a small bank *de minimis* exception whereby small bank mergers would be presumed not to create monopolies or have anticompetitive effects if they meet certain prudential thresholds that can only be overturned based on other criteria such as the results of the competitive effects analysis.

In general, RFI comments were mixed on the following topics: (i) whether there is a presumption of approval for merger applications; (ii) whether the existing framework considers all aspects of the BMA; and (iii) whether prudential considerations or ''bright lines'' should be developed for any of the statutory factors. Many of the comments, as well as new questions that the FDIC has developed in response to public comments on the RFI, are addressed in this preamble.

III. Description of the Proposed Statement of Policy

Overall Changes in the Proposed SOP

The Proposed SOP reflects regulatory, legislative, and industry changes since the SOP was last published for comment in 1997. Further, the Proposed SOP includes new content to make it more principles based, communicates the FDIC Board's expectations regarding the evaluation of merger applications filed pursuant to the BMA, and describes the types of merger applications for which the FDIC is the responsible agency.

The Proposed SOP does not include the application procedures narrative that is included in the Current SOP. The APM describes procedural matters such as application filing, expedited processing and notification to the Attorney General. The Proposed SOP includes a separate discussion of each statutory factor, including: competitive effects, financial and managerial resources, future prospects, convenience and needs of the community to be served, risk to the stability of the U.S. banking or financial system, and effectiveness in combatting money laundering. In addition, the Proposed SOP includes a declarative statement for each statutory factor to highlight the Board's expectations and accompanying narrative to describe the analytical considerations for the evaluation of each factor. While historical performance provides contextual insight into the evaluation of these factors, the SOP affirms that the evaluations are forward looking. A detailed discussion of each statutory factor follows this section.

The FDIC seeks comment on all aspects of the Proposed SOP.

Question:

1. Does the structure of the Proposed SOP effectively present the FDIC's expectations with regard to review and evaluation of merger applications? If not, please describe how the structure could be improved.

Jurisdiction and Scope

The Proposed SOP clarifies the circumstances in which FDIC approval is required in connection with a proposed merger transaction. The FDIC plays an important role in the administration of the BMA, which is codified in the FDI Act and covers a broad range of transactions.[11] Specifically, Section 18(c)(1) of the BMA requires FDIC approval in connection with transactions in which an IDI: (A) merges or consolidates with any non-insured bank or institution,[12] (B) assumes liability to pay any deposits or similar liabilities in a non-insured bank or institution,[13] or (C) transfers assets to any non-insured bank or institution in consideration of an assumption of deposit liabilities of the IDI.[14] The FDIC's authority extends to a variety of transactions between an IDI and a non-insured entity, which are ''merger transactions'' for the purposes

[11] The broad scope of transactions expressly subject to FDIC approval under the BMA evinces a clear congressional intent for the FDIC to review a wide array of transactions between IDIs and non-insured entities that have the potential to affect the safety and soundness of a resultant IDI or increase the potential liability of the Deposit Insurance Fund.

[12] 12 U.S.C. 1828(c)(1)(A). A non-insured entity refers to any entity that is not FDIC insured. Although there is no definition of the term ''non-insured institution'' in the BMA, it has long been the FDIC's interpretation that the term includes any non-insured entity with which an IDI can legally merge. Notably, although federally insured credit unions are insured by the National Credit Union Administration, such credit unions are not IDIs for the purposes of the FDI Act, see 12 U.S.C. 1813(a)-(c), and any merger transaction between an IDI and a credit union is therefore subject to FDIC approval under the BMA.

[13] 12 U.S.C. 1828(c)(1)(B).

[14] 12 U.S.C. 1828(c)(1)(C). The statutory requirements of 12 U.S.C. 1828(c)(1) originate from the Banking Act of 1935. Sec. 101, Public Law 74–305 (adopting Section 12B(v)(4) of the Federal Reserve Act).

of the BMA, even if the transaction is not legally structured as a merger.[15]

Mergers and Consolidations Involving IDIs and Non-Insured Entities

Section 18(c)(1)(A) of the BMA prohibits an IDI from merging or consolidating with a non-insured entity without the FDIC's approval. Neither the BMA nor the FDIC Rules and Regulations define the terms ''merge'' or ''consolidate.'' [16] The FDIC implements the BMA by emphasizing a transaction's substance over its form and asserting jurisdiction over transactions that substantively result in a merger (merger in substance). The FDIC interprets the term ''merge'' in the BMA to encompass all transactions that result in an IDI substantively and effectively combining with a non-insured entity, regardless of whether the transaction is structured as a merger or asset acquisition.

Although acquisitions of assets are not specifically enumerated as a category of transactions subject to FDIC approval under the BMA, an IDI's acquisition of assets from a non-insured entity could be the substantive equivalent of a transaction legally structured as a merger. For example, this occurs when the acquired assets constitute all, or substantially all, of the non-insured entity's assets or business enterprise and if the non-insured entity dissolves, is rendered a shell, or otherwise substantially ceases its main business operations or enterprise. This applies when there is a transfer of all, or substantially all, of a non-insured entity's assets to an IDI, regardless of whether: (i) such transactions consist of an assumption of identified liabilities, (ii) the assets acquired are tangible or intangible (without regard to whether the assets would be considered assets under generally accepted accounting principles), or (iii) such acquisitions occur as a single transaction or over the course of a series of transactions. Excluding transactions that are mergers in substance involving IDIs and non-insured entities from FDIC review would be inconsistent with the purposes of the BMA by overlooking transactions that could affect the safety and soundness of an IDI and increase the risk to the DIF.

The Proposed SOP clarifies the applicability of Section 18(c)(1)(A) of the BMA by emphasizing that the scope of merger transactions subject to approval encompasses transactions that take other forms, including purchase and assumption transactions that are mergers in substance. The Proposed SOP provides an example of a transaction that is a merger in substance, and is therefore subject to the BMA, such as when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves or otherwise ceases engaging in the acquired lines of business.

Questions:

2. How can the FDIC increase clarity to interested parties regarding the applicability of the BMA to a merger in substance?

3. What additional clarity should the FDIC provide regarding the circumstances in which a transaction is subject to FDIC approval under the BMA, including transactions involving an IDI and a non-insured entity that is not a traditional financial institution, such as a fintech firm, whose assets may be primarily intangible in nature?

Assumptions of Deposits by IDIs From Non-Insured Entities

Section 18(c)(1)(B) of the BMA prohibits an IDI from assuming liability to pay any deposits made in, or similar liabilities of, any non-insured bank or entity.[17] The scope of this provision depends on the meaning of deposit (or other similar liability) and on the interpretation of what constitutes an IDI's assumption of such a deposit (or other similar liability). Section 3(*l*) of the FDI Act defines ''deposit'' broadly. In addition to the definition generally encompassing unpaid balances of money, the definition expressly includes a variety of other instruments, including trust funds and escrow funds.[18]

In addition to the breadth of the definition of ''deposit,'' the FDIC broadly interprets what it means to assume liability to pay such deposits for the purposes of Section 18(c)(1)(B) of the BMA in order to prevent circumvention of the provision. Specifically, the applicability of Section 18(c)(1)(B) does not depend on the existence of a formal written agreement between an IDI and a non-insured entity to transfer deposit liabilities. In cases where an IDI and a non-insured entity cooperate to arrange a transfer of deposits from a non-insured entity to an IDI, the FDIC will generally consider such an orchestration to constitute an assumption of deposits or other similar liabilities for the purposes of Section 18(c)(1)(B).[19]

Unlike the applicability of Section 18(c)(1)(A) of the BMA to asset acquisitions, which depends in part on the acquisition of ''all or substantially all'' of a non-insured entity's assets, the applicability of Section 18(c)(1)(B) does not depend on a finding that an IDI assumes all, or substantially all, of a non-insured entity's deposits or similar liabilities. The assumption of any deposits or other similar liabilities is sufficient to implicate Section 18(c)(1)(B).

The FDIC takes the view that any expansion of an IDI's deposit base via acquisition would be subject to approval under the BMA. As discussed above, when an IDI assumes liability to pay a deposit or other similar liability from a non-insured entity, FDIC approval is required under Section 18(c)(1)(B). As discussed later in this section, when an FDIC-supervised IDI assumes liability to pay a deposit from another IDI, FDIC approval is required under Section 18(c)(2)(C). The FDIC clarifies that the BMA would not necessarily be implicated by an organic expansion of an IDI's deposit base, such as when a depositor or a nonaffiliated third party that acts as agent, custodian, or trustee for a depositor, elects—at their initiative—to establish a deposit relationship with the IDI or to place deposits with the IDI. However, in cases where the agent, custodian, or trustee itself serves as a depository, a transfer of deposits for which it has liability to pay to an IDI would be subject to FDIC approval under the BMA. Furthermore, if customers are solicited to transfer their deposits to an IDI in connection with, or in relation to, an arrangement or agreement to which that IDI is party, the IDI is expected to seek approval under the BMA in connection with the ultimate transfer of such deposits.

The Proposed SOP seeks to capture and convey the broad applicability of Section 18(c)(1)(B) of the BMA by affirming that an FDIC-supervised IDI's assumption of a deposit from another IDI, or any IDI's assumption of a deposit from a non-FDIC insured entity, is likewise subject to FDIC approval even in the absence of an express agreement for a direct assumption. The Proposed SOP highlights the broad definition of ''deposit'' in Section 3(*l*) of the FDI Act, and notes that the definition extends beyond traditional demand deposits to include, among other things, trust funds, and escrow funds.

[15] 12 U.S.C. 1828(c)(1)–(3).

[16] A consolidation generally is a combination of the assets and liabilities of two or more IDIs into a newly chartered IDI, and the extinguishment or cancellation of the charters of the other institutions. Although rare, the FDIC would consider two institutions substantively combining with a newly created third institution to be a consolidation in substance.

[17] 12 U.S.C. 1828(c)(1)(B) (emphasis added).

[18] See 12 U.S.C. 1813(*l*). Section 18(c)(1)(B) also includes liabilities that would be deposits except for the provision in Section 3(*l*)(5) of the FDI Act.

[19] See id.

Question:

4. Does the Proposed SOP sufficiently alert interested parties to the range of transactions that could be subject to FDIC approval under Section 18(c)(1)(B) of the BMA? If not, please comment on how the range of transactions could be more clearly articulated.

Asset and Deposit Transfers From IDIs to Non-Insured Entities

Section 18(c)(1)(C) of the BMA prohibits an IDI from transferring assets to any non-insured bank or entity in consideration of the assumption for any portion of the deposits made in such IDI. Generally, when an IDI transfers deposits to a non-insured entity, an application to the FDIC would be necessary under Section 18(c)(1)(C) since such transfers are typically accompanied by a transfer of assets, even if such assets consist only of cash. As with Section 18(c)(1)(B), the applicability of Section 18(c)(1)(C) is broad given the scope of the FDI Act's definition of deposit. Furthermore, similar to the FDIC's approach to Section 18(c)(1)(B), the FDIC generally views an orchestration of a transfer of deposits from an IDI to a non-insured entity to be subject to FDIC approval under Section 18(c)(1)(C), even in the absence of an express agreement.

Although parties seeking to engage in transferring customer accounts that consist of both custodial and deposit relationships may characterize the transaction solely as a transfer of custodial relationships, such transactions implicate the BMA if they also result in a transfer of the deposit relationship. It has therefore been the view of the FDIC that the BMA is implicated if an IDI transfers deposit relationships concurrent with, or subsequent to, a transfer of the custodial relationship. Accordingly, where customers have both a custodial and depository relationship with an IDI, an IDI may not evade the BMA by transferring custodial rights to a third party that, in its newly acquired custodial capacity, causes the customer's depository relationship to be transferred either to itself or to another entity. This is true even if such transfer was ostensibly at the direction of a non-insured entity pursuant to custodial rights acquired from the IDI.

The Proposed SOP communicates the FDIC's policy with regard to transfers of deposits from IDIs to non-insured entities by stating that a transfer of deposits from any IDI to a non-insured entity is subject to FDIC approval.

Question:

5. What additional clarity, if any, is needed to make interested parties aware of the circumstances in which FDIC approval would be required in connection with a transfer of deposits from an IDI to a non-insured entity?

Merger Transactions Solely Involving Insured Depository Institutions

Section 18(c)(2)(C) of the BMA generally prohibits an IDI from merging or consolidating with any other IDI or, either directly or indirectly, acquiring the assets of, or assuming liability to pay any deposits made in, any other IDI except with the prior written approval of the FDIC if the acquiring, assuming, or resulting bank is a state nonmember bank or state savings association.[20] If the acquiring, assuming, or resulting bank is a national bank or Federal savings association, the approval of the Office of the Comptroller of the Currency (OCC) is required, and if it is a state member bank, the approval of the Board of Governors of the Federal Reserve System (FRB) is required.[21]

As with transactions involving IDIs and non-insured entities, the FDIC considers that a transaction in which an IDI absorbs another IDI by acquiring all, or substantially all, of its assets would be subject to FDIC approval under Section 18(c)(2)(C) of the BMA. It is less common for the FDIC to evaluate whether a large-scale transaction exclusively among IDIs constitutes a merger in substance since such transactions typically include an assumption of deposits, which is itself a sufficient basis to implicate Section 18(c)(2). As previously stated, the breadth of the FDIC's definition of ''deposit'' causes Section 18(c)(2) to encompass a wide range of transactions, and the FDIC similarly takes a broad view as to what constitutes a direct or indirect assumption of liability to pay deposits.

The foregoing discussion addresses the FDIC's policy with regard to the applicability of the BMA to a wide variety of transactions. However, the FDIC emphasizes that this is not an exhaustive overview of potential transactions that are subject to FDIC approval under the BMA. Interested parties should be alert to the FDIC's policies of emphasizing a transaction's substance over its form, its interest in preventing evasion of the BMA, and of the scope of the terms used in Sections 18(c)(1) and 18(c)(2) of the BMA.

Overview of the Application Process

The Proposed SOP describes the FDIC's expectations for application processing, emphasizing the utility of the pre-filing process and the importance of filing a substantially complete application. The Proposed SOP alerts applicants to the FDIC's expectation that all submitted materials, including the financial projections and any related analyses, be well supported and sufficiently detailed. In addition, the Proposed SOP emphasizes the importance of the narrative supporting the rationale for the proposed transaction, and communicates the FDIC's expectation that the narrative be supported by studies, surveys, analyses and reports, including those prepared by or for officers, directors, or deal team leads.

Merger Application Adjudication

Generally, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger application. Approvals will be subject to the standard conditions detailed in 12 CFR 303.2(bb) and any non-standard conditions deemed appropriate by the FDIC. However, the FDIC will not use conditions or written agreements that may be required as part of the conditions, as a means for favorably resolving any statutory factors that otherwise present material concerns. The Order and Basis for Approval (Order) will be posted to the FDIC's Decisions on Bank Applications page.

The Order will address all statutory factors, as well as summarize information regarding any Community Reinvestment Act (CRA) protests. The FDIC will summarize the related analysis and conclusions and include any conditions imposed in conjunction with the approval. Finally, the SOP articulates certain elements that may result in unfavorable findings and would require action by the Board of Directors on the application. This commentary presents a general overview of the potential scenarios and fact patterns that would present significant challenges to favorable findings on the statutory factors. The FDIC may not be able to find favorably on any given statutory factor (or therefore approve the application) if there are unresolved deficiencies, issues, or concerns (including with respect to any public comments), or the lack of sustained performance under corrective programs particularly when the transaction implicates the areas that are the subject of the corrective program.

Merger Application Activity

To provide some perspective on the volume and types of filings subject to FDIC review and action, the tables in

[20] 12 U.S.C. 1828(c)(2)(C).

[21] 12 U.S.C. 1828(c)(2)(A)–(B).

Appendix A to this preamble were developed regarding the volume, disposition, and size of merger transactions processed by the FDIC from January 1, 2004, through December 31, 2023. In total, the FDIC processed 2,497 merger applications that were either ''bank-to-bank'' merger applications solely involving IDIs where the resulting institution was an FDIC-supervised institution or that involved an IDI and a credit union or other non-insured institution.[22] This does not include pending applications or applications for corporate reorganizations or interim mergers.[23]

As shown in Table 1, the volume of bank-to-bank merger applications processed by the FDIC has ranged between 49 and 152 annually from 2004 through 2023. The annual average number of such applications processed during this period was 110. Of the 2,209 bank-to-bank applications processed over the referenced period, 92.9 percent (2,054) were approved, 5.4 percent (116) were withdrawn at the applicant's discretion, 1.7 percent (39) were returned due to insufficient information provided in the application submission, and none were denied. Applicants that choose to withdraw an application frequently do so before receiving a public denial. As described in the APM,[24] when applications are recommended for denial, FDIC staff are directed to contact applicants, describe the concerns, and provide a final opportunity to provide additional information that might influence the decision. The APM also states that at its discretion, the FDIC may offer the applicants the opportunity to withdraw the application. If an applicant withdraws their filing, the FDIC Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.

Table 2 provides a breakdown of the bank-to-bank merger applications processed during this period by the size of the resulting IDI. Approximately 93.0 percent (2,055) of applications received and acted upon, and 95.0 percent of applications approved, were for IDIs that would be $10 billion or less in asset size following the proposed merger. Of the 2,054 approved applications, approximately 4.4 percent (91) involved resulting IDIs with an asset size between $10 billion and $100 billion in total assets, and 0.3 percent (seven) were in excess of $100 billion.

Statutory Factors

Monopolistic or Anticompetitive Effects

The Federal banking agencies are prohibited from approving a merger that would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in the United States.[25] There is no exception to this prohibition. Furthermore, the Federal banking agencies are prohibited from approving a merger that does not constitute a monopoly or conspiracy to monopolize, but that would nonetheless substantially lessen competition, tend to create a monopoly, or otherwise be in restraint of trade, *unless* the anticompetitive effects of the transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[26] For example, this public interest exception may apply where a transaction is necessary to prevent the probable failure of an IDI.

The FDIC conducts its own independent analysis to ensure compliance with the BMA's prohibition against the approval of any merger transaction that would result in a monopoly or be in furtherance of an attempt to monopolize the business of banking in any part of the U.S.[27] In situations where a transaction would not result in a monopoly but where anticompetitive effects are nonetheless identified, the FDIC will evaluate whether the applicants have established that the benefits to the convenience and needs of the community will clearly outweigh any anticompetitive effects.

The way in which the convenience and needs of the community to be served is juxtaposed against the antitrust competitive standard is important. A non-monopolistic yet anticompetitive merger can only be approved in situations where the proponents to the transaction can establish that the advantage of the merger for the convenience and needs of the community clearly outweighs the anticompetitive effects. This creates a heavy burden for the proponents of a merger to support that the benefits to the community outweigh identified anticompetitive concerns. A favorable finding on the convenience and needs of the community to be served factor may not support approval of the application when anticompetitive effects are identified.

In addition to its own independent analysis, the BMA requires the FDIC to request a competitive factors report from the Attorney General for any merger between an IDI and a non-affiliated entity, unless the FDIC finds that it must act immediately in order to prevent the probable failure of an IDI involved in the transaction.[28] The FDIC may consult with the DOJ on mergers that may raise competitive concerns. In cases where the FDIC considers proposed divestitures of business lines, branches, or portions thereof to mitigate anticompetitive effects, the FDIC will generally expect such divestitures to be completed before allowing the merger to be consummated. Additionally, to promote the ongoing competitiveness of the divested business lines, branches, or portions thereof, the FDIC will generally require that the selling institution will neither enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities.

The Proposed SOP does not include any bright lines or specific metrics for which it is presumed that the transaction would be considered anticompetitive. A few RFI commenters suggested that the FDIC develop a benchmark asset size at or below which there is no presumption of non-competitive effects. The Proposed SOP does not include such metrics or benchmarks, as it is important to

[22] As of December 31, 2023, there were 17 pending bank-to-bank merger applications and ten pending merger applications that involve a credit union or other non-insured institution. Data regarding FDIC-processed merger applications involving credit unions and other non-insured entities is provided as Tables 3–6 in Appendix A to this preamble. Table 7 in Appendix A provides data regarding the number of IDIs acquired by FDIC-supervised banks or savings associations, or by credit unions in purchase and assumption transactions.

[23] A corporate reorganization is a merger transaction that involves solely an IDI and one or more of its affiliates. Corporate reorganizations may include transactions where two IDIs merge immediately following a merger between two bank holding companies. An interim merger transaction is a merger transaction between an IDI and a newly formed IDI that is established solely to facilitate a corporate reorganization. From the beginning of 2004 through December 31, 2023, the FDIC processed 2,008 corporate reorganizations and 483 interim mergers. As of December 31, 2023, there were nine pending corporate reorganization applications and five pending interim merger applications.

[24] See APM, Section 1.3, ''Denials and Disapprovals.''

[25] 12 U.S.C. 1828(c)(5)(A).

[26] 12 U.S.C. 1828(c)(5)(B).

[27] 12 U.S.C. 1828(c)(5)(A). In addition to the BMA's prohibition against approving merger transactions that would result in a monopoly, the BMA generally prohibits the Federal banking agencies from approving an interstate merger that would result in an IDI (together with its affiliates) controlling more than 10 percent of the total amount of deposits of IDIs in the U.S. See 12 U.S.C. 1828(c)(13).

[28] 12 U.S.C. 1828(c)(4).

maintain flexibility to appropriately evaluate the facts and circumstances of each application filed.

The Proposed SOP reaffirms the FDIC's commitment to undertaking a thorough review of the potential competitive effects of a proposed merger transaction. As described in the Proposed SOP, the FDIC will tailor its evaluation of competitive effects to consider all relevant market participants (local, regional, and national). The Proposed SOP establishes the relevant geographic markets as the areas where the merging entities have a physical presence in the form of an office (generally a main office or a branch). It also notes that the market may include areas where the merging entities do not have a physical presence, but may still provide products and services. The Proposed SOP outlines the FDIC's approach to considering product markets. The FDIC uses deposits as an initial proxy for commercial banking products and services, but it will tailor the product market definition to individual products as needed. In its analysis, the FDIC uses proxies that reasonably reflect the competitive dynamics of the market, including deposit and loan activity. However, the Proposed SOP notes that the FDIC will, if appropriate, utilize additional analytical methods, data sources, or geographic or product market definitions in order to assess the competitive effects of a proposed merger when practicable and relevant with consideration given to whether consumers retain meaningful choices.

Consistent with the approach of the DOJ and the other Federal banking agencies, the FDIC uses deposits as reported in the SOD data submitted by IDIs (and compiled by the FDIC), as a general proxy for the product market and then calculates the resulting market concentration and change in market concentration in each relevant geographic market using the HHI calculation. The FDIC initially focuses on the respective shares of total deposits held by the merging IDIs and the various other participants with offices in the relevant geographic market(s) to measure market concentration. Multiple RFI commenters suggested that the analysis of competition should include the influence of thrifts, credit unions, fintech firms, Farm Credit System institutions, and other online entities that offer products and services in the relevant market. The Proposed SOP affirms that the FDIC considers the influence of these entities when evaluating competitive effects. Some RFI commenters suggested alternatives to the HHI calculation such as the Hall-Tideman Index (HTI)[29] or the comprehensive industrial concentration index (CCI).[30] The Proposed SOP indicates that the FDIC will consider other products in its competitive analysis, but does not incorporate any specific alternatives to the HHI calculation.

Several RFI commenters requested changes to how the FDIC compiles SOD data, such as assigning online accounts to the account owner's residence, rather than the main office of the entity receiving the deposit. Additionally, RFI commenters requested that the FDIC amend both the methods and reporting standards for SOD data, and provide more guidance and instruction regarding how a reporting entity attributes deposits to branches to enhance geographic specificity. The Proposed SOP indicates that, as applicable, the FDIC will take into account any additional data sources, appropriate analytical approaches, or additional products beyond deposits to fully assess the competitive effects of the transaction. Further, to the extent that amendments or revisions to the SOD's reporting requirements, standards, and methods are considered, they will be published in a separate request for industry comment and feedback.

The relevant geographic markets are the areas where the merging entities have overlapping branch footprints, and generally correspond with the geographic markets defined by the FRB. The Proposed SOP notes that on a case-by-case basis, the FDIC may consider alternative or additional geographic and product markets. A few RFI commenters suggested that the FDIC should conduct a separate analysis of the competitive impact in rural areas, minority markets, or low- to moderate-income communities when relevant. While the Proposed SOP does not specifically address analytics of rural, minority, or low- to moderate-income communities, it does affirm that the FDIC will use a geographic market with a scope that is suited to the products or services offered or planned.

RFI commenters were split on changes to the HHI; some RFI commenters suggested that the overall threshold should be raised, while others suggested that the overall level should be lowered. Similar differences were also noted with respect to the change in the HHI calculation; some RFI commenters suggested that the current change threshold be increased, while others believed it should be lowered or reflect any point change. Some RFI commenters suggested that the HHI should be calculated for certain types of loans such as residential or small business loans, rather than (or in addition to) deposits. The Proposed SOP does not address the calculation of the HHI or the attendant thresholds. The Proposed SOP notes that the FDIC will consider additional methods of assessing the competitive nature of markets for relevant products or services, as necessary or appropriate. The FDIC plans to coordinate with other appropriate agencies regarding any potential changes to the calculation of, or thresholds for, HHI usage.

Questions:

6. To what extent is the FDIC's approach to analyzing the competitive effects of a proposed merger transaction appropriate?

7. What changes to the current approach should the FDIC consider to better reflect present-day competitive conditions?

8. Should the HHI be a definitive factor in making a determination? In other words, should the FDIC find favorably regarding competitive effects if the proposed merger does not exceed the defined banking-specific HHI thresholds? If not, why not?

9. How should the Proposed SOP specifically address the ways to calculate the competitive effects of mergers of IDIs with non-insured entities, whether credit unions, financial services entities, bank service corporations, or other entities?

10. What additional information should the FDIC provide about the circumstances under which it will consider products other than deposits and loans for transparency and so that filers may provide a more complete initial submission?

11. Is the geographic market definition outdated? If so, why? How should the definition be updated and why?

12. Would it be appropriate to define relevant geographic markets by reference to markets in which the merging institutions have delineated CRA assessment areas, including both facility-based assessment areas and retail lending assessment areas?

13. Would it be appropriate to define relevant geographic markets by reference to markets in which the merging institutions have delineated CRA assessment areas?

[29] The HTI is used to measure the concentration (or unequal distribution) of n market participants, who each have a market share h_i and a rank i (ordered according to decreasing market shares).

[30] The CCI is the sum of the proportional share of the leading IDI and the summation of the squares of the proportional sizes of each IDI, weighted by a multiplier reflecting the proportional size of the rest of the industry.

14. Other than the HHI, what tools could be used to assess market concentration and why would such tools be appropriate?

15. How should the Proposed SOP specifically address analytics for rural, minority, or low- to moderate-income communities? What type of analytical standards or criteria would be appropriate?

16. How can the FDIC's review address competitive effects beyond geographic markets? For example, commenters are invited to provide their views on any concerns that might typically be associated with mergers that result in a large institution of a certain asset size, and are further invited to identify what asset size thresholds (*e.g.,* $50 billion, $100 billion, $250 billion, etc.) are most likely to present such concerns. In addition, commenters are invited to provide detailed views on the nature of competitive concerns that are associated with mergers that involve a large institution absorbing a community bank.

Financial Resources and Managerial Resources and Future Prospects

The BMA requires the Federal banking agencies to take into account the financial and managerial resources and future prospects of the existing and proposed institutions involved in a merger transaction.

Financial Resources

The FDIC assesses the financial history, condition, and performance of each entity involved in the merger transaction, as well as the combined financial resources of the resulting IDI. The assessment of financial resources includes an analysis of capital, asset quality, earnings, liquidity, and sensitivity to market risk. The FDIC will consider the liquidity risk of the resultant IDI, including the extent of its projected reliance on uninsured deposits and its contingency funding strategies. An IDI's overreliance on uninsured deposits or non-core funding sources may not be consistent with a favorable finding on this statutory factor.

Overall, the FDIC expects that the resulting IDI will reflect sound financial performance and condition consistent with the IDI's size, complexity, and risk profile. Generally, the FDIC will not find favorably on this factor if the merger would result in a larger, weaker IDI from an overall financial perspective.

RFI commenters were split on whether bright lines or formally defined metrics should be developed and implemented for the evaluation of this factor. Several RFI commenters desired to have defined ratings and benchmarks formally articulated, and requested that merging entities meeting these defined standards should have a streamlined review or a presumption of approval. The Proposed SOP does not include specific requirements for a favorable finding on this factor, as the FDIC believes each transaction should be evaluated based on the facts and circumstances presented in the application, and any determination on the filing should be specific to that transaction. The incorporation or adoption of formal metrics restricts the FDIC's ability to effectively analyze the findings regarding the statutory factors and make informed determinations and recommendations based on those findings.

If the proposed merger involves an operating non-insured entity, the FDIC will consider the entity's operational activities and performance record when evaluating financial resources. The FDIC will review audited financial statements (covering at least three years, unless the entity's operating history is shorter) including details regarding any deferred tax assets or liabilities, intangible assets, contingent liabilities, and any recent or pending legal or regulatory actions. The FDIC may also require an identification of, and accounting for, low quality assets, including independent appraisals or valuations to support the projected value of any businesses or assets expected to transfer to the resultant IDI upon consummation of the merger.

The FDIC's evaluation of financial resources also will consider the current and projected financial impact of any related entities on the IDI, including the parent organization and any key affiliates. For each relevant entity, the FDIC will consider, among other items, the size and scope of operations, capital position, quality of assets, overall financial performance and condition, compliance and regulatory history, primary revenue and expense sources, and funding strategies.

Depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards. Further, as appropriate, the FDIC may impose a non-standard condition that requires the resulting IDI and other applicable parties (such as certain affiliates or investors) to enter into one or more written agreements that may address, as applicable, capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant items.

Managerial Resources

The FDIC assesses the managerial resources of the existing entities involved in a merger transaction, as well as the proposed management of the resulting IDI. The FDIC expects that the proposed directors, officers, and as appropriate, principal shareholders (collectively, management) possess the capabilities to administer the resultant IDI's affairs in a safe and sound manner. The background and experience of each member of the proposed management team will be reviewed relative to the size, complexity, and risk profile of the resulting IDI. The capability of management to identify, measure, monitor, and control risks and ensure an efficient operation in compliance with applicable laws and regulations are important facets of the evaluation of managerial resources.

A few RFI commenters requested that specific performance standards (such as the management component rating) for small and mid-sized institutions should be publicly stated, and entities in compliance with these standards that meet certain other metrics (such as total asset size) would have a presumption of approval or streamlined review protocols. As previously stated, the Proposed SOP does not include specific performance metrics or bright lines for any of the statutory factors in order to maintain flexibility in the analysis and to ensure each proposed transaction is evaluated on its merits, facts, and circumstances.

The FDIC will review supervisory assessments of management made by the relevant prudential regulators. This includes the current and historical management ratings for any IDI involved in the proposed merger, and the managerial performance and supervisory record of any subsidiaries and affiliates. The FDIC will evaluate the extent and effect of any organizational relationships on the IDI, while also considering the operating history, risk management, and control environment of the parent organization. Inherent in these considerations are the condition, performance, risk profile, and prospects of the organization as a whole, as well as the capacity of management to successfully implement the resulting IDI's strategic (or business) plan.

The evaluation of managerial resources includes an assessment of each entity's record of compliance with respect to consumer protection, fair lending, and other relevant consumer laws and regulations. The FDIC will review supervisory assessments of management made by the relevant regulators. In addition, the FDIC will

analyze the record of compliance with consumer laws and regulations, the compliance management system for each of the IDIs, as well as the compliance management rating system for the resulting IDI, to ensure that there are appropriate controls to identify, monitor, and address consumer compliance risks. Consideration is also given to the consumer compliance rating pursuant to the Uniform Interagency Consumer Compliance Rating System and the CRA.[31]

The FDIC expects management to develop and implement effective plans and strategies, and the resulting IDI to have sufficient managerial and operational capacity, to integrate the acquired entity. Effective integration includes, but is not limited to, human capital; products and services; operating systems, policies, and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs. In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations.

Various other matters are also pertinent to the evaluation of managerial resources. The FDIC will consider the breadth and depth of management, including the adequacy of succession planning; responsiveness to issues or supervisory recommendations raised by regulators or auditors; existing or pending formal or informal enforcement actions; management's performance with respect to information technology, consumer protection, and other specialty or functional areas; recent rapid growth and the record of management in overseeing and controlling risks associated with such growth; and the reasonableness of fees, expenses, and other payments made to insiders.

Future Prospects

The FDIC evaluates the future prospects of the existing and proposed entities involved in a merger transaction. As part of this evaluation, the FDIC will review the submitted business (or strategic) plan, including pro-forma financial projections and related assumptions to assess whether the resulting IDI will be able to operate in a safe and sound manner on a sustained basis following consummation of the merger. Any accompanying valuations (such as those related to the target entity, goodwill, or other assets) will also be reviewed to ensure that the applicant adequately supports that the resulting IDI will maintain an acceptable risk profile.

The FDIC will consider the economic environment, the competitive landscape, the acquiring IDI's history in integrating merger targets, the anticipated scope of the resulting IDI's operations and the quality of its supporting infrastructure, and any other relevant factors. Any significant planned changes to the resulting IDI's strategies, operations, products or services, activities, income or expense levels, or other key elements of its business will be closely assessed.

Questions:

17. To what extent is the FDIC's evaluation of financial resources appropriate, and what additional items, if any, should be considered?

18. To what extent is the FDIC's evaluation of managerial resources appropriate, and what additional items, if any, should be considered?

19. To what extent is the FDIC's evaluation of future prospects appropriate, and what additional items, if any, should be considered?

Convenience and Needs of the Community To Be Served

The BMA requires the Federal banking agencies to take into account the convenience and needs of the community to be served when evaluating a merger transaction.[32] One of the items considered in connection with this factor is each IDI's CRA performance evaluation record and any comments submitted by the public on the application. The FDIC provides the public the ability to search pending merger applications submitted to the FDIC and allows comments on merger applications to be submitted electronically during the comment period. A few RFI commenters suggested that the FDIC update its website to facilitate the public's ability to review and comment on applications; and that the FDIC should post any regulatory questions or information requests to the applicants, and any applicant responses to its website. The FDIC is considering enhancing the current website to include information regarding public comments received on applications.

Several RFI commenters requested that approval should be conditioned upon the fulfillment of a strategy to address the convenience and needs of the community, and that regulatory approval or non-objection should be sought when the resultant IDI deviates from the submitted plan. The Proposed SOP describes the analytical considerations, but does not require a separate strategy to address the convenience and needs of the community. However, the applicant is expected to provide forward-looking information to the FDIC for the purposes of evaluating the benefits of the merger on the community to be served. As appropriate, claims and commitments made by the applicant to the FDIC may be included in the Order and Basis for Approval, and the FDIC's ongoing supervisory efforts will evaluate the IDI's adherence to any such claims and commitments.

Multiple RFI commenters raised concerns with reliance on only the most recent CRA evaluation. One RFI commenter noted that an Outstanding CRA rating on two out of the most recent three CRA evaluations should be a predicate to obtain regulatory approval for a merger; and another RFI commenter requested a three-year average score for the CRA rating as a benchmark. Some RFI commenters stated the CRA rating should be no less than Outstanding, with a minimum of Satisfactory ratings on component categories. A few RFI commenters requested that a presumptive denial should be established if the CRA rating is not currently (or over a recent, multi-year average period) at least Outstanding with Satisfactory component ratings. The Proposed SOP does not establish specific CRA rating benchmarks or bright lines in order to maintain flexibility in the analysis and to ensure each proposed transaction is evaluated on its merits, facts, and circumstances. However, a less than Satisfactory rating or significant deterioration in CRA performance may present significant concerns in resolving this factor. The FDIC's review is not limited to the CRA record of the institutions and will encompass a broad review of the institutions' existing products and services and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

In addition, the FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system. This review will include consideration of any existing orders, ongoing enforcement actions, and pending reviews or investigations of

[31] Uniform Interagency Consumer Compliance Rating System, 81 FR 79473, (Nov. 14, 2016). Community Reinvestment Act ratings are defined in 12 CFR part 345, Appendix A.

[32] 12 U.S.C. 1828(c)(5).

violations of consumer protection laws and regulations. A less than Satisfactory consumer compliance rating may present significant concerns in resolving this factor.

The FDIC will evaluate the community to be served broadly, which will include the proposed assessment area(s), retail delivery systems, populations in affected communities, and identified needs for banking services. The FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger. The FDIC expects applicants to demonstrate how the transaction will benefit the community such as through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means. Several RFI commenters suggested that a higher burden should be placed on the applicant to demonstrate the public benefits of the transaction. Multiple RFI commenters stated that the FDIC should focus the analysis on the additive benefits of the transaction for consumers, particularly those in low- to moderate-income and minority communities. Numerous RFI commenters indicated that a community benefit plan should be required, as should mandatory public hearings to discuss the impact on the relevant communities. Further, several RFI commenters stated that a cost/benefit analysis of the proposed merger should be prepared and included in the publicly available application materials. The Proposed SOP outlines the FDIC Board's expectations with regard to the public benefits of the transaction, but does not require public benefit statements or plans to be established.

In addition to the CRA and consumer compliance ratings and performance, the FDIC will also consider the resulting assessment area(s) and branch locations, as well as the impact of branch closings or consolidations, particularly on low- and moderate-income neighborhoods or designated areas. The application form solicits information regarding projected or anticipated branch expansions, closings, or consolidations. Generally, the FDIC considers a substantially complete merger application to include, among other items, at least three years of information regarding projected branch expansions, closings, or consolidations. Some RFI commenters suggested that the projected impact of prospective branch closings should be closely scrutinized, and that public meetings and community hearings should be conducted to discuss the impact of the proposed closings. The Proposed SOP states that any proposed or expected closures, including the timing of each closure, the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas, any job losses or lost job opportunities from branching changes, and the broader effects on the convenience and needs of the community to be served will be closely evaluated. Applications that project material reductions in service to low- and moderate-income communities or consumers will generally result in unfavorable findings. A favorable finding on this factor may not necessarily be sufficient for approval of the application when anticompetitive effects are noted.

Further, the Proposed SOP advises applicants to be prepared to make commitments regarding future retail banking services in the community to be served for at least three years following consummation of the merger. The Proposed SOP places an affirmative expectation on applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected impact of the merger on convenience and needs of the community to be served. In certain cases, the FDIC may hold hearings or other proceedings in connection with evaluating a merger application The Proposed SOP provides that the FDIC will generally consider it is in the public interest to hold a hearing for merger applications resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction. The decision to hold such meetings depends on issues raised during the comment period and the significance of the merger transaction to the public interest, the banking industry, and communities affected.

Questions:

20. How could the Proposed SOP more effectively describe the FDIC's expectations with regard to its review of the convenience and needs factor, and what notable considerations, if any, are overlooked?

21. What are the pros and cons of providing forward-looking information? What are some specific challenges and difficulties that applicants might experience when providing information concerning projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger?

22. What are the pros and cons of holding a hearing for merger applications resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received? For what other situations, in addition to those described, would it generally be in the public interest to hold hearings?

23. How can the FDIC best consider comments and feedback from the public in the context of evaluating the convenience and needs of the community to be served, consistent with the BMA's public notice requirements?

24. What are the benefits of imposing a non-standard condition that captures the affirmative commitments an IDI has made to the FDIC to serve the needs of its community?

25. In addition to the methods described, how should the FDIC consider an institution's CRA performance in the context of an application subject to the BMA?

26. What additional information should be included in the application materials to enable a more comprehensive review of branch closings or consolidations? What additional information should be included in application materials related to retail delivery systems?

27. What additional benefits to the community could be specified in the SOP beyond those already detailed?

28. What other elements should be considered in the evaluation of the convenience and needs of the community with respect to mergers?

29. What types of merger transactions may present unique factors that the FDIC should consider in its evaluation of the convenience and needs of the community to be served? For example, are there special considerations that should be considered in connection with transactions in which a community bank is absorbed by a larger institution?

Risk to the Stability of the United States Banking or Financial System

The Dodd-Frank Act amended the BMA to require the responsible agency to consider the risk to the stability of the U.S. banking or financial system when evaluating a proposed bank merger.[33] The FDIC expects that the resulting IDI will not materially increase the risk to the stability of the U.S. banking or financial system. Multiple RFI commenters noted the FDIC's Current SOP does not incorporate this statutory factor. Additionally, while some RFI commenters asked for more clarity and

[33] 12 U.S.C. 1828(c)(5).

transparency regarding the FDIC's financial stability analysis, others objected to changing the existing regulatory framework. Finally, some RFI commenters asserted that recent large mergers have increased concentration within the banking sector and have created more systemic risk, while others presented positions that attempt to refute this assertion. The Proposed SOP largely builds upon the financial stability criteria previously employed in practice by the FDIC, FRB, and OCC since passage of the Dodd-Frank Act, and clarifies the FDIC's perspective when conducting the analysis.[34]

The Proposed SOP details the considerations that the FDIC uses to determine whether a resulting IDI's systemic footprint would be such that its financial distress or failure could compromise the stability of the U.S. banking or financial system. While many RFI commenters addressed entities other than a resulting IDI (*e.g.,* bank holding companies and broker-dealer subsidiaries), the Proposed SOP considers financial stability influences primarily from the perspective of the resulting IDI. Where appropriate, the FDIC's analysis will take into account the facts and circumstances of parent companies and affiliates. Proposed transactions that solely involve affiliates that were related at the time a merger application is filed generally will not raise concerns with regard to this factor. However, each such proposal will be reviewed to ensure that the resulting IDI would not present any new or unforeseen stability risks that may not have existed when the merging entities operated on a standalone basis.

In evaluating the risk to the stability of the U.S. banking or financial system, the Proposed SOP identifies the following: (i) the size of the entities involved in the transaction; (ii) the availability of substitute providers for any critical products and services to be offered by the resulting IDI; (iii) the resulting IDI's degree of interconnectedness with the U.S. banking or financial system; (iv) the extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and (v) the extent of the resulting IDI's cross-border activities. These items are addressed in more detail below:

Size. The distress or failure of an IDI is more likely to adversely impact the banking or financial system if the IDI's activities comprise a relatively large share of system-wide activities. Upon financial distress or failure, a larger IDI may present greater challenges to replacing or substituting the services and products it provides, as compared with smaller institutions, thereby potentially increasing the possibility for the IDI's distress or failure to disrupt the broader system. Additionally, the negative effects to the banking or financial system caused by stress at a single large institution may be greater than the impact of simultaneous stress at multiple smaller institutions engaged in business lines similar to those of their larger peer. The majority of comments regarding financial stability focused on the resulting IDI's asset size with many concerned about not creating institutions that are ''too big to fail.'' Numerous RFI commenters suggested the imposition of asset limits, thresholds, or other quantitative measures that would be applicable to IDIs of a certain size, and suggested that any analysis start with certain presumptions. Others stated that any limits or presumptions with respect to asset size would be contrary to the plain language of the BMA, have anticompetitive results, and could even serve to ''insulate'' the largest banks. Some RFI commenters suggested the imposition of enhanced capital requirements in lieu of size limitations.

With respect to these suggestions, the FDIC believes that the asset size of a resulting IDI should not serve as the sole basis for evaluating this statutory factor. Rather, size is only one of several important considerations that needs to be evaluated in the context of the other criteria. However, transactions that result in a large IDI (*e.g.,* in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross-border activities, and will be subject to added scrutiny. The FDIC takes the view that the failure of a larger IDI with a traditional community bank business model may pose significantly different resolvability and stability risks than a smaller IDI with one or more complex business lines, large derivative exposures, or extensive cross-border operations.

Availability of substitute providers. The purpose of considering the availability of substitute providers is to understand whether an inability or unwillingness by a resulting IDI to continue providing specific products or services could be disruptive to the U.S. banking or financial system. The FDIC considers whether the resulting IDI provides critical products or services that may be difficult to replace or substitute, or conducts activities that comprise a relatively large share of the relevant activity in the banking or financial system. Concerns are heightened, and may preclude favorable resolution of this factor, in situations where there are limited readily available substitutes, as relied upon services may be disrupted or discontinued if the resulting IDI encounters financial distress or fails. Several RFI commenters recommended that specific risk factors be developed to address the availability of substitute providers; however, the Proposed SOP does not include specific targets or bright lines regarding the consideration and assessment of this factor.

Interconnectedness. The purpose of considering interconnectedness is to assess the degree to which the resulting IDI may be engaged in transactions with other financial system participants and the risk that exposures to the resulting IDI of creditors, counterparties, investors, or other market participants could affect U.S. banking or financial system stability. The purpose of considering the effects of asset liquidation by the resulting IDI as a component of interconnectedness is to assess whether, following the proposed merger, the resulting IDI would hold assets that, if liquidated quickly, could significantly disrupt the operation of key markets or cause significant losses or funding problems for other firms with similar holdings. The analysis of interconnectedness specifically contemplates intra-financial system assets and liabilities; exposures to creditors and counterparties; the potential volatility of the resulting IDI's funding structure; and the potential results of rapid asset liquidation.

A resulting IDI may present greater risk from a stability perspective if key aspects of its business (including any on- or off-balance sheet activities) are highly interconnected with other financial system participants. For example, securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, inter-affiliate guarantees, and other similar contracts which the FDI Act refers to collectively as ''qualified financial contracts'' [35] are all examples of interconnected exposures within the U.S. banking or financial system. A high volume of such contracts may equate to a higher degree of potential systemic spillover effects if the resulting IDI, or its parent or affiliates, are unable to perform.

Increased Complexity. Under the Proposed SOP, evaluation of the

[34] See, *e.g.,* Order and Basis for Corporation approval of BB&T's application for consent to merger with SunTrust Bank. Refer to FDIC Press Release PR–111–2019: *https://www.fdic.gov/news/press-releases/2019/pr19111.html.*

[35] 12 U.S.C. 1821(e)(8)(d)(i).

resulting IDI's contribution to the U.S banking or financial system's complexity would consider the full scope of the resulting IDI's operations. This includes the resulting IDI's business lines, products and services, on- and off-balance sheet activities, delivery channels, and any material affiliate or other third-party relationships. One RFI commenter stated that many large regional banks do not have complex operations and have recently reduced their level of complexity. The FDIC considers an important part of the complexity analysis to be the potential financial stability consequences of the resulting IDI failing and being placed into a receivership under Section 11 of the FDI Act. The FDIC is responsible for resolving the resulting IDI in a way least costly to the DIF.

The FDIC has several options for carrying out the resolution of an IDI. First, the FDIC can sell some or most of the assets of the failed IDI to a healthy acquiring IDI, which would also generally assume all of the deposits or only the insured deposits of the failed IDI along with some or most of the remaining liabilities. This is generally called a ''purchase and assumption transaction.'' Second, a special type of purchase and assumption transaction used when additional time is needed to market a failed IDI is referred to as a ''bridge bank.'' A bridge bank is a bank chartered by the OCC and temporarily owned and operated by the FDIC to bridge the time between the date of failure and the date of sale to an acquiring IDI. Use of a bridge bank enhances the FDIC's ability to pursue options that could involve the sale to multiple acquirers, and/or spinning off some remaining streamlined operations as a restructured entity with ongoing viability depending on which strategy is most desirable. The final option is executing an insured deposit payout. However, in deciding which option to pursue, the FDIC must show how it would meet the least cost test set forth in Section 13(c)(4) of the FDI Act. Additionally, regardless of the strategy selected, the challenges associated with resolving a large bank would be significant, both operationally and financially.

In addition to the resolution challenges presented based on size, many regional IDIs present complexities such as large branch networks, substantial information technology systems, millions of account holders, and heavy reliance on uninsured deposits. Further, cross-border operations or key dependencies on non-affiliated entities can raise additional challenges to effecting an orderly and least costly resolution.

The failure of a larger IDI with a traditional community bank business model may present significantly different resolvability and stability risks than a smaller IDI with a complex businesses model. Staff from the FDIC's Division of Resolutions and Receiverships and (if appropriate) the Division of Complex Institution Supervision and Resolution will identify potential purchasers for the resulting IDI or its component parts, and identify resolution impediments that could impact the stability of the U.S. banking or financial system. Some potential resolution impediments include the resulting IDI's organizational structure and the necessity and difficulty of: (i) continuing the IDI's operations and activities until they can be sold or wound down, (ii) marketing and selling key business lines and asset portfolios at the least cost to the DIF,[36] and (iii) separating business lines and other assets to enable their sale or other disposition. While the FDIC would perform this analysis on the IDI, it would also take into account possible alternative resolution strategies and scenarios. This process could consider the presence of support agreements from the resulting IDI's ultimate parent company, strengthened risk governance procedures, and capital maintenance requirements for the IDI. Several RFI commenters suggested formal thresholds should be developed (such as total asset metrics) for when a resolution plan should be required. Such thresholds have not been incorporated into the Proposed SOP as each prospective resolution presents unique facts and circumstances, and the FDIC does not believe a one size fits all approach to the resolution process is appropriate.

While the vast majority of IDIs that the FDIC has resolved have been relatively small in size (assets under $10 billion), experience has shown that the failure of a larger IDI can have a contagion effect. Two recent examples that illustrate the systemic risk associated with the failure of a large regional IDI are Silicon Valley Bank (SVB) and Signature Bank.

SVB, with $209 billion in assets as of December 31, 2022, failed on March 10, 2023. SVP's depositors were primarily commercial and private banking clients, mostly linked to businesses financed through venture capital. Total assets grew rapidly, coinciding with rapid growth in the innovation economy and a significant increase in the valuation placed on public and private companies. The resulting influx of deposits was largely invested in medium- and long-term Treasury and Agency securities.

On March 8, 2023, Silvergate Bank, with $11.3 billion in assets as of December 31, 2022, and a business model focused almost exclusively on providing services to digital asset firms, announced its self-liquidation.[37] On that same day, SVB announced that it had sold substantially its entire available-for-sale securities portfolio at a loss. Many of SVB's venture capital customers took to social media to urge companies to move their deposit accounts out of SVB. The deposit run, coupled with insufficient liquidity to meet the demands of depositors and other creditors, resulted in its failure.

On March 12, 2023, just two days after the failure of SVB, Signature Bank, with $110 billion in assets at year-end 2022, was closed and the FDIC was appointed as receiver. Signature Bank implemented an operating model that shared risk characteristics with SVB. Like SVB, Signature Bank grew rapidly, held deposit accounts for crypto-asset firms, and was heavily reliant on uninsured deposits for funding. As word of SVB's problems began to spread, Signature Bank began to experience contagion effects with deposit outflows. Signature Bank failed as withdrawal requests mounted beyond its ability to pay.

Because of these failures, and the fact that other institutions were experiencing stress, serious concerns arose about a broader economic spillover. As such, the FDIC invoked the systemic risk exception under Section 13 of the FDI Act in winding down SVB and Signature Bank.[38] These failures demonstrate the implications that IDIs with assets over $100 billion can have on financial stability. As of December 2023, the failures of SVB and Signature Bank have resulted in an estimated cost

[36] Id.

[37] Following the collapse of digital asset exchange FTX in November 2022, Silvergate Bank experienced a rapid loss of deposits, which necessitated the sale of debt securities to cover deposit withdrawals. The securities sales resulted in substantial losses. The troubles experienced by Silvergate Bank demonstrated the impact of a lack of diversification, aggressive growth, maturity mismatches in a rising interest rate environment, and inadequate management of liquidity risk. Many of these same risks were also present at SVB.

[38] As a general rule, Section 13(c)(4) of the FDI Act requires the FDIC to resolve failed IDIs at the least cost to the DIF, but provides an exception for instances where the failure would have serious adverse effects on economic conditions or financial stability, and any action to be taken would avoid or mitigate such adverse effects.

of $21.8 billion and $1.8 billion, respectively, to the DIF.[39]

Additional examples that highlight the impact of a larger IDI failure on the DIF are the failures of Washington Mutual Bank and IndyMac Bank in 2008. Washington Mutual Bank (Washington Mutual), with over $300 billion in assets at the time of its failure in September 2008, was the largest thrift institution in the United States and the sixth largest IDI. Its failure was the largest in the FDIC's history in terms of the IDI's asset size. Several factors made it possible for Washington Mutual to fail with no loss to the DIF and no loss imposed on its $45 billion of uninsured deposits, which approximated 24 percent of total deposits. First, there was an acquirer with the capacity to assume all the assets and all the deposits through a traditional purchase and assumption transaction. This acquirer could act quickly at the time of failure because it had previously performed due diligence on Washington Mutual for a potential open bank acquisition. Second, Washington Mutual had a substantial volume of unsecured debt—$13.8 billion, or 4.5 percent of total assets—which was available to absorb losses in resolution. This loss absorbing capacity was essential to meeting the least cost test and for uninsured depositors to avoid taking a loss. Absent these factors, the FDIC likely would have had to establish a bridge bank and take over the operation of the failed institution. The failure of Washington Mutual in that scenario would have depleted the DIF, and uninsured depositors would likely have had to take a loss in order to meet the least cost test. Imposing losses on uninsured deposits could have had a significantly destabilizing effect, especially given the stressed economic and financial environment in September 2008. The only way to avoid that outcome would have been for the FDIC to exercise the systemic risk exception.

When IndyMac Bank—a $30 billion thrift—failed in July 2008, it had no unsecured debt and there was no viable acquirer. The FDIC established a bridge bank and uninsured depositors realized losses.[40] IndyMac Bank was the most costly failure in the FDIC's history up to that point, resulting in a $12.4 billion loss to the DIF. If these conditions were to repeat for an institution several times larger, the effects could be significant for U.S. financial stability.

[39] See 2023 FDIC Annual Report, at *https://www.fdic.gov/about/financial-reports/reports/2023annualreport/2023-arfinal.pdf.*

[40] Uninsured deposits totaled $2.6 billion, which was almost 14 percent of total deposits.

Cross-Border Activities. The purpose of considering cross-border activities is to assess the degree to which coordination of the resulting IDI's supervision and resolution could be complicated by different legal requirements, geopolitical events, and competing national interests, leading to increased potential for spillover effects. A high degree of cross-border activity by the resulting IDI presents significant challenges to supervising and examining the operations of IDIs and their subsidiaries. Historically, cross-border operations present significant challenges to supervision and examination, and cross-border proceedings can be slow, cumbersome, and require significant amounts of coordination between different resolution authorities with differing objectives and administrators. Accordingly, the FDIC would determine if the resulting IDI's cross-border activities represent a significant component of operations; and if so, whether the activities present a high degree of cross-jurisdictional claims, liabilities, and other impediments to effective supervision and resolution. The Proposed SOP affirms that such activities may present challenges from both supervisory and resolution perspectives given the potential exposure to differing legal requirements, geopolitical events, and competing national interests.

Other Financial Stability Considerations

RFI commenters suggested that the FDIC impose various requirements upon large newly merged IDIs such as a requirement to submit resolution plans, a single-point-of entry resolution strategy, enhanced capital levels, total loss absorbing capacity standards, and other quantitative measures. With respect to these comments, the Proposed SOP does not include such requirements, in order to enable the FDIC to retain flexibility to review and evaluate the facts and circumstances appropriate to the application. For example, the FDIC may consider previously filed resolution plans (if any)[41] relevant to any IDI that may be party to a bank merger application. Resolution plans submitted are highly relevant and those submitted by large IDIs are intended to enable the FDIC, as receiver, to provide customers prompt access to their insured deposits and maximize the return from the sale or disposition of the bank's assets. These resolution plans include information pertaining to the bank's organizational structure, core business lines, information technology, funding needs, and other data to assist in the sale or disposition of the bank's deposit franchise, business lines, and material assets.

The FDIC will closely assess the degree to which the resulting IDI's potential financial distress or failure could cause other IDIs with similar activities or business profiles to experience a loss of market confidence, falling asset values, or liquidity stress and decreased funding options. Further, the FDIC may consider the resulting IDI's regulatory framework post-merger; however, the resulting framework cannot solely ameliorate other identified financial stability concerns.

In addition to the items previously noted, the FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist. As appropriate, consideration may be given to the merging IDIs' records with respect to cybersecurity as well as their stress-testing results. For example, the FDIC evaluates the IDI's record of preventing data breaches and responding to and preventing cybersecurity threats.

Questions:

30. How could the FDIC enhance its approach to evaluating risk to the stability of the U.S. banking or financial system?

31. Should the FDIC adopt size thresholds (other than the proposed $100 billion threshold) related to financial stability? If so, why, and what size thresholds would be appropriate to identify transactions that present concerns for this statutory factor?

32. Should the FDIC consider a quantitative risk indicator for overall financial stability? If so, how should this indicator be calculated, and what historical data would support the validity of its usage?

33. How should the FDIC measure the potential impact (*e.g.,* financial, economic, or other) of a resulting IDI on the banking or financial system?

[41] This would include resolution plans filed under 12 CFR part 381 (those filed under Section 165(d) of the Dodd-Frank Act), as well as those filed under 12 CFR 360.10 (IDI Plans). Section 165(d) resolution plans typically include details of the firm's structure, assets, and obligations; information on how the depository subsidiaries are protected from risks posed by its non-bank affiliates; and information on the firm's cross-guarantees, counterparties, and processes for determining to whom collateral has been pledged. IDI Plans typically include information and analysis on the IDI that better enable the FDIC to resolve the IDI under the FDI Act.

34. When measuring the potential impact of a merger, what potential scenarios or assumptions regarding financial and economic conditions would be appropriate, regarding both the merger transaction parties and the overall banking and financial systems?

35. What, if any, additional criteria should be included in the evaluation of the financial stability risk factor?

36. How should the FDIC assess whether a change in the overall risk to financial stability is problematic? Should the FDIC place more emphasis on the creation of new risk to financial stability, an increase to existing risk, or both? If so, what emphasis should be placed and why?

Effectiveness in Combatting Money Laundering Activities

In every case, the BMA directs the responsible agency to consider the effectiveness of any IDI involved in the proposed merger transaction in combatting money laundering activities, including in overseas branches.[42] The FDIC expects that the resulting IDI will operate under a satisfactory anti-money laundering (AML)/countering the financing of terrorism (CFT) program commensurate with its risk profile and business (or strategic) plan.[43]

As part of its evaluation of this factor, the FDIC will undertake a comprehensive analysis of each entity's record with regard to AML/CFT. Among other relevant items, the FDIC will consider each entity's overseas branch operations; policies, procedures, and processes; risk management programs; supervisory record, including compliance with the Bank Secrecy Act (BSA) and its implementing regulations; and remediation efforts pursuant to any outstanding corrective programs. Significant unresolved AML/CFT deficiencies, or an outstanding or proposed formal or informal enforcement action that includes provisions related to AML/CFT, is generally inconsistent with a favorable resolution of this factor. One RFI commenter suggested a bar on the approval of any mergers where an IDI ''has been found guilty of AML misconduct in the previous five years.'' No such bar has been included in the Proposed SOP to retain flexibility in evaluating the merits of each proposed transaction.

Questions:

37. What additional items should the FDIC evaluate as it relates to the respective merger parties' AML/CFT programs?

38. If one party to the transaction has a less than satisfactory AML/CFT compliance program, how much emphasis should be placed on the resultant IDI's AML/CFT compliance program and its plan for integrating the target entity?

Other Matters and Considerations

With regard to interstate mergers, the Proposed SOP states that the FDIC will ensure that the additional requirements and restrictions of Section 44 are satisfied.[44]

The SOP highlights other matters and considerations, such as filings from non-banks[45] or banks that are not traditional community bank[46] applicants, as well as applications from operating non-insured entities.

While the Proposed SOP is solely an FDIC issuance, the FDIC is working collaboratively with the relevant Federal agencies to review and evaluate existing merger—related regulations, guidance, and instruction. Several RFI commenters requested that any amendments to any new merger regulations, guidelines, and instructions should be applied on an interagency basis, and any changes should be made prospectively. Regarding the roles of the Federal banking agencies, several RFI commenters requested that the Consumer Financial Protection Bureau (CFPB) be consulted on all mergers, or at least all mergers for which the CFPB has an examination interest. A similar number of RFI commenters presented the opposite position and noted that the CFPB should not be consulted in any capacity, as that is not their congressional mandate. Several RFI commenters noted that state regulatory and supervisory authorities should be consulted, such as state financial regulators, state Attorney's General, and courts. The Proposed SOP does not specifically address the CFPB by name, but as previously stated, the FDIC works collaboratively with the other Federal regulators, as well as the relevant state authorities when processing merger applications.

Finally, RFI commenters requested that the FDIC review, to the extent possible, the effects of past mergers to evaluate the appropriateness of merger guidelines; and make the results of the evaluation public and apply the results to future merger decisions. The FDIC is considering this recommendation.

Question:

39. Are there other elements of the Proposed SOP that would benefit from additional clarity? If so, please provide details and explain how the elements may be clarified.

IV. Administrative Law Matters

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[47] the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The proposed SOP does not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review. The FDIC is separately requesting comment on proposed changes to the FDIC Supplement to the interagency Bank Merger Act application form.

[42] 12 U.S.C. 1828(c)(11).

[43] The Anti-Money Laundering Act of 2020 (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the Bank Secrecy Act or BSA). The AML Act requires the Financial Crimes Enforcement Network (FinCEN), in consultation with Federal functional regulators, to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA) when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

[44] See 12 U.S.C.1831u.

[45] A ''non-bank'' refers to an IDI that is a ''bank'' for purposes of the FDI Act, but not for purposes of the BHCA. Non-banks may be owned by parent companies that are not subject to the BHCA and therefore may not regulated or supervised by the FRB. Existing insured non-banks include IDIs that are controlled by parent organizations engaged in a variety of commercial activities. These include industrial banks and industrial loan companies, trust and credit card banks organized under the Competitive Equality Banking Act, and other IDIs, such as municipal deposit banks.

[46] In contrast to a traditional community bank, an IDI that is not a traditional community bank generally: (1) focuses on products, services, activities, market segments, funding, or delivery channels other than local lending and deposit taking; (2) pursues a broad geographic footprint (such as operating nationwide from a limited number of offices); (3) pursues a monoline, limited, or specialty business model; or (4) operates within an organizational structure that involves significant affiliate or other third-party relationships (other than common relationships such as audit, human resources, or core information technology processing services). A non-community bank may or may not operate under a non-bank charter. Specialty (sometimes referred to as ''niche'') IDIs are less-diversified and usually considered ''non-community'' in nature given the concentrated business focus or emphasis on specialized activities.

[47] 44 U.S.C. 3501–3521.

Appendix A—Merger Application Activity [48]

TABLE 1—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS [49] (BANK-TO-BANK)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	145	2	2	149
2005	103	1	3	107
2006	137	3	7	147
2007	143	2	1	146
2008	99		10	109
2009	66	2	11	79
2010	86	5	5	96
2011	84	1	13	98
2012	135	6	11	152
2013	133	7	10	150
2014	136		11	147
2015	135		5	140
2016	108		4	112
2017	96	1	4	101
2018	118	2	5	125
2019	94	3		97
2020	58	1	6	65
2021	88	1		89
2022	44		7	51
2023	46	2	1	49
Totals	2,054	39	116	2,209

TABLE 2—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (BANK-TO-BANK)

[1/1/2004–12/31/2023]

Asset size of resultant IDI	Approve	Return	Withdraw	Totals
No Reported Assets	3	13	34	50
Assets >$0 and ≤$10 Billion	1,953	26	76	2,055
Assets >$10 Billion and ≤$100 Billion	91		6	97
Assets >$100 Billion	7			7
Totals	2,054	39	116	2,209

[48] Source of data in Tables 1–7: FDIC.

[49] Merger applications may be returned if they are not substantially complete. At its discretion, the FDIC may offer an applicant an opportunity to withdraw an application. Applicants may withdraw an application at any time if they elect not to pursue the transaction. In some cases, in anticipation of a denial recommendation, applicants choose to withdraw their filing. The number of mergers that occur in a given year may differ from the number of mergers approved by the FDIC that same year, as a merger may not be consummated in the same year it is approved.

A regular merger is generally a combination of the assets and liabilities of two or more unaffiliated IDIs under one IDI's charter with the extinguishment or cancellation of the charter(s) of the other IDI(s). For purposes of these tables, ''Bank to Bank'' refers to a merger when all of the parties involved are IDIs and the resulting IDI is a state nonmember bank or state savings association; ''Involving Credit Unions'' refers to a merger that involves the combination of any IDI with a credit union; and ''Involving Uninsured Entities'' refers to a merger that involves the combination of any IDI with an uninsured entity.

TABLE 3—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS (INVOLVING CREDIT UNIONS)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	1			1
2005	2			2
2006	2		1	3
2007	1			1
2008				0
2009				0
2010	2			2
2011	2			2
2012	4			4
2013	7			7
2014	3		1	4
2015	2			2
2016	7			7
2017	5		1	6
2018	12		2	14
2019	17			17
2020	13		4	17
2021	8	3	1	12
2022	19		2	21
2023	14			14
Totals	121	3	12	136

TABLE 4—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (INVOLVING CREDIT UNIONS)

[1/1/2004–12/31/2023]

Asset size of resultant institution	Approve	Return	Withdraw	Totals
No Reported Assets			2	2
Assets >$0 and ≤$10 Billion	115	3	10	126
Assets >$10 Billion and ≤$100 Billion	5			5
Assets >$100 Billion	1			1
Totals	121	3	12	136

TABLE 5—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS (INVOLVING UNINSURED ENTITIES)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	6	2	1	9
2005	6			6
2006	15		2	17
2007	2		1	3
2008	5		2	7
2009	2	2	1	5
2010	2		1	3
2011				0
2012	4		4	8
2013	2		1	3
2014	5		1	6
2015	2		1	3
2016	10	3	1	14
2017	8	1	2	11
2018	11		1	12
2019	14	1		15
2020	6		2	8
2021	10		1	11
2022	5		3	8
2023	1	1	1	3
Totals	116	10	26	152

TABLE 6—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (INVOLVING UNINSURED ENTITIES)

[1/1/2004–12/31/2023]

Asset size of resultant IDI	Approve	Return	Withdraw	Totals
No Reported Assets	1	7	8	16
Assets >$0 and ≤$10 Billion	92	2	15	109
Assets >$10 Billion and ≤$100 Billion	20	1	.....	21
Assets >$100 Billion	3	.....	3	6
Totals	116	10	26	152

TABLE 7—NUMBER OF IDIS ACQUIRED PURCHASE & ASSUMPTION TRANSACTIONS [50]

[1/1/2004–12/31/2023]

Year	No.
2004	128
2005	132
2006	167
2007	148
2008	130
2009	91
2010	104
2011	106
2012	112
2013	152
2014	146
2015	161
2016	159
2017	134
2018	149
2019	151
2020	99
2021	94
2022	75
2023	78
Total	2,516

V. Proposed Statement of Policy

The text of the proposed Statement of Policy follows:

FDIC Statement of Policy on Bank Merger Transactions

I. Introduction

This Statement of Policy (SOP) communicates the FDIC Board of Directors' expectations and views regarding applications filed pursuant to Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which is referred to herein as the Bank Merger Act (BMA). The SOP reflects the FDIC's interpretations of the BMA and its implementing regulations. The structure of the SOP follows the BMA's core statutory provisions, and its content highlights the principles that guide the FDIC's evaluation of the statutory factors for a merger application.

The BMA prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. It identifies the types of undertakings that constitute ''merger transactions'' and outlines which of the three Federal banking agencies is the ''responsible agency'' for acting on a given merger application.[1] In addition, the BMA sets forth advance public notice requirements [2] and generally requires the responsible agency to request a report on the competitive factors for a merger transaction from the Attorney General.[3]

The BMA generally prohibits the responsible agency from approving a monopolistic or otherwise anticompetitive merger transaction.[4] In addition to competitive considerations, the BMA requires the relevant agency to evaluate a merger transaction in light of the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States (U.S.) banking or financial system,[5] and the effectiveness of the IDIs involved in the merger transaction in combatting money laundering.[6]

II. Jurisdiction and Scope

The FDIC is one of three Federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity,[7] and those that solely involve IDIs in which the acquiring, assuming, or resulting

[50] Only includes transactions in which the resulting institution was an FDIC-supervised state nonmember bank or state savings association, or in which an IDI sold substantially all of its assets to a credit union and ceased operation.

[1] 12 U.S.C. 1828(c)(1) and (2).

[2] 12 U.S.C. 1828(c)(3).

[3] 12 U.S.C. 1828(c)(4).

[4] 12 U.S.C. 1828(c)(5).

[5] Ibid.

[6] See Financial Stability Board 2022 list of GSIBs available at *https://www.fsb.org/wp-content/uploads/P211122.pdf.*

[7] 12 U.S.C. 1828(c)(1). A non-insured entity refers to any entity that is not FDIC insured.

institution is an FDIC-supervised institution.[8]

The BMA requires regulatory approval for any merger transaction involving an IDI.[9] The applicability of the BMA will depend on the facts and circumstances of the proposed transaction. In addition to transactions that combine institutions into a single legal entity through merger or consolidation, the scope of merger transactions subject to approval under the BMA encompasses transactions that take other forms, including purchase and assumption transactions or other transactions that are mergers in substance, and assumptions of deposits or other similar liabilities.[10]

The FDIC considers transactions to be mergers in substance when a target would no longer compete in the market, regardless of whether the target plans to liquidate immediately after consummating the transaction. An example of a transaction that is a merger in substance, and therefore subject to the BMA, is when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (or otherwise ceases to engage in the acquired lines of business).

An FDIC-supervised IDI's assumption of a deposit from another IDI, or any IDI's assumption of a deposit from a non-insured entity, is likewise subject to FDIC approval even in the absence of an express agreement for a direct assumption. Similarly, a transfer of deposits from any IDI to a non-insured entity is subject to FDIC approval.[11] The definition of ''deposit'' per Section 3(*l*) of the FDI Act is broad and extends beyond traditional demand deposits to include trust funds and escrow funds, among other items.

Merger and other corporate transactions may be conducted through a single transaction or through a series of related transactions that each require an application, such as transactions effected through interim institutions. In all cases, the FDIC will evaluate the substance of all of the facts and circumstances of the transaction and any related transactions, identify which aspects of the transaction(s) are subject to FDIC approval, and fully evaluate the statutory factors applicable to each transaction.

Overview of the Application Process

The FDIC encourages prospective applicants to engage in a pre-filing process to discuss regulatory expectations. It is particularly important for the application to be substantially complete when initially filed.[12] The quality and comprehensiveness of a filing are critical to the FDIC's evaluation of the application under the statutory factors and other regulatory requirements.[13] The FDIC expects all submitted materials, including the financial projections and any related analyses, to be well supported and sufficiently detailed. The narrative describing the analysis and evaluation of the transaction should be supported by studies, surveys, analyses and reports, including those prepared by or for officers, directors, or deal team leads. Incomplete filings or non-responsiveness to additional information requests are substantial impediments to the FDIC's ability to fully evaluate and resolve the statutory factors.

Public feedback is an important component of the FDIC's review of a merger application. Section 18(c)(3) of the FDI Act requires that public notice of the proposed merger transaction be published in an approved form and at appropriate intervals in a newspaper or newspapers of general circulation. A list of pending merger applications subject to the Community Reinvestment Act (CRA) is available on the FDIC's website using the Applications in Process Subject to the CRA Report Selection Options.[14] In all cases, the FDIC will review and evaluate any public comments received regarding the merger application, and will provide the applicant an opportunity to respond to any comment that is determined to be a CRA protest.[15] The FDIC will also consider the views of each relevant Federal and state agency. Generally, the FDIC will not approve a merger application if adverse CRA comments have not been resolved.[16] In certain cases, the FDIC may hold hearings or other proceedings in connection with evaluating a merger application.[17]

Section 18(c)(4) of the FDI Act requires the FDIC to request a competitive factors report from the Attorney General of the United States for any merger transaction between an IDI and a non-affiliated entity, unless the FDIC finds that it must act immediately in order to prevent the probable failure of an IDI involved in the transaction.[18] As circumstances warrant, the Department of Justice (DOJ) and the FDIC will coordinate the review when there are concerns or questions regarding the competitive effects of the transaction. As described below, the FDIC undertakes an independent review consistent with the statutory factors of the BMA.

Merger Application Adjudication

Generally, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger application. Approvals will be subject to the standard conditions detailed in 12 CFR 303.2(bb) and any non-standard conditions deemed appropriate by the FDIC. However, the FDIC will not use conditions as a means for favorably resolving any statutory factors that otherwise present material concerns. The Order and Basis for Approval (Order) will be posted to the FDIC's Decisions on Bank Applications web page.[19] The Order will address all statutory factors, as well as summarize information regarding any CRA protests. The FDIC will summarize the related analysis and conclusions and include any conditions imposed in conjunction with the approval.

The FDIC's publicly available Delegations of Authority set forth criteria that must be satisfied in order for staff in the FDIC Regional Offices or

[8] The Office of the Comptroller of the Currency has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a national bank or a Federal savings association. The Board of Governors of the Federal Reserve System (FRB) has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a state-chartered bank that is a member of the Federal Reserve System. The FRB also has approval authority under the Bank Holding Company Act for mergers involving bank holding companies and the Home Owners' Loan Act for mergers involving savings and loan holding companies. Merger transactions that are subject to the FDIC's review may also be subject to the review of state authorities.

[9] 12 U.S.C. 1828(c).

[10] A merger that includes the establishment or relocation of branches is also subject to approval under 12 U.S.C. 1828(d).

[11] 12 U.S.C. 1828(c)(1)(C).

[12] As noted in Section 1.1 of the Applications Procedures Manual, a filing that is not substantially complete lacks the substance necessary for the FDIC to evaluate the statutory factors.

[13] Regulatory requirements for merger applications are provided in 12 CFR part 303 (including Subparts A and D) and any other Federal or state regulations, statutes, or laws applicable to the filing.

[14] Applications In Process Subject to the CRA Report Selection Options, *https://cra.fdic.gov/*.

[15] 12 CFR 303.2(*l*) defines the term ''CRA protest'' to mean any adverse comment from the public related to a pending filing that raises a negative issue relative to the CRA, whether or not it is labeled a protest and whether or not a hearing is requested. An ''adverse comment'' is defined in 12 CFR 303.2(c), as any objection, protest, or other adverse written statement submitted by an interested party relating to a filing.

[16] See 12 CFR 303.2(c) and 303.2(*l*).

[17] See 12 CFR 303.10.

[18] 12 U.S.C. 1828(c)(4). In addition to acting to prevent the probable failure of an IDI, Section 18(c)(4)(C) of the FDI Act includes exceptions for merger transactions involving solely an IDI and one or more of its affiliates.

[19] Decisions on Bank Applications, *https://www.fdic.gov/regulations/laws/bankdecisions/merger/*.

Washington Office to approve a merger application.[20] Notably, the Board of Directors reserves the authority to deny any merger application or act on certain types of proposed transactions, including any transaction for which one or more statutory factors are unfavorably resolved.

Generally, applications will present significant concerns and will likely result in unfavorable findings with regard to one or more statutory factors if they include the following circumstances:

- Non-compliance with applicable Federal or state statutes, rules, or regulations (this includes, for example, transactions that would exceed the 10 percent nationwide deposit limit, as well as both issued and pending enforcement actions);
- Unsafe or unsound condition relating to the existing IDIs or the resulting IDI;
- Less than Satisfactory examination ratings, including for any specialty areas (*i.e.,* information technology or trust examinations);
- Significant concerns regarding financial performance or condition, risk profile, or future prospects;
- Inadequate management, including significant turnover, weak or poor corporate governance, or lax oversight and administration; or
- Incomplete, unsustainable, unrealistic or unsupported projections, analyses, and/or assumptions.

Additionally, the FDIC may not be able to find favorably on any given statutory factor (and the application as a whole) if there are unresolved deficiencies, issues, or concerns (including with respect to any public comments). A lack of sustained performance under corrective programs will also be inconsistent with a favorable finding on one or more statutory factors, particularly when the transaction implicates the areas that are the subject of the corrective program. Further, the inability or unwillingness of the applicant to agree to proposed conditions or execute written agreements, if deemed necessary, will result in unfavorable findings and would require action by the Board of Directors on the application.

If FDIC staff finds unfavorably on one or more statutory factors based on the application review, staff generally will recommend denial of the application. At the FDIC's discretion, applicants may be offered the opportunity to withdraw the filing. If an applicant withdraws their filing, the Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.

III. Statutory Factors

Merger applications are evaluated under the framework of statutory factors as described in the BMA. Generally, the BMA prohibits approval of monopolistic or otherwise anticompetitive transactions; and requires the responsible agency to consider specific statutory factors related to financial and managerial resources and future prospects, convenience and needs of the community to be served, combatting money laundering, and financial stability. The BMA also prohibits interstate mergers in which the resulting IDI would control more than 10 percent of the deposits of IDIs in the United States.[21] Evaluations of each statutory factor consider the respective entities' supervisory record, potential risks and compensating controls, and any other available information deemed appropriate.

Monopolistic or Anticompetitive Effects

The FDIC strives to ensure that resulting institutions continue as participants in a competitive environment. Section 18(c)(5) of the BMA prohibits the FDIC from approving a merger transaction that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any part of the U.S. The BMA also prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[22] For example, such a circumstance may exist where a transaction is necessary to prevent the probable failure of an IDI.

The FDIC will evaluate the competitive effects of a proposed merger in a manner that is most relevant to each transaction. Consistent with the majority of merger transactions typically presented to the FDIC, the FDIC generally employs a framework for evaluating competitive effects involving a transaction between IDIs with traditional community banking operations within their local geographic markets. However, the FDIC will tailor its evaluation to consider the size and competitive effects of the resulting IDI. Additionally, the FDIC will consider all relevant market participants. For example, the FDIC may include any other financial service providers that the FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market. Further, in cases involving merging entities with specialty lines of business or non-traditional products, services, or delivery methods, the FDIC will take into account any additional data sources or appropriate analytical approaches to fully assess the competitive effects of the transaction.

In assessing competitive effects, the FDIC considers concentrations with respect to both geographic and product markets. The FDIC identifies all relevant geographic markets (local, regional, and national) based on the geographic areas in which the merging entities operate and in which customers may practically turn to competitors for alternative products and services.[23] The FDIC uses deposits as an initial proxy for commercial banking products and services. The FDIC will initially measure the respective shares of total deposits held by the merging entities and the various other participants with offices in the geographic market. The FDIC evaluates the market concentration and change in market concentration in each geographic and product market.[24]

In addition, the FDIC will consider concentrations beyond those based on deposits. As appropriate, the FDIC may consider concentrations in any specific products or customer segments, such as, for example, the volume of small business or residential loan originations or activities requiring specialized expertise. Additionally, when relevant, the analysis may incorporate other products offered by the merging entities with consideration given to whether consumers retain meaningful choices. In its analysis, the FDIC will evaluate a market with a scope that is appropriate to the products or services offered or planned. Moreover, the FDIC will consider the emergence of new competitors for products or services in relevant markets; and the expansion of products and services offered by the merging entities and other market participants. Finally, as necessary or

[20] Refer to *https://www.fdic.gov/regulations/laws/matrix/delegations-filings.pdf.*

[21] 12 U.S.C. 1828(c)(5), 1828(c)(11), and 1828(c)(13).

[22] 12 U.S.C. 1828(c)(5).

[23] See *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963).

[24] Indicators of market concentration and change in concentration include calculations using the Herfindahl-Hirschman Index (HHI).

appropriate, the FDIC will consider other products or services and additional methods of assessing the competitive nature of markets. In particular, the FDIC may consider information on the pricing of products and services to assess the competitive effects of a proposed merger when practicable and relevant.

The FDIC may require divestitures of business lines, branches, or portions thereof as a means to mitigate competitive concerns before allowing the merger to be consummated. In such cases, the FDIC will generally require that the selling institution will not enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities.

Nationwide Deposit Cap

The BMA prohibits approval of an interstate merger that results in an IDI (and its affiliates) controlling more than 10 percent of the total deposits of IDIs in the U.S.[25] This prohibition does not apply to transactions that involve one or more IDIs in default or in danger of default. Consistent with the competitive effects review, the FDIC will use the most current Summary of Deposits data to confirm the nationwide deposit share of the resulting IDI following the proposed transaction.

Financial Resources

The BMA requires the responsible agency to consider the financial resources of the existing and proposed entities involved in a merger transaction.[26] The FDIC expects that the resulting IDI will reflect sound financial performance and condition.[27] Generally, the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective.

A critical component of the analysis of financial resources is the resultant IDI's ability to meet applicable capital standards (including maintenance of appropriate allowances for loan or credit losses). Depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards.[28] Further, as appropriate, the FDIC may impose a non-standard condition that requires the resulting IDI and other relevant parties (such as certain affiliates or investors) to enter into one or more written agreements that address, as applicable, capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant provisions. The FDIC also expects the resulting IDI to maintain sufficient liquidity and appropriate funding strategies given its size, complexity, and risk profile.

The FDIC will also consider the current and projected financial impact of any related entities on the IDI, including the parent organization and any key affiliates. For each relevant entity, the FDIC will consider, among other items, the size and scope of operations, capital position, quality of assets, overall financial performance and condition, compliance and regulatory history, primary revenue and expense sources, and funding strategies.

Managerial Resources

The BMA requires the responsible agency to consider the managerial resources of the existing and proposed entities involved in a merger transaction.[29] The FDIC expects that the directors, officers, and as appropriate, principal shareholders (collectively, management) possess the capabilities to administer the resultant IDI's affairs in a safe and sound manner, and effectively implement post-merger integration plans and strategies.

The capability of management to identify, measure, monitor, and control risks and ensure a safe and sound operation in compliance with applicable laws and regulations is included in the evaluation of managerial resources. The FDIC will consider the background and experience of each member of management relative to the size, complexity, and risk profile of the resulting IDI, including the managerial performance and supervisory record of affiliates and subsidiaries.

The FDIC will review supervisory assessments of management made by the relevant regulatory authorities, as well as the nature and extent of organizational relationships. The FDIC will also evaluate the effect of such relationships on the IDI, as well as the operating history, risk management, and control environment of the parent organization. Inherent in these considerations are the condition, performance, risk profile, and prospects of the organization as a whole, as well as the consistency of the proposed merger with the resulting IDI's strategic (or business) plan.

The FDIC will assess each IDI's record of compliance with respect to consumer protection, fair lending, and other relevant consumer laws and regulations. The FDIC will analyze the compliance management system of each of the IDIs, as well as the compliance management system for the resulting IDI to ensure that appropriate controls will be implemented to identify, monitor, and address consumer compliance risks. Consideration will also be given to the consumer compliance rating pursuant to the Uniform Interagency Consumer Compliance Rating System and the CRA rating.[30]

Additional managerial resource considerations include:

- The supervisory history of each entity involved in the proposed merger, including the management rating[31] for any IDI involved in the transaction;
- The breadth and depth of management, and adequacy of succession planning;
- Management's responsiveness to issues or supervisory recommendations raised by regulators or auditors;
- Any existing or pending enforcement actions;
- Any issues or concerns with regard to specialty areas including information technology, trust, consumer compliance, CRA, or Anti-Money Laundering (AML)/countering the financing of terrorist activities (CFT);[32] and
- The reasonableness of fees, expenses, and other payments made to insiders.
- Recent rapid growth and the record of management in overseeing and controlling risks associated with such growth.

The FDIC expects management to develop and implement effective plans and strategies, and the resulting IDI to have the managerial and operational capacity to integrate the acquired entity. Effective integration includes, but is not limited to, human capital; products and

[25] 12 U.S.C. 1828(c)(13).

[26] 12 U.S.C. 1828(c)(5).

[27] This evaluation encompasses capital, asset quality, earnings, liquidity, and sensitivity to market risk, as described in the Uniform Financial Institution Rating System (UFIRS); see 61 FR 67021 (December 19, 1996).

[28] Refer to the applicable capital regulations for the relevant parties. The minimum capital ratios for FDIC-supervised institutions are set forth at 12 CFR 324.10, and the capital measures and capital category definitions for the purposes of Prompt Corrective Action are set forth at 12 CFR 324.403 for FDIC-supervised institutions.

[29] 12 U.S.C. 1828(c)(5).

[30] 81 FR 79473, (Nov. 14, 2016).

[31] The management rating is defined in the UFIRS.

[32] The Anti-Money Laundering Act of 2020 (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the Bank Secrecy Act or BSA). The AML Act requires the Financial Crimes Enforcement Network (FinCEN), in consultation with Federal functional regulators, to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA) when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

services; operating systems, policies, and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs. In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations.

Future Prospects

The BMA requires the responsible agency to consider the future prospects of the existing and proposed entities involved in a merger transaction.[33] The FDIC expects that the resulting IDI will operate in a safe and sound manner on a sustained basis following consummation of the merger. Among other items, the FDIC will consider the economic environment, the competitive landscape, the acquiring IDI's history in integrating merger targets and managing growth, the anticipated scope of the resulting IDI's operations, the quality of its supporting infrastructure, and other pertinent factors. Any significant planned changes to the resulting IDI's strategies, operations, products or services, activities, income or expense levels, or other key elements of its business will be closely assessed. The FDIC will review the pro forma financial projections, the underlying assumptions, and any accompanying valuations (such as those related to the target entity, goodwill, or other assets) to ensure they demonstrate and support that the resulting IDI will maintain an acceptable risk profile.

Convenience and Needs of the Community To Be Served

The BMA requires the responsible agency to consider the convenience and needs of the community to be served when evaluating a merger transaction.[34] The FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger. Applicants are expected to demonstrate how the transaction will benefit the public through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means.

The FDIC expects applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected benefits of the merger on the convenience and needs of the community to be served. As appropriate, claims and commitments made to the FDIC to support the FDIC's evaluation of the expected benefits of the merger may be included in the Order, and the FDIC's ongoing supervisory efforts will evaluate the IDI's adherence with any such claims and commitments. The FDIC will evaluate the community to be served broadly, which will include the proposed assessment area(s), retail delivery systems, populations in affected communities, and identified needs for banking services.

As part of its evaluation, the FDIC will review the CRA record of the institutions. The CRA requires the FDIC to take into account each IDI's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution.[35] As such, the FDIC will consider each institution's CRA performance evaluation record of helping to meet the credit needs of its assessment areas, including low- and moderate-income neighborhoods, and record of community development activity, as applicable. A less than Satisfactory historical rating or significant deterioration in CRA performance will generally result in unfavorable findings. The FDIC's review is not limited to the CRA record of the institutions and will encompass a broad review of the institutions' existing products and services and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

In addition, the FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system. This review will include consideration of any existing or pending orders, ongoing enforcement actions, and pending reviews or investigations of violations of consumer protection laws and regulations. A less than Satisfactory consumer compliance rating [36] may present significant concerns in resolving this factor.

The CRA assessment area(s) and branch locations resulting from the merger are evaluated as part of this factor. The assessment area(s) should be delineated in accordance with 12 CFR part 345 (or other appropriate regulations), and should not reflect illegal discrimination. The FDIC will evaluate all projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger.[37] Branch closings are subject to both Section 42 of the FDI Act and the Interagency Policy Statement Concerning Branch Closing Notices and Policies.[38] Information regarding any proposed or expected closures, including the timing of each closure, the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas, any job losses or lost job opportunities from branching changes, and the broader effects on the convenience and needs of the community to be served will be closely evaluated. Applications that project material reductions in service to low- and moderate-income communities or consumers will generally result in unfavorable findings.

The FDIC will consider all substantive public comments received in accordance with 12 CFR 303.9, as well as the views of relevant state and Federal regulators regarding the ability of the applicant to meet the convenience and needs of the community to be served. Non-standard conditions may be imposed, as appropriate, in response to CRA weaknesses, relevant regulator input, bank commitments, or public comments. The FDIC will consider whether it is in the public interest to hold a hearing for merger applications, and generally expects to hold a hearing for any application resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction. The decision to hold such meetings depend on issues raised during the comment period and the significance of the merger transaction to the public interest, to the banking industry, and communities affected.

As noted above, the BMA prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive

[33] 12 U.S.C. 1828(c)(5).

[34] 12 U.S.C. 2902(3)(E) and 2903(a)(2).

[35] 12 U.S.C. 2902(3)(E) and 2903(a)(2).

[36] Uniform Interagency Consumer Compliance Rating System, 81 FR 79473 (Nov. 14, 2016).

[37] Generally, the FDIC considers a substantially complete merger application to include, among other items, at least three years of information regarding projected branch expansions, closings, or consolidations. Short-distance consolidations that may not be subject to Section 42 outside of a merger context should be included in this information.

[38] 64 FR 34845 (June 29, 1999).

effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[39] In situations where anticompetitive effects are identified, the FDIC will evaluate whether the applicant has established that the benefits to the convenience and needs of the community will clearly outweigh the anticompetitive effects. A favorable finding on the convenience and needs of the community to be served factor may not support approval of the application when anticompetitive effects are identified.

Risk to the Stability of the United States Banking or Financial System

Section 604 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to require the FDIC to consider the risk posed by a merger transaction to the stability of the U.S. banking or financial system. The FDIC expects that the resulting IDI (or consolidated company) will not materially increase the risk to the stability of the U.S. banking or financial system.[40] Consistent with the other Federal banking agencies,[41] the FDIC evaluates this factor with respect to the following:

- The size of the entities involved in the transaction;
- The availability of substitute providers for any critical products or services to be offered by the resulting IDI;
- The resulting IDI's degree of interconnectedness with the U.S. banking or financial system;
- The extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and
- The extent of the resulting IDI's cross-border activities.

Generally, the FDIC will not view the size of the entities involved in a proposed merger transaction as a sole basis for determining the risk to the U.S. banking or financial system's stability. However, transactions that result in a large IDI (*e.g.,* in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross border activities, and will be subject to added scrutiny. The FDIC will consider the nature and scope of operations of the target entity, the resulting IDI, and any other elements that may also influence the risk to the U.S. banking or financial system's stability.

With regard to substitute providers, the FDIC will consider whether the resulting IDI provides critical products or services that may be difficult to replace, or conducts activities (including specific business lines) that comprise a relatively large share of system-wide activities. Concerns are heightened, and may preclude favorable resolution of this factor, in situations where there are limited readily available substitutes, as relied upon services may be disrupted or discontinued if the resulting IDI encounters financial distress or fails.

In assessing the resulting IDI's interconnectedness, the FDIC will consider the degree to which the merging entities are engaged in transactions or relationships with IDIs, affiliates of banking organizations, or other financial service providers. Consideration will be given to whether any exposures with creditors, counterparties, investors, or other market participants could affect the U.S. banking or financial system. A resulting IDI may present financial stability concerns if key aspects of its business (including any on- or off-balance sheet activities) are highly interconnected with other financial system participants.

The FDIC's evaluation of the resulting IDI's contribution to the U.S banking or financial system's complexity will consider the full scope of the IDI's operations. This includes the IDI's business lines, products and services, on- and off-balance sheet activities, branch network and delivery channels, number of account holders (including the volume of uninsured deposits), extent of information technology systems, and any material affiliate or other third-party relationships. As part of evaluating the resulting IDI's impact on complexity, the FDIC will also consider its resolvability in a potential failure situation. The FDIC may not be able to find favorably on this factor when the resultant IDI's organizational and funding structure preclude its ability to: (i) continue operations and activities until they can be sold or wound down, (ii) sell key business lines or large asset portfolios, and (iii) be marketed for sale in a manner that limits the potential for losses to the Deposit Insurance Fund.[42]

The extent of a resulting IDI's cross-border activities may also have implications with regard to a favorable finding on this factor. The FDIC will consider whether cross-border activities comprise a material component of the resulting IDI's operations and present a significant degree of cross-jurisdictional claims or liabilities. Such activities may present challenges from both supervisory and resolution perspectives given the potential exposure to differing legal requirements, geopolitical events, and competing national interests.

Other Stability Considerations

The above list of items is not exhaustive. The FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist. As appropriate, consideration may be given to the merging IDIs' records with respect to cybersecurity and stress-testing results. The FDIC may also evaluate the degree to which the resultant IDI's potential financial distress or rapid liquidation could cause other market participants with similar activities or business profiles to experience a loss of market confidence, falling asset values, or decreased funding options.

Proposed transactions that solely involve affiliates that were related at the time a merger application is filed generally will not raise concerns with regard to this factor. However, each proposal will be reviewed to ensure that the resulting IDI would not present any new or unforeseen financial stability risks that may not have existed when the merging entities operated as affiliates or on a standalone basis.

Effectiveness in Combatting Money Laundering Activities

The BMA requires the responsible agency to consider the effectiveness of any IDI involved in a merger transaction in combatting money-laundering activities, including in overseas branches.[43] The FDIC expects that approved merger transactions will result in institutions with effective programs to combat money laundering (Anti-Money Laundering or AML) and counter the financing of terrorism (CFT). A favorable finding on this factor will be based on a comprehensive evaluation of each entity's AML/CFT program that includes overseas branches; policies, procedures, and processes; risk

[39] 12 U.S.C. 1828(c)(5).

[40] 12 U.S.C. 1828(c)(5).

[41] The FDIC will consider data collected by the Federal Reserve to monitor the systemic risk profile of the institutions, which are subject to enhanced prudential standards under Section 165 of the Dodd-Frank Act.

[42] In addition to considering the FDIC's potential role as receiver of the resulting IDI under Section 11 of the FDI Act, it will also take into account possible alternative resolution scenarios.

[43] 12 U.S.C. 1828(c)(11).

management programs; the supervisory record of each participating entity, the entity's compliance with Bank Secrecy Act (BSA) and its implementing regulations; and remediation efforts pursuant to an outstanding corrective program.[44] In all cases, the FDIC will consider whether the resulting IDI has developed an appropriate plan for the integration of the combined operations into a single, comprehensive, and effective program to combat money laundering and terrorist financing. Additionally, the FDIC expects the applicant to demonstrate how the resulting IDI will comply with the BSA and its implementing regulations following consummation of the merger.

Significant unresolved AML/CFT concerns or uncorrected problems, or an outstanding or proposed formal or informal enforcement action that includes provisions related to AML/CFT, will generally result in unfavorable findings on this factor. In limited cases, sufficient mitigating factors may support a favorable finding, such as when an acquirer with a strong AML/CFT program replaces a target entity's less than satisfactory program and presents an appropriate plan to address the target entity's deficiencies.

IV. Other Matters and Considerations

Interstate Merger Transactions

In cases where Section 44 of the FDI Act applies to an interstate merger transaction, the FDIC will ensure that the additional requirements and restrictions of Section 44 are satisfied.[45]

Applications Involving Non-Banks or Banks That Are Not Traditional Community Banks

Historically, most merger transactions considered by the FDIC have involved traditional community banks. In general, traditional community banks focus on providing the banking services, including loans and core deposits, typically relied on by individuals and businesses in their local communities. However, merger applications may also involve non-banks[46] or banks that are not traditional community banks, which may involve more complexity than a traditional community bank in terms of its business model, products, services, activities, market segments, funding, delivery channels, geographic footprint, operations, or intercompany or other third-party relationships. Merger applications where the resulting IDI will be a non-bank or not a traditional community bank are subject to the same statutory factors as any other merger application. However, the FDIC will appropriately tailor its review to the nature, complexity, and scale of the entities involved in the transaction and the underlying business model. The FDIC's Washington Office or Board of Directors reserve authority to act on certain merger applications that do not involve traditional community banks.

Applications Involving Operating Non-Insured Entities

Applications may involve an existing IDI merging with an operating entity that is not FDIC-insured. Operating non-insured entities may vary widely in the type of business and activities conducted (*e.g.,* credit unions, which typically offer products and services consistent with a traditional community bank, mortgage companies, financing companies, payment services firms, or other types of entities whose business model may have elements more consistent with that of a non-community bank). Merger applications that involve an operating non-insured entity are subject to the same statutory factors as any other merger application. However, in reviewing such applications, the FDIC will consider the nature and complexity of the non-insured entity, its scale relative to the existing IDI, its current condition and historical performance, and any other relevant information regarding the entity's operations or risk profile.

The FDIC will review audited financial statements (covering at least three years, unless the entity's operating history is shorter) and assess any deferred tax assets or liabilities, intangible assets, contingent liabilities, and any recent or pending legal or regulatory actions. Further, independent appraisals or valuations may be necessary to support the projected value of any business (or assets) expected to be transferred from the operating non-insured entity to the resultant IDI through the merger transaction.

V. Resources

FDIC Bank Application Resource page, *https://www.fdic.gov/regulations/applications/resources/*
FDIC Regional Offices, *https://www.fdic.gov/about/contact/directory/region.html*
FDIC Law, Regulations, Related Acts, *https://www.fdic.gov/regulations/laws/rules/*
Section 18(c) of the FDI Act, 12 U.S.C. 1828(c)
Section 42 of the FDI Act, 12 U.S.C. 1831r–1
Section 44 of the FDI Act, 12 U.S.C. 1831u
12 CFR part 303, subparts A and D
Interagency Policy Statement Concerning Branch Closing Notices and Policies, 64 FR. 34845 (June 29, 1999)
Applications Procedures Manual (APM), *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/index.html*
Section 1 of the FDIC APM, *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-01-01-overview.pdf*
Section 4 of the FDIC Application Procedures Manual, *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf*
FDIC Delegations of Authority—Filings, *https://www.fdic.gov/regulations/laws/matrix/index.html*
Interagency Bank Merger Act Form, *https://www.fdic.gov/formsdocuments/f6220-01.pdf*
Deposit Market Share Reports—Summary of Deposits, *http://www.fdic.gov/sod*
Federal Reserve Bank of St. Louis, Competitive Analysis and Structure Source Instrument for Depository Institutions, *https://cassidi.stlouisfed.org/index*

Authority: 12 U.S.C. 1813, 1818, 1819, 1828, 1831u, 1831r–1, 1835a, 2901–2908, 5412.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, March 21, 2024.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–08020 Filed 4–18–24; 8:45 am]

BILLING CODE 6714–01–P

[44] An IDI under an outstanding formal enforcement action should make substantial progress to correct problem(s) addressed in the action. Progress should be sufficient to determine that the AML/CFT program is now adequate.

[45] See 12 U.S.C.1831u.

[46] A ''non-bank'' refers to an IDI that is a bank for purposes of the FDI Act, but that is not a bank for purposes of the Bank Holding Company Act (BHCA). Non-banks may be owned by parent companies that are not subject to the BHCA, and therefore may not regulated or supervised by the FRB.

FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064–0015]

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collection described below (OMB Control No. 3064–0015).

DATES: Comments must be submitted on or before June 18, 2024.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.*
- *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.
- *Mail:* Michelle Mire, Senior Attorney, 202–898–7377, *mmire@fdic.gov,* MB–3072, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street NW building (located on F Street NW), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Michelle Mire, Senior Attorney, 202–898–7377, *mmire@fdic.gov,* MB–3072, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

1. *Title:* Interagency Bank Merger Application.

OMB Number: 3064–0015.

Form Number: 6220/01.

Affected Public: FDIC-insured depository institutions.

Burden Estimate:

SUMMARY OF ANNUAL BURDEN

Information collection description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated frequency of responses	Estimated time per response (hours)	Estimated annual burden (hours)
Interagency Bank Merger Act Application—Affiliated Transactions.	Reporting	Mandatory	103	On Occasion ...	19	1,957
Interagency Bank Merger Act Application—Nonaffiliated Transactions.	Reporting	Mandatory	117	On Occasion ...	33	3,861

Total Estimated Annual Burden: 5,818.

General Description of Collection: Section 18(c) of the Federal Deposit Insurance Act (FDI Act) requires an insured depository institution (IDI) that wishes to merge or consolidate with any other IDI or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other IDI, to apply for the prior written approval of the responsible agency (the FDIC; the Board of Governors of the Federal Reserve (FRB); or the Office of the Comptroller of the Currency (OCC)).[1] Section 18(c) further requires FDIC approval in connection with any merger transaction involving an IDI and a non-insured entity.

The Interagency Bank Merger Act Application Form (Application Form) is used by the FDIC, the FRB, and the OCC for applications under section 18(c) of the FDI Act. The Application Form may be used for any merger transaction subject to section 18(c). There is a different level of burden for each of the two types of merger transactions, nonaffiliated and affiliated. An affiliate transaction refers to a merger, consolidation, other combination, or transfer of any deposit liabilities, between an IDI and another entity controlled by the same parent company, regardless of whether the other entity is FDIC-insured. It includes a business combination between an IDI and an affiliated interim institution. Applicants proposing affiliate transactions are not required to complete questions 12 through 14 of the Application Form. If the merging entities are not controlled by the same parent company, the merger transaction is considered nonaffiliated, and the applicant must complete the entire application form.

The FDIC Supplement to the Interagency Bank Merger Act Application Form (Supplement) requires each applicant to provide information that delineates the relevant geographic market(s) and describes the competition in the relevant geographic market(s). The information collected focuses on the relevant geographic market(s) where the applicant and the entity to be acquired provide banking products or services. The Supplement includes specific instructions to facilitate a comprehensive competitive analysis relative to transactions between nonaffiliated entities.

Proposed Changes to the FDIC Supplement

The proposed edits to the Supplement would make certain changes to the required information that would be applicable to all merger transactions that require FDIC approval. The revised Supplement clarifies that the delineation of the relevant geographic market(s) includes offices where customers may access a substantial share of banking products or services, which extend beyond deposits to include loans and private wealth management services, among other examples.

The delineation of the relevant geographic market(s) includes the county, municipality, or census tract where both the applicant and target entity operate offices and provide products and services, as well as the alternate areas where customers may practically turn for products and services. The revised Supplement includes additional details regarding lists of products and services, including the number and dollar volume of deposits and loans.

To enhance the analysis of the potential competitive effects in the relevant geographic market(s), the revised Supplement also seeks

[1] 12 U.S.C. 1828(c). The FDIC is the responsible agency if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank or a State savings association.

information regarding non-FDIC insured entities (such as credit unions), as well as other entities that do not take deposits (such as finance companies or government agencies). Specific requests for additional information beyond the items articulated in the Supplement may be made to an applicant depending on the structure and nature of the proposed transaction. The proposed form can be viewed at *https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-bank-merger-act-supplement-clean.pdf;* and the revisions to the form can be viewed at *https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-bank-merger-act-supplement-redline.pdf.*

The changes to the Supplement results in a 234-hour increase in burden hours for applicants required to file the Supplement with the FDIC.

Request for Comment

Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (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; (e) whether the FDIC should require additional information for transactions over a certain threshold (such as when the resulting IDI's total assets exceed $100 billion), and if so, what information should be requested; and (f) whether the FDIC should streamline the Supplement to limit the information provided when the application is filed, and only seek additional information, as needed, depending on the nature of the transaction, and if so, how should the Supplement be streamlined. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on April 11, 2024.

James P. Sheesley,

Assistant Executive Secretary.

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List March 26, 2024

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